

Spotlight on the Guardians of the Gatekeepers: An Assessment of the Judicial Service Commission of Malawi

Mwiza Jo Nkhata*

Abstract

The judiciary is commonly regarded as the gatekeeper of democracy and constitutionalism. In Malawi, the work of the judiciary must be appreciated closely with the powers and functions of the Judicial Service Commission (JSC). While precise connections have yet to be fully unravelled, it is clear that the JSC or any other body, however named, that manages appointments and discipline of judges, can influence the quality of a judiciary. By focussing on the JSC, the article demonstrates that the JSC has remained dormant, especially in terms of elaborating on the framework governing its operations. The article focuses specifically on the composition and legal status of the JSC; the record of the JSC in maintaining discipline among judicial officers; the accountability of the JSC in its operations and the role of the JSC in the appointment of judges and the maintenance of judicial independence. It is the article's conclusion that these aspects of the work of the JSC are in dire need of reform. Building on a comparative expose, the article recommends that legislation should be adopted to clarify the duties and operations of the JSC; that there should be enhanced transparency and accountability in the operations of the JSC; that greater administrative support be rendered to the JSC; and that the composition of the JSC be altered to increase its size and diversity.

BACKGROUND

One of the key steps in Malawi's transition from a one-party state to a multi-party democracy was the adoption of a new Constitution. The 1994 Constitution of the Republic of Malawi (hereinafter 'the Constitution') was adopted in order to lay a foundation for safeguarding human rights, generating accountability of public functionaries, upholding the rule of law and separation of powers, and also preserving checks and balances.¹ The Constitution's centrality to the transition is best appreciated when one

* LLB (Hons) Malawi, PGCHE, LLM, LLD (University of Pretoria), Dip (Turku). Associate Professor of Law, University of Malawi and Research Fellow, Free State Centre for Human Rights, University of the Free State. I am grateful for the comments made by Anganile-Kyala on an earlier draft of this article.

¹ Jande Banda, 'The Constitutional Change Debate of 1993-1995' in Kings Phiri and Kenneth Ross (eds), *Democratisation in Malawi: A Stocktaking* (CLAIM 1998) 320.

considers that it was adopted as part of the dismantling of a dictatorship that had autocratically ruled Malawi for thirty years. The Constitution can be said to have established a blue print for democratic governance in the country.² Unlike the situation that prevailed in the country during the thirty years of Kamuzu Banda's dictatorship, under the new Constitution, political power is located in the people of Malawi and the state exercises it as a trustee paying due respect to the fundamental rights and liberties of individuals.³

The Constitution reserves a hallowed role for the judiciary. The judiciary is the only institution entrusted with the responsibility of 'interpreting, protecting and enforcing [the] Constitution and all laws ... in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.'⁴ Under section 103(2) of the Constitution, the judiciary has 'jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.' In the words of Ng'ong'ola, the Constitution has restored the judiciary to its pedestal as the supreme authority on the interpretation and application of the Constitution and other laws.⁵

As Ackermann has argued, it is important to point out that entrusting the interpretation, enforcement, and protection of a constitution to the judiciary conforms to sound political science, and is proof of an intelligent perception of the necessity of checks and balances in a constitutional democracy.⁶ To ensure that the judiciary has the appropriate personnel to discharge its mandate, the Constitution established the Judicial Service Commission (JSC) which, among other things, helps to facilitate appointments to the judiciary

² Mwiza Nkhata, 'Rethinking Governance and Constitutionalism in Africa: The Relevance and Viability of Social Trust-based Governance and Constitutionalism in Malawi (LLD Thesis, University of Pretoria 2010) 14.

³ Fidelis Kanyongolo, 'The Limits of Liberal Democratic Constitutionalism in Malawi' in Phiri and Ross (n 1) 353.

⁴ Section 9 of the Constitution. In *The State and President of the Republic of Malawi, The Minister of Finance, Secretary to the Treasury Ex Parte Malawi Law Society* Constitutional Cause No. 6 of 2006 (Being Miscellaneous Civil Cause No. 165 of 2006) (HC) (PR) the High Court, sitting as a Constitutional Court, made the following remarks: 'Our understanding of the above section is that the judiciary, and no other institution, shall have the responsibility of interpreting and, if need be, enforcing the Constitution.'

⁵ Clement Ng'ong'ola, 'Judicial Mediation in Electoral Politics in Malawi' in Harri Englund (ed), *A Democracy of Chameleons: Politics and Culture in the New Malawi* (CLAIM 2002) 65.

⁶ Lourens Ackermann, 'Opening Remarks on the Conference Theme' in Jonathan Klaaren (ed), *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (Siber Ink 2006) 8.

and provides disciplinary oversight over judicial officers.⁷ Judicial officers are the gatekeepers of the Constitution and constitutionalism in Malawi. The JSC can be viewed as the guardian of the gatekeepers. Although the JSC may not have the public prominence of other constitutional institutions such as the Human Rights Commission⁸ or the Ombudsman,⁹ it remains a key institution for governance and constitutionalism. Its operations may have deep repercussions for the consolidation of democratic governance.

In a wide-ranging comparative analysis, Garoupa and Ginsburg conclude that the use of JSCs is an important phenomenon that has spread all over the world and can be regarded as a global best practice.¹⁰ Nevertheless, Garoupa and Ginsburg also conclude that not much is known about JSCs and their effects on, for example, judicial independence and accountability.¹¹ It is important to note that JSCs operate in varied social and political contexts. They have also been called by different names in different countries.¹² Understanding how a JSC operates, therefore, requires a thorough appreciation of the particularities of the specific commission before accurate general conclusions can be drawn.

This article is an assessment of the JSC in Malawi and thus hopes to contribute to the understanding of the JSC in Malawi and its role in monitoring the performance of the judiciary. Notably, over twenty years have passed since the adoption of the Constitution. However, even though there have been analyses of some of the functions of the JSC, a systematic assessment of the JSC has yet to be conducted. Most existing analyses have focused on judicial independence in Malawi and have tackled the JSC largely only in so far as it relates to the appointment and discipline of

⁷ Neither the Constitution nor the Judicature Administration Act, Cap. 3:10, Laws of Malawi, defines a judicial officer. However, the Constitution in section 111(4) defines judicial office to mean the following offices: (a) a Justice of Appeal or Acting Justice of Appeal, (b) a Judge of the High Court or Acting Judge of the High Court, (c) the Registrar or Deputy Registrar of the Supreme Court of Appeal or High Court, (d) a magistrate of whatever grade and (e) a person presiding over a traditional or local court. By implication, the holders of all the aforementioned offices can aptly be described as judicial officers. Nevertheless, the focus of the discussion is on the JSC in relation to judges of the High Court and Supreme Court of Appeal. The reference to 'judicial officer(s)' therefore, refers to judges of the High Court and the Supreme Court of Appeal.

⁸ Established under s 129 of the Constitution.

⁹ Established under s 120 of the Constitution.

¹⁰ Nuno Garoupa and Tom Ginsburg, 'The Comparative Law and Economics of Judicial Councils' (2008) 27(1) 83.

¹¹ Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57(1) *American J of Comparative L* 119.

¹² In other countries, they have been referred to as judicial service councils or judicial appointments committees or even Berkeley J of Intl L merit commissions.

judicial officers.¹³ The article conducts the assessment at two levels. Firstly, it conducts a broad assessment of the normative framework establishing the JSC and; secondly, it assesses the performance of the JSC since 1994. Considering that there are numerous issues implicated in the performance of the JSC, the article attempts to streamline the discussion by focusing on four thematic areas. These are firstly, the composition and status of the JSC; secondly, the role of the JSC in disciplining judicial officers; thirdly, the accountability of the JSC; and, lastly, the role of the JSC in judicial independence and the appointment of judges. In its penultimate section, the article also addresses the question of whether the JSC should be amenable to judicial supervision in the performance of its functions.

The article begins by exploring the place of a judiciary in a constitutional democracy. It then proceeds to discuss the role of JSCs in general, and their role in ensuring constitutionalism, specifically. Thereafter the article explores the law establishing the JSC and the mandate of the JSC. Subsequently, the article conducts an assessment of the JSC along the earlier mentioned thematic areas. The article also makes suggestions for improving the performance of the JSC. The assessment in this article employs a liberal use of examples from comparative jurisdictions. However, in terms of drawing lessons and comparative practices, the article principally utilises examples from South Africa and the United Kingdom. South Africa has been selected as a comparator because it is within the same region as Malawi and because its constitution has considerable similarities with Malawi's. The United Kingdom has been selected because of the affinities between its legal system and Malawi's, largely due to Malawi's colonial history.

THE GUARDIANS OF THE GATEKEEPERS: THE JSC, THE JUDICIARY AND CONSTITUTIONALISM

A judiciary is a necessity in any constitutional democracy.¹⁴ Constitutional democracies are premised on the existence of three branches of government and these are the executive, the legislature, and the judiciary. The doctrine of separation of powers requires that the three branches of government must exercise their functions independently of each other and also that they should operate as a check and balance on the exercise of authority

¹³ See, Rachel Ellet, 'The Politics of Judicial Independence in Malawi' <https://freedomhouse.org/sites/default/files/inline_images/Politics%20of%20Judicial%20Independence%20in%20Malawi_1.pdf> accessed 21 July 2017; Fidelis Kanyongolo, 'State of the Judiciary Report: Malawi 2003' <https://www.ifes.org/sites/default/files/soj_malawi_final.pdf> accessed 21 July 2017; Siri Gloppen and Fidelis Kanyongolo, 'Malawi' in Linda van de Vijver (ed), *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (Siber Ink 2006) 73–94; and Fidelis Kanyongolo, 'Malawi: Justice Sector and Rule of Law' <https://www.opensocietyfoundations.org/sites/default/files/malawi_20060912.pdf> accessed 21 July 2017.

¹⁴ Farid Shuaib, 'Malaysian Judicial Appointment Process: An Overview of the Reform' (2011) 7(13) *Journal of Applied Sciences Research* 2273–2278.

by the other branches. The judiciary is the branch of government whose task is the authoritative adjudication of disputes over the application of laws in specific situations.¹⁵ In order for a judiciary to fulfil its mandate, a constitution, ordinarily, vests exclusive judicial authority in the judiciary.¹⁶ Judicial authority is the power to ‘resolve disputes that can be resolved by the application of the law by determining what the law is and how to apply it to a particular instance.’¹⁷

The nature of the functions entrusted, by law, to a judiciary require that the judiciary must be independent, if it is to fulfil its functions. Judicial independence is foundational and indispensable for the discharge of the judicial function.¹⁸ Judicial independence is an incidence of separation of powers and can be understood at different levels, key being personal and functional independence.¹⁹ Personal independence of the judiciary means that the appointment, terms of office, and conditions of service of judicial officers should not be arbitrarily controlled or interfered with by any individual or any other government body. Functional independence requires that the functions of courts must be subject only to law. Functional independence is meant to protect the objectivity of the judicial process by barring, as far as is possible, any form of interference.²⁰ The flipside of judicial independence is judicial accountability and this requires that the judiciary must always account for the exercise of its powers. Judicial accountability creates space for legitimate scrutiny of the judiciary’s actions and also engenders responsibility among judicial officers.²¹

Although the judiciary has sometimes been regarded as the weakest and least dangerous branch of government, courts have enormous power with which they can significantly alter political and social paradigms.²² The judiciary acts as a fulcrum that balances the needs of the majority against constitutional limits on public action.²³ In countries like Malawi and South

¹⁵ Encyclopaedia Britannica <<https://www.britannica.com/topic/judiciary>> accessed 21 July 2017.

¹⁶ For example, in Malawi, ss 9 and 102 of the Constitution confirm that judicial functions are vested in the judiciary. A corresponding provision in South Africa is s 165 of the Constitution of the Republic of South Africa.

¹⁷ Ignatius Rautenbach and Erasmus Malherbe, *Constitutional Law* (LexisNexis 2004) 217.

¹⁸ *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 59 (Ackermann J).

¹⁹ Rautenbach (n 17) 220. In *Malawi Law Society* (n 4), the Court stated as follows: ‘Judicial independence in turn revolves around three things: security of tenure, administrative independence and financial security.’

²⁰ For example, s 103(1) of the Constitution of the Republic of Malawi provides as follows: ‘All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority.’

²¹ Janet Liabunya, ‘Judicial Accountability in a Democratic Malawi: A Critical Assessment’ (2012) 6(2) Malawi LJ 208.

²² Alexander Bickel, ‘The Least Dangerous Branch: The Supreme Court at the Bar of Politics’ <<http://www.law.uh.edu/faculty/eberman/conlaw/Bickel.pdf>> accessed 26 July 2017.

²³ Margaret Marshall, ‘The Separation of Powers: A Comparative View’ in Klaaren (n 6) 19.

Africa, with constitutions that manifest an explicit transformative potential, the judiciary is implicated in the goal of transforming society and its various institutions.²⁴ For a judiciary to fulfil its role in the transformation of society, judicial independence and accountability must be guaranteed. Independence and accountability, however, will not be attained unless the judiciary has competent and disciplined personnel to enable it to fulfil its mandate. A JSC remains an important vehicle for ensuring that a judiciary has competent personnel within its ranks.

According to Garoupa and Ginsburg, the nature of a JSC, however named, is such that it takes the appointment and promotion of judges away from partisan political processes while at the same time ensuring a measure of accountability.²⁵ JSCs have been the preferred option for appointing judicial officers in many countries because they can operate to insulate the functions of appointment, promotion, and discipline of judges from partisan political processes while at the same time guaranteeing a measure of accountability.²⁶ A JSC allows the appointment and superintendence of judicial officers to be vested in an independent body.²⁷ According to Malleson, a JSC has the best chance of guaranteeing judicial independence, strengthening the quality of judicial appointments, enhancing fairness in the judicial selection process, promoting diversity in the composition of a judiciary, and, generally, maintaining public confidence in the system.²⁸

A JSC embodies a balance between allowing judges full control over their own affairs and the alternative of allowing full political control of judicial appointments, promotion and discipline.²⁹ Many models of JSCs exist and this is in part a reflection of a particular country's concerns about the judiciary. While JSCs may be the common method for appointing judicial officers and supervising the performance of their duties, they are not the only mechanism that can achieve this. In terms of appointing

²⁴ Mtendewaka Mhango, 'Transformation and the Judiciary' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 69. In relatively new democracies like Malawi and South Africa, the judiciary is also recognised as a critical factor in facilitating the consolidation of democracy—Peter von Doepp, 'Politics and Judicial Assertiveness in Emerging Democracies: High Court Behaviour in Malawi and Zambia' (2006) 59(3) *Political Research Quarterly* 390.

²⁵ Garoupa (n 10) 57.

²⁶ *ibid.*

²⁷ SADC Lawyers' Association, 'Appointment Processes for Judicial Services Commissions (JSCs) and their Role in Promoting Independence of the Judiciary in Southern Africa: A Focus on Law/Bar Association Representatives on the JSCs' <<http://www.sadcla.org/publications/reports?download=20:research-paper-appointment-processes-for-judicial-services-commissions-jscs-and-their-role-in-promoting-independence-of-the-judiciary-in-southern-africa-a-focus-on-law-society-bar-association-representatives-on-the-jscs>> accessed 2 October 2017.

²⁸ Kate Malleson, 'Creating a Judicial Appointments Commission: Which Model Works Best?' (2004) *Public Law* 103.

²⁹ Garoupa (n 11) 106.

judicial officers, for example, the choice of method is often country specific and responds to country-specific concerns. For example, in Bolivia judges are selected by way of election; in Algeria executive appointment is used to select judges; and for the Supreme Court in the United States of America, legislative appointment is the preferred method.³⁰ Notwithstanding these differences, some commentators view the use of JSCs as international best practice meant to ensure judicial independence and also guarantee external accountability of a judiciary.³¹

A few remarks about constitutionalism are in order. Fombad notes, correctly, that constitutional scholars have had great difficulties in defining constitutionalism.³² In truth, there is no universally acceptable definition of constitutionalism. As Butleritchie has pointed out, 'constitutionalism is an ambiguous concept, or at least the term is used in ambiguous ways.'³³ Notwithstanding the uncertainty in definition, it is clear that modern constitutionalism rests on two main pillars.³⁴ Firstly, the existence of certain limitations imposed on a state in its relations to citizens based on clearly defined core values. Secondly, the existence of a well-defined mechanism for ensuring that the limitations on government are legally enforceable. Understood in this way, five core elements of constitutionalism are manifest. These are: firstly, the recognition and protection of fundamental rights and freedoms; secondly, the separation of powers; thirdly, an independent judiciary; fourthly, the review of the constitutionality of all laws; and, lastly, the control of the amendment of a constitution.³⁵ For purposes of attaining constitutionalism, it is the institutionalisation of the aforementioned elements that is important and not the simple adoption of a constitution by a country.³⁶ Constitutionalism, therefore, becomes a reality to the extent that the rules in the constitution actually operate to curb arbitrariness on the part of those wielding political authority and to the extent that no encroachment is made on the fundamental liberties protected by law.³⁷

Clearly, a judiciary that is independent and accountable is necessary for the consolidation of constitutionalism. The centrality of an independent and accountable judiciary for constitutionalism places a high premium on

³⁰ Njeri Thuku, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' (2013) 19 Annual Survey of Intl and Comparative L 77–88.

³¹ Garoupa (n 11) 104.

³² Charles Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 The American J of Comparative L 7.

³³ David Butleritchie, 'The Confines of Modern Constitutionalism' (2004) 3(1) Pierce LR 1.

³⁴ Fombad (n 32) 7.

³⁵ *ibid* 7–8.

³⁶ See, Hastings Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Paradox' in Issa Shivji (ed), *State and Constitutionalism: An African Debate on Democracy* (SAPES 1991) 1–25.

³⁷ Stanley de Smith, *The New Commonwealth and its Constitutions* (Stevens 1964) 106.

the mechanisms for selecting judicial officers and maintaining the required supervisory authority over them. Looked at holistically, a JSC is always in a position to contribute towards the creation and maintenance of a judiciary that can either be supportive of or undermining of constitutionalism. The role of a JSC is particularly acute in countries like Malawi where judicial officers are not popularly elected, but appointed by the president, and their constitutionally guaranteed tenure makes it very difficult to remove them from office. It must also be recalled that, unlike the other branches of government, the judiciary does not derive its legitimacy through ordinary democratic processes. For the large part, the credibility of a judiciary depends on the independence and integrity of its members.³⁸ To maintain the sanctity of a judiciary's place in constitutional governance, therefore, the mechanisms for appointing and superintending over judicial officers require constant introspection. The next section outlines the establishment and mandate of the JSC in Malawi.

MALAWI'S JUDICIAL SERVICE COMMISSION: ESTABLISHMENT AND MANDATE

Section 116 of the Constitution provides as follows:

There shall be a Judicial Service Commission for the regulation of judicial officers and which shall have such jurisdiction and powers as may be conferred on it by this Constitution or, subject to this Constitution, by any Act of Parliament.

As should be apparent, the JSC has very wide powers. It has the broad mandate of regulating judicial officers. The constitutional provision vesting this authority in the JSC is couched in very generous and permissive terms. The JSC, therefore, may perform wide reaching regulatory functions as long as the same do not fall foul of the Constitution. Importantly, both sections 116 and 118 of the Constitution leave open the possibility that additional functions may be conferred on the JSC by an Act of parliament so long as such functions do not contravene the Constitution.

In terms of composition, the JSC is a committee of five individuals.³⁹ The chief justice is the chairperson. Other members include the chairperson of the Civil Service Commission or his/her designate; a justice of appeal or judge, as may be designated by the president acting in consultation with the chief justice; a legal practitioner; and a magistrate. Notably, the legal practitioner and magistrate who serve on the JSC are designated by the president acting in consultation with the chief justice. The powers of the JSC

³⁸ Ismail Mahomed, 'The Role of the Judiciary in a Constitutional State: Address at the First Orientation Course for New Judges' (1989) 115 SALJ 112.

³⁹ Section 117 of the Constitution.

are outlined in section 118 of the Constitution. They include the following: the power to nominate persons for judicial office; to exercise disciplinary powers in relation to judicial officers as may be prescribed by an Act of parliament but subject to the Constitution; to recommend the removal of a person from judicial office; to make representations to the president as may be prescribed by an Act of parliament; and to exercise such powers as are conferred on the JSC by the Constitution or as are necessary for the performance of its duties.

The only statute that has direct relevance to the operations of the JSC is the Judicature Administration Act.⁴⁰ According to its long title, the Judicature Administration Act was enacted ‘to provide for the establishment of the office of Chief Courts Administrator; the administration of the judiciary; the funding of the judiciary; the terms and conditions of service for members of staff of the judiciary; and for matters connected therewith or incidental thereto.’ Of direct relevance to the present discussion is section 5 of the Act. In terms of section 5, the JSC is given the power, subject to sections 118 and 119 of the Constitution, to adopt regulations guiding the following; the nomination of persons to judicial office, the exercise of disciplinary powers over judicial officers, the appointment of members of staff in the judiciary,⁴¹ and also for the exercise of disciplinary power over members of staff in the judiciary. The Judicature Administration Act also vests the JSC with the authority to make regulations for the general administration of the judiciary.

Akin to the provisions on the JSC in the Constitution, section 5 of the Judicature Administration Act assumes that the specific regulations governing the detailed functions of the JSC will be provided for in regulations to be adopted at a later date. Strangely, no other law, other than the Judicature Administration Act, has been passed to clarify the functions and operations of the JSC in Malawi. As will be demonstrated later in this article, as the Judicature Administration Act has not specifically dealt with the rules and procedures to be followed by the JSC, there is still a lack of clarity about the precise procedures that the JSC must comply with in fulfilling its constitutional mandate. The next section conducts an assessment of the JSC.

AN ASSESSMENT OF MALAWI’S JUDICIAL SERVICE COMMISSION

The constitutional mandate of the JSC remains very broad. The lack of enabling legislation means that the specific functions vested in the JSC remain unclarified. To narrow down the discussion, the assessment herein focuses on the following aspects: the composition and status of the JSC; the role of the JSC in disciplining judicial officers; the accountability of the

⁴⁰ Chapter 3:10, Laws of Malawi.

⁴¹ ‘Member of staff of the judiciary’ means any employee of the judiciary, other than a person holding judicial office—s 2, Judicature Administration Act.

JSC; and the role of the JSC in ensuring judicial independence and in the appointment of judges.

The Composition and Status of the JSC

There are many models of JSCs across the world. The composition and competences invested in the various commissions is often a reflection of a country's general concerns about the judiciary.⁴² There are also different approaches to appointing members of a JSC. A good practice, however, is to eliminate the possibility of political influence in the appointment of members of a JSC.⁴³ This is because the mechanisms for appointing members of a JSC do matter for the outcomes of its processes.⁴⁴ If the process of appointing members of a JSC is left too open to partisan influences, the work of such a commission loses credibility and may become tainted.

The size and composition of a JSC is also a relevant consideration. In terms of composition, for example, a JSC dominated by judges tends to trigger conflicting deductions.⁴⁵ On the one hand, it is thought that such a JSC has a greater likelihood of being independent. The assumption being that judges would, ordinarily, transfer their independence to the JSC. It is thus argued that where a JSC is 'dominated' by members of the judiciary, judges could use their majority to self-regulate their members thereby enhancing the independence of the JSC.⁴⁶ On the other hand, it is argued that such a JSC may be prone to self-interested decision-making. For example, judges on a JSC may have a strong incentive to represent the judiciary's interests on the JSC, after all such judges return to work for the judiciary after the JSC's work. Following this line of reasoning, lay members of a JSC are arguably more inclined to support a general agenda as compared to their peers from the judiciary. There is also the fact that the information that a JSC uses to make decisions, is invariably sourced from the judiciary itself. This may give judges a dominant or preponderant position on the JSC. Overall, the major drawback with a JSC dominated by the judiciary is that members of the judiciary tend to have very narrow backgrounds—such a JSC, stereotypically, captures older male lawyers and may end up undermining the objective of having a diversified JSC.⁴⁷ Additionally, such a JSC may find it difficult to exert disciplinary powers over judicial officers because of the high likelihood of conflict of interest. While, traditionally, it was assumed that a JSC, especially in the common-law world, should be dominated by members of the judiciary, this need not be the case any

⁴² Gift Manyatera and Charles Fombad, 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution' (2014) XLVII (1) CILSA 96.

⁴³ *ibid* 104.

⁴⁴ Garoupa (n 10) 65–66.

⁴⁵ Garoupa (n 11) 120.

⁴⁶ Thuku (n 30) 47.

⁴⁷ Cf. Malleeson (n 28) 105.

longer.⁴⁸ An example of a commission with a minority of members from the judiciary is England's Judicial Appointments Committee (JAC). The JAC consists of fifteen members and only five of these are from the judiciary. The JAC includes five lay members within its membership. The JAC is also unique because it is, by law, required to be chaired by a layperson.⁴⁹ The composition of the JAC evinces a deliberate attempt to broaden and diversify its membership.

It has been argued that the status of a JSC remains at risk of legislative manipulation when its powers and composition are left to ordinary laws and not a constitution.⁵⁰ Therefore, when a JSC's founding provisions are entrenched in a constitution, there is, arguably, a greater propensity towards independence and insulation from political influence. Competence and composition in connection with a JSC, admittedly, interact in complex ways in response to particular institutional problems.⁵¹ It is, therefore, not foregone that establishing the JSC via the constitution would automatically solve all problems related to independence and status of a JSC.

Like Malawi, South Africa is an example of a jurisdiction where the JSC is established by the constitution. Section 178 of the Constitution of the Republic of South Africa, 1996 establishes the JSC; determines its composition; and outlines the functions vested in it. While section 178(4) of the Constitution of the Republic of South Africa, 1996 left open the possibility that further functions could be vested in the JSC by national legislation, the sanctity of the JSC, as an institution, derives primarily from its constitutional establishment. Similarly, in the United Kingdom, the JAC is established as part of the constitutional reforms contained in the Constitutional Reform Act of 2005. The major difference between Malawi, on the one hand, and South Africa and the United Kingdom, on the other hand, is that in the latter case statutory guidance has been provided to govern the operations of the respective JSCs while in the former case nothing has been done to date.

A number of points are worth noting in respect of the JSC in Malawi. Firstly, it is of credit to the framers of the Constitution that the JSC is established by the Constitution and not by an ordinary statute. This confers a higher status on the JSC than if it had been established by an ordinary statute. However, it is also desirable that apart from establishing a JSC via a constitution, mechanisms must be adopted to insulate the JSC from political influence. One of the ways in which this can be done is by entrenching the

⁴⁸ Pierré Olivier, 'Appendix 1.4: The Latimer House Principles and Guidelines' <https://vula.uct.ac.za/access/content/group/9bd11bce-1f06-4178-86d8-962580ee400d/CodesofConduct/Latimer_house_principles.pdf> accessed 2 August 2017.

⁴⁹ Schedule 12, Constitutional Reform Act 2005 <http://www.legislation.gov.uk/ukpga/2005/4/pdfs/ukpga_20050004_en.pdf> accessed 24 July 2017.

⁵⁰ Garoupa (n 10) 123.

⁵¹ *ibid* 130.

constitutional provisions that deal with the JSC so that they are protected from whimsical amendment.⁵² The constitutional provisions relating to the JSC in Malawi are not entrenched. Resultantly, these provisions can be amended by a Bill, which is supported by at least two-thirds of the ‘total number of members of the National Assembly entitled to vote.’⁵³ A similar position exists in South Africa where provisions pertaining to the JSC can be amended by a Bill supported by at least two-thirds of the members of the National Assembly.⁵⁴

While the provisions pertaining to the JSC are not entrenched in Malawi, the provisions on judicial independence, judicial appointment, remuneration of judges, and security of tenure are entrenched and cannot be amended by parliament without holding a national referendum.⁵⁵ Nevertheless, Malawi’s experience reveals that the lack of entrenchment of the provisions pertaining to the JSC has not caused problems. While it is impossible to predict future political conduct, it is fair to conclude that the position of the JSC has not been jeopardised because of a non-entrenchment of the provisions establishing it. Amidst the plethora of constitutional amendments that have been passed since 1994, no amendment has been passed which can be said to have detrimentally affected the composition or powers of the JSC.⁵⁶ This is simply testament to the fact that, to a large extent, local social and political circumstances condition the work of a JSC.

Secondly, it is important to acknowledge that there are no rigid prescriptions pertaining to the ideal size of a JSC. The variation among the countries that use JSCs is very wide ranging from very small commissions to big ones. In general, small JSCs are often accused of representing narrow interests while big ones tend to create problems in terms of ease in decision-making.⁵⁷ As contrasted to the JSC in Malawi, which is a five-member committee, the South African JSC is a twenty-three member committee while in Kenya the JSC is a committee of twelve⁵⁸ and the JAC of England is a fifteen-member committee.⁵⁹ As will be argued later, while a twenty-three member JSC, like the one in South Africa, is clearly on the bigger side, taking the cue from both Kenya and the United Kingdom, a commission with between ten and fifteen members would be ideal for Malawi. This would move the JSC in

⁵² Manyatera (n 42) 97.

⁵³ Section 197 Constitution of the Republic of Malawi.

⁵⁴ Section 74(3) Constitution of the Republic of South Africa.

⁵⁵ Gloppen (n 12) 75. See also, s 196 and the Schedule to the Constitution of the Republic of Malawi.

⁵⁶ For amendments to the Constitution, see Anthony Kamanga, ‘Amendments to the Constitution since 18 May 1994’ (First National Conference on the Review of the Constitution, Lilongwe, 28–31 March 2006) [Copy on file with author].

⁵⁷ Cf. Kate Malleson, ‘Assessing the Performance of the Judicial Service Commission’ (1999) 116 SALJ 39.

⁵⁸ Article 171, Constitution of the Republic of Kenya.

⁵⁹ Schedule 12, Constitutional Reform Act 2005.

Malawi beyond its current small membership and create an opportunity for diversity of its membership with the increased size.

It is clear that, comparatively, the JSC in Malawi is very small in size. However, the problematic issues in relation to the JSC are not necessarily because of its size. Rather they are, in the first place, due to the influence that the president has on its composition. The president has a hand in the appointment of all members of the JSC and this, arguably, compromises its independence.⁶⁰ The problem here is not necessarily a presumption of incompetence in relation to the *ex officio* appointments that the president makes. Rather the problem is the view that those appointed by the president remain beholden to him/her.⁶¹ This view needs to be dispelled. Additionally, the president appoints members of the JSC largely because of the office that the individual holds. The problem here is that it is hard, if not impossible, for the president to factor in positive personal attributes in making appointments to the JSC.⁶² Secondly, there are no fixed terms for members of the JSC. This may have implications for the independence of the JSC because, in principle, members of the JSC hold office at the pleasure of the appointing authority. An immediate contrast can be drawn with the situation in the United Kingdom where the Constitutional Reform Act of 2005 in Schedule 12 expressly stipulates that members of the JAC must be appointed for a fixed period that should not exceed five years at a time, and the total number of years that one can serve on the JAC, must never exceed ten years.⁶³ Thirdly, the legal profession, and in particular the judiciary, dominates the JSC. This narrows the diversity of its membership. The capacity of the JSC to adequately process information outside of the legal profession is limited by its composition where all but one member are lawyers by training. As currently structured, the JSC in Malawi is, therefore, ill-suited to meaningfully discharge its constitutional mandate. Both South Africa and the United Kingdom have adopted broad-based JSCs, which attempt to incorporate a range of personalities and professions within their membership. For example, in South Africa, membership of the JSC includes six members of the national assembly three of whom must be members of opposition parties represented in the National Assembly and four members selected by the National Council of Provinces, among others.⁶⁴ Similarly, in the United Kingdom, members of the judiciary sitting on the JAC can

⁶⁰ Gloppen (n 13) 77.

⁶¹ SADC Lawyers' Association (n 27).

⁶² Selflessness, integrity, objectivity, accountability, openness, honesty and leadership have, in the United Kingdom, been identified as key principles of public life and are used to evaluate all potential candidates for public office— Gov.UK, Committee on Standards in Public Life, 1995 <<https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>> accessed 26 July 2017 There is hardly any room for the president to individually factor in these attributes in making appointments to the JSC.

⁶³ Rules 12 and 13, Schedule 12, Constitutional Reform Act 2005.

⁶⁴ Section 178(1)(h) and 178(1)(i), Constitution of the Republic of South Africa.

never be more than five.⁶⁵ Diversity in the membership of a JSC can boost the capacity of a commission to process the various issues that may come before it.

The Role of the Judicial Service Commission in Disciplining Judicial Officers

In terms of section 118 of the Constitution, the JSC is mandated to exercise disciplinary powers over judicial officers. To date, however, the mechanisms for receiving complaints and disciplining judicial officers remain non-existent.⁶⁶ In the absence of special mechanisms for handling disciplinary matters affecting judicial officers, the Public Service Commission Regulations of 1989 have been used to enforce discipline over judicial officers.⁶⁷ Needless to point out that these regulations are not suitable for the regulation of judicial officers, and it is doubtful if they are in full consonance with the Constitution. The implications of the absence of clear mechanisms and procedures for disciplining judicial officers came to the fore in 2001 when parliament passed a motion recommending the impeachment of three High Court judges.⁶⁸ Once the impeachment motion fell through, the JSC unsuccessfully tried to discipline the concerned judges but could not proceed in the absence of the applicable rules of procedure.⁶⁹

According to section 119 of the Constitution, a judge can only be removed from office for ‘incompetence in the performance of the duties of his office or for misbehaviour.’ The actual process of removing a judge from office involves impeachment proceedings in the National Assembly. If a majority of the members of parliament, after debate, pass a motion for the removal of a judge from office, the president, in consultation with the JSC, may remove the judge from office. In removing a judge from office, however, the president is required to follow a procedure that complies with the principles of natural justice. In terms of section 118 of the Constitution, a judicial officer affected by a decision of the JSC has the right to appeal to the High Court against such a decision. As has been noted, the role of the JSC in this process is not clearly defined and neither is it clear what the president must do to ensure that his/her action, in removing a judge from office, complies with the principles of natural justice.⁷⁰

⁶⁵ Rule 2, Schedule 12, Constitutional Reform Act 2005.

⁶⁶ Gloppen (n 13) 83.

⁶⁷ James Kalaile, ‘Judicial Transparency’ in The Malawi Judiciary (ed), *Judges Conference on Independence, Accountability and Transparency* (Montfort Media 2007) 30. There is also the judiciary’s Code of Conduct and Conditions of Service, 2003. However, while this code empowers the JSC to impose various penalties on judicial officers that violate it, the code is not applicable to judges of the High Court and justices of appeal—Kanyongolo (n 13) 87–88.

⁶⁸ As for the attempted impeachment of judges, see Rachel Ellet, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge 2013) 120–123.

⁶⁹ Gloppen (n 13) 83.

⁷⁰ *ibid* 82.

The problem is that while the Constitution has vested general supervisory and disciplinary powers in the JSC, no enabling statute has been passed to provide details as to how the supervisory and disciplinary power must be exercised. This is a huge omission and it is regrettable that the JSC has continued to operate without an enabling statute over twenty years after the Constitution was adopted. Even the lee-way created by section 5 of the Judicature Administration Act, allowing the JSC to adopt regulations governing aspects of its work, has not been utilised and no regulations exist to govern the work of the JSC.⁷¹ There is, therefore, no legislative guidance for the disciplinary operations of the JSC. Perhaps as a result of the lack of a legislative framework for the disciplinary operations of the JSC, very little is known about the disciplinary work of the JSC.⁷²

It is also striking to note that apart from removal from office, which the Constitution provides for, there is no legislative guidance providing for any lesser penalties that can be imposed by the JSC in disciplining judicial officers. The result is the absurdity of having one penalty for all manner of infractions that judicial officers may be found guilty of. By way of comparison, the United Kingdom's Constitutional Reform Act of 2005 reveals that the Lord Chief Justice has a range of possible disciplinary measures that he/she can have recourse to in exercise of his/her disciplinary powers. In terms of section 108 of the Constitutional Reform Act, the Lord Chief Justice may give an errant judicial officer formal advice, a formal warning, a formal reprimand, or suspend a person from office among other options. Similarly, the Judicial Service Commission Act of South Africa reveals a range of disciplinary options that can be utilised other than removal from office. For example, under section 15, the Chairman of the JSC or the Head of Court may summarily dismiss 'lesser complaints'⁷³ and for the serious but non-impeachable offences, the Head of Court may direct that the concerned judicial officer receive a reprimand, make an apology to the complainant or that a warning be issued against the judicial officer.⁷⁴ Against this background, it is important to bear in mind the fact that the JSC remains the only institution that can, if properly empowered, exercise the required supervisory and disciplinary authority over judicial officers

⁷¹ Author interview with a former member of the JSC (Mangochi, Malawi, 26 February 2015).

⁷² The judiciary has a Code of Ethics but as Gloppen and Kanyongolo note, this is neither well known nor effectively enforced, Gloppen (n 13) 83. As poignantly acknowledged by a former Acting Chief Justice, 'The Malawian Code is quite comprehensive save that it is rather weak in prescribing sanctions for offenders'—Kalaile (n 67) 30.

⁷³ This includes complaints that are deemed to be frivolous or lacking in substance or those that are hypothetical, see s 15, Judicial Service Commission Act 1994.

⁷⁴ Section 17, Judicial Service Commission Act 1994. 'Head of Court' is defined under section 7 of the Act and may mean, in relation to a complaint against a judge; the chief justice for judges of the Constitutional Court, the President of the Supreme Court of Appeal for judges of the supreme court and for judges serving in any other court, the judge president of their respective courts.

without being implicated in political or other averse influences.⁷⁵ In the end, it is for the JSC to adopt regulations governing its work. While the adoption of regulations must be a function undertaken by the JSC, it is also important that such procedures support transparency and accountability.⁷⁶

The position in Malawi, in relation to the JSC and the disciplining of judicial officers, contrasts sharply with the situation in both South Africa and the United Kingdom. In South Africa the Judicial Service Commission Act of 1994, as amended, has provided fairly clear procedures for maintaining disciplinary oversight over judicial officers. For example, under chapter 2 of the Judicial Service Commission Act a judicial conduct committee chaired by the Chief Justice is established to spearhead the oversight over judicial conduct and accountability of judicial officers. Should the chairperson of the judicial conduct committee be satisfied that a judicial officer is guilty of an impeachable offence, the chairperson must refer the complaint to the judicial conduct committee which in turn must consider whether it must recommend to the JSC that a judicial conduct tribunal should investigate and report on the concerned officer.⁷⁷ The judicial conduct tribunal is mandated to investigate allegations of incapacity, gross incompetence, or gross misconduct against judicial officers and make a determination on the merits of the allegations.⁷⁸ Upon making its determination, the judicial conduct tribunal must submit a report with its findings to the JSC. Acting under the powers conferred by section 25 of the Judicial Service Commission Act, the Chief Justice has promulgated rules to govern the hearings before the judicial conduct tribunal.⁷⁹

In the United Kingdom, the Judicial Conduct Investigations Office (JCIO), formerly the Office of Judicial Complaints, works with the Lord Chancellor and the Lord Chief Justice in overseeing the discipline of judicial officers.⁸⁰ The JCIO is governed by the Judicial Discipline (Prescribed Procedures) Regulations of 2014 and other rules made thereunder.⁸¹ Part two of the Judicial Discipline (Prescribed Procedures) Regulations outlines the process by which allegations of misconduct must be investigated. Briefly, a judge nominated by the Lord Chief Justice leads the investigation

⁷⁵ Garoupa (n 10) 64.

⁷⁶ Manyatera (n 42) 98.

⁷⁷ Section 16, Judicial Service Commission Act 1994.

⁷⁸ Section 26, Judicial Service Commission Act 1994.

⁷⁹ Rules Made in Terms of s 25(1) of the Judicial Service Commission Act 1994 (Act No. 9 of 1994) to Regulate Procedures Before Judicial Conduct Tribunals, 18 October 2012 <<http://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor864-jsc-rules.pdf>> accessed 2 October 2017.

⁸⁰ For the Judicial Conduct Investigations Office, see <<https://judicialconduct.judiciary.gov.uk/>> accessed 2 October 2017.

⁸¹ The Judicial Discipline (Prescribed Procedures) Regulations, 2014 <https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1-xuw6pgd2b1rf/uploads/2015/12/uksi_20141919_en.pdf> accessed 2 October 2017.

of misconduct against a judicial officer.⁸² A disciplinary panel formally considers the allegations and makes recommendations to the Lord Chief Justice. The final decision rests with the Lord Chief Justice and the Lord Chancellor who may decide whether to dismiss the case against the judicial officer or take some other form of disciplinary action.⁸³

In the absence of detailed regulations on the disciplining of judicial officers in Malawi, it is very difficult to conduct a meaningful comparison between the situation in Malawi and that in South Africa or the United Kingdom. Nevertheless, the amount of attention dedicated to the matter, both in South Africa and in the United Kingdom, highlights the anomaly of the situation in Malawi. It is simply impossible to maintain a viable disciplinary regime over judicial officers in the absence of clear and detailed regulations.

The accountability of the JSC in Malawi

Globally, while independence of the judiciary has been extensively studied, little attention has been paid to judicial accountability.⁸⁴ The same is true in Malawi.⁸⁵ Even less scholarly attention has been accorded to the accountability of JSCs in countries where they exist. Nevertheless, for a JSC to adequately support an independent and accountable judiciary, it must also be both independent and accountable. As demonstrated earlier, the independence of a JSC may depend on its legal status and its composition, among other attributes.

The JSC exercises public power. It is trite that the exercise of all public power demands accountability. However, the nature and intensity of the accountability varies depending on the nature of the power being exercised.⁸⁶ Nevertheless, the norm is that those who hold public power must always be responsible and answerable for their actions and inactions.⁸⁷ Generally, 'weak systems and processes are harbingers of poor accountability and public institutional decadence.'⁸⁸ Examples of weak systems include organisational structures that do not offer clear descriptions of responsibilities or even clear lines of authority and accountability.

Even though the means of accountability for the judiciary are markedly different from those applicable to the executive and the legislature, as an institution, the judiciary is not immune from accountability. The duty to

⁸² Regulation 10, Judicial Discipline (Prescribed Procedures) Regulations.

⁸³ *ibid* Reg 15.

⁸⁴ Garoupa (n 11) 106.

⁸⁵ Liabunya (n 21).

⁸⁶ Mhango (n 24) 75.

⁸⁷ Umar Kakumba and David Fourie, 'Enhancing Local Government Systems and Processes towards Accountability: The Case for External Control Agencies in Uganda' <http://repository.up.ac.za/bitstream/handle/2263/8168/Kakumba%20_Enhancing%282008%29.pdf?sequence=1&isAllowed=y> accessed 25 July 2017.

⁸⁸ *ibid*.

account extends to the JSC. In Malawi the Constitution underlines the need for justification for all exercise of public power.⁸⁹ Crucially, the legitimacy of a JSC can also be measured in terms of its accountability.⁹⁰ A JSC that does not practice any accountability will find it difficult to demand or facilitate accountability on the part of the judiciary.

The JSC in Malawi has no public record of its accountability. This is compounded by the fact that, as pointed out earlier, there is no specific legislative guidance for the work of the JSC. This lack of an accountability record is an anomaly considering the emphasis that the Constitution places on transparency and accountability.⁹¹ By way of example, firstly, the JSC has never publicly disclosed considerations that it takes into account in recommending names for appointment as judges, and also for rejecting applications for appointment to the bench. Secondly, the JSC has never publicly disclosed the number of complaints that it has received against serving judicial officers, and the steps it has taken to resolve the complaints. Admittedly, there may be aspects of the work of the JSC that may require confidentiality. The problem, however, is that, presently, almost the entire remit of the JSC's work is shrouded in secrecy and mystery. The JSC exercises authority vested in it by the Constitution and it is axiomatic that it should be accountable at all times, for how it exercises this authority. There is no constitutional imperative that can justify a blanket lack of accountability on the part of the JSC. This lack of accountability undermines the legitimacy of the JSC as a body entrusted with constitutional functions.

A good contrast to the situation in Malawi can be gleaned by examining the position in South Africa. Section 5 of South Africa's Judicial Service Commission Act empowers the Minister to 'make known the particulars' of the procedures adopted by the JSC. Acting under the powers conferred by section 5, the Minister promulgated the Judicial Service Commission Act, 1994 (Act No. 9 of 1994), Procedure of the Commission Rules (the Rules).⁹² These Rules have very clear provisions setting out, among other things, the procedure for the nomination of candidates for appointment as judges of the Constitutional Court or judges of the High Court. Further, the Rules set out, in detail, steps that must be followed in processing applications for potential appointment to the South African bench. In Malawi's case, it is the lack of similar detail that is worrying.

⁸⁹ For example, s 12 and s 43 of the Constitution.

⁹⁰ Malleon (n 57) 39.

⁹¹ Section 13(o) and section 12 of the Constitution.

⁹² Republic of South Africa, Government Gazette (March 2003) <http://www.justice.gov.za/legislation/regulations/r2003/2003_r423_gg24596-jsc.pdf> accessed 2 October 2017.

The JSC, Judicial Independence and the Appointment of Judges

Judicial independence is a complex and multifaceted phenomenon.⁹³ As earlier pointed out, it can be understood at various levels. Irrespective of how it is understood, judicial independence can be compromised by both external and internal factors. Externally it may be compromised by other government agencies, with the executive remaining the traditional major potential threat. Internally, judicial officers themselves may constitute a threat to judicial independence if they subscribe to, and seek to impose on other judicial officers, methods and styles inimical to judicial independence. It must be recalled that judicial independence is ultimately founded in public trust. To maintain it, judges must uphold the highest standards of integrity and be accountable to the public.⁹⁴

In many countries, the system employed for selecting judicial officers manifests a dialectic between judicial independence and judicial accountability. Independence is necessary to prevent the emergence of a compromised judiciary. At the same time, improperly structured, independence may increase the risk of judicialising public policy.⁹⁵ This is because, inevitably, judicial decisions have an impact on politics and the performance of executive function as courts are constantly involved in the resolution of wide ranging political disputes. There is, therefore, always motivation for seeking to capture the judiciary. At the same time, it must be recalled that the clout of the judiciary is not political. Rather, it is intellectual and reputational, and thus limited to what it can acquire through effective job performance.⁹⁶ A careful balance between independence and accountability should preserve the constitutional role of the judiciary and enhance its credibility. A JSC retains high prospects of generating judicial independence as it is best placed to maintain the delicate balance between judicial independence and accountability.⁹⁷ It has also been argued that how judicial officers are selected reflects not just their decision-making but also their conduct while on the bench.⁹⁸ Therefore, the manner in which judicial officers are appointed remains very important. Equally important is the role of a JSC as a vehicle to facilitate judicial appointments.

There is no universally accepted method for selecting judicial officers. Countries utilise different mechanisms depending on their perception of judicial independence.⁹⁹ Admittedly, international guidelines exist governing the appointment of an independent judiciary. However, none of these prescribe a specific modality through which judicial officers must

⁹³ Garoupa (n 10) 58.

⁹⁴ Jane Ansah, 'Judicial Accountability' in *The Malawi Judiciary* (n 67) 181.

⁹⁵ Garoupa (n 10) 59–61.

⁹⁶ Marshall (n 23) 25.

⁹⁷ Manyatera (n 42) 95.

⁹⁸ Thuku (n 30) 47.

⁹⁹ Manyatera (n 42) 90.

be appointed.¹⁰⁰ While different countries employ different methods, the overriding objective is always to constitute a judiciary that can ably discharge its functions and maintain public confidence.¹⁰¹ Nevertheless, many common law and civil law countries use JSCs for the purposes of facilitating the appointment of judicial officers. The use of a JSC to midwife the appointment of judicial officers does not in itself guarantee the creation of an independent judiciary.¹⁰² Whether a JSC contributes to the creation and maintenance of an independent judiciary in practice, is often a result of the powers vested in it by law and the manner in which it exercises these powers.

In connection to the JSC in Malawi, a major point of concern is that there are no robust limitations on the power of the president to appoint judges.¹⁰³ Coupled with a general lack of transparency in the entire process for appointing judicial officers, this is a fertile source of discontent and rumour mongering.¹⁰⁴ By way of illustration, although the Constitution directs the president to appoint judges ‘on the recommendation of the Judicial Service Commission’, the exact meaning of this directive is not certain. It is not clear if the president is bound to follow the recommendations of the JSC and it is difficult to tell, in practice, the amount of weight that the president attaches to these recommendations. Therefore, one cannot tell if the president has appointed a judicial officer from the list recommended by the JSC or if he/she has made the appointment from outside of the recommended list of names. The entire process for appointing judicial officers is marked by a deep opacity which does not augur well for judicial independence and accountability.¹⁰⁵ Additionally, it is not clear what guidelines, beyond the general qualifications criteria in the Constitution, the JSC follows in vetting applications to come up with recommendations for the president. Unfortunately, the lack of transparency creates legitimate doubt about the integrity of the recommendations that the JSC makes in terms of appointments to the bench.¹⁰⁶

¹⁰⁰ See for example, Principle 10 in UN, ‘United Nations Basic Principles on the Independence of the Judiciary’ (1985) <<https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>> accessed 20 July 2017.

¹⁰¹ Thuku (n 30) 46.

¹⁰² Manyatera (n 42) 90.

¹⁰³ Gloppen (n 13) 77.

¹⁰⁴ See for example, Editorial Staff, ‘Malawi Judicial Officers Protest Mbendera Appointment as Justice of Appeal’ *Nyasa Times* (Malawi, 4 February 2013) <<https://www.nyasatimes.com/malawi-judicial-officers-protest-mbendera-appointment-at-justice-of-appeal/>> accessed 19 January 2018.

¹⁰⁵ Kanyongolo (n 13).

¹⁰⁶ IBA Malawi, ‘Report on a Mission to Malawi by the IBA’ (August 2002) <<https://www.ibanet.org/Document/Default.aspx?DocumentUId=7141B042-B9FD-44A8-A0A4-3A27833B1F7D>> accessed 2 August 2017.

The process followed by the South African JSC in appointing judges offers helpful insights against which the processes in Malawi can be evaluated.¹⁰⁷ Under section 178(6) of the Constitution of the Republic of South Africa, the JSC is entitled to determine its own procedures. The ‘Procedures of the Judicial Service Commission’ were duly adopted and they guide the JSC in its operations. When a vacancy arises the JSC calls for nominations which must consist of a letter of nomination; the candidate’s acceptance of the nomination; a questionnaire prepared by the JSC and completed by the candidate; and any ‘further pertinent information’ that the candidate or the nominator may wish to provide. The JSC then prepares a short list of candidates including those that any member feels that they should be included or who have a ‘real prospect of selection for appointment.’ Comments on nominations are then sought from the organised legal profession, the Ministry of Justice, and any other institutions as may be identified by the JSC as having an interest in its work. Material received on the short-listed candidates is then distributed to the commissioners who conduct public interviews of the candidates. Deliberations of the JSC take place in private and candidates are selected by consensus or majority vote if necessary. In the case of judges for the Constitutional Court, the JSC makes recommendations, with reasons, to the president. The president has to choose from a list of three more than the number of vacancies. The president must follow the JSC’s advice.¹⁰⁸

While the relationship between selection procedures for judicial officers and judicial independence is far from a simplistic linear one, it is arguable that the more detailed and transparent procedures applied in South Africa stand a better chance of nurturing judicial independence and accountability. The involvement of the president, who is, invariably, vested with political interests, in the selection of judges in Malawi highlights the necessity of having in place very clear procedures for the appointment of judges so that judicial independence is safeguarded. The lack of clarity about the president’s role in the appointment of judicial officers means that there will always be a risk that the president may, without public knowledge, undermine both the recommendations of the JSC as well as the Constitution’s foundational values.

LOOKING TO THE FUTURE: A JSC ALIGNED WITH THE CONSTITUTION’S ASPIRATIONS

As alluded to earlier, the Constitution embodies a commitment to democratic governance and constitutionalism. The JSC is a key player in

¹⁰⁷ For a good analysis of the selection of judges in South Africa and the role of the judicial service commission, see, Democratic Governance and Rights Unit, ‘Judicial Selection in South Africa’ <<http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf>> accessed 3 October 2017.

¹⁰⁸ *ibid.*

safeguarding judicial independence and entrenching constitutionalism in Malawi. Subsequent to the transition to multiparty democracy, the political settlement in Malawi, over time, has resulted in a significant erosion of public confidence in the country's political institutions and processes. However, amidst all this the judiciary has remained 'reasonably robust and politically significant, with considerable public confidence.'¹⁰⁹ While the public confidence that the judiciary enjoys is commendable, it is no cause for complacency. It is therefore important to create continuous engagement and reflection on the judiciary in order to improve its performance further. In this article, the focus has been the JSC and its role in fostering, among other things, judicial independence and accountability. Many lessons can be learnt from the manner in which JSCs elsewhere function. However, as cautioned by Malleson, it is not necessary to religiously adopt arrangements from elsewhere.¹¹⁰ It is contended that the lessons from other jurisdictions may help in shaping solutions but local conditions must inform the proposed solutions. In the following paragraphs some suggestions are offered for improving the performance of the JSC.

The Adoption of Enabling Legislation

It is a big anomaly that the JSC does not have an enabling law.¹¹¹ Many of the shortfalls highlighted so far could be addressed by the adoption of a comprehensive enabling legislation. A detailed legislative framework is a necessity for the JSC.¹¹² In the absence of an enabling law, the JSC finds itself in the undesirable position where it has to rely on the general guidance from the Constitution for its operations. It is trite, however, that constitutions, generally, make broad and general provisions, leaving the specifics to Acts of parliament. It is unrealistic to expect that the JSC can get sufficient guidance on specific questions from the general guidance in the Constitution. While the JSC has been operating without enabling legislation since 1994, it is clear that this has only been possible in straightforward, routine, and minor issues. As currently positioned, for example, the JSC

¹⁰⁹ Gloppen (n 13) 75.

¹¹⁰ Malleson (n 28) 102–103.

¹¹¹ Examples from other jurisdictions include: the Judicial Service Act 2011, from Kenya available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Judicial_Service_Act_2011.pdf> accessed 26 July 2017; the Judicial Service Commission Act 1994 of South Africa available at <<http://www.justice.gov.za/legislation/acts/1994-009.pdf>> accessed 26 July 2017 and the Judicial Service Commission Act 1995 of Namibia available at <<http://www.ejustice.moj.na/JUDICIARY/LegislationAndDirectives/Acts%20%20Judiciary/Judicial%20Service%20Commission%20Act%2018%20of%201995.pdf>> accessed 26 July 2017.

¹¹² This was also recognised by Justice Andrew Nyirenda, currently the Chief Justice of Malawi. In his words: 'Perhaps because of lack of appropriate legislation events of the recent past have exposed the challenges the Commission will face in dealing with disciplinary matters involving judicial officers'—Andrew Nyirenda, 'The Supervisory Role of the Judicial Service Commission' in *The Malawi Judiciary* (n 67) 220.

cannot dispose of any complex case involving judicial misconduct.¹¹³ The adoption of a legislative framework to guide the operations of the JSC, therefore, needs to be prioritised.

Transparency and Accountability of the JSC

The JSC has key roles to play in recommending names for appointment to judicial office and in the disciplinary superintendence over judicial officers. Both roles are matters over which the public retains a legitimate interest. Therefore, to cloak the processes in secrecy undermines constitutionalism. In terms of recommending names for possible appointment to the bench, the JSC must spearhead a process of publicly clarifying the manner in which it shortlists applicants and makes recommendations to the president, among other things. The danger with maintaining high levels of secrecy is that it creates room for patronage to influence appointments to the bench with little opportunity for public scrutiny.¹¹⁴ It would also be important to provide clarity as to the grounds on which the president, as the appointing authority, may reject a recommendation of the JSC.¹¹⁵ Similarly, the JSC must help bring greater transparency in the manner in which disciplinary matters are handled. For example, the public needs greater clarity on where to lodge complaints against judicial officers and the JSC should also take the initiative of being open about the complaints it receives and the manner in which it resolves them.¹¹⁶ An expeditious way of resolving this would be through the adoption of regulations under section 5 of the Judicature Administration Act.

In terms of its accountability, the JSC could improve on many levels. Generally, the JSC needs to be more accountable about the manner in which it performs its duty of regulating the judiciary.¹¹⁷ One simple way in which this could be done would be by the JSC adopting the practice of publishing annual reports of its operations. In this regard, the JSC could learn from the South African and English approaches, where the respective commissions produce annual reports of their operations. In South Africa, the JSC's duty

¹¹³ *ibid* 221.

¹¹⁴ Malleon (n 28) 104.

¹¹⁵ *ibid* 113.

¹¹⁶ For example, under s 14(1) of the South African JSC Act it is provided as follows: 'Any person may lodge a complaint about a judge with the Chairperson of the committee.' Such clarity of direction is lacking in Malawi.

¹¹⁷ As noted by a former SCA judge in 2007: 'we have not seen that a single concerned judge has been publicly reprimanded in one way or another. We still adhere to the old principle that judges must be trusted and that they should be accountable to their conscience, therefore, that they should be left alone. We cling to the view that the judge does not need to give an explanation for this action' [*sic*]*—*HM Mtegha, 'Judicial Transparency' in *The Malawi Judiciary* (n 67) 192.

to prepare reports is required by law in terms of section 6 of the JSC Act.¹¹⁸ Similarly, in the United Kingdom, the duty is provided for in rule 32 of Schedule 12 of the Constitutional Reform Act.¹¹⁹ In the case of Malawi, the annual report could, among other things, include a review of the staffing levels in the judiciary; a summary of the recruitment for the particular year including the number of vacancies advertised; the number of shortlisted candidates; and any other achievements worth highlighting.¹²⁰ An analysis of the complaints filed and how they have been resolved would be apposite. A statement as to the status of the outstanding complaints would also be in order. Within the country, the practice by the Malawi Human Rights Commission and the Office of the Ombudsman, whereby they prepare annual reports that are submitted to the National Assembly could also be utilised as a model to enhance the accountability of the JSC.¹²¹

Strengthened Administrative Support

In principle, the remit of the JSC is very wide. As pointed out earlier, in terms of the Constitution, the JSC is vested with the power to regulate judicial officers.¹²² Nominating people for judicial office and exercising disciplinary powers over judicial officers is simply part of the regulation of judicial officers. Currently, however, the administrative support for the JSC is rather invisible. Apart from members of the legal profession, knowledge about the JSC and its operations remains very low among the general populace. It must also be recalled that, as currently composed, members of the JSC work part-time as they all have other positions besides serving in the JSC. To properly capacitate the JSC to discharge its constitutional mandate, therefore, the JSC requires visible and prominent administrative support. Such support may assist in the creation of a vibrant JSC even if some of its members continue to serve on a part-time basis.

¹¹⁸ Section 6 as amended in 2008, provides as follows: (1) The Commission shall within six months after the end of every year submit a written report to Parliament for tabling; (2) The report referred to in subsection (1) must include information regarding—(a) the activities of the Commission during the year in question; (b) all matters dealt with by the Judicial Conduct Committee referred to in section 8; (c) all matters relating to, including the degree of compliance with, the Register of Judges' Registrable Interests; and (d) all matters considered by the Commission in the course of the application of Chapters 2 and 3 of this Act, including the number of matters outstanding and the progress in respect thereof.

¹¹⁹ Rule 32, in so far as is material provides as follows: (1) The Commission must, as soon as practicable after the end of each financial year, provide to the Lord Chancellor a report about the performance of its functions during that year; (4) The Lord Chancellor must lay before each house of Parliament a copy of any report provided to him under paragraph (1).

¹²⁰ Thuku (n 30) 89.

¹²¹ In the case of the Office of the Ombudsman, the submission of annual reports to parliament is a constitutional obligation under s 127 of the Constitution. As for the Human Rights Commission, the obligation is statutory by virtue of s 37 of the Human Rights Commission Act, Cap. 3:08, Laws of Malawi.

¹²² Section 116 of the Constitution.

Under the present arrangement, the JSC is ‘administered’ as part of a cluster of four service commissions.¹²³ The most visible of these four commissions remains the Civil Service Commission and euphemistically speaking, it is often said that the JSC is housed within the Civil Service Commission. In terms of budget allocation, none of the commissions gets an individual vote. Funding is allocated to the cluster of four service commissions, which must then decide how to allocate the funding amongst themselves depending on their programmes.¹²⁴ The four service commissions share a secretariat and staff. For reporting purposes, the four service commissions prepare a single combined report which is submitted to the office of the president and cabinet.

By way of comparison, in South Africa, under the terms of section 37(1) of the Judicial Service Commission Act, the ‘Executive Secretary in the Office of the Chief Justice must assign an appropriate number of personnel, one of whom must be designated as the Secretary of the Commission ... to provide administrative support to the Commission.’ Further, in terms of section 36(3) of the same Act, ‘[t]he Minister must consult with the Chief Justice on the funds required for the administration and functioning of the Commission, as part of the budgetary process of departments of state, in the manner prescribed.’ Similar provisions are found in Schedule 12 of the Constitutional Reform Act in the United Kingdom. For example, in terms of rule 22 of Schedule 12, ‘[t]he Commission – (a) must appoint a chief executive, and (b) may appoint such other staff as it considers necessary to assist in the performance of its functions.’ In rule 30(1) of Schedule 12 the following provision is made: ‘the Lord Chancellor must pay to the Commission such sums as he may determine are appropriate for, or in connection with, the exercise by it of its functions.’

The position in South Africa and the United Kingdom evinces a deliberate attempt to clarify the administrative arrangements pertaining to their respective commissions. With its rather ‘undefined’ administrative structure, the JSC in Malawi is ill positioned to fulfil its constitutional mandate. The JSC requires a fully functional and permanent secretariat in order to be in a position where it can ably fulfil its mandate. One key role that the strengthening of the JSC’s administrative support should target is the design and implementation of a regular appraisal system for judicial officers. This may be for purposes of auditing their performance or determining the training needs of the judiciary or simply for determining the needs for maintaining ethical conduct.¹²⁵ An appraisal system would also assist in providing feedback about the work of the JSC and facilitate

¹²³ The other three service commissions being the Police Service Commission, the Civil Service Commission and the Prison Service Commission.

¹²⁴ Author interview with Director of Programmes at the Judicial Service Commission (9 October 2017).

¹²⁵ Cf. Thuku (n 30) 97.

the training of members of the JSC on good practices to help them better carry out their duties.¹²⁶ As appraisals of judicial officers raise delicate issues, it may be ideal that the JSC should oversee this function rather than the judiciary itself. However, meaningful appraisals would require greater administrative support to the JSC than is currently available.

Composition of the JSC

With its membership at twenty-three, the South African JSC is, arguably, too big for efficient decision-making. However, the South African JSC is a product of the unique negotiations that preceded the adoption of the Constitution of the Republic of South Africa. Therefore, the size of the South African JSC must be understood within this context. The JSC in Malawi, with a membership of five, is also too small a committee in the light of the functions bestowed on it by the Constitution. Crucially, the JSC also suffers from a narrow membership seeing as it is dominated by members of the legal profession, generally, and the judiciary, specifically. It is thus important not only to increase the size of the JSC but also, to ensure a broadening of its expertise, by providing for a diversification of its membership. A JSC, with a more diversified membership, is best placed to command acceptance and legitimacy. Therefore, in restructuring the JSC, it would be important to consider diversity.¹²⁷ Seeing as the composition of the JSC is provided for in the Constitution, it would be necessary to amend the Constitution in order to alter the composition of the JSC. The amendment could deliberately increase the size of the JSC and direct a mandatory diversification of the professions and personalities represented in the JSC. On this point, the composition of the JAC in the United Kingdom and the JSC in South Africa offer useful examples of the diversity that may be aimed at restructuring the JSC. As pointed out earlier, a commission of between ten and fifteen members would be ideal for Malawi.

ARE THE GUARDIANS OF THE GATEKEEPERS BEYOND REPROACH?

A final issue to be addressed relates to the question whether the guardians of the gatekeepers are beyond reproach in the performance of their duties. Admittedly, this issue is related to the question of accountability of a JSC. However, bearing in mind the significance of the matter in Malawi, it is apposite to address it separately. Foundationally, the question is whether a JSC can be challenged in the performance of its duties.

It is important to point out that since the Constitution was adopted in 1994, there has been only one attempt to challenge the JSC in the performance of its duties in Malawi. In 2003, President Bakili Muluzi appointed four judges of the High Court. Subsequently, a non-governmental organisation,

¹²⁶ *ibid.*

¹²⁷ Malleison (n 28) 117.

the Civil Liberties Committee, filed an application with the High Court in an attempt to stop the swearing in of the four judges pending a judicial review of the appointment process. The basis for the challenge was that the appointing authority had shown ethnic bias in appointing the four judges.¹²⁸ The High Court granted leave to move for judicial review of the appointment process but never pronounced itself on the merits of the application and the president went ahead to swear in the four judges.¹²⁹ The reasons for the court's failure to pronounce itself on the merits of the case remain unclear.

On this point, the most instructive comparative jurisprudence is from South Africa. The single consistent point that emerges from the South African case law is that a JSC, being a creature of the law, cannot be beyond reproach. Rather, it is amenable to judicial scrutiny in the performance of its duties. As will be demonstrated shortly, this is equally valid in and applicable to Malawi. A quick survey of a few judgments involving the South African JSC will help illustrate the point here.

The decisions in both *The Judicial Service Commission v The Cape Bar Council*¹³⁰ (the *Cape Bar Council* case) and *The Acting Chairperson: Judicial Service Commission v The Premier of the Western Cape Province*¹³¹ (the *Premier of the Western Cape Province* case) speak to the importance of having a JSC properly constituted when it is transacting its business. Two interrelated issues fell for resolution in the *Cape Bar Council* case. Firstly, whether the JSC could be properly constituted in the absence of the president of the Supreme Court when the law expressly required his presence and, secondly, whether the JSC acted rationally and constitutionally in failing to recommend names for appointment to judicial office to the president. The Supreme Court of Appeal of South Africa (the Supreme Court) held that under the doctrine of legality, which is a part of the rule of law, the exercise of public power is legitimate only when it is lawful. The principle also requires that public power should not be exercised arbitrarily or irrationally. The Supreme Court held that decisions of the JSC advising the president on the appointment of judges are an exercise of public power and, therefore, amenable to review under the doctrine of legality. In terms of the composition of the JSC, the Supreme Court's view was that if any of the persons listed by the constitution are absent, the JSC would be improperly constituted, and any decisions taken in such a context would be invalid. In relation to the decision not to recommend names for appointment as judges,

¹²⁸ See SAPA/AFP, 'New Judges are Ethnically Biased' *IOL* (Johannesburg, 19 March 2003) <<https://www.iol.co.za/news/africa/new-malawi-judges-are-ethnically-biased-103382>> accessed 15 January 2018.

¹²⁹ See Editorial Staff, 'Malawi Review into New Judges' (*Media24* Johannesburg, 28 March 2003) <<https://www.news24.com/Africa/News/Malawi-review-into-new-judges-20030328>> accessed 15 January 2018.

¹³⁰ (818/11) [2012] ZASCA 115 (14 September 2012).

¹³¹ (537/10) [2011] ZASCA 53 (31 March 2011).

the Supreme Court held that, as a general rule, the JSC is obliged to provide reasons for its decisions not to recommend a particular candidate when called upon to do so. The expansiveness of the reasons, however, will vary on a case-by-case basis. In the *Premier of the Western Cape Province* case, the Supreme Court confirmed that where the JSC made decisions while not being properly constituted such decisions should be set aside in their entirety.

The decisions in *Mail and Guardian Limited v The Judicial Service Commission*,¹³² (*Mail and Guardian* case) and *eTV and others v The Judicial Service Commission*,¹³³ (*eTV* case), stand for the proposition that proceedings of the JSC are matters of public interest and the public should be granted access to them unless exceptional circumstances require otherwise. In the *Mail and Guardian* case, the applicants challenged the decision of the JSC barring media access to a preliminary investigation which was to be held as part of the disciplinary process. The court held that in a democracy there was no justification for veiling operations of the JSC and the judiciary at large. Pointedly, the court also held that while the JSC retained the right to regulate its procedures, this power would not absolve it from acting in accordance with the constitution. In the court's view, the need for public information and awareness follows from the demands of democracy, which require continuous public participation in matters of national interest. The decision of the JSC was, accordingly, set aside. In the *eTV* case, the challenge was against the decision of the JSC to hold a closed-door hearing of a complaint against a serving judge president. In overruling the JSC, the court held that it is of fundamental constitutional importance that matters of public importance should be determined in public rather than behind closed doors save in exceptional cases. In the court's view, while it may not be illegal for the JSC to hold closed door hearings, the burden of proving that it was necessary to hold a closed door hearing lay with the JSC.

In terms of the procedures of the JSC, two decisions are relevant. Firstly, in *Nkabinde v The Judicial Service Commission*¹³⁴ the challenge related to the legality of steps taken by the JSC in response to a complaint lodged by judges of the Constitutional Court against the judge president of the Western Cape High Court. Notable here is the fact that in 2010, well after the complaint at issue had been lodged, the Judicial Service Commission Act was amended to create a new statutory regime for dealing with complaints against judges. It was the applicability of the new disciplinary regime to a complaint lodged before the amendments to the JSC Act that was in issue. The Supreme Court held that in the absence of impairment of substantive rights the complaint against the judge president of the Western Cape High

¹³² South Gauteng High Court, Case No. 09/30894.

¹³³ South Gauteng High Court, Case No. 13712/09; 13647/09.

¹³⁴ (20857/2014) [2016] ZASCA 12 (10 March 2016).

Court could legally proceed under the new statutory regime. Secondly, in *Langa v Hlophe*¹³⁵ two interrelated issues rose for determination. The first was whether a judge against whom a complaint was laid before the JSC was entitled to be heard before the complaint was formally lodged, and the second was whether such a judge was entitled to be heard before the complaint against him/her was made public. The Supreme Court held that there is no obligation to invite a judge to be heard, before a complaint is laid against him/her even though such a judge would be entitled to be heard in the course of the investigation. Further, the Supreme Court held that once a complaint is lodged there is no obligation to keep it secret.¹³⁶

Admittedly, there are differences in the legal framework between Malawi and South Africa. Nevertheless, the decisions discussed above stand for principles that have equal applicability in Malawi. As intimated earlier, the core principle emerging from the decisions is that courts can intervene to supervise the work of a JSC to ensure compliance with the law. Three key principles are also manifest. The first principle speaks to the importance of ensuring that a JSC is always constituted according to the law that establishes it. As pointed out earlier, section 117 of the Constitution spells out the composition of the JSC in Malawi. It is therefore, axiomatic that the JSC must always be constituted as outlined in section 117. A failure to constitute the JSC in line with section 117 of the Constitution would nullify any decisions reached by the JSC. The challenge in Malawi, however, is that since the proceedings of the JSC are not made public, there is the initial difficulty of determining whether a meeting of the JSC is legally quorate. This secrecy entails that even where the JSC proceeds without its full membership, as listed in section 117 of the Constitution, a publicly spirited citizen may still struggle to obtain evidence of the basis on which to challenge the proceedings of the JSC.

The second principle emphasises the importance of granting public access to proceedings of a JSC. As the decisions in the *Mail and Guardian* case and the *eTV* case reiterate, proceedings of a JSC are matters of public interest and unless exceptional reasons militate otherwise, the public should be granted access to these proceedings. In Malawi, transparency, accountability, and openness are recognised as constitutional values.¹³⁷ Against this background, therefore, it is highly anomalous that proceedings of the JSC remain shrouded in secrecy. Facilitating openness to the proceedings of

¹³⁵ (697/08) [2009] ZASCA 36 (31 March 2009).

¹³⁶ In *Freedom Under Law v Judicial Service Commission* (52/2011) [2011] ZASCA 59 (31 March 2011) the SC held that where an allegation of misconduct was lodged against a judicial officer, it was always in the interests of justice that such complaint should be determined on the merits and should not simply be swept under the carpet, because it is being denied by the accused judge, or because it would be expensive to investigate.

¹³⁷ See, ss 12 and 13 of the Constitution and also s 37 which guarantees the right of access to information.

the JSC would be doing no more than aligning the operations of the JSC to the values of the Constitution. This openness could be extended to the process of recruiting judicial officers as well as aspects of the disciplinary process. Admittedly, and as pointed out in the South African case law, where appropriate, the JSC could still insist on barring public access to its proceedings. In such a cases, however, the onus lies with the JSC to justify the need for secrecy.

The third principle emphasises the need for a JSC to comply with the law in all its operations. This point emerges most clearly from the decisions in *Nkabinde v The Judicial Service Commission* and *Langa v Hlophe*. A JSC, being a creature of the law, is bound to act within the same law. In the case of Malawi, further imperative for ensuring that the JSC complies with the law in all its operations is to be found in section 4 of the Constitution which stipulates that the Constitution binds all executive, legislative, and judicial organs of the state at all levels of government. Clearly, therefore, although this article has called for the adoption of regulations to guide the operations of the JSC, it remains important that any such regulations should be crafted bearing in mind the values that the Constitution espouses. It is thus not difficult to deduce, for example, that any such regulations must automatically support the values of openness and transparency, which are already found in the Constitution.

CONCLUSION

Public perception is key to securing the integrity of the judiciary.¹³⁸ The judiciary is routinely judged by the manner in which the public perceives its work to be independent and apolitical. In as far as the JSC is concerned, the truth is that the nature of its work entails that it will never be completely free from controversy. This is partly because it is impossible to completely remove political pressure on the judiciary's work, generally.¹³⁹ The controversies and the pressures attendant to the judicial function, however, can be managed and kept within legally acceptable limits. A JSC, plays an important role in managing the pressures and controversies that are attendant to the judicial function. In the case of Malawi, this article has demonstrated that little has been done to clarify the functions of the JSC after it was re-constituted under the Constitution.¹⁴⁰ The result is that the operations of the JSC are shrouded in considerable secrecy and it is doubtful if the JSC operates in line with the values of transparency and accountability that the Constitution stands for.

¹³⁸ Shuaib (n 14) 2277.

¹³⁹ Garoupa (n 11) 117.

¹⁴⁰ The constitution preceding the 1994 Constitution also made provision for a JSC which was a committee of three people and these were: the Chief Justice, as chairperson; the Chairperson of the Public Service Commission or his representative; and a justice of appeal or judge designated by the president—Section 71, 1966 Constitution of the Republic of Malawi.

While the JSC has remained static since 1994, this article has demonstrated that there is an acute need to reform certain key aspects of its work. The article argued that constitutional institutions, like the JSC, require constant reflection to improve their performance. Specifically, in terms of reforming the JSC, the reforms could target the following, among other areas, the adoption of legislation to clarify the operations and mandate of the JSC, enhancing accountability and transparency of the JSC, creating structures to ensure that the JSC has adequate administrative support to enable it to carry out its functions, and reconfiguring the composition of the JSC to ensure an increase in its size and diversity in its membership. By referring to examples, largely from South Africa and the United Kingdom, the article has also highlighted some good practices that can be used in reforming Malawi's JSC.