LOCATING THE LIMITS OF JUDICIALISATION OF JUDICIAL APPOINTMENTS: A STUDY OF INDIA, KENYA AND SOUTH AFRICA

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Submitted to

Central European University

Department of Legal Studies

In partial fulfilment of the requirements for the degree of LL.M. in Comparative Constitutional Law

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Vienna, Austria

June 2023

Central European University - Private University

Abstract

The global phenomenon of the judicialisation of judicial appointments is a response to the growing politicisation of judicial appointments in an era of rising judicial power and the consequent judicialisation of politics. Judicial appointments act as a gatekeeping tool to prevent the politicisation of the judicial power. A judicial minority in the judicial appointments reverts back to the politicisation of judicial appointments. Conversely, a judicial majority can create challenges in maintaining democratic accountability. This thesis, through a study of judicial appointments in India, Kenya and South Africa, explores the boundaries of the judicialisation of judicial appointments in striking a balance between the conflicting demands of judicial independence and judicial accountability.

Acknowledgements

The thesis would not have been possible without the able support and guidance of my supervisor, Prof. Markus Böckenförde. Prof. Böckenförde's infinite patience and passion helped me negotiate my biases and gain a deeper understanding of the judicial role in judicial appointments. I would also like to thank Prof. Kate Malleson and Prof. Andras Sajo for their helpful suggestions. Anindita Mukherjee (the Zotero expert), Anjali Rawat, Sruthisagar Yamunan, Tanvi Tuhina, and Teodora Miljojkovic helped me formulate the scope of the thesis with their valuable and insightful suggestions. Last but not least, many thanks to the wonderful cohort at the comparative constitutional law program, Borana, Chernor, Farhan, Joao, Ludovic, Ragib and Timi, for making my much-delayed short-stay in Vienna informative and memorable.

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Chapter-I: Introduction

The question of judicialisation in judicial appointments presupposes judicial appointments as a facet of judicial independence, posing a significant challenge to judiciaries and academics.[1] Extrapolating judicial independence to judicial appointments entails *regulating* independence *prior* to the exercise of judicial functions by the 'future' judges. Judicial independence *pre-appointment* merits serious attention[2] to ensure that the independence *post-appointment* is not misused through distortions in the appointment process.[3]

The judicial role in judicial appointments is increasingly becoming a response to the challenge of maintaining judicial independence pre-appointment.[4] Around 69% of the world constitutions have a judicial role in judicial appointments through a form of judicial commission.[5] Peter Brett categorised the global shift in understanding judicial appointments from appointing judges on merit without improper motives (executive-based appointments) *to* increasingly prescriptive standards beyond merit with less executive representation.[6] Essentially, the prevailing standard towards judicial appointments entails appointments beyond party politics and vested interests and ensuring representativeness through diverse and transparent appointments.[7]

This *judicialisation of judicial appointments* is a result of the tension between the *judicialisation of politics* and the *politicisation of judicial appointments*. At the same time, the presence of a judicial role in judicial appointments raises further questions about the scope and extent of the role, i.e. passive, minority, preponderant, majority etc. The thesis's research question investigates the limits of the judicial role within the broader framework of maintaining judicial independence and accountability. The thesis will enquire about the limitations of the

[1] Arghya Sengupta, *Independence and Accountability of the Higher Indian Judiciary*, 1st ed. (Cambridge University Press, 2019), 125-126.
[2] Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," *American Journal of Comparative Law* 57, no. 1 (January 1, 2009): 103–34.
[3] As a necessary corollary, judicial independence extends to post-retirement as well. See Sengupta (n 1)., 100-116.
[4]See Mount Scopus International Standards of Judicial Independence, 2008; Kiev Recommendations on Judicial Independence; and Shimon Shetreet and Wayne McCormack (eds), 'The Culture of Judicial Independence in a Globalised World', *The Culture of Judicial Independence in a Globalised World* (Brill Nijhoff 2016).
[5]Data collated by the Comparative Constitutions Project (Available at constituteproject.org under the "establishment of judicial council" topic).
[6] Peter Brett, "The New Politics of Judicial Appointments in Southern Africa," *Law & Social Inquiry*, September 20, 2022, 1–31, 5.
[7] Elliot Bulmer, 'Judicial Appointments: International IDEA Constitution-Building Primer 4' [2017] International Institute for Democracy and Electoral Assistance (International IDEA), 3-4.

judicial role in the judicial appointment processes through a detailed historical and legal study of judicial appointment processes in India, Kenya and South Africa (mentioned alphabetically). The thesis relies on India's unique judicial appointment process as a point of departure for understanding Kenyan and South African processes to argue for a *preponderant role in judicial appointments*.

1.1. Research Question

What are the limits of the judicial role in judicial appointments?

1.2. Assumptions

The research question presupposes the judicial role in judicial selection methods. The presupposition is predicated on two normative claims, ***(i)*** judicial independence is essential for liberal constitutional democracies; and ***(ii)*** judicial selection methods are part of judicial independence.[8] The two normative claims are undisputed in India, Kenya and South Africa, and their respective judicial selection methods presuppose the judiciary's role in judicial appointments. At the same time, they *diverge* on the extent of the judicial role in judicial selection methods, with judicial primacy in India, judicial preponderance in Kenya, and executive dominance in South Africa, making them prototypes for understanding the judicial role in judicial appointments.

1.3. The Indian Point of Departure

The contestation over judicial appointments in India revolves around the controlling authority over judicial appointments, i.e. executive or judiciary. The tussle is between the traditional understanding of separation of powers and checks and balances theory with the changing times of judicialisation of politics. The traditional understanding necessitates the determining role of the executive-legislature in judicial appointments as a *check* on the judiciary, also enabling democratic legitimacy to an unelected judiciary. The post-appointment independence acts as the *balance*. However, the unequivocal rise of judicial power in liberal constitutional democracies challenges the traditional understanding of judicial appointments. The *judicialisation of politics*[9] through the rise in judicial power has resulted in the

[8] See Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe, 30 October 2018.
[9] Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

politicisation of judicial appointments.[10] Resultantly, judicial appointments have started to merit serious attention to safeguard the judiciary from the politicisation of judicial appointments.

The politicisation of judicial appointments in the age of rising judicial power with the judicialisation of politics results in an unorthodox situation. In representative democracies, the involvement of the executive and legislature in judicial appointments is necessary to bestow democratic legitimacy upon the judiciary. Without this involvement, an unelected judiciary could become a self-perpetuating, unaccountable institution that runs counter to the principles of liberal constitutional democracies. However, the judicialisation of politics creates incentives for the ruling elite to manipulate their role in judicial appointments for their own ends, bypassing democratic processes.[11] This complex situation lacks straightforward solutions. Graham Gee refers to this as the "politics of judicial selection".[12]

A 'commission' method comprising executive-legislature **and** judiciary is increasingly becoming the solution to the tricky question of judicial appointments.[13] In addition, the trend is towards a *dominant* judicial role.[14] However, the dominant judicial role challenges the checks and balances aspects of the classic separation of powers doctrine.

1.4. The Indian 'Solution'

India exemplifies the conflict between the executive-legislature and the judiciary over judicial appointments in the face of the judicialisation of politics and increasing judicial power. The original constitutional framework prescribed a consultative and cooperative judicial appointment procedure involving the executive and judiciary. They did not envisage the abuse of judicial appointments by the executive. However, over a period of time, the executive started to exercise its dominance over judicial appointments to the exclusion of the judiciary. Similarly, despite the conferral of judicial review on the Courts (Supreme Court and the High Courts), the constitution drafters did not envisage the extension of the judicial power from basic

[10] Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press 2006).
[11] Charles Manga Fombad, "A Comparative Overview of Recent Trends in Judicial Appointments: Selected Cases from Africa," *Canadian Journal of African Studies / Revue Canadienne Des Études Africaines* 55, no. 1 (January 2, 2021): 161–82, 162.
[12] Graham Gee, 'The Persistent Politics of Judicial Selection: A Comparative Analysis' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012).
[13] Brett (n 6), 2.
[14] See Mount Scopus International Standards of Judicial Independence, 2008, Kiev Recommendations on Judicial Independence and Shetreet and McCormack (n 4).

structure doctrine to relaxed standing for public interest litigation.[15] As a result, the judiciary, exercising its constitutional interpretative role and the rise in judicial power, (re)interpreted the framework to wrest the control of judicial appointments from the executive.[16] Essentially, the judiciary replaced the executive in the appointment process, with the executive retaining a consultative role.

The Indian experience towards a judicial commission for appointments famously resulted in the ISC declaring an amendment to the Constitution unconstitutional.[17] The envisaged judicial commission had several institutional flaws skewing the appointments completely in favour of the executive.[18] The prevailing judicial appointments in India occur based on a convention-based informal judicial collegium comprising the senior-most judges of the Supreme Court with consultative roles for the national executive, and provincial judiciary and executive.[19] As a result, despite various brushes with judicial service commissions, formally and informally, the commission model for judicial appointments has never been implemented in India.

The tussle over judicial appointments in India between the executive and the judiciary is primarily based in terms of primacy, executive or judicial. The arguments from the executive and the judiciary are not framed in terms of locating judicial appointments in the face of rising judicial power. Constraining and deconcentrating governmental power is an essential feature of liberal constitutional democracies.[20] Judicial power as a component of governmental power needs to be constrained and made accountable. Judicial appointments serve as one of the methods to constrain judicial power while maintaining its independence. However, the Indian 'solution' and the debate do not revolve around constraining judicial power through accountability or otherwise. As a result, executive-led appointments or judiciary-led appointments face similar problems.[21]

[15]Sengupta (n 1), 1-2.
[16] See ***Supreme Court Advocates-on-Record v. Union of India***, (1993) 4 SCC 441 and supra Chapter 4.1.
[17] See in ***Supreme Court Advocates-on-Record v. Union of India*** (2016) 5 SCC 1 and supra Chapter 4.1.
[18] Indira Jaising, 'National Judicial Appointments Commission: A Critique' (2014) 49 Economic and Political Weekly 16.
[19] See Infra Chapter 4.1.
[20] See The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).
[21] See Aparna Chandra, William Hubbard and Sital Kalantry, 'From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court' (2018) 51 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 273.

1.5. The Kenyan and South African Solutions

Kenya and South Africa reacted to the politicisation of judicial appointments and its impact on judicial independence through establishing judicial service commissions comprising members of the executive-legislature, judiciary and others for appointing their judges at the time of adopting their 'new' constitutions, unlike India, where the shift away from the executive control in judicial appointments occurred through judicial (re)interpretation of the constitutional provisions.

Kenya with its judicial preponderance in its commission and South Africa with the executive dominance in their commission are two contrasting cases of commissions for judicial appointments. The contrast between Kenyan and South African methods is noteworthy when one realises the impact of the South African Constitution on the Kenyan Constitution.[22] Moreover, India, Kenya and South African share common commonwealth heritage, albeit with varying level of colonial influence.

The present thesis will look into the contested question of judicial appointments from the independence-accountability paradox, not from primacy. Adopting the commission method of judicial appointments through contrasting examples of Kenya and South Africa, the thesis will argue for the predominant judicial role (without an executive majority) as the preferred model for judicial appointments. In effect, the thesis reformulates the debate over judicial appointments from executive primacy or judicial primacy *to* locating the limits of the judicial role in judicial appointments without sacrificing independence and accountability.

The thesis is divided into five chapters (including introduction). Chapter-II will explore the independence-accountability paradox in judicial independence, providing a framework for understanding the limits of judicialisation of judicial appointments. In Chapter-III, the argument will be made for a judicial preponderance in judicial appointments (with the majority including members of the legal profession) as a means to reconcile the independence-accountability paradox in judicial appointments. Chapter-IV will discuss the historical origins and controversies of judicial appointments in India and juxtapose them with the origins of prevailing judicial appointments in Kenya and South Africa. Finally, Chapter-V will justify the framework of a preponderant judicial role through addressing the issues of politicisation

[22] See Jill Cottrell Ghai and Yash Ghai, 'The Contribution of the South African Constitution to Kenya's Constitution' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018).

(independence), diversity (accountability), and transparency (accountability) by examining the diverse scenarios of judicial appointments in India, Kenya, and South Africa.

1.6. Methodology

Comparative academic exercise in any field is susceptible to methodological fallacies, more so comparative constitutional law due to the nature of constitutional law and the unfamiliarity of the practitioners (academics, lawyers, judges etc.) in addressing the methodological challenges faced in a comparative study.[23] As a result, methodology and case selection become crucial for arriving at deductible conclusions.

The thesis adopts what Ran Hirschl calls the *most similar cases*[24] and *prototypical cases*[25] principles to answer the research question. The commonwealth background and the constant tussles over judicial appointments between the executive-legislature and the judiciary are *similar* in the three comparators. At the same time, the prevailing solutions in India, Kenya and South Africa to the tussles illustrate the diversity in approaches to the politics of judicial appointments, exemplifying the *prototypes* for understanding the judicial appointment processes. The thesis provides a far-more detailed study of the origins and the prevailing judicial appointment methods in India than in Kenya and South Africa on account of the *sui generis* judicial appointment method in India, where the judiciary judicialised the judicial appointment processes through (re)interpreting the constitution.[26] At the same time, the thesis assesses the three comparators equally in terms of analysing their judicial appointment methods in the broader debate over judicial appointments and judicial independence.

The judicial appointment process in the three countries provides us with tools to understand the evolution of the judicial appointment procedures in liberal constitutions. The present Indian method is judicial primacy. At the same time, Kenya and South Africa follow judicial preponderance and executive dominance in their judicial appointment processes. Studying the three diverse judicial selection methods will help us understand the global shift towards judicialisation of judicial appointments. Furthermore, due to the doctrinal and practical limitations arising from a master's thesis, the thesis limits its study of judicial appointments methods enshrined in the Constitution and dealing primarily with *superior courts* which deal

[23] See Ran Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies', *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).
[24] ibid.245-253.
[25] ibid.256.
[26] See the Second Judges case.

with constitutional issues (Supreme Court and High Courts in India, Supreme Court, Court of Appeal and High Court in Kenya, and Constitutional Court, Supreme Court of Appeal and Hights Court in South Africa).

Naturally, comparing the three Constitutions in relation to judicial selection methods might fall foul of the "functional versus identity divide"[27] due to the identarian nature of the Constitutions and the functional analysis of the thesis. Fortunately, the *presently* evolving jurisprudence on judicial appointment methods in South Africa and Kenya and the discussion over revising judicial appointments in India ensures that analysing judicial appointment methods would combine functional and identity-based approaches.[28] In essence, the continuing debate on judicial appointment methods in the three comparators reduces the impact of constitutional identities on the analysis.

Finally, the thesis will focus on *formal* judicial selection methods enshrined in the Constitution[29]. Therefore, the thesis will discuss but not focus on conventions/informal methods forming part of the judicial selection methods due to the malleability of conventions in understanding Constitutions.[30]

1.7. Contributions to the Field

The Indian Supreme Court ["**ISC**"] is a regular in comparative constitutional law studies. The migration of the basic structure doctrine across various parts of the world[31] and the expansive power exercised by the Court through public interest litigation[32] has made ISC an important court for comparative constitutional studies. However, not much has been said about the appointment procedure of judges who comprise the ISC. The silence about the judicial appointment procedure in India is even more surprising when one looks at the *sui generis* judicialised judicialisation of judicial appointments in India.

[27]Michel Rosenfeld and András Sajó, 'Introduction' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 18.
[28] Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 62-67,71-72.
[29]It includes judicial interpretation of constitutional provisions (see the Second Judges case).
[30] See Scott Stephenson, 'Constitutional Conventions and the Judiciary' (2021) 41 Oxford Journal of Legal Studies 750; and Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64 The Cambridge Law Journal 149.
[31] See Manoj Mate, "State Constitutions and the Basic Structure Doctrine," *Colombia Human Rights Review* 45, no. 2 (Winter 2014): 441–98; and Rehan Abeyratne, 'Global Constitutionalism Reconfigured through a Regional Lens' (2021) 10 Global Constitutionalism 331.
[32] See Diana Kapiszewski, Gordon Silverstein and Robert A Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013).

The unique Indian judicial appointment procedure with its judicial primacy is rarely studied in comparative literature, despite the increasing global trend towards judicial primacy in judicial appointments.[33] The silence over the Indian judicial appointment procedure in comparative constitutional law scholarship is best illustrated by the fact that the *Constitute Project* classifies India as having a judicial service commission since 2014, arguably because of the establishment of the National Judicial Appointments Commission in 2014. However, the ISC invalidated the NJAC in 2015.[34] The lack of revision illustrates the field's silence towards India's unique judicial appointment method.

The present thesis will locate the Indian example of judicialised judicialisation of judicial appointments in the global trend of judicialisation of judicial appointments by comparing with judicial preponderance in Kenya and executive primacy in South Africa. India illustrates the extreme judicialisation of judicial appointments with Kenya and South Africa on two different ends of the spectrum. Accordingly, studying judicial appointment methods in India, Kenya, and South Africa will help to understand better the global trend towards the judicialisation of judicial appointments and locate the limits of the judiciary in judicial appointments. In addition, a study of Indian, South African and Kenyan judicial appointment procedures will add to the exciting cross-border constitutional learnings between the three countries.[35]

1.8. On Terminology

It is important to exercise caution when using terminology to describe judicial commissions, as their composition is becoming increasingly hybrid, extending beyond the traditional executive-legislature versus judiciary dichotomy. This hybrid character, along with the presence of opposition leaders in judicial councils, helps to prevent the concentration of

[33] The scholarly works on judicial appointments and judicial independence such as Malleson and Russell (n 12); Hugh Corder and Jan van Zyl Smit (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (Siber Ink 2017), do not talk about the Indian experience of judicialisation of judicial appointments by the judiciary.

[34] ***Supreme Court Advocates-on-Record v. Union of India***, (2016) 5 SCC 1.

[35] See the discussion on Kenyan constitutional developments in the Indian Constitutional Law and Philosophy blog (available at https://indconlawphil.wordpress.com/tag/kenya); Vijayashri Sripati, 'Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective' (2007) 16 Tulane Journal of International and Comparative Law 49; and Ghai and Ghai (n 22). This is in addition to strong cultural ties between the countries on account of people of Indian descent settling in Kenya and South Africa, see Rael Ombuor, 'Kenyans of Asian Descent Become Nation's 44th Tribe' (*VOA News*, 28 July 2017) <https://www.voanews.com/a/kenyans-asian-descent-nations-newest-tribe/3963971.html> accessed 13 June 2023; and Kathryn Pillay, 'South African Families of Indian Descent: Transmission of Racial Identity' (2015) 46 Journal of Comparative Family Studies 121.

decision-making power within a single institution. As a result, it is not accurate to categorise judicial councils strictly as either executive-driven or judicial-driven in terms of primacy. For example, in Kenya, the judicial appointments procedure involves five judicial members, two lawyers, and four members nominated and/or appointed by the legislature-executive, either directly or indirectly. Similarly, South Africa's composition includes three judicial members, four lawyers (two advocates and two attorneys), one law teacher, and fifteen members nominated and/or appointed by the executive-legislature (with three members from opposition parties).

In light of this, the thesis will refer to the Kenyan judicial appointments procedure as judicial preponderant, given the presence of five judicial members compared to three from the executive-legislature. On the other hand, the South African judicial appointments procedure will be described as executive dominant/driven, with twelve executive members (in addition to three members from opposition parties) out of twenty-five council members. Similarly, India's judicial appointments will be referred to as judicial primacy.

Judicial independence is associated with the independence of the judiciary from the other organs of the State.[36] Resultantly, the term 'executive-legislature' is used to refer the 'executive and/or legislature'. Finally, linguistic tension exists between the terms "judicial selection" and "judicial appointment". The tension results from judges being "selected" in Kenya and South Africa through the judicial service commissions and *appointed* by the executive. In contrast, the informality of the selection of judges by the collegium in India means judges are only appointed by the executive. The thesis uses "judicial selection" and "judicial appointment" interchangeably for ease of comparison and convenience.

[36]See Sengupta (n 1), 147-150.

Chapter-II: Understanding the independence-accountability paradox for judicial appointments

The tension between independence and accountability has long been associated with the functioning of the judiciary.[37] Unlike the legislature-executive, the judiciary has neither the purse nor the sword. Similarly, the fact that judges are not elected makes achieving democratic accountability for the judiciary challenging, unlike the executive-legislature, which is subject to elections. As a result, judicial independence is established as a constitutional principle to counterbalance the absence of the purse and the sword while relying on executive-legislature dominance/monopoly in judicial appointments for accountability. But this understanding hides the inherent tension between independence and *external* accountability or what is known as the "independence-accountability paradox"[38]. The present chapter will focus on the rise of the judicialisation of judicial appointments as a facet of judicial independence and its conflict with judicial accountability.

2.1 Traditional Understanding of Judicial Appointments: The Self-Interest Conundrum

The traditional understanding of separation of powers and checks and balances theory places judicial appointments in the domain of the executive-legislature. Judicial appointments were not part of judicial independence. Pertinently, judicial appointments acted as a *check* on the power of an unelected judiciary. At the same time, post-appointment independence, such as security of tenure, financial security, rigorous removal procedures etc., acted as the *balance*.

Historically, judicial independence commenced after appointments with the exercise of the judicial function and is usually classified into institutional and individual independence.[39] The origins of judicial independence in the common law world lie in Lord Coke's opinion in *Dr Bonham's case*,[40] who formulated judicial independence in contradistinction with the presence of the executive (King) before the judiciary for the resolution of disputes while maintaining its ability to influence the judiciary. Lord Coke alluded to the power of the King

[37] See Martin Shapiro, 'Judicial Independence: New Challenges in Established Nations' (2013) 20 Indiana Journal of Global Legal Studies 253.
[38] ibid.; Brett (n 6).
[39] See John A Ferejohn and Larry D Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 New York University Law Review 962.
[40] (1610) Hil. 7 Jac. 1, 8 Co. Rep. 114 (Court of Common Pleas, England).

to remove judges at his *pleasure* and its opposition to a fundamental principle of the nature of justice, *nemo debate esse judex in propria causa*, no person shall be a judge in his own cause.[41] The Act of Settlement, 1701 enshrined this principle with the doctrine of good behaviour, forming the basis for removing the judges and not the doctrine of pleasure. As Arghya Sengupta observes, the conditions stipulated in the Act of Settlement for judicial independence, financial security, security of tenure and onerous impeachment mechanisms remain the basis for judges' individual independence to date.[42] The Constitution of the United States of America, written in 1787, re-affirms these principles.[43]

The traditional understanding of judicial appointments stems from a time when the judiciary operated within a monarchical system of governance. In such a system, the judiciary did not frequently act as a mediator between the monarch and the people, as the monarch held absolute power. Subsequently, the shift from monarchy to representative governance did not acutely envisage a situation dealing with the infraction of individual rights, specifically minority rights, by the representative governments and the significant litigation involving the executive-legislature before the judiciary. In these early stages, the judiciary primarily served as a forum for resolving disputes between private parties in monarchical and representative governance. Judicial review, as we understand it today, did not exist.

The phenomenon of judicialisation of politics arises from the growing authority of the judiciary and its role in reviewing executive-legislature actions. World over, Courts are striking down original provisions of the Constitution as unconstitutional,[44] declaring constitutional amendments as unconstitutional,[45] annulling presidential elections,[46] determining the winner of presidential elections,[47] and even shaping criminal offences[48]. The traditional understanding did not foresee the dilemma where the judiciary becomes the platform for resolving political

[41]Sengupta (n 1). 143-144.
[42]ibid. 144-145.
[43] See Articles 3(1) and 2(4), Constitution of the United States of America.
[44] David E Landau, Rosalind Dixon and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8 Global Constitutionalism 40. constitutional amendment to an unconstitutional constitution? Lessons from Honduras.
[45] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).
[46] Joe Ombuor, 'Kenya Third Country in the World and First in Africa to Annul a Presidential Election' *The Standard* (1 September 2017) <https://www.standardmedia.co.ke/article/2001253337/kenya-third-country-in-the-world-and-first-in-africa-to-annul-a-presidential-election> accessed 12 June 2023.
[47] ***Bush v. Gore***, 531 U.S. 98 (2000).
[48] In Abortion I Case (1975; no. 7.4) the German Federal Constitutional Court directed the state to protect the life of the fetus against the constitutionally guaranteed personality right of the mother. –See Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany: Third Edition, Revised and Expanded* (Duke University Press 2012), 60.

conflicts between the executive-legislature and judiciary. In addition, the executive is one of the largest litigants before the Courts.[49]

In effect, the rise in judicial power and the judicialisation of politics has created a perverse incentive to executive-legislature to distort and politicise judicial appointments to suit their vested interests.[50] The ability of the executive-legislature to appoint judges to influence outcomes in their favour is a natural extension of Lord Coke's allusion in *Dr Bonham's* case. In other words, executive-legislature can appoint self-serving judges to validate their actions, in violation of *nemo debete esse judex in propria causa*. I call this situation a self-interest conundrum facing a democratic society. The spectre of an executive-legislature-appointed judiciary deciding cases involving the executive-legislature raises questions on the impartiality of the judiciary.

As a result, judicial independence has moved from commencing from judicial appointments to including pre-tenure (judicial appointments) in its ambit. While it is beyond the scope of the thesis, judicial independence can be usefully categorised into three categories, ***(i)*** pre-tenure; ***(ii)*** in-tenure; and ***(iii)*** post-tenure.[51] Judicial appointments fall under pre-tenure judicial independence, the traditional understanding of judicial independence falls under in-tenure judicial independence, and post-retirement opportunities fall under post-tenure judicial independence.

2.2 The Other Side: Accountability Conundrum

The expansion of judicial power, particularly in matters concerning human rights, has shifted the judiciary's role from solely resolving private disputes to adjudicating conflicts involving the executive-legislature. This evolution has raised concerns about accountability within the judiciary. The principle of checks and balances is not limited to monitoring executive-legislature but also involves overseeing the judiciary. Moreover, as an organ of the State, the judiciary is responsible to the people and the Constitution.

[49] Alok Prasanna Kumar, 'Justice Lokur's Concurring View: The Future of Appointments Reform' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018), 148.
[50] See Oagile Bethuel Key Dingake and others, 'Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa, and Kenya' (2019) 44 Southern Illinois University Law Journal 407.
[51] See Sengupta (n 1).

Unlike judicial independence, judicial accountability is a relatively modern phenomenon.[52] The origins of judicial accountability can be traced to the rise in judicial power. As the judiciary's influence extended beyond resolving private disputes, ensuring accountability became crucial in regulating its power, similar to other branches of the State. Judicial accountability is an extension of the broader theory of public accountability that governs various state entities. At the same time, unlike other state entities, the need for accountability in the judiciary must balance the equally important need for maintaining judicial independence.

Arghya Sengupta's adoption of Mark Boven's framework on public accountability[53] for judicial accountability serves as a useful framework for understanding judicial accountability and balancing the competing claims of independence and accountability. Sengupta argues that the five-fold structure adopted by Boven for public accountability— individuals or entities responsible for their actions (subjects), the authorities or entities to whom they are answerable (addressees), the particular actions for which they are held accountable (subject matter), the underlying reasons for establishing accountability (rationale), and how accountability is enforced (methods) is useful for studying judicial accountability.[54] Sengupta further classifies the structure into "subjects of accountability (individual and institutional), subject matter (decisional, behavioural and administrative), addressees (horizontal, vertical and internal), methods (legal, political, public, internal/ hard and soft) and the rationale for seeking accountability (responsible decision-making)".[55]

For the purposes of judicial appointments as a facet of judicial accountability, institutional accountability on the judicial role in appointments (subjects), horizontal accountability on the role of the executive-legislature in appointments (addresses) and *transparency and diversity* in appointments (rationale) are important. By institutional accountability, the judicial role in judicial appointments will be subject to accountability. By horizontal accountability, the executive-legislature's presence in judicial appointments will assist with judicial accountability and confer democratic legitimacy. By transparency and diversity in appointments, judicial appointments will not be arbitrary and subject to pre-determined classification. Thus, judicial accountability is not limited to democratic

[52]ibid. 119.
[53] See Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework1' (2007) 13 European Law Journal 447.
[54] Sengupta (n 1). 121
[55] ibid. 123-124.

accountability, i.e. the role of executive-legislature in judicial accountability. It also encompasses accountability beyond the role of the judiciary and executive-legislature through measures such as transparency and diversity.

Transparency in judicial appointments is an extremely important prerequisite to ensure judicial accountability. Historically, the qualification requirements for a judge are minimalist by design, usually age and professional experience. The appointing authority, executive-legislature-based or judiciary-based, has wide discretion in appointing judges if the baseline qualification requirements are the only criteria. Excessive discretion undermines the fundamental tenets of the rule of law and erodes democratic oversight over the decision-making process.[56] Transparency in judicial appointments through advertising the judicial vacancies, conducting candidate interviews publicly, and reasoned decision-making go a long way in curtailing the discretion available to the appointing authority and making the process accountable.

Diversity is necessary to make the judiciary representative and reflect the society it serves.[57] The increasing dominance of the judicial role in public life necessitates that the judiciary members represent the society at large and are not old-wigged individuals.[58] There are no uniform criteria except gender[59] to measure diversity in judicial appointments. The criterion for diversity is country-specific, race and gender in South Africa, religion, caste and regions in India and regions and ethnicity in Kenya.[60] In addition, the contestation over 'merit' in judicial appointments must be subsumed under the requirements of transparency and

[56] See Anders Molander, Harald Grimen and Erik Oddvar Eriksen, 'Professional Discretion and Accountability in the Welfare State' (2012) 29 Journal of Applied Philosophy 214.

[57]Brenda Hale, 'Women in the Judiciary' (Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society, London, 27 June 2014) <https://www.supremecourt.uk/docs/speech-140627.pdf>; and Graham Gee and Erika Rackley, 'Introduction: Diversity and the JAC's First Ten Years' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017), 1.

[58]See Kevin Sieff, 'It's Been 50 Years since Britain Left. Why Are so Many African Judges Still Wearing Wigs? - The Washington Post' *The Washington Post* (17 September 2017) <https://www.washingtonpost.com/world/africa/its-been-50-years-since-britain-left-why-are-so-many-african-judges-still-wearing-wigs/2017/09/14/6dc03b50-7ea6-40f8-9481-7f034498a790_story.html> accessed 12 June 2023.; Nzau Musau, 'Wigs and Robes Made a Comeback as Mutunga's Attire Was Discarded' *The Standard* (11 January 2021) <https://www.standardmedia.co.ke/nairobi/article/2001399804/wigs-and-robes-made-a-comeback-as-mutungas-attire-was-discarded> accessed 12 June 2023.; Lawrence Baraza, 'CJ Koome Issues Historic Directive on Lawyers Wearing Expensive Wigs' [2022] *Keyans.co.ke* <https://www.kenyans.co.ke/news/78021-cj-koome-issues-historic-directive-lawyers-wearing-expensive-wigs> accessed 12 June 2023.

[59] It is a contextual choice as sexual orientation, disability etc., have competing claims for being a universal criterion. See Hilary Sommerlad, 'Judicial Diversity: Complexity, Continuity and Change' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017).

[60] See Jan van Zyl Smit, '"Opening Up" Commonwealth Judicial Appointments to Diversity?: The Growing Role of Commissions in Judicial Selection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017).

accountability. The varied understanding of what constitutes 'merit'[61] ensures that diversity and transparency in judicial appointments will enable the selection of the best individuals as judges. In the end, judicial accountability is required to counteract and balance the rise of judicial power and the judicialisation of judicial appointments. The next chapter will address the ways to reconcile the independence-accountability paradox in the context of judicial appointments.

[61] See Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126; and Barbara Hamilton, 'Criteria for Judicial Appointment and Merit' (1999) 15 Queensland University of Technology Law Journal 10.

Chapter-III: Reconciling the independence-accountability paradox through preponderant judicial role

The independence-accountability paradox in understanding judicial appointments relies on the competing claims of independence and accountability over judicial appointments. Proponents of judicial independence cite the executive-legislature control over judicial appointments as a problem that must be resolved to protect judicial independence. In contrast, the proponents of judicial accountability cite the representative role of the executive-legislature in judicial appointments in an otherwise unelected judiciary to protect judicial accountability. There is no dispute over the judicialisation of politics and politicisation of appointments in framing the independence-accountability paradox. The dispute revolves around the controlling role in judicial appointments. This instant chapter will address the increasingly preponderant judicial role in the judicial service commissions as a means to reconcile the independence-accountability paradox in judicial appointments.

3.1 Commission Model: Response to the Independence-Accountability Paradox

The tension between judicial independence and accountability is a result of the delicate balance required to keep the judiciary away from the influence of the executive-legislature (separation of powers) while keeping a check on the judiciary (checks and balances). The rise of judicial power is integral to understanding the independence-accountability paradox facing judicial appointments. The rise of judicial power as a check against executive-legislature excesses and judicialisation of politics has led to the politicisation of judicial appointments and the consequent need for independence in judicial appointments. At the same time, the rise of judicial power requires a check on judicial power. Judicial appointments become a battleground between judicial independence and accountability proponents, as it involves controlling judicial power prior to the exercise of judicial power.

The solution to the paradox lies in recasting the debate from adversarial terms, *independence vs accountability* to cooperative terms, and the necessity of an independent ***and*** accountable judiciary for liberal constitutional democracies. Recasting the debate into non-adversarial terms ensures that the executive and judiciary will play a role in judicial appointments. Judicial Service Commissions/Councils comprising members from the executive, legislature and judiciary to determine judicial appointments is an increasingly accepted global solution for tackling the independence-accountability paradox in judicial

appointments.[62] The prevalence of such bodies worldwide has risen significantly, from 10 per cent to more than 65 per cent of jurisdictions over the past 35 years.[63] A notable aspect of this trend is the increasing acceptance of commissions across the Commonwealth. As of 2015, a remarkable 81 per cent of Commonwealth jurisdictions had some form of judicial service commission for appointing judges to the superior courts.[64]

A judicial service commission involving the judiciary in judicial appointments is not a radical solution. Instead, it merely formalises the informal role of the judiciary in judicial appointments. The infamous 'tap on the shoulder'[65] soundings for appointments by Lord Chancellor prior to judicial appointments in the United Kingdom existed as early as the 19th century.[66] The United States of America adopted a different system for judicial appointments. However, the rigidity of the process in the United States has left much to be desired and is beyond the scope of the present thesis.[67]

A judicial service commission *moves* judicial appointments from the monopoly of the executive-legislature by formally including the judiciary in the appointment process. It resolves the problem of the self-serving executive-legislature appointing judges and the question of expertise in selection as judiciary will provide safeguards against self-serving executive-legislature and lack of expertise. At the same time, by involving executive-legislature, it also addresses the concerns of democratic accountability. The executive-legislature acts as a check on judicial power and thereby ensures democratic accountability.

The formalisation of the judicial role in judicial appointments is a step towards the judicialisation of judicial appointments. The presence of judiciary and executive-legislature in judicial service commissions still does not completely resolve the independence-accountability paradox. As mentioned above, the judiciary historically had an informal role in judicial appointments. Resultantly, the formalisation of the judicial role does not resolve the independence-accountability paradox unless the judiciary's role in the judicial service commissions is determined. As a necessary corollary, a judicial service commission with an

[62] Garoupa and Ginsburg (n 2).
[63] See data collated by the Comparative Constitutions Project (Available at constituteproject.org under the "establishment of judicial council" topic); and ibid.
[64] Smit (n 60).
[65] Graham Gee and others, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015), 159-93.
[66] See Anthony Clarke, 'Selecting Judges: Merit, Moral Courage, Judgment & Diversity' (2009) 5 High Court Quarterly Review 49.
[67] See David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (1992) 101 The Yale Law Journal 1491.

overwhelming majority of executive-legislature will lead to the same results as the executive-legislature-appointed judiciary. This is especially true in a parliamentary democracy where the executive and legislature are essentially one entity like India or a dominant one-party state like South Africa.

Naturally, the way to avoid the executive-legislature majority is to provide a judicial majority in judicial appointments. However, the judicial majority will merely replace the executive-legislature rule with the judicial one. It also leads to a possibility of "homo-social reproduction"[68] and cloning in judicial appointments.[69] In addition, the judicial majority in judicial appointments raises accountability questions as it opens the possibility of an unelected judiciary, without any representative link, perpetuating itself without any safeguards. Judicial appointments dominated by the judiciary, without proper representation from the executive-legislature, face challenges in terms of democratic accountability and are susceptible to criticisms regarding their transparency and accountability.[70]

The majority dilemma (between the judiciary and the executive-legislature) can be resolved by opening up the commission to members from the legal profession (lawyers and academics), i.e. reverting to the framework requiring an independent ***and*** accountable judiciary for liberal constitutional democracies. The choice of lawyers and law professors as commission members is premised on the distinctiveness of the legal profession as a social group[71] and the highly intricate and specialised nature of judicial decision-making, which involves navigating through a complex and continuously expanding framework of laws.[72] The strong relationship between the bar and the bench ensures that the bar has the incentive to maintain judicial independence and avoid politicising judicial appointments. In addition, academics and lawyers provide an *outsider perspective* to the judiciary's *insider perspective*.[73]

[68] See Raju Ramachandran, 'Judicial Independence and the Appointment of Judges' (DAKSH's Fourth Annual Constitution Day Lecture, Bengaluru, 28 November 2015).
[69] See Gee and others (n 65).
[70] See Supriya Routh, 'Independence Sans Accountability: A Case for Right to Information Against the Indian Judiciary' (2014) 13 Washington University Global Studies Law Review 321.
[71] Lawyers are a distinct social group in terms of understanding Western rationality. See Joyce S Sterling and Wilbert E Moore, 'Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification' (1987) 2 Sociological Forum 67.
[72] See Brian Opeskin, 'The Relentless Rise of Judicial Specialisation and Its Implications for Judicial Systems' (2022) 75 Current Legal Problems 137; and Santiago Basabe-Serrano, 'The Judges' Academic Background as Determinant of the Quality of Judicial Decisions in Latin American Supreme Courts' (2019) 40 Justice System Journal 110.
[73] Gee and Rackley (n 56), 3.

Limiting the membership of the commissions to members from the legal profession is a contested issue. The choice does not preclude appointing lay persons within the purview of the executive-legislature, i.e. executive-legislature can replace their nominees/representatives with lay persons. The judicialisation of judicial appointments is a response to the judicialisation of politics and politicisation of judicial appointments. As a result, the judicialisation of judicial appointments is premised on the malleability and ambiguous functioning of democratic institutions and the need to safeguard the judiciary from abuse of power. Within that framework, appointing laypersons to the commission can make them proxies for the executive-legislature to control judicial appointments.[74] One could also argue that the judicial members also could persuade the laypersons.[75] As a result, there is a distinct possibility of further politicising judicial appointments through the exertion of influence on laypersons.

The proponents of laypersons in judicial service commissions correctly focus on the need for the members to bring different perspectives to the selection process.[76] But the role of judicial service commissions is not limited to appointing judges adjudicating only constitutional or public law disputes. In most cases, it also involves appointing judges whose substantial job involves adjudicating 'simple' disputes relating to property rights, marital rights, and petty offences. As a result, lay persons (without any legal background) will not always be able to offer the requisite expertise required for the commissions.

The argument for excluding the laypersons from the commission also reflects the reality of limiting the size of the commissions. The commission performs a significant function which requires decisions on selecting judges frequently. For example, the maximum strength of the superior courts in India is 1148 judges, [77] in Kenya is 237 judges[78] and in South Africa is 268

[74] Ozan O Varol, Lucia Dalla Pellegrina and Nuno Garoupa, 'An Empirical Analysis of Judicial Transformation in Turkey' (2017) 65 The American Journal of Comparative Law 187, 198-199; and Ella George, 'Purges and Paranoia' (2018) 40 *London Review of Books* <https://www.lrb.co.uk/the-paper/v40/n10/ella-george/purges-and-paranoia> accessed 10 June 2023.

[75] Alan Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017), 50.

[76] See Arun Jaitley, 'The Judicial Collegium: Issues, Controversies, and the Road Ahead' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018), 55; and 'Judicial Appointments' (House of Lords 2012) Select Committee on the Constitution 25th Report of Session 2010–12, 24.

[77] 34 Supreme Court judges and 1114 High Court judges.

[78] 7 Supreme Court judges, 30 Court of Appeal Judges and 200 High Court judges.

judges[79]. In addition, these commissions are also used for appointing other judges[80] and act as disciplinary authorities. Therefore, a larger commission will lead to delays in decision-making and consequent politicisation of judicial appointments. However, excluding laypersons from the commission does not foreclose a consultative role for laypersons. The commission can always approach any layperson for their opinion before appointing judges.

The involvement of members from the bar (lawyers) in the council need to be understood in the broader framework of diversity. The strong relationship between the bar and the bench goes both ways. The issues plaguing judicial dominance in judicial appointments can also affect the bar. So, it becomes necessary to ensure that members from the bar do not engage in homo-social reproduction or self-perpetuate[81] while exercising their membership in the appointing bodies. Transparency and diversity requirements in selecting the members will go a long way to address these concerns.

In the end, a commission model comprising around 7-13 members[82] with preponderant judicial roles and a simple majority comprising a preponderant judiciary, lawyers (insiders) and academics (outsiders) is a way for balancing judicial independence with judicial accountability. Transparency and diversity requirements should be formally enshrined into the functioning of the judicial appointments body.

[79] See Judges Matter, 'What Does South Africa's Judiciary Look like?' (*Judges Matter*, 25 February 2021) <https://www.judgesmatter.co.za/opinions/what-does-south-africas-judiciary-look-like/> accessed 13 June 2023. The prevailing strength is 11 judges of the Constitutional Court, 23 Supreme Court of Appeal judges (now) and 203 High Court judges (approx.).

[80] The Kenya JSC also recommends appointments to Kadhi and Magistrate Courts. See Article 172, Constitution of Kenya.

[81] Paterson (n 74), 54.

[82] A fifteen-member JSC is considered large by international standards. See Gee and Rackley (n 56), 5.

Chapter-IV: Historical and contextual overview of judicial appointments in India, Kenya and South Africa

The present chapter will provide a historical and contextual overview of judicial appointments in India, Kenya and South Africa. While British colonialism and governance is a unifying theme among the three countries, South Africa was a settler colony, unlike India and Kenya. As a result, India and Kenya had a similar set of colonial laws, with 'India' replacing 'Kenya' in many pre-colonial statutes.[83] Similarly, the geographic connection between South Africa and Kenya has resulted in a strong constitutional exchange of ideas, including judicial appointments.[84]

The formulation of judicial appointment methods in India, Kenya and South Africa plays an important role in locating the limits of the judicialisation of judicial appointments. The trajectory of judicial appointment methods in India from executive primacy to judicial primacy is a useful starting point for understanding the evolution of judicial appointment methods.

4.1 India

4.1.1 Pre-independence Appointments

Judicial appointments in India prior to independence were governed through several colonial statutes such as the Regulating Act 1773, the Charter of Justice dated 26th March 1774, the High Courts Act 1861 and the Government of India Act 1935. At the time of independence in 1947, judges to the High Courts and Federal Court were appointed by the Crown, i.e. executive/prime minister. Under the Government of India Act 1935, the executive based in London appointed the judges with inputs from its colonial Government in India.

The qualification requirement for judges necessitated legal and/or judicial training. As a result, the opinions of the High Court and Federal Court judges became instinctively valuable for the Government in appointing judges. Accordingly, a convention started to develop wherein the Governor-General/Crown sought the opinion of the Chief Justice before making judicial appointments.[85] The tradition of lawyers being "called to the bench" by the Chief Justice and

[83]Njeri Thuki, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' (2013) 19 Annual Survey of International & Comparative Law 45, 47.
[84] See Ghai and Ghai (n 22).
[85]See Memorandum Representing the Views of the Federal Court and of the Chief Justices of the High Courts, in B Shiva Rao, *The Framing of India's Constitution*, vol 4 (Indian Institute of Public Administration 1968); and HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 3 (4th edn, NM Tripathi 1999). at 2956

the consequent role of judges in judicial appointments started around this time.[86] The Chief Justice's power to determine and allocate judicial work made them well-suited for consultation on judicial appointments. Thus the consultative role of the Chief Justice in judicial appointments was the prevailing norm for judicial appointments in India at the time of independence and the drafting of the new Constitution.

4.1.2 Constituent Assembly Debates

The Constituent Assembly debates on judicial appointments reflect the then-prevailing notions of judicial independence. Broadly, there were three views on judicial appointments, ***(i)*** appointments with the consultation of the Council of States / Rajya Sabha; ***(ii)*** appointments made by the executive upon confirmation of a two-thirds vote by the Parliament; and ***(iii)*** appointments with the concurrence of the CJI.[87] The appointments with the consultation with the Council of States and a two-thirds vote by the Parliament were negated to avoid the "influence of the Legislature"[88] At the same time, the concurrence of the CJI for judicial appointments was famously rejected by Dr Ambedkar with the following words:

> "*With regard to the question of the concurrence of the Chief Justice… …Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and* ***I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to veto is the President or the Government of the day****.*"[89]

The celebrated words of Dr Ambedkar have become a rallying point to criticise the judicial primacy in judicial appointments. At this stage, it is necessary to note that Dr Ambedkar sought to steer a "middle course"[90] between the United States model of the unbridled executive-legislature role and the United Kingdom model of unbridled executive appointment. Dr Ambedkar did not envisage an executive-legislature monopoly in judicial appointments.

In the end, the Constitution mandated the President to consult the CJI for appointing a judge other than the CJI and consultation with Judges of the Supreme Court and the High Courts in the States as the President may deem necessary.[91] Similarly, the President was

[86] M.C. Chagla, *Roses in December: An Autobiography* (Bharatiya Vidya Bhavan, 1974).
[87] See Dr. Ambedkar, speech on 24th May 1949, Constituent Assembly Debates, Volume 8.
[88] ibid.
[89] ibid.
[90] ibid.
[91] Article 124(2), Constitution of India.

mandated to consult with the CJI and the Chief Justice of the High Court (except when appointing the Chief Justice of the High Court) before appointing a High Court judge.[92] The pre-existing informal consultative role of the judiciary in judicial appointments was formalised in the Constitution.

4.1.3 Post-independence appointments

The trajectory of judicial appointments in post-independent India till 1973 is a story of "providence, manipulation and destiny"[93] and resignations. The formalisation of the consultative role resulted informally in the determinative role of the CJI in judicial appointments.[94] The CJI's determinative role in judicial appointments, the growing number of Supreme Court judges (from eight in 1950 to fourteen in 1960), the establishment of new High Courts, and the subsequent increase in judges potentially prompted Chief Justice Gajendragadkar to seek agreement from the most senior judge before suggesting names to the executive.[95] Judicial appointments were an exercise of negotiation between the mutually respectful executive and the judiciary.[96]

The rise in judicial power through the judiciary's invalidation of important legislative agenda increased tensions with the executive-legislature. The tension turned into a conflict when the executive disregarded the seniority convention (for appointing the CJI)[97] and appointed Justice A.N. Ray as the CJI, superseding three senior-most judges who decided against the Government in the famous ***Kesavananda Bharati v. State of Kerala***.[98] Subsequently, the executive superseded Justice H.R. Khanna who famously dissented in the (in)famous ***A.D.M. Jabalpur v. Union of India***[99] and ruled favour individual liberty during national emergency for appointing the next CJI. The repeated supersession of judges for their

[92] Article 217(1), Constitution of India.
[93]Suchindran B.N., 'From Kania to Sarkaria: Judicial Appointments from 1950 to 1973' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018), 4.
[94] See Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford, New York: Oxford University Press, 2003); and George H Gadbois Jr., *Judges of the Supreme Court of India: 1950-89* (Oxford University Press 2019).
[95] Gadbois Jr. (n 94), 104
[96]Suchindran B.N. (n 92), 11.
[97] Abhinav Chandrachud, 'Supreme Court's Seniority Norm: Historical Origins' (2012) 47 Economic and Political Weekly 26.
[98](1973) 4 SCC 25.
[99] (1978) 2 SCC 479. See TR Anidhyarujina, 'A Committed Judiciary: Indira Gandhi and Judicial Appointments' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018); and HR Khanna, *Neither Roses Nor Thorns* (2021).

decisions against the executive in favour of judges who decided for the executive permanently changed the discourse on judicial appointments in India.

Prior to the 1973 supersession, the executive held the authority over judicial appointments and transfers in India. The CJI's role was primarily confined to appointing judges in the Supreme Court by leveraging their moral influence and the threat of resignation. Ultimately, the executive continued to vest predominant control over judicial appointments. As a result, violating the seniority convention to appoint the CJI to punish "anti-government" judges laid bare the Government's dominant role in judicial appointments.

The executive's power to transfer judges[100] became a proxy for the tussle between the judiciary and executive over judicial appointments. The transfer of Justice Sankalchand Sheth from the Gujarat High Court to the Andhra Pradesh High Court by the executive was declared unconstitutional by ISC for not consulting the CJI effectively, legalising the tussle between the executive and judiciary over judicial appointments.[101]

In the second case, ***SP Gupta v. Union of India***[102] ["**First Judges case**"], the ISC was faced with a challenge to the Union Law Minister's omnibus directive of appointing non-domiciled judges as Chief Justices of High Courts. The Court upheld the executive primacy in judicial appointments and transfers while emphasising the importance of consultation with the CJI before making any decision. Nevertheless, the executive consistently downplayed the consultative function of the CJI in the process of judicial appointments. All these circumstances led the ISC to (re)interpret consultation with the CJI in the proviso to Articles 124(2) and 217 to mean concurrence of the CJI in the ***Supreme Court Advocates-on-Record v. Union of India***[103] ["**Second Judges case**"].

In the Second Judges case, the Court reframed the judicial appointment process as a "participatory consultative process" between the judiciary and the executive to select the best persons available for appointment. However, in case of a conflict between the view of the judiciary and the executive, the Court held that the "opinion of the judiciary symbolised by the view of the CJI"[104] would prevail over the executive. In effect, the word consultation in the proviso to Articles 124(2) and 217 meant *concurrence* of the CJI comprising a collegium of

[100] See Andhyarujina (n 99).
[101] ***Union of India v. Sankalchand Himatlal Sheth***, (1977) 4 SCC 193.
[102] (1981) Supp SCC 87.
[103] (1993) 4 SCC 441.
[104] ibid., plurality opinion of Justice Verma, Para 486.

CJI and two-senior most judges of the Supreme Court [Article 124(2) proviso and Article 217] and Chief Justice of the High Court and two-senior most judges of the High Court [Article 217]. The Second Judges case led to the collegium system for selecting judges.

The (re)interpretation of constitutional provisions to wrest the powers of judicial appointments from the executive was heavily criticised, leading to an impasse between the executive and judiciary over judicial appointments. Eventually, in a presidential advisory opinion[105] ["**Third Judges case**"] sought by the executive, the Supreme Court affirmed the Second Judges case and broadened the membership of the collegium appointing Supreme Court judges to the CJI and four senior-most judges.[106] In essence, the Court further deconcentrated the power of the CJI to be shared with fellow senior-most judges, a reflection of the Court's earlier convention.[107]

The Second and Third Judges' cases laid down broad principles for judicial appointments and not a detailed procedure. Eventually, the judiciary and executive adopted the Memorandum of Procedure, which laid the detailed procedure for judicial appointments.[108] As per the Memorandum of Procedure, judicial appointments to the High Court can be initiated by the provincial executive or the Chief Justice of the High Court while appointments to the Supreme Court vest with the Supreme Court collegium of three judges.[109] The collegium of judges representing the opinion of the judiciary at the Supreme Court must speak in one voice.[110] The executive can reject the collegium recommendations if there is a dissenting voice in the collegium.[111] Similarly, the executive can provide reasons for rejecting a candidature, which can be overridden only by a unanimous collegium decision.[112]

The divergence between the executive-legislature and judiciary over controlling the judicial appointments came to a head with the introduction of the National Judicial

[105] *Special Reference No. 1 of 1998, In re*, (1998) 7 SCC 739.
[106] If the four-senior most judges do not become the immediate Chief Justice of India in accordance with the seniority convention, the next probable Chief Justice of India, despite not being the senior-most judge will be a member of the collegium. - Bar & Bench, 'Why the Supreme Court Collegium under CJI DY Chandrachud Will Have Six Judges Instead of Five till May 2023' (2022) <https://www.barandbench.com/news/supreme-court-collegium-under-cji-dy-chandrachud-to-have-six-judges-till-may-2023> accessed 11 June 2023.
[107] Gadbois Jr. (n 95), 104.
[108] See 'Memorandum of Procedure of Appointment of High Court Judges' (*Department of Justice, Government of India*) <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/> accessed 12 June 2023.; 'Memorandum of Procedure of Appointment of Supreme Court Judges' (*Department of Justice, Government of India*) <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/> accessed 12 June 2023.
[109] See Third Judges case, Paragraphs 450, 451, 455, 468, 478 and 486.
[110] ibid, Para 456 and 466.
[111] ibid., Para 478(8).
[112] ibid., Para 478(7).

Appointment Commission, for appointing and disciplining judges, through the Constitution (Ninety-Ninth Amendment) Act, 2014. The National Judicial Appointment Commission consisted of the CJI, two senior-most judges, Union Law Minister and two eminent persons nominated by a panel of the CJI, the Prime Minister and the Leader of Opposition in the House of People, for appointing judges to the Supreme Court and the High Courts.[113]

The constitutional amendment was invalidated as unconstitutional by the ISC in ***Supreme Court Advocates-on-Record v. Union of India***[114] ["**Fourth Judges case**"]. The Court observed that judicial primacy in judicial appointments is part of the basic structure of the Indian Constitution[115], and NJAC violated basic structure on account of non-judicial veto in judicial appointments[116], i.e. any two members, including the eminent persons and the Union Law Minister can scuttle judicial appointments approved unanimously by the three judicial members.

The constitutional invalidation of NJAC made judicial primacy in judicial appointments part of the basic structure of the Indian Constitution and not collegium. A close reading of the Fourth Judges cases clarifies that the Court was conscious of the accountability-independence paradox while upholding judicial primacy in judicial appointments. However, while recognising the shortcomings of the collegium system in ensuring accountability, the Court deferred the matters of transparency and diversity in judicial appointments for future consideration.

4.2 Kenya

Kenya's trajectory of judicial appointments is significantly influenced by historical judicial corruption and patronage-based judicial appointments. Kenya became independent in 1962 and adopted a constitution in 1963. The Constitution prescribed a judicial service commission comprising the Chief Justice, Attorney General, two judges appointed by the President and the Chairman of the Public Service Commission.[117] In effect, the President

[113] Section 3, Constitution (Ninety-ninth Amendment) Act, 2014, inserting Article 124A in the Constitution.
[114] (2016) 5 SCC 1.
[115] Elevating judicial primacy in judicial appointments as the basic structure of the doctrine makes any judicial appointment methods violating judicial primacy will be declared unconstitutional. See Raju Ramachandran and Mythili Vijay Kumar Thallam, 'The Obvious Foundation Test: Re-Inventing the Basic Structure Doctrine' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018).
[116] Section 6, National Judicial Appointments Commission Act, 2014.
[117] Article 68(1), Constitution of Kenya.

appointed directly or directly all the members of the JSC, including the Chief Justice.[118] The original text of the 1963 Constitution was never implemented in spirit due to historical and political reasons.[119] The politicisation of the Constitution and the consequent rise of executive dominance negatively impacted the independence of the judiciary. The state of judicial independence in Kenya could be ascertained from the fact that security of judicial tenure, a cardinal and uncontested principle of judicial independence, was removed for two years between 1988 and 1990.[120]

The lack of criteria or guidelines in judicial appointments made them susceptible to manipulation, leading to the appointment of undeserving individuals.[121] It also led to the judiciary willing collaborating with the executive to supress political dissent.[122] The executive-dominated judiciary precipitated patronage and cronyism as foundational to judicial appointments.[123] As a result, faith in the judiciary was abysmal when enacting and adopting a new constitution.[124] Resultantly, an independent and corruption-free judiciary became the need of the hour during the drafting of the new constitution. The constitution of an independent judges and magistrates vetting board under the Constitution to vet all the existing judges informs the influence of corruption in the judiciary.[125] Like South Africa, Kenya adopted a judicial commission method for judicial appointments to avoid an executive-influenced subservient judiciary.

The Kenyan Constitution establishes a judicial service commission.[126] The commission comprises the Chief Justice of the Supreme Court, a Supreme Court judge, a Court of Appeal judge, a High Court judge and a magistrate (one woman and one man), the Attorney-General, two advocates (one woman and one man), one person nominated by the Public Service Commission and one woman and one man to represent the public, not being lawyers, appointed

[118] Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96, 104.
[119] HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) 71 African Affairs 9.
[120] Walter Khobe Ochieng, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Charles Manga Fombad and Walter Khobe Ochieng (eds), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016), 286-289, 289.
[121] Yash Ghai and others, 'Constitutional Reforms and Judicial Appointments in Kenya' [2017] Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth 85, 87.
[122] ibid.
[123] ibid.
[124] Ochieng (n 120), 289-290.
[125] Schedule 6, S. 23(1), Constitution of Kenya.
[126] Articles 171-172, Constitution of Kenya.

by the President with the approval of the National Assembly.[127] The judicial service commission has a judicial preponderance, as five members of the total eleven members are from the judiciary. The combination of lawyers and judges comprises a majority in the JSC. Interestingly, the Kenyan JSC's choice to move towards judicial preponderance and not the executive majority in JSC is influenced by the South African experience of politicisation of executive majority-based JSC.[128]

The JSC facilitates the appointments of judges[129], acts as a disciplinary authority,[130] and initiates the removal of judges[131]. At the same time, unlike South Africa, where the President has limited discretion in selecting judges[132], no such discretion exists with the Kenyan President. The Kenyan President is duty-bound to appoint judges recommended by JSC.[133] The Kenyan President appoints Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly, without any discretion.[134]

4.3 South Africa

The devasting legacy of apartheid significantly influenced the present judicial appointments in South Africa. Despite gaining independence in 1934 and becoming a republic in 1961, South Africa was not democratic due to the exclusion of the significant population from public participation due to apartheid. The Supreme Court Act, 1959 governed judicial appointments in the pre-apartheid era. Section 10 provided unfettered power to appoint judges to the premier, the President or the Prime Minister. Similar to the Indian experience, the Chief Justice or the relevant Judge President informally started recommending names for appointments due to the specialised expertise required for the justice delivery system.[135] The

[127] Article 171, Constitution of Kenya.
[128] Jill Cottrell Ghai and Yash Ghai, 'The Contribution of the South African Constitution to Kenya's Constitution' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018), Brett (n 6). 12.
[129] Article 172(1)(a), Constitution of Kenya.
[130] ibid.
[131] Section 168(2), Constitution of Kenya.
[132] Infra, Chapter 4.3.
[133] Article 166(1)(b), Constitution of Kenya.
[134] Article 166(1)(a), Constitution of Kenya.
[135] Yvonne Mokgoro, 'Judicial Appointments' (2010); and Murray Wesson and Max Du Plessis, 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary' (2008) 24 South African Journal on Human Rights 187.

consultative role of the Chief Justice or the relevant Judge President was informal and had no formal value.

The dominant role of the executive coupled with apartheid political disenfranchisement meant the judiciary and its composition was a reflection of the apartheid government.[136] On the day of South Africa's first 'true' democratic election (27th April 1994), 160 white men, three black men, and two white women formed the 165 judges of the higher judiciary.[137] The skewed representation and politicisation of judicial appointments were reflected in the numerous distressing judgments against individuals.[138] Resultantly judicial appointments and the composition of the judiciary became extremely important for the post-apartheid constitution-building project. The collusion between the executive and judiciary during apartheid meant that the South African constitutional building project recognised the importance of reducing the executive influence on the functioning of the judiciary. As a result, the Constitution safeguarded judicial independence by providing safeguards in judicial appointments.

Consequently, the Judicial Service Commission was constituted not only to make recommendations for judicial appointments but to transform the composition of the judiciary to reflect society. The mandate to transform the judiciary composition is not only to protect judicial independence but also to restore the public's faith in the judiciary.[139] The erosion of faith in the judiciary meant that judicial primacy in appointments was also not an option. As a result, South Africa adopted a model with a judicial minority.

The Judicial Service Commission comprise 23-25 members with the Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal, one Judge President, the Law Minister, two practising attorneys, two practising advocates, one teacher of the law, six persons designated by National Assembly (including three opposition members), four permanent delegates to the National Council of Provinces (with a supporting vote of at least six provinces), four members designated by the President (after consulting all parties in the National Assembly) and Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them (in cases involving matters relating to their Courts). Formally, the executive-legislature can appoint 14 members, a significant

[136] Sydney Kentridge, Special Series Lectures 'Telling the Truth about Law' (1982) SALJ 648, 652.
[137] Mokgoro (n 135).
[138] Cora Hoexter, 'The Judicial Service Commission: Lessons from South Africa' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge).
[139] Chris Oxtoby, 'The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission' (2021) 56 Journal of Asian and African Studies 34.

majority, as a simple majority decides the decisions of the JSC.[140] Theoretically, the presence of three opposition leaders reduces the direct influence of the *controlling* executive-legislature to 11 members, a minority in the commission. However, the dominance of the African National Congress in the polity has made the JSC susceptible to politicisation.

Like Kenya, the function of the JSC in South Africa is not only to make recommendations to the President for the appointment of judges but also to act as the initial disciplinary authority before the initiation of any disciplinary proceedings against the judges by the executive-legislature,[141] and act as the recommending authority for impeachment[142]. Unlike Kenya, the President in South Africa has the unfettered discretion to appoint the Chief Justice and Deputy Chief Justice of the Constitutional Court and the President and the Deputy President of the Supreme Court of Appeal with a consultative role for the JSC.[143] Additionally, the President has limited discretion in appointing judges from the list of judges prepared by the Judicial Service Commission.[144] Overall, the South African experience "ordinarily secure[s] a dominant position for the ruling party"[145], even more so due to the dominant position of the African National Congress in South African polity.

[140] Article 178(6), Constitution of South Africa.
[141] See Section 14, Judicial Service Commission Act, 1994.
[142] Article 177(1)(a), Constitution of South Africa.
[143] Article 174(3), Constitution of South Africa.
[144] Article 174(4), Constitution.
[145]Koos Malan, 'Reassessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa' (2014) 17 Potchefstroom Electronic Law Journal 1964.

Chapter-V: Towards judicial preponderance in judicial appointments

The previous chapters suggested judicial preponderance in judicial appointments, i.e. a commission which gives the preponderant role (not majority) to the judiciary and majority role in to judiciary in conjunction with the members from the legal profession (lawyers and academics) as a solution to the independence-accountability paradox for judicial appointments.[146] They also dealt with the framework for the independence-accountability paradox in terms of judicial appointments.[147] The chapter dealing with the judicial appointment procedure in India, Kenya and South Africa shows that they currently follow judicial primacy, judicial preponderance and executive dominant models of judicial appointments, respectively.[148] The present thesis will rely on the experiences of the three countries to make a case for judicial preponderance in judicial appointments.

The framework for understanding independence and accountability in terms of judicial appointments involves the politicisation of judicial appointments (independence) and diversity and transparency (accountability).[149] The limits of the judicial role in judicial appointments are an extension of the limits of the executive-legislature role in judicial appointments.

5.1 Politicisation of Judicial Appointments (judicial independence)

The judicialisation of judicial appointments is a result of the judicialisation of politics and the consequent politicisation of judicial appointments.[150] Judicialisation of politics, i.e. resolution of political disputes through the judiciary, has become the norm in India, Kenya and South Africa. In India, the judiciary adjudicates electoral disputes and any major political disputes.[151] Similarly, the Kenyan Supreme Court ("**KSC**") is the sole authority to adjudicate the Presidential elections.[152] Likewise, the South African Constitutional Court has exclusive jurisdiction to decide on disputes about the powers and constitutional status of branches of

[146] Supra, Chapter 3.
[147] Supra, Chapter 2.
[148] Supra, Chapter 4.
[149] Supra, Chapter 2
[150] Supra, Chapter 4.1.
[151] Shylashri Shankar, 'Winds of Change: Judicialization of Mega-Politics in India' *The Times of India* (4 March 2011) <https://timesofindia.indiatimes.com/india/winds-of-change-judicialization-of-mega-politics-in-india/articleshow/7624112.cms> accessed 15 June 2023.
[152] Article 163(3), Constitution of Kenya.

Government.[153] One commentator has observed that the judges of the KSC curse the Court's jurisdiction to adjudicate presidential election disputes.[154]

The judicialisation of politics in India, Kenya and South Africa has made the politicisation of appointments an accepted reality. The three countries adopted three different ways to resolve the politicisation of appointments (after their independence). Through a judicial (re)interpretation of the constitution, India moved from executive primacy *to* judicial primacy. In contrast, Kenya moved from executive dominance *to* judicial preponderance, and South Africa moved from executive monopoly *to* executive dominance in judicial appointments through new constitutions.

5.1.1 India

The politicisation of judicial appointments by the executive in India post-1970s became the judicial basis for (re)interpreting the constitutional provisions to formulate the collegium system for appointing judges, i.e. judicialisation of judicial appointments.[155] The politicisation of judicial appointments persists in India, despite the collegium system. The executive, at times, has weaponised its role in appointing the judges to exercise a pocket veto over judicial appointments. Despite the collegium system, the continuing saga over appointing Mr Saurabh Kirpal as the Delhi High Court judge illustrates the politicisation of judicial appointments in India. The Delhi High Court collegium recommended Mr Kirpal in October 2017. After four rounds of deliberations by the Supreme Court collegium involving discussions with the executive,[156] the collegium formally recommended the name of Mr Kirpal as a judge in November 2021.[157] The executive returned the recommendation in November 2022, citing intelligence reports about the foreign nationality of his partner and openness about his sexual orientation.[158] The collegium directed the appointment of Mr Kirpal as a judge of the Delhi

[153] Article 167(4)(a), Constitution of Kenya.
[154] Apollo Mboya, 'Judging The Judges: Who Are the Supreme Court Justices?' [2017] *The Elephant* <https://www.theelephant.info/features/2017/09/01/judging-the-judges-who-are-the-supreme-court-justices/> accessed 11 June 2023.
[155] Supra, Chapter 4.3.
[156] Bhadra Sinha, 'Modi Govt Still against Gay Lawyer Saurabh Kirpal's Elevation as Judge, Tells CJI as Much' [2021] *The Print* <https://theprint.in/judiciary/modi-govt-still-against-gay-lawyer-kirpals-elevation-as-hc-judge-tells-cji-as-much/636130/> accessed 11 June 2023.
[157] Sharmita Kar, 'Who Is Saurabh Kirpal, Advocate Who May Become India's First Openly Gay Judge?' *Hindustan Times* (16 November 2021) <https://www.hindustantimes.com/india-news/who-is-saurabh-kirpal-advocate-who-may-become-india-s-first-openly-gay-judge-101637077993072.html> accessed 12 June 2023.
[158] Krishnadas Rajagopal, 'Supreme Court Collegium Firm on Appointing Gay Lawyer Saurabh Kirpal as High Court Judge' *The Hindu* (19 January 2023) <https://www.thehindu.com/news/national/supreme-court-collegium-firm-on-appointing-gay-lawyer-saurabh-kirpal-as-high-court-judge/article66408634.ece> accessed 12 June 2023.

High Court to be *processed expeditiously* in January 2023. As of the date of finishing this chapter (June 2023), Mr Kirpal is yet to be appointed as a judge. The delays in appointing Mr. Kirpal's appointment by the executive part of the continuous attempts made by the executive to influence the appointments.[159]

5.1.2 Kenya

The Kenyan constitution provides for judicial preponderance in judicial appointments and vesting the majority with the judiciary and members of the legal profession collectively. However, the judicial preponderance has not completely resolved the politicisation of judicial appointments. Like India, the formal role of the executive/president in appointing the judges recommended by the JSC has become the basis for the politicisation of judicial appointments and not the functioning of the JSC. The exclusive jurisdiction of the KSC to determine presidential election disputes creates a perverse incentive for the executive to influence judicial appointments through the politicisation of judicial appointments.[160]

The JSC recommended 41 names for appointment as judges to the High Court and the Court of Appeal in July and August 2019. The President did not appoint the judges recommended by the JSC, citing classified information by the National Investigation Agency against the candidates. The JSC was not provided with classified information against the candidates. The Nairobi High Court in ***Adrian Kamotho Njenga v. Attorney General***[161] in February 2020 directed the President to appoint the 41 candidates as the constitution does not confer any discretion to reject the candidates recommended by the JSC. However, the President did not appoint the 41 candidates as judges. As a result, a petition was filed before the Nairobi High Court in February 2020. During the pendency of the petition, the President appointed 34 candidates while leaving the remaining six candidates[162]. The High Court in ***Katiba Institute v. President of Republic of Kenya***[163] directed the President to appoint the remaining six candidates within the next 14 days, failing which the six candidates would be deemed

[159] Prashant Bhushan, 'Scuttling Inconvenient Judicial Appointments' (2014) 49 Economic and Political Weekly 12; and Scroll Staff, 'Senior Advocate Aditya Sondhi Withdraws Consent for His Elevation as Karnataka High Court Judge' [2022] *Scroll.in* <https://scroll.in/latest/1017077/senior-advocate-aditya-sondhi-withdraws-consent-for-his-elevation-as-karnataka-high-court-judge> accessed 11 June 2023.

[160] Chege Waitara, 'Manufacturing a Crisis: How the Executive Is Failing the Judiciary' <https://www.theelephant.info/features/2020/08/29/manufacturing-a-crisis-how-the-executive-is-failing-the-judiciary/> accessed 11 June 2023.

[161] Petition No. 369 of 2019, [2020] eKLR.

[162] One candidate passed away in the meanwhile.

[163] Constitutional Court Petition No. 206 of 2020, [2020] eKLR.

appointed. On appeal, the Court of Appeal suspended the order of the High Court.[164] Eventually, during the pendency of the appeal, the new Kenyan President notified the six candidates as judges in September 2022. Thus, despite multiple judicial orders and clear constitutional provisions, politicising judicial appointments was inevitable in Kenya.

5.1.3 South Africa

Unlike the Indian and Kenyan experiences, where the executive weaponised and politicised its role in notifying the judges, the South African experience revolves around politicising the executive-majority JSC. The JSC regularly faces accusations for subjecting candidates with notable human rights backgrounds to aggressive questioning and exhibiting a bias favouring the executive branch[165] . The parallel appointment process run by the African National Congress, the dominant ruling party, brings JSC's impartiality into sharp question.[166] One opposition leader observed that the political members representing "ANC caucus" execute a "political mandate" and not a constitutional mandate.[167]

The parallel appointing process by a political party attests to the politicisation of judicial appointments, a marked contrast to the initial period when JSC was rated favourably by legal scholars.[168] The politicisation of the JSC has also resulted in Judge Robert Nugent, the senior-most judge of the Supreme Court of Appeal, withdrawing his appointment, citing a lack of trust in the JSC due to its handling of Judge Hlphoe crisis[169] and attests to the politicisation of JSC.[170]

5.1.4 Implications

The three countries illustrate that the politicisation of judicial appointments is a reality of our times. No model of judicial appointments can avoid the politicisation of judicial

[164] Susan Muhindi, 'Court of Appeal Suspends High Court Order Directing Uhuru to Appoint Rejected Judges' *Star* (1 November 2021) <https://www.the-star.co.ke/news/2021-11-01-court-of-appeal-suspends-high-court-order-directing-uhuru-to-appoint-rejected-judges/> accessed 11 June 2023.
[165] Hoexter (n. 138).
[166] ibid.
[167] Helen Zille, 'The Design Flaw of the JSC' [2011] Politicsweb <https://www.politicsweb.co.za/news-and-analysis/the-design-flaw-of-the-jsc--helen-zille> accessed 11 June 2023.
[168] Kate Malleson, 'Assessing the Performance of the Judicial Service Commission' (1999) 116 South African Law Journal 3.
[169]Nomthandazo Ntlama, 'The Hlophe Saga: A Question for the Institutional Integrity of the Judiciary?' (2011) 8 US-China Law Review 758.; Marianne Thamm, 'Judiciary in Crisis: The Rise and (Slow) Fall of John Hlophe, the Judge Who Almost Took the Judiciary down with Him' [2021] *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-09-08-the-rise-and-slow-fall-of-john-hlophe-the-judge-who-almost-took-the-judiciary-down-with-him/> accessed 12 June 2023.
[170] Dianne Hawker, 'Concourt Candidate Riles Commissioners' (10 June 2012) <https://www.iol.co.za/news/concourt-candidate-riles-commissioners-1315509> accessed 11 June 2023.

appointments. The politicisation of judicial appointments is a result of the judicialisation of politics. In the broader question of judicial independence, the politicisation of judicial appointments can only be tempered through strong institutional safeguards such as judicial preponderance in judicial appointments. The judicial preponderance and not majority in judicial appointments is a safeguard against an unaccountable judiciary while reducing the politicisation of judicial appointments.

The reason for pivoting to judicial preponderance in judicial appointments instead of executive dominance to maintain judicial independence is due to the unequal power dynamic between the legislature-executive and the judiciary. Judiciary has neither the purse nor the shield. As a result, the dominance of legislature-executive in judicial appointments creates incentives to convert the judiciary into an arm of the executive-legislature, in the prevailing world of judicialisation of politics.

The Kenyan example of the Presidential tussle with the JSC exemplifies the power inequality between the judiciary and the executive. Despite clear constitutional stipulations and judgments, the President sought to hinder the functioning of the JSC. Eventually, the judges could be appointed only after the change in incumbent President, illustrating the role of the incumbent/ruling class to politicise judicial appointments. Similarly, the Indian case with judicial primacy illustrates the power imbalance between the executive and the judiciary. Despite the judicial primacy in judicial appointments, the executive in India continues to exert influence in judicial appointments by scuttling judicial appointments in many ways. Thus, even in a judicial-centric appointments system in India, executive influence is prevalent due to the judicialisation of politics.

5.2 Diversity (judicial accountability)

The courts in India, Kenya and South Africa whose judicial appointments are under study in the present thesis serve not only as constitutional courts but also as ‘regular’ courts, i.e. adjudicate disputes *inter se* private parties and disputes between private parties and the executive which do not involve constitutional interpretation. As a result, the judiciary is required to represent the society it serves for holistic adjudication of disputes.

5.2.1 India

Diversity plays an important role in the prevailing debate over judicial appointments in India. The collegium is criticised for its lack of diversity in judicial appointments.[171] Justice Joseph, who was part of the bench invalidating the NJAC in the Fourth Judges cases, has criticised the absence of "transparency, accountability and objectivity" in the functioning of the collegium.[172] The data shows that 2% of the High Court judges appointed in the past five years represent the marginalised communities, while a significant 79% are from the dominant upper caste community.[173] Similarly, women constitute less than 8% of the total appointed judges in the High Court, with just three women judges presently in the Supreme Court, signifying the problematic under-representation of women in the judiciary.[174] Out of the 268 judges appointed to the Supreme Court to date (June 2023), there have been only 11 women judges, with the first women judge appointed to the Supreme Court in 1989.[175] This indicates that the problem of diversity in judicial appointments is not limited to the collegium model of functioning.

Aparna Chandra, William Hubbard and Sital Kalantry have empirically demonstrated no statistically significant change in the diversity (regional, religious, caste and gender) in the judiciary pre and post-collegium. Interestingly, they observe that the pre-collegium and collegium have maintained regional representation in appointing judges.[176] The pre-collegium and the collegium methods have not formally tackled the issue of diversity in judicial appointments in India. The NJAC did not specify diversity as integral for the judicial appointment procedure, except specifying that *[o]ne of the eminent persons must be a woman or someone belonging to a scheduled caste, scheduled tribe, other backward classes or another defined minority*[177]. The constitutional amendment and attendant enactments did not formally include diversity as a component of judicial appointments.

[171] Rangin Pallav Tripathy, 'Unveiling India's Supreme Court Collegium: Examining Diversity of Presence and Influence' [2023] Asian Journal of Comparative Law 1.
[172] Fourth Judges case, Paragraph 990.
[173]Apurva Vishwanath and Manoj C G, 'Last 5 Years, 79% of New HC Judges Upper Caste, SC and Minority 2% Each' *Indian Express* (10 January 2023).
[174] Rukmini S, 'Where Are the Women? A Study of High Court Judges in India Offers a Number of Insights' *Scroll.in* (21 September 2022) <https://scroll.in/article/1033242/where-are-the-women-a-study-of-high-court-judges-in-india-offers-a-number-of-insights> accessed 12 June 2023.
[175] See 'Chief Justice & Judges | Supreme Court of India' (*Supreme Court of India*) <https://main.sci.gov.in/chief-justice-judges> accessed 12 June 2023.
[176] Anashri Pillay, 'Protecting Judicial Independence through Appointments Processes: A Review of the Indian and South African Experiences' (2017) 1 Indian Law Review 283. 282-283.
[177] ibid., 292.

5.2.2 Kenya

Like the South African constitution,[178] the Kenyan constitution categorically requires the appointments to JSC to reflect the regional and ethnic diversity of the people of Kenya.[179] In addition, the constitution mandates judiciary (being an appointive body of the State) not to have more than two-thirds of the members from the same gender[180], i.e. a minimum of one-third of women representation. Kenyan courts, by and large, are fully compliant with the rule.[181] The Kenyan judiciary as an institution (including the employees) is close to achieving gender parity.[182] The Court of Appeal made it clear that the two-thirds rule applies individually across the courts and not cumulatively to the judiciary as an institution.[183] As a result, the KSC is constitutionally obligated to function with at least three judges from either gender.[184] Kenya JSC has done a good job of maintaining ethnic diversity in SC.[185] At the same time, the relatively new JSC (just over a decade of functioning) makes it difficult to make a final claim regarding its impact on diversity in judicial appointments.

5.2.3 South Africa

The South African turn towards JSC in the new constitution was preceded by the need for a more diverse judiciary in terms of race and gender. As discussed in the previous chapter, the South African higher judiciary comprised 160 white men out of 165 judges in 1994.[186] The interim constitution mandated that the Constitutional Court be "independent and competent and representative in respect of race and gender"[187]. The final constitution extends it to the

[178] See infra Chapter 5.2.4.
[179] Articles 250(4) and 248(2)(e), Constitution of Kenya.
[180] Article 27(8), Constitution of Kenya.
[181] Leo Kipkogei Kemboi, 'Compliance of Two-Thirds Gender Principle: An Assessment of Kenya's Judiciary - IEA Kenya' (*Compliance of Two-Thirds Gender Principle: An Assessment of Kenya's Judiciary*) <https://ieakenya.or.ke/blog/compliance-of-two-thirds-gender-principle-an-assessment-of-kenyas-judiciary/> accessed 12 June 2023.
[182] Allan Kisia, 'Kenyan First? Judiciary about to Achieve Elusive Gender Parity' *Star* (9 July 2021) <https://www.the-star.co.ke/news/2021-07-09-kenyan-first-judiciary-about-to-achieve-elusive-gender-parity/> accessed 12 June 2023.
[183] ***Njenga v. Judicial Service Commission***, [2022] KECA [1429] (KLR).
[184] Jerameel Kevins Odhiambo Owuor, 'Of Two-Thirds Gender Rule and Supreme Court Composition: A Commentary on the Court of Appeal Decision in Civil Appeal No 234 of 2017' (*The Platform*) <https://theplatform.co.ke/of-two-thirds-gender-rule-and-supreme-court-composition-a-commentary-on-the-court-of-appeal-decision-in-civil-appeal-no-234-of-2017/> accessed 12 June 2023.
[185] Jan van Zyl Smit, '"Opening Up" Commonwealth Judicial Appointments to Diversity?: The Growing Role of Commissions in Judicial Selection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017), 80.
[186] See supra Chapter 4.3.
[187] Article. 99(5)(d), Interim Constitution of South Africa.

entire judiciary due to the "need for the judiciary to reflect broadly the racial and gender composition of South Africa"[188] when appointments are being considered.

The JSC, armed with the transformative mandate, transformed the judiciary with more than 63% of the judges in South Africa being black (comprising African, Coloured and Indian, with African being 44%) and around 32% female judges in 2014.[189] However, the emphasis on race has led to allegations of sacrificing 'merit'[190] and discrimination against qualified white candidates[191]. Legal observers have observed that the JSC has prioritised 'merit' over other criteria.[192] Similarly, gender diversity has taken a backseat to race-based diversity.[193] Overall, the new judicial selection has seen a visible improvement in the diversity of members in terms of race and gender due to the concerted push by the JSC to increase diversity. At the same time, Cora Hoexter cautions that the example of South Africa's JSC is a valuable reminder that achieving rapid progress in diversity alone is insufficient for understanding judicial appointments.[194]

5.2.4 Implications

The difference between the Indian approach towards diversity and the Kenyan and South African approach to diversity in judicial appointments is clear. Kenya and South Africa require the JSC to consider diversity as a factor in judicial appointments, unlike India, which does not have a formal requirement for considering diversity in judicial appointments. Despite the lack of diversity in the Supreme Court and the High Courts,[195] judicial appointments remain unaccountable due to the absence of a rule specifying diversity requirements in judicial appointments in India.

[188] Article 174(2), Constitution of South Africa.
[189] Judges JMatter (n 79).
[190] See interview with Izak Smuts SC regarding his resignation from the JSC at the University of Cape Town Law Faculty, 20 April 2013
[191] Elsje Bonthuys, 'Gender and Race in South African Judicial Appointments' (2015) 23 Feminist Legal Studies 127, 139.
[192] Catherine Albertyn, 'Judicial Diversity' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014)., pp. 279–283, 286
[193] Amy Gordon and David Bruce, "Transformation and Independence of the Judiciary in South Africa" (The Centre for the Study of Violence and Reconciliation, 2007). 24; Bonthuys (n 191).
[194] Hoexter (n 162), 85.
[195] The Wire Staff, 'Collegium System Has Not Improved Social Diversity in Higher Judiciary: Law Ministry' *The Wire* <https://thewire.in/law/collegium-social-diveristy-higher-judiciary-law-ministry> accessed 12 June 2023.

5.3 Transparency (judicial accountability)

Transparency in judicial appointments is the other side of the coin, along with diversity for judicial accountability in judicial appointments. The difference between Kenya and South Africa in adopting transparent methods of judicial appointments through JSCs is in stark contrast with the Indian collegium system of judicial appointments, similar to the difference in ensuring diversity in the three countries. Similarly, the excessive politicisation of judicial appointments in South Africa has reduced the transparency in judicial appointments in South Africa compared to Kenya.

The colonial heritage of India, Kenya and South Africa meant that the initial judicial appointments resulted from the infamous English 'tap on the shoulder' system reliant primarily on the discretion of the appointing authorities. However, the executive and judiciary's misadventures and misuse of the system in post-independent Kenya and South Africa necessitated a shift away from the system when adopting new constitutions. India continued with the tap-on-the-shoulder system for appointing judges in the collegium system replacing executive primacy with judicial primacy.

5.3.1 India

The collegium system of appointing judges in India is plagued with opaqueness. The opaqueness of the collegium is exemplified in that three of the four judges invalidating NJAC in favour of the collegium in the Fourth Judges case noted the opaque functioning of the collegium as a concern. The selection of judges in India continues through the 'tap-on-the-shoulder system,[196] without any criteria for selection, except the minimum constitutional qualifications of age and legal experience.[197] The controversy over the appointment of Justice Victoria Gowri, who, despite being alleged to have made hate speeches, was appointed as a temporary judge of the Madras High Court, illustrates the severe transparency problems plaguing the collegium system.[198] Unlike the Kenyan and South African JSCs, which invite

[196] Pradeep Thakur, "Govt Gives Collegium 'Proof' of Nepotism in Picks for HC Judges," *The Times of India*, August 1, 2018, https://timesofindia.indiatimes.com/india/govt-gives-collegium-proof-of-nepotism-in-picks-for-hc-judges/articleshow/65220425.cms.
[197] See Articles 125(3) and 217(2), Constitution of India.
[198] Krishnadas Rajagopal, 'Victoria Gowri Appointment | Two Views Emerge from Supreme Court on What Collegium Considered' *The Hindu* (7 February 2023) <https://www.thehindu.com/news/national/victoria-gowri-appointment-two-views-emerge-from-supreme-court-on-what-collegium-considered/article66481159.ece> accessed 12 June 2023.

applications for appointments and objections to the appointments and public hearings of the applicants, the Indian collegium operates in complete secrecy.[199]

5.3.2 Kenya and South Africa

The JSCs in Kenya and South Africa require applications from prospective candidates[200] instead of nominations under the tap-on-the-shoulder system. However, the candidates in South Africa are nominated for selection as part of their application before the JSC, while the candidates in Kenya apply directly to the JSC.[201] In addition, after the initial sifting process, the short-listed candidates are subject to public interviews by the members of the JSC, upon which the JSCs select the judges.

The transparency in the functioning of the Kenyan and the South African JSCs takes a divergent turn from the stage of public interview.[202] While the Kenyan JSC interviews and the final decisions have been relatively uncontroversial, the South African JSC's conduct of interviews and the final decisions have left much to be desired. The JSC started to disclose the deliberations of the JSC and the reasons behind its decisions only after judicial interventions.[203] Moreover, as Chris Oxtoby notes Justice Zondo was interviewed successfully for the position of Deputy Chief Justice for around 3.5 hours, while Magistrate Mia was interviewed successfully for the position of Gauteng High Court for less than 3 minutes, a recurring pattern in the JSC's functioning.[204]

The role of excessive executive influence in the JSC affecting the judicial appointments process in South Africa can be illustrated through the interviews conducted by the JSC in 2015. In 2015, the interviews conducted for a Constitutional Court position in South Africa were sidetracked by an indirect dispute between politicians and judges regarding the repercussions of a court ruling that held the Government accountable for its failure to apprehend former

[199] The collegium subjectively provides vague statements from time to time justifying the appointments recommended. See Mihir R, 'Collegium's 13 Resolutions Recommending SC Judges' (Supreme Court Observer 2021) <https://www.scobserver.in/journal/collegiums-13-resolutions-recommending-sc-judges/> accessed 12 June 2023.

[200] See for South Africa, Judicial Service Commission Act 9 of 1994: Procedure of Commission GN R 423 in GG 7616 of 27-03-2003 and for Kenya, S 4 (2) First Schedule of the Judicial Service Act.

[201] See Chris Oxtoby and Tabeth Masengu, 'Who Nominates Judges? Some Issues Underlying Judicial Appointments in South Africa' (2017) 28 Stellenbosch Law Review 540, pg. 545-547.

[202] Penelope Andrews raises issues about the nature of sifting process in the South African JSC – Penelope Andrews, 'The South African Judicial Appointments Process' (2006) 44 Osgoode Hall Law Journal 565. 569

[203] ***Judicial Services Commission v. Cape Bar Council***, 2013 (1) SA 170 (SCA); and ***Helen Suzman Foundation v. Judicial Service Commission***, 2018 (4) SA 1 (CC).

[204] Oxtoby (n 139)., 41.

Sudanese President Omar Al-Bashir.[205] In the end, the judicialisation of politics and the highly politicised nature of the South African JSC means that its proceedings have become formal and notionally transparent.[206]

5.3.3 Implications

Transparency in judicial appointments is a *sine qua non* for accountable judicial appointments. Transparency safeguards judicial appointments from executive-legislature politicisation and judicial homo-social reproduction and cloning. India's judiciary-centric judicial appointment procedure does not include transparency as part of its functioning, leading to many questionable and contested appointments. At the same time, South Africa's executive-dominated judicial appointment procedure faces allegations of being only *facially* transparent due to the politicisation of judicial appointments. In contrast, the process adopted by the Kenyan JSC is more transparent due to the limited politicisation of the JSC processes.

Concluding, a conspectus of accountability in judicial appointments in India, Kenya, and South Africa leads to a conclusion that the prevailing Indian judicial appointment method is "informal, secret and unaccountable",[207] similar to the judicial appointments in Kenya and South Africa before the enactment of the new constitutions, with informal laws governing appointments regulated by the then executive in Kenya and South Africa and judiciary in India. At the same time, the alternative suggested by the executive through the NJAC in India does not address the independence-accountability paradox in light of the historical constitutional experiences of subversion of judicial independence through judicial appointments by the executive. In the end, a commission model that prioritises judicial representation, with a majority composed of judges and legal professionals (lawyers and academics), and a executive-legislature minority along with a well-defined, transparent and diverse selection process, can effectively reconcile the conflicting demands arising from the independence-accountability paradox. The judicial role in judicial appointments should be limited to a preponderant role to balance judicial independence and accountability effectively.

[205] Chris Oxtoby, 'Managing a Fraught Transition: The Practice of the South African JSC' in Hugh Corder and Jan van Zyl Smit (eds), *Securing Judicial Independence The Role of Commissions in Selecting Judges in the Commonwealth* (Siber Ink 2017), 39-84.
[206] Brett (n 6). 11
[207] Hugh Corder, 'The Appointment of Judges: Some Comparative Ideas' (1992) 3 Stellenbosch Law Review 207, 226.

Conclusion

A preponderant judicial model as a limiting tool to the judicial role in judicial appointments is fraught with difficulties in India. A preponderant role in judicial appointments is not judicial primacy, as the judiciary does not have a majority in judicial appointments. As a result, a preponderant judicial role may violate the basic structure of the Indian Constitution enshrined in the Fourth Judges case.[208] Some commentators have argued that the Fourth Judges lacks precedential value due to polyvocality of the majority opinion with four different opinions.[209]

The thesis is not a response to the requirement of improving judicial appointments within the boundaries drawn by the judiciary in India.[210] The thesis is a response to the increasing judicial role in judicial appointments. India's judicialisation of judicial appointments is a result of judicial intervention exercising its judicial power, unlike other countries. It serves as a singularly unique point of departure to understand the judicialisation of judicial appointments. However, it does not validate the Indian experience. The Indian judiciary has struggled to tackle transparency and accountability issues in judicial appointments for years.[211] Representative democracies require the judiciary to be accountable to the people as much as it is independent. The judicialised judicialisation of judicial appointments causes a severe accountability crisis, as seen in the Indian case.

The thesis thus moves away from the Indian experience to understand the reasons for the judicialisation of judicial appointments. The thesis makes a case for the judicialisation of judicial appointments due to the increasing judicialisation of politics. The thesis argues that the judicialisation of judicial appointments does not resolve the politicisation of judicial appointments. The judicialisation of politics has made the politicisation of judicial appointments an accepted reality, notwithstanding the judiciary's role in the appointing body. A judicial service commission is not a panacea unless the role of its members is determined. [212]

[208] Gautam Bhatia, 'The Sole Route to an Independent Judiciary? The Primacy of Judges in Appointment' in Arghya Sengupta and Ritwika Sharma (eds), *Appointment of Judges to the Supreme Court of India: Transparency, Accountability, and Independence* (Oxford University Press 2018).
[209] Arghya Sengupta, 'Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment' (2015) 50 Economic and Political Weekly 27.
[210] See Jaitley (n 76).
[211] See the Fourth Judges case (n. 172).
[212] Gift Manyatera and Charles Manga Fombad, 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution' (2014) 47 The Comparative and International Law Journal of Southern Africa 89.

The thesis argues for limiting the judicial role to a preponderant role in the appointing body with a minor role (but not insignificant) for the executive-legislature. The thesis argues for bridging the gap between the judicial majority and executive-legislature minority in the appointing body with members from the legal profession (lawyers and academics) to provide diverse perspectives to the appointing body.

In the end, it is important to recognise that this challenge extends far beyond the borders of India, Kenya, and South Africa. The planned judicial reforms in Israel involve modifying the composition of the judicial selection body to give the government a permanent majority, serves as a stark reminder of the pervasive nature of this issue.[213] Acknowledging that any process, regardless of its design, can be misused or abused is important. The judicialisation of politics increases judicial power and serves as a motivation for the politicisation of appointments. Unless the judicialisation of politics is reduced (or, as the retired Chief Justice of Kenya, Justice Willy Mutunga, observed, politicians should "deal with their own shit" elsewhere.[214]), the politicisation of judicial appointments will persist. Limiting the judicial role in judicial appointments to a preponderant judicial role with a majority comprising lawyers and academics satisfies the independence-accountability paradox and makes the abuse of power difficult, but not impossible.

[213] Gila Stopler, 'The Israeli Government's Proposed Judicial Reforms: An Attack on Israeli Democracy' (*ConstitutionNet*, 16 February 2023) <https://constitutionnet.org/news/israeli-governments-proposed-judicial-reforms-attack-israeli-democracy> accessed 15 June 2023.
[214] Mboya (n 154).

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