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The Criminal Justice System:

Radical reform required to purge political interference

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The Criminal Justice System:

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Introduction

South Africa's criminal justice system is in disarray, as anyone with just a superficial knowledge of the system would know. Over the past decade, personnel at the top of the various institutions have been appointed and removed to suit, it would appear, the requirements of the previous Head of State, for two main purposes: first, avoidance of personal prosecution and secondly, avoidance of the investigation and prosecution of specific persons who were engaged in illegal activities (mainly of a financial nature) in relation to a variety of state institutions. The damage has been great and it is clear that reform of the appointment and removal procedures is needed in order to guard against a repetition.

The criminal justice system's major institutions include the following:

- the National Prosecuting Authority ("**NPA**");
- the South African Police Service ("**SAPS**");
- SAPS' Directorate for Priority Crime Investigation (commonly known as "**the Hawks**");
- the Independent Police Investigation Directorate ("**IPID**");
- the Special Investigating Unit ("**SIU**"); and
- the judiciary (comprising both superior and lower courts).

Each of these institutions will be discussed in some detail below, with specific reference to the prescribed procedure for the appointment, suspension and removal from office of the persons who lead them. Although not, strictly speaking, part of the criminal justice system, we have also included the institutions of the Public Protector and the Financial Intelligence Centre ("**FIC**") in this analysis, as they are of relevance in the broader context.

What the lay South African public may not know about the appointment and removal procedures of these pillars of our criminal justice system is that they are, to a large extent, left up to the sole and unfettered discretion of the President or the relevant Minister (or in some cases both).

This paper will detail how and under what circumstances the heads of the six identified criminal justice system institutions, as well as the office of the Public Protector and the head of the FIC, may be appointed and removed in terms of the relevant legislation. Recommendations for the reform of what is clearly a major failing in the functioning of the criminal justice system as a whole will also be made.

The National Director of Public Prosecutions

The problems at the NPA date back a long way. In its judgement of August 2018 on the invalid appointment of the former National Director of Public Prosecutions ("**NDPP**" – who heads up the NPA) Shaun Abrahams, the Constitutional Court stated that, "*The judgment of the High Court notes that it was common cause before that Court that since September 2007 the recent history at the NPA "has been one of paralysing instability*"."[1] One of the most cogent pieces of evidence of the effect of political influence on the NPA's activities is that during the period of Shaun Abrahams' tenure of more than three years as the head of the NPA (from 2015), the only high-profile corruption case, where an attempt was made to prosecute, concerned the then Minister of Finance, Pravin Gordhan. These charges were then very quickly withdrawn by the NPA, which led to its being held up to ridicule.

Prior to Shamila Batohi's appointment on 4 December 2018, the NPA was headless as a result of the aforementioned Constitutional Court ruling in August 2018. This was followed by the short-lived tenure of Nomgcobo Jiba, who was the Acting NDPP until her suspension by the President in October 2018, pending an inquiry into her fitness to hold office. Jiba had been found by the High Court to no longer be "fit and proper" to practice as an advocate in 2016 because of her untoward dealings in the Mdluli matter[2] - a decision which was overturned by the Supreme Court of Appeal, but which has now been set down for hearing on appeal in the Constitutional Court in March 2019. To complete the picture, Jiba's husband, Booker Nhantsi, received an almost unheard of presidential pardon by former President Jacob Zuma in 2010 for a conviction of theft of trust fund monies.

In terms of the Constitution[3] and the National Prosecuting Authority Act[4] ("**the NPA Act**"), the appointment of the NDPP is at the sole discretion of the President. The NPA Act requires that the candidate have the necessary legal qualifications to practice in court, and that he/she be a fit and proper person, with due regard given to his/her experience, conscientiousness and integrity.[5] No further oversight is required for the NDPP's appointment by the President.

Prior to 2012, the above criteria were viewed as falling within the President's wide and subjective discretion.[6] In fact, the NDPP was understood by Government to be a political appointee who had a substantial policy-related role distinct from other Directors of Public Prosecutions.[7] This was the position until the Constitutional Court in *Democratic Alliance v President of South Africa and Others*[8] declared that,

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[1] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 at para 6.
[2] In March 2011, Mdluli, then the head of Police Crime Intelligence, was charged with intimidation, three counts of kidnapping, two counts of assault with intent to do grievous bodily harm, attempted murder, and conspiracy to commit murder. Mdluli faced an additional charge of defeating and obstructing the course of justice. In September 2011, Mdluli faced further charges of fraud and corruption. By April 2012 all charges had been withdrawn by the NPA.
[3] Section 179(1).
[4] Section 9.
[5] Section 9(1) of the NPA Act.
[6] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24 at para 8.
[7] *Supra*.
[8] [2012] ZACC 24.

on the contrary, the office of the NPA is non-political and non-partisan, as it is closely related to the function of the judiciary and is located at the core of delivering criminal justice[9]. As such, the Court held that the criteria for the appointment of the NDPP are objective and not subject to "*the President's view*".[10]

The appointment of the NDPP can therefore be challenged on the basis of a rationality test.[11] According to the Constitutional Court, the NDPP is now regarded as a "*non-political chief executive officer directly appointed by the President*".[12]

The NPA has a constitutional guarantee of independence.[13] This implies that not only are the appointment procedures for its head required to be independent, but so too are disciplinary proceedings and the method of removal from office – so as to ensure security of tenure.[14]

However, it needs to be pointed out that the removal procedures in terms of the NPA Act allow for the NDPP to be immediately suspended by the same office that appointed him/her – the Presidency – pending an inquiry into his/her fitness to hold office, and thereafter may be removed by the President.[15] The NDPP's final removal is subject to approval by Parliament[16], but in reality a decision by the President to remove the NDPP has yet to be considered by Parliament as the removal of NDPPs from office have up to now been done by agreement (Nxasana and Pikoli) or by court order (Simelane and Abrahams). Parliament itself has the option to remove the NDPP through the passing of a resolution which requires that the President remove him/her.[17] This section of the NPA Act is yet to be exercised.

The President therefore controls the NDPP's security of tenure, subject to parliamentary oversight. Whilst this oversight may seem to offer a means to control any unwanted or unlawful action by the President, this supervisory mechanism is more apparent than real, especially in a situation where a parliamentary majority supports the President and is not prepared to take action. This is demonstrated by the effective removal by former President Jacob Zuma of the former NDPP, Mxolisi Nxasana, by "*buying [him] out*"[18]. The Constitutional Court, in August 2018, found this removal to be invalid, as the manner in which it was effected (buying him out) was not contemplated by the NPA Act and flew in the face of the NPA's mandatory independence.[19] In addition, the Court found the President's power to suspend the NDPP indefinitely and without pay to be entirely unconstitutional and the wording of the NPA Act was amended accordingly.[20]

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[9] *Ibid* fn6 at para 26.
[10] *Ibid* fn6 at para 22.
[11] *Ibid* fn6 at para 44.
[12] *Ibid* fn6 at para 16.
[13] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 at para 19.
[14] *Ibid* fn13 at para 22.
[15] Section 12(6)(a) of the NPA Act.
[16] Section 12(6)(b)-(d) of the NPA Act.
[17] Section 12(7) of the NPA Act.
[18] *Ibid* fn13 at para 28.
[19] *Ibid* fn13 at para 29.
[20] *Ibid* fn13 prayer 11 of the order.

From the judgments of the Constitutional Court, it is clear that the interpretations of the appointment and removal provisions of the NDPP are gradually being brought in line with the values of the Constitution. However, the question can be raised as to whether the current powers of the President, combined with a potentially subservient majority in Parliament, provide adequate safeguards for the independence required by the Constitution and the prohibition against improper interference stipulated by the NPA Act[21].

The National Commissioner of SAPS

SAPS is headed by a National Commissioner who is assisted by nine Provincial Commissioners. According to the Constitution, the National Commissioner is appointed by the President[22], and the Provincial Commissioners are in turn appointed by the National Commissioner in concurrence with the provincial executive[23]. There are no oversight mechanisms for the National Commissioner's appointment by the President. However, the appointment of the Provincial Commissioners must be done in concurrence with the provincial executive. Neither the Constitution nor the South African Police Services Act ("**the SAPS Act**")[24] contain a single eligibility criterion for the appointment of the head of the country's main and largest crime fighting institution – the police. Unlike the appointment of the NDPP, which could be challenged on the basis of a rationality enquiry, we are not even provided with a basis upon which the appointment of the National Commissioner may be challenged (in the form of a minimum eligibility requirement).

Against this background, it must be noted that three successive National Commissioners were removed from their post for a variety of reasons: Jackie Selebi (convicted of corruption[25]), Bheki Cele (appointed after Selebi's conviction and removed on allegations of corruption – currently the Minister of Police) and Riah Phiyega (appointed with no prior police experience and removed as she was found to be unfit to hold office after an investigation into the Marikana massacre).

The appointment of the head of one of the most important criminal justice system institutions (the police) is essentially a political one, but has yet to come under the scrutiny of the courts.

The removal procedures for the office of the National Commissioner seem to be more stringent than the appointment procedures. The National Commissioner may be removed by the President upon the recommendation of a board of inquiry, established by the President, which is to consist of a judge of the Supreme Court as the chairperson and two other suitable persons.[26] The required presence of a Supreme Court judge on the board provides comfort as to the impartiality of the inquiry. The procedure to

[21] Section 32(1)(b).
[22] Section 207(1) of the Constitution.
[23] Section 207(3) of the Constitution.
[24] Section 6.
[25] *S v Selebi* (25/09) [2010] ZAGPJHC 53 (5 July 2010).
[26] Sections 8(1) and 9(1) of the SAPS Act.

be followed by the inquiry[27] and the requisite submission of its recommendations[28] to the President, National Commissioner and Parliamentary Committees[29] are also detailed in the Act. Subsequent to receiving this report, the President may remove the National Commissioner or "*take any other appropriate action*". Should the President postpone his decision for a period, he is required to request the same board of inquiry, or a similar board established for that purpose, to compile a new report and to make a new recommendation. [30]

The National Head of the Hawks

The Hawks were preceded by the Directorate of Special Operations (commonly known as "**the Scorpions**"). The Scorpions, a crime fighting unit of the NPA (and not SAPS), underwent an embattled disbanding in 2009 during President Kgalema Motlanthe's administration, following concerns expressed at Polokwane by the ANC that some of its high profile members were being investigated by the Scorpions. It was replaced by the Hawks, which fell under SAPS. A Constitutional Court judgment in 2011 ordered amendments to the SAPS Act (the Hawks' enabling legislation) in order to strengthen the Hawks' inadequate independence.[31]

At the end of 2017, the former National Head of the Hawks, Berning Ntlemeza, was declared to have been invalidly appointed. The High Court singled out the Minister of Police for having been aware at the time of Ntlemeza's appointment that Ntlemeza lacked the honesty and integrity required of someone holding that office.[32] The Court found further that the Minister had failed to disclose this information to the interview panel that had been convened to consider this appointment.[33]

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[27] Section 8(4) of the SAPS Act: If a board of inquiry is established under subsection (1) or (2) (c), the Commissioner concerned shall be notified thereof in writing, and thereupon he or she may:
(a) be assisted or represented by another person or legal representative;
(b) make written representations to the board;
(c) be present at the inquiry;
(d) give evidence thereat;
(e) cross examine witnesses not called by him or her;
(f) be heard;
(g) call witnesses; and
(h) have access to documents relevant to the inquiry.

[28] Section 8(6)(b) of the SAPS Act: The report referred to in paragraph *(a)* may recommend that
(i) no action be taken in the matter;
(ii) the Commissioner concerned be transferred to another post or be employed additional to the fixed establishment;
(iii) his or her salary or rank or both his or her salary and rank be reduced;
(iv) action be taken against him or her in accordance with subparagraphs (ii) and (iii);
(v) he or she be removed from office; or
(vi) any other appropriate steps (including the postponement of any decision by the President or the National Commissioner, as the case may be, for a period not exceeding 12 calendar months) be taken.

[29] Section 8(6)(a) of the SAPS Act.

[30] Section 8(7) of the SAPS Act.

[31] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6.

[32] *Helen Suzman Foundation and Another v Minister of Police and Others*(23199/16) [2017] ZAGPPHC 68 at paras 36 and 39.

[33] *Ibid* fn32 at para 22.

The appointment provisions for the National Head of the Hawks hardly differ from that of the NDPP. The only difference is that the Hawks, unlike the NPA, is not a constitutionally created institution and the appointment of the National Head is made by the Minister of Police with the concurrence of Cabinet.[34]

The National Head is required to be a fit and proper person with due regard given to his/her experience, conscientiousness and integrity[35] - according to the wording of the SAPS Act. The High Court in *Helen Suzman Foundation and Another v Minister of Police and Others*[36] followed the interpretation of the Constitutional Court and held that, as in the case of the NDPP, the appointment criteria for the National Head of the Hawks must be objective.[37] Despite the decision maker's discretion, the National Head must be objectively fit for office[38] and this must be a positive determination.[39] The absence of evidence showing that a candidate is not fit and proper is not sufficient.[40] According to the Court, the qualities that are of paramount importance to the National Head of the Hawks are independence, honesty and integrity[41] - stressing again the importance of the independence of criminal justice system institutions.

Before 27 November 2014, the National Head's removal from office was subject to the discretion of the Minister of Police, subsequent to an inquiry into his/her fitness to hold office, as the Minister deemed fit.[42] Unlike the NPA Act, the SAPS Act detailed the composition[43] of and the procedure[44] to be followed by this inquiry.

The above suspension and removal provision was exercised by the Minister of Police in the case of a former National Head, Anwa Dramat, when he was suspended on 9 December 2014 pending an inquiry into his fitness to hold office. The problem was that the Minister was exercising powers that were no longer available to him as the Constitutional Court had, 12 days prior, declared them to be invalid and deleted the relevant provision.[45] The Minister, nevertheless, attempted to validate his decision to suspend Dramat, but the High Court declared Dramat's suspension invalid for lack of an empowering provision (as

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[34] Section 17CA(1) of the SAPS Act.
[35] *Supra*.
[36] (23199/16) [2017] ZAGPPHC 68.
[37] *Ibid* fn32 at para 27.
[38] *Ibid* fn32 at para 31 and 33.
[39] *Ibid* fn32 at para 40.
[40] *Supra*.
[41] *Ibid* fn32 at para 36.
[42] Section 17DA(2)(a) of the SAPS Act.
[43] Section 17DA(2)(d) of the SAPS Act: An inquiry referred to in this subsection:
(i) shall perform its functions subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), in particular to ensure procedurally fair administrative action; and
(ii) shall be led by a judge or retired judge: Provided that the Minister shall make the appointment after consultation with the Minister of Justice and Constitutional Development and the Chief Justice.
[44] Section 17DA(2)(e) of the SAPS Act: The National Head of the Directorate shall be informed of any allegations against him or her and shall be granted an opportunity to make submissions to the inquiry upon being informed of such allegations.
[45] Section 17DA(2)(a) to (e). *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 at para 112 prayer 5(g).

it had been deleted).[46] The Supreme Court of Appeal subsequently refused to grant the Minister leave to appeal. The matter became moot after Dramat's resignation.

What is disconcerting is that despite the Constitutional Court's deletion of the provision governing the suspension and removal of the National Head in terms of section 17DA(2) of the SAPS Act in 2014, and the High Court's subsequent application of this order, the entire subsection remains in existence in the Act. This allows for confusion and enables attempts to reinterpret the court order.

Notwithstanding the deletion of the Minister's suspension powers pending an inquiry into the National Head's fitness[47], the Minister is still empowered to suspend him/her, in terms of another section (17DA(5)(a)), at any time after the start of proceedings for the removal of the National Head by a Committee of the National Assembly. The Minister is therefore left with some powers of suspension, which are subject to the commencement of proceedings in Parliament.

Considering that the Minister no longer has the discretion to remove the National Head subject to the finding of an inquiry into his/her fitness to hold office (which was part of the subsection deleted by the Constitutional Court), the National Head may now only be removed subsequent to a finding of a Committee of the National Assembly to that effect[48] or by a resolution passed by the National Assembly.[49] The Minister's powers have therefore again been significantly curtailed by the courts – leaving a Parliamentary oversight mechanism as the only option for the National Head's removal.

The Executive Director of IPID

Spurious charges have been and continue to be laid from time to time against the current Executive Director of the IPID, Robert McBride.

One of the most surprising of all of the appointment powers is that of the Minister of Police to nominate and appoint the Executive Director of IPID – the "*watchdog*" of the police[50] – according to a procedure to be determined by the Minister of Police himself/herself.[51] There are no eligibility criteria for the Executive Director. The appointment must, however, subsequently be confirmed or rejected by a Parliamentary Committee, which technically provides for some oversight.[52] In contrast, prior to a Constitutional Court judgment in 2016, the Executive Director could be removed at the sole and unfettered discretion of the Minister of Police with the total absence of an oversight mechanism.[53]

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[46] *Helen Suzman Foundation v Minister of Police and Others* (1054/2015) [2015] ZAGPPHC 4 (23 January 2015) at para 66.
[47] Section 17DA(2)(a) of the SAPS Act.
[48] Section 17DA(3) of the SAPS Act.
[49] Section 17DA(4) of the SAPS Act.
[50] *McBride v Minister of Police and Another* [2016] ZACC 30 at para 41.
[51] Section 6(1) of the Independent Police Investigation Directorate Act ("IPID Act").
[52] Section 6(2) of the IPID Act.
[53] Section 6(6) of the IPID Act and *McBride v Minister of Police and Another* [2016] ZACC 30 at para 17.

IPID is mandated to conduct independent and impartial investigations of specified crimes committed by members of SAPS and Municipal Police Services. Notwithstanding the Constitutional protection provided,[54] the office of the Executive Director requires absolute structural and operational independence in order for the institution as a whole to be able to function in line with its mandate.[55] This would not only require that the appropriate person be appointed to the position but also that his/her tenure in office be secured from intimidation and undue influence.

This too was the view of the courts when both these appointment and removal provisions were challenged by the current Executive Director, Robert McBride. The High Court held that IPID's constitutionally guaranteed independence requires more stringent protection than that of the Hawks.[56] The Constitutional Court confirmed that section 6 of the IPID Act gives the Minister of Police enormous political powers and control over the Executive Director to remove him without parliamentary oversight.[57] The following is taken directly from the Constitutional Court judgment when referring to the Minister's powers:

> "*This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.*"[58]

The Constitutional Court went further to say that the credibility of and public confidence in IPID means that the institution must not only actually be independent, but must also be perceived to be so.[59]

Accordingly the Constitutional Court declared, *inter alia*, sections 6(3)[60] and 6(6)[61] of the IPID Act to be unconstitutional.[62] Section 6(6), which is the removal provision for the Executive Director, was amended to read like the remaining removal provisions for the National Head of the Hawks contained in the SAPS

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[54] Section 206(6) of the Constitution.
[55] *Ibid* fn50 at paras 15 and 16.
[56] *Supra*.
[57] *Ibid* fn50 at para 38.
[58] *Supra*.
[59] *Ibid* fn50 at para 41.
[60] Section 6(3): In the event of an appointment being confirmed:
(a) the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and
(b) such appointment is for a term of five years, which is renewable for one additional term only.
[61] Section 6(6): The Minister may, remove the Executive Director from office on account of:
(a) misconduct;
(b) ill health; or
(c) inability to perform the duties of that office effectively.
[62] *Ibid* fn50 at para 58.

Act.[63] Parliament was given 24 months from the date of the order (6 September 2016) to permanently cure the defects in the IPID Act.[64]

Unfortunately, 27 months on, the IPID Amendment Bill has yet to be passed, meaning Parliament is now in contempt of court. The Amendment Bill merely codifies the wording of the interim Constitutional Court order into the IPID Act without at all addressing the defects in the appointment provisions contained in sections 6(1)[65] and 6(2)[66] of the Act.[67]

The Head of the SIU

A lesser known criminal justice system institution is the SIU. This institution is a forensic investigation and litigation agency. It is tasked with investigating serious malpractices or maladministration in the administration of state institutions, state assets and public money; as well as investigating any conduct which could seriously harm the interests of the public.[68]

The Head of the SIU, like the NDPP, is appointed at the sole discretion of the President (without any oversight) and it is required that he/she be a fit and proper person with due regard given to his/her experience, conscientiousness and integrity.[69] This is also the same wording used for the appointment of the National Head of the Hawks. It can then only be assumed that the President would be required to use the same objective assessment expressed by the Constitutional Court when exercising this discretionary power.

The removal procedures for the Head of the SIU, however, provide for absolutely no security of tenure as the President may, "*at any time"*, remove the Head from office if there are "*sound reasons"* for doing so.[70] Aside from the total lack of due process, no grounds for removal are provided by the Special Investigating Unit and Special Tribunal Act. The effect is an absence of security of tenure in its entirety.

The Judiciary

Our judiciary has four layers and is split into the lower courts and superior courts. The lower courts are the Magistrates' Courts (district and regional) which are creatures of statute (created by legislation). The superior courts are the High Courts, Supreme Court of Appeal and, our apex court, the Constitutional

[63] Sections 17DA(3) to (7) of the SAPS Act.
[64] *Ibid* fn62.
[65] Section 6(1): The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.
[66] Section 6(2): The relevant Parliamentary Committee must, within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.
[67] https://pmg.org.za/bill/791/.
[68] Preamble to the Special Investigating Unit and Special Tribunal Act ("SIUST Act").
[69] Section 3(1)(a) of the SIUST Act.
[70] Section 3(4)(d) of the SIUST Act.

Court. These courts, unlike the Magistrates' Courts, are constitutionally enshrined and not statutorily created.[71]

Superior Courts

Any man or woman appointed as a judicial officer must be a fit and proper person.[72] The Chief Justice and Deputy Chief Justice of the Constitutional Court are appointed by the President in consultation with the Judicial Service Commission ("**JSC**") and the leaders of the parties represented in the National Assembly.[73] The remainder of the Constitutional Court judges are also appointed by the President, but in consultation with the Chief Justice and the National Assembly party leaders, from a list of nominees prepared by the JSC.[74]

The President and Deputy President of the Supreme Court of Appeal are appointed by the President in consultation with the JSC.[75]

High court judges are appointed by the President under the advisement of the JSC.[76]

As the JSC is the common denominator for appointments in the superior courts, a closer look into its composition and procedures are warranted. The JSC consists of 23 members – 8 of whom are affiliated with the legal profession (judges, attorneys, advocates and a professor) while the remaining 15 are politicians (a Minister, presidential appointees, and members of the National Assembly and National Council of Provinces).[77] The fact that two-thirds of the JSC are comprised of politicians (which include members of the opposition parties) has raised concerns that our judiciary may at some point fall prey to the political influences of those who appoint them. Since the composition of the JSC is set out in the Constitution, its reconstitution would require an amendment of section 178 of the Constitution – this would be no small task.

The most recent appointment procedures followed by the JSC were gazetted in March 2018[78] in terms of section 5 of the Judicial Service Commission Act. When a vacancy on the bench of the superior courts occurs the vacancy must be publicly announced with a call for nominations.[79] The nominees' *curriculum vitae*, and all other pertinent information, must be made available to the JSC.[80] A list of candidates is subsequently compiled and presented to a screening committee[81] which then prepares a shortlist of candidates to be interviewed.[82] This shortlist is made available for public comment.[83] The candidates

[71] Chapter 8 of the Constitution.
[72] Section 174(1) of the Constitution.
[73] Section 174(3) of the Constitution.
[74] Section 174(4) of the Constitution.
[75] Section 174(3) of the Constitution.
[76] Section 174(6) of the Constitution.
[77] Section 178(1) of the Constitution.
[78] Government Gazette no 41547, Government Notice no 404, dated 29 March 2018.
[79] Sections 2(b) and 3(b) of the Judicial Service Commission Act: Procedure of the Commission.
[80] Sections 2(c)(iii)(iv) and 3(c)(iii)(iv) of the Judicial Service Commission Act: Procedure of the Commission.
[81] Sections 2(d) and 3(d) of the Judicial Service Commission Act: Procedure of the Commission.
[82] Sections 2(e) and 3(e) of the Judicial Service Commission Act: Procedure of the Commission.

then undergo an interview process which is open to the public and the media.[84] Thereafter a private deliberation is had within the JSC and the candidate is chosen by a majority vote (this is where the composition of the JSC plays the most important role).[85] The JSC then publicly announces the recommended candidate[86] and advises the President of the reasons for its recommendation.[87] This is the most comprehensive and transparent appointment process across all of the criminal justice system institutions. In April 2018, the Constitutional Court in the *Helen Suzman Foundation v the Judicial Service Commission*[88] ordered that even the private deliberations of the JSC must be made public in certain circumstances – such as in an application for the review of judicial appointments, which was the case here.

The Constitution provides for the removal of judges by the President based on a finding of the JSC, which then requires a two-thirds majority for the adoption of a resolution by the National Assembly.[89] The Judicial Service Commission Act provides for the establishment of a Judicial Conduct Committee[90] which is meant to give effect to the aforementioned constitutionally endorsed removal provisions. This Committee may in turn establish a tribunal for impeachable complaints made to it.[91] The problem here can be illustrated by the case of the Judge President of the Western Cape High Court, John Hlophe. In 2008 Judge Hlophe had a complaint lodged against him by a full bench of the Constitutional Court for approaching Justices Jafta and Nkabinde in their chambers in a bid to improperly influence them in a matter being heard before them, which involved then Deputy President Jacob Zuma. Ten years later, and after much litigation, Judge Hlophe remains Judge President of the Western Cape High Court while the JSC has been unable to exercise its constitutional duty to investigate these complaints – despite being ordered by the courts to do so.[92]

There was also an attempt by the former President Jacob Zuma in 2011 to extend former Constitutional Court Chief Justice Sandile Ngcobo's tenure on the bench. This attempt was shut down by Chief Justice Ngcobo's own court when it ruled, in a unanimous decision, that a non-renewable term of office was a prime feature of judicial independence. [93] It went further to state that non-renewability fostered public

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[83] Sections 2(f) and 3(f) of the Judicial Service Commission Act: Procedure of the Commission.
[84] Sections 2(h)(i) and 3(h)(i) of the Judicial Service Commission Act: Procedure of the Commission.
[85] Sections 2(j) and 3(j) of the Judicial Service Commission Act: Procedure of the Commission.
[86] Sections 2(m) and 3(k) of the Judicial Service Commission Act: Procedure of the Commission.
[87] Sections 2(n) and 3(l) of the Judicial Service Commission Act: Procedure of the Commission.
[88] (CCT289/16) [2018] ZACC 8.
[89] Section 177 of the Constitution.
[90] Section 8 of the Judicial Service Commission Act ("JSC Act").
[91] Section 16 of the JSC Act.
[92] *Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others* (25467/2009) [2010] ZAWCHC 80(31 March 2010); *Judicial Service Commission v Premier, Western Cape* (537/10) [2011] ZASCA 53 (31 March 2011); and *Freedom Under Law v JSC* (52/2011) [2011] ZASCA 59 (31 March 2011).
[93] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23 at para 73.

confidence in the institution because its members functioned without the threat of their terms not being renewed or any inducement to seek to secure renewals.[94]

Lower Courts

The Magistrates' Courts are established and function within the bounds of two pieces of legislation – the Magistrates Act and the Magistrates' Courts Act. Magistrates are appointed by the Minister of Justice on recommendation by the Magistrates' Commission.[95] Although a Magistrate is statutorily required to be a fit and proper person, he/she is not required to have any legal qualifications.[96] An appointment committee, established by the Commission, is responsible for such appointments.[97] The problem with this system of appointment is that, although there is an appointment committee, there are no transparent appointment procedures or processes (as there are with the superior courts) and no minimum eligibility criteria (legal qualifications). This has an obvious potential to lead to problematic appointments.

This is where removal procedures can act as effective deterrents to misconduct by magistrates. A complaints commission is statutorily created for the public to report any improper conduct on the part of a magistrate.[98] The Minister of Justice has the power to suspend a magistrate pending an investigation by the Magistrates' Commission into his/her fitness to hold office[99]; and must suspend a magistrate on recommendation of the Magistrates' Commission that he/she be removed.[100] Parliament must, however, confirm a magistrate's suspension, otherwise it lapses[101] (which it does anyway 60 days from its commencement date, unless an inquiry has been instituted[102]). Parliament is required to pass a resolution to that effect[103] and any recommendation of removal made by the Magistrates Commission has the same requirement.[104] The removal procedures clearly provide for security of tenure as no one is afforded the sole discretion to remove a magistrate.

The Public Protector

Although not formally part of the criminal justice system, the office of the Public Protector is included in this analysis because aspects of its functions are relevant to the ongoing viability of the criminal justice system.

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[94] *Supra.*
[95] Section 9 of the Magistrates' Courts Act and sections 4(a) and 10 of the Magistrates Act. For the composition of the Magistrates Commission refer to section 3 of the Magistrates Act.
[96] Section 10 of the Magistrates' Courts Act.
[97] Section 6(1)(b) of the Magistrates Act.
[98] Section 6A of the Magistrates Act.
[99] Section 13(3)(a) of the Magistrates Act.
[100] Section 13(4)(a) of the Magistrates Act.
[101] Sections 13(3)(c)(d) and 13(4)(c) of the Magistrates Act.
[102] Section 13(3)(e) of the Magistrates Act.
[103] Sections 13(3)(c)(d) and 13(4)(c) of the Magistrates Act.
[104] Section 13(4)(c)(d) of the Magistrates Act.

The Public Protector is appointed by the President on the recommendation of the National Assembly,[105] which puts forward a candidate nominated by a committee[106] composed by it and approved by the adoption of a resolution.[107] The Public Protector is required to be a fit and proper person.[108] The remainder of the eligibility criteria for the appointment are also quite stringent and require a high level of qualification and experience.[109] One of the criteria, however, provides for the eligibility of a parliamentarian who has been a member of Parliament for at least 10 years,[110] which means that there is still room for some form of political influence to creep in. That said, the appointment procedures stipulated by legislation for the office of the Public Protector are reasonably fair and rational, but there is no formal provision for transparency or public participation during this process.

Yet despite the above procedures, the current Public Protector is someone who has, in essence, been declared incompetent by the High Court.[111] The High Court declared that she "*does not fully understand her constitutional duty to be impartial and perform her functions without fear, favour and prejudice*".[112] This goes to prove that efficient appointment procedures alone cannot guarantee an efficient and independently functioning institution – effective removal procedures are also necessary as they provide for accountability.

The removal procedures for the Public Protector are also contained in the Constitution.[113] Interestingly, although the President executes the final removal of the Public Protector and has suspension powers[114],

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[105] Section 193(4) of the Constitution.

[106] The committee of the National Assembly must be proportionately composed of members of all parties represented in the Assembly.

[107] Section 193(5) of the Constitution.

[108] Section 193(1)(b) of the Constitution.

[109] Section 1A(3) of the Public Protector Act reads: The Public Protector shall be a South African citizen who is a fit and proper Person to hold such office, and who-

(a) is a Judge of a High Court; or
(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or
(c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or
(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or
(e) has, for a cumulative period of at least 10 years, been a member of Parliament; or
(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.

[110] Section 1A(3)(e) of the Public Protector Act.

[111] *Absa Bank Limited and Others v Public Protector and Others* (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2**.**

[112] *Supra*.

[113] Section 194 of the Constitution: (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on:

(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of:

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

the Public Protector may only be removed following a recommendation by a committee of the National Assembly.[115] A resolution subsequently has to be adopted by the National Assembly with a two-thirds majority vote following a recommendation of the committee.[116]

The Director of the FIC

The FIC is a public administration institution established in terms of section 195 of the Constitution.[117] The FIC was formed to identify the proceeds of unlawful activities; and to combat money laundering activities and the financing of terrorist and related activities.[118]

The Director of the FIC is appointed by the Minister of Finance[119] in consultation with the Money Laundering Advisory Council[120] established in terms of section 17 of the Financial Intelligence Centre Act ("**FIC Act**", commonly referred to as FICA). Although there is an oversight mechanism for the appointment made by the Minister, the only eligibility criterion for the Director is that he/she be a fit and proper person.[121] No specialized knowledge or skill for a post such as this is required in the eligibility criteria.

Again, it is the Minister who is empowered to remove the Director from office, based on specified grounds (i.e misconduct, incapacity, incompetence and failure of a security screening investigation).[122] Whilst an inquiry or a security screening investigation is required for a suspension, no inquiry is required for a removal.[123] The Director's removal by the Minister is not subject to any other form of oversight.

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(3) The President:
(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

[114] Section 194(3) of the Constitution.
[115] Section 194(1)(b) of the Constitution.
[116] Section 194(2) of the Constitution.
[117] Section 2 of the Financial Intelligence Act ("FIC Act").
[118] Section 3 of the FIC Act.
[119] Section 6(1) of the FIC Act.
[120] Section 6(3) of the FIC Act. In terms of section 19 of the FIC Act the Council is composed as follows:
S19 (1) The Council consists of the Director and each of the following, namely:
(a) the Director-General of the National Treasury;
(b) the Commissioner of the South African Police Service;
(c) the Director-General of the Department of Justice and Constitutional Development;
(d) the National Director of Public Prosecutions; (e) the Director-General of the National Intelligence Agency;
(f) the Director-General of the South African Secret Service; (g) the Governor of the South African Reserve Bank;
(h) the Commissioner for the South African Revenue Service;
(i) persons representing categories of accountable institutions requested by the Minister to nominate representatives;
(j) persons representing supervisory bodies requested by the Minister to nominate representatives; and
(k) any other persons or bodies requested by the Minister to nominate representatives.
[121] Section 6(1) of the FIC Act.
[122] Section 7(1) of the FIC Act.
[123] Section 7(2) of the FIC Act.

Recommendations

From the above account, it is clear that all of the heads of our criminal justice system institutions (with the exception of the judiciary and the Public Protector) may be appointed and removed, for the most part, at the instance of the President or one of his ministers (subject only in some cases to Parliamentary approval).

The experience of the last decade shows that there is an urgent need to guard against political office-bearers being able to appoint, suspend or remove the heads of important institutions within the criminal justice system at their discretion with little effective oversight. We cannot continue to lean solely on the judiciary to set aside unlawful political decisions. Such a corrective mechanism can be very slow and costly. There is also a real risk that a heavy dependency on the courts in this respect could lead to ever increasing friction among the judicial, legislative and executive branches.

It has been shown time and again that the heads of criminal justice system institutions have been appointed, suspended or removed in direct conflict with the constitutionally required independence of these institutions. There is therefore a need to adjust the appointment, suspension and removal procedures for these key positions. What is required is a legislative reform of all of the enabling legislation cited in this paper, most easily implemented through a General Law Amendment Act, to require a committee (of one form or another) to make recommendations upon which the relevant political office-holder is required to act. This would enable a transparent and rational process, minimizing the threat of purely partisan or personal agendas. A similar model to that of the JSC (with more limited party political input) could be used in the case of appointments to and removals from each of the criminal justice system institutions. It is a tried and tested model within the South African context and has proven to be successful. Another example is the process which has been employed very recently to provide a recommendation to the President on the appointment of a new NDPP[124] – which follows a similar process to that for judicial appointments, in terms of its transparency and public calls for applications. Whilst this innovation is not set out in any legislation, there is no reason why it could not be enacted.

It would also be useful to look beyond our borders to models that work in other jurisdictions, such as the United Kingdom, which has a judicial appointment model roughly corresponding to our JSC. The United Kingdom's judicial appointments commission, unlike the JSC, is smaller and comprises of lawyers and lay persons (with absolutely no politicians). The laity is there to represent the public interest and ask questions which legal professionals may be less inclined to do. Another example is Colombia's appointment of its equivalent of our NDPP. It has a transparent process mirroring almost exactly the one used by the JSC (again minus the politicians).

[124] An Advisory Panel chaired by Energy Minister Jeff Radebe. The remaining panelists included Auditor-General Thembekile Kimi Makwetu; the Chairperson of the SA Human Rights Commission Advocate Bongani Majola; Advocate Barry Roux (General Council of the Bar of South Africa representative); Mr R Scott (Law Society of South Africa representative); Mr L Manye (Advocates for Transformation representative); Mr LB Sigogo (Black Lawyers Association); and Mr M Notyesi (National Association of Democratic Lawyers representative).

In the end, it needs to be emphasised that transparency, efficiency and independence are necessary when it comes to rational decisions being made regarding the leadership of the criminal justice system – which would ultimately allow for the institutions themselves to embody these principles.

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