

Concept Note for Roundtable

Delivery of Justice: Independence and Accountability of the Judiciary

Introduction

The appointment and removal procedures of the heads of the NPA, SAPS, the Hawks, IPID, the SIU, the office of the Public Protector, the Financial Intelligence Centre (“FIC”), and the judiciary (comprising both superior and lower courts) are of immediate concern in the era of state capture.

The HSF regards these procedures as an integral part of its ongoing research into the Delivery of Justice. This research commenced in 2010, and laid the foundations for our litigation in the fight for the independence of South Africa’s criminal justice system institutions. The current initiative in this ongoing project is centred on the legal gaps in the law identified in HSF’s publication of *The Criminal Justice System: Radical reform required to purge political interference* (<https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf>).

The HSF recommends legislative reform to codify the constitutionally required independence of these institutions. The HSF also strongly recommends that a modified Judicial Service Commission-type model be used in the appointment of all the heads of the criminal justice system institutions, with strict limitations on the number of politicians as members of such appointment committees. It further suggests that these appointment committees be made up not only of experts, but that the laity also be represented for increased public participation in a criminal justice system which is meant to be working in the interest of the public.

Similar considerations would apply to effective removal procedures which would allow for a balance between security of tenure and holding the leadership accountable.

The focus of this particular roundtable is the judiciary. The HSF’s involvement in the reform of the appointments process of judges dates back more than six years, and found its first public expression in *Helen Suzman Foundation v the Judicial Service Commission*¹. More recently, the HSF was cited as *amicus curiae* in *Lawrence v the Magistrates Commission and 3 Others*², for which judgment is awaited.

¹ (CCT289/16) [2018] ZACC 8.

² case no 1070/19 in Free State Division of the High Court.

What are the principles which should guide our deliberations?

1. **Independence:** structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference.
2. **Security of tenure:** as a feature promoting institutional independence. This provides certainty that certain office-bearers cannot be removed from office except in exceptional and specified circumstances.
3. **Accountability:** answerable to the public, with consequences for improper or incompetent conduct.

Purpose

Very general recommendations are made in our original research paper. (We have submitted an edited version of this paper to the South African Law Reform Commission³). This leaves room for debate on how best to address the outlined gaps in legislation, as well as minimising political interference and ensuring accountability in our criminal justice system.

Proposed central questions to be addressed are:

1. How should we interpret sections 174(1) and (2) of the Constitution in the context of demands for independence, competence and diversity in the judiciary?⁴
2. How can the composition and/or procedures of the JSC and the Magistrates' Commission be reformed to ensure the appointment of independent and competent judges and magistrates?
3. How can the composition and/or procedures of the Judicial Conduct Committee ("JCC") and Magistrates' Commission be reformed to ensure effective accountability of judges and magistrates?
4. Is legislative reform necessary for the improved "*transparency, efficiency and independence*" of the judiciary? Is it a matter of policy instead?
5. What other recommendations can be made to improve the "*transparency, efficiency and independence*" of our judiciary?

³ <https://hsf.org.za/news/press-releases/submission-to-salrc.pdf>.

⁴ Section 174 (1): Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.