Artificial Intelligence as an addition to the interviewing procedures of the South African Judicial Service Commission

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Dissertation accepted in fulfilment of the requirements for the degree *Master of Laws* in International Aspects of Law at the North-West University

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SOLEMN DECLARATION

I **Mpho Adam Titong** hereby declare that the dissertation entitled: **Artificial Intelligence as an addition to the interviewing procedures of the South African Judicial Service Commission** is submitted in fulfilment of the requirements for the Master of Laws (LLM) degree, is the product of my research and opinion with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any university or by any person for any qualification.

Signature of Candidate: ……

University Number: ……

Signed at: …… on this…. day of ……. 2023

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I would also like to acknowledge the support and expertise afforded to me by my supervisors- Prof Erlank Wian and Prof Neels Kilian, I am grateful beyond words for your patience and developmental input, specifically Prof Neels- who gave birth to this research project in 2022.

DEDICATION

This research project is dedicated to my two beautiful and wise daughters, Tlhalefo and Botlhale (Pule).

ABSTRACT

This research project argues for the inclusion of Artificial Intelligence (AI) in judicial appointment procedures of the South African Judicial Service Commission. It is important to note that the project does not argue the exclusion or repealing of any of the current members or procedures of the Commission. It however argues for the inclusion of AI in as far as possibility is measured. South Africa is a country with a significant measure of failure, the inclusion of AI in as far as the appointment processes are concerned is herein argued to be a plausible solution which demands due recognition. Judicial appointment processes are nothing more than employment processes, in this regard, reference to Human Resource Management (HRM) is demanded. The submission that judicial appointment processes ought to be treated as employment interviews demands acknowledgement of the fact that judicial appointment processes are a constitutional mandate. Employment as a phrase invokes the principles of recruitment and selection. Evidence on the positive results that emanate from the inclusion of AI in recruitment and selection process is, at this point, growing rapidly. Recognising the prospects of AI in recruitment and selection processes demands that attention be paid to plausible risks that are inherent to the use of the technological advancement. Bias and ethicality are some of the issues that arrive with the use of AI. Failure to execute proper recruitment and selection amounts to evidence of failure to recruit and appoint proper employment candidates. Failure to appoint proper judicial candidates results in severe results, one being the quality of judicial precedence. The global economic presence of South Africa teaches us that respect ought to be paid to the essence of judicial appointments because same is linked to a country's economy. The inclusion of AI is backed by research and experience, just as the failures of the Commission. It is against this background that this project argues for proper amendments to judicial appointment processes of the JSC by suggesting the inclusion of AI.

Keywords: artificial intelligence, judicial appointments, South Africa, recruitment and selection

LIST OF ABBREVIATIONS

AI- Artificial Intelligence

AJCL- American Journal of Comparative Law

AJRBM- Asian Journal of Research in Business and Management

ALSL- African Law Study Library

ANC- African National Congress

BCLR- Butterworths Constitutional Law Reports

BCRP- Business Communication Research Practice

BJALS- British Journal of American Legal Studies

BRSS- Bussecon Review of Social Sciences

CASAC- Council for the Advancement of South African Constitution

CC- Constitutional Court

CHB- Computers in Human Behaviour

CIE- Computer and Industrial Engineering

CILJSA- Comparative and Industrial Law Journal of Southern Africa

CJPS- Canadian Journal of Political Science

CLA- Commonwealth Lawyers Association

CLEA- Commonwealth Legal Education Association

CMJA- Commonwealth Magistrates' and Judges' Association

COPE- Congress of the People

CRPD- Convention on the Rights of Persons with Disabilities

CV- Curriculum Vitae

DGRU- Democratic Governance and Rights Unit

DPLF- Due Process of Law Foundation

EFF- Economic Freedom Fighters

EJRR- European Journal of Risk Regulation

ESPS- Excellent Student Paper Series

FJC- Federal Judicial Centre

FLS- Feminist Legal Studies

FUL- Freedom Under Law

GCBA- General Council of the Bar of Advocates

GCBSA- General Council of the Bar of South Africa

HCSCJHR- House of Commons Standing Committee on Justice and Human Rights

HLR- Hasanuddin Law Review

HR- Human Resources

HSF- Helen-Suzman Foundation

IABSCC- Independent Advisory Board for the Supreme Court of Canada

IBM- International Business Machines

ICJ- International Court of Justice

ICJC- Independent Canadian Judicial Council

IJMET- International Journal of Mechanical Engineering and Technology

IJOA- International Journal of Organizational Analysis

IPC- Independent Patriots for Change

J. Intell.- Journal of Intelligence

JAAS- Journal of Asian and African Studies

JAC- Judicial Appointments Commission

JBE- Journal of Business Ethics

JCRDL- Journal of Contemporary Roman-Dutch Law

JSC- Judicial Service Commission

JSSM- Journal of Service Science and Management

LCP- Law and Contemporary Problems

LIT- Law, Innovation and Technology

NCOP- National Council of Provinces

NDP- National Development Plan

NDPP- National Director of Public Prosecutions

NLP- Natural Language Processing

OHLJ- Osgoode Hall Law Journal

PELJ- Potchefstroom Electronic Law Journal

PTRSA- Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences

SCA- Supreme Court of Appeal

SLR- Stellenbosch Law Review

SSCLCA- Standing Senate Committee on Legal and Constitutional Affairs

THRHR- Tydskrif vir Hedendaagse Romeins Hollandse Regte

UCT- University of Cape Town

UNSC- United Nations Security Council

USA- United States of America

USIP- United States Institution for Peace

UTLJ- University of Toronto Law Journal

VJTL- Vanderbilt Journal of Transnational Law

WMBRJ- William & Mary Bill of Rights Journal

ZAGPJHC- South African: South Gauteng High Court, Johannesburg

ZEC- Zimbabwean Electoral Commission

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CHAPTER 1 RESEARCH OUTLINE

1.1 Introduction

Artificial intelligence (AI) pervades the lives of millions of people around the world. There are instances where AI can augment human decision-making processes in relation to the judiciary.[1] Simply put, AI is a field that combines computer science and vigorous data-sets to enable problem solving.[2] In the justice system, AI could facilitate the development of the skills of judges in the workplace- given that AI can provide an accurate understanding of their skill-set.[3] Additionally, the use of predictive analytics (an AI -based software advancement) within the judicial sphere has proven to be essential.[4] Predictive analytics has the potential to facilitate the maintenance of the rule of law,[5] moreover, it can improve accuracy in decision-making processes- and this will enhance and strengthen faith in the JSC.

Kevin Parker(CEO of Hirevue) has acknowledged the importance of AI by submitting that the use of machine learning to provide support for man-made decisions is essential and should be used instead of disregarding and replacing it.[6] Hirevue is a company based in the United States, which uses video intelligence to canvass video interviews of candidates

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1 Sourdin *Judges, Technology and Artificial Intelligence: The Artificial Judge* ix; Bishop 2021 https://google.com/amp/s/observer.com/2021/03/artificial-intelligence-job-interview-problems-bias-tips/amp/.

2 IBM 2020 https://www.ibm.com/za-en/cloud/learn/what-is-artificial-intelligence.
Bishop 2021 https://google.com/amp/s/observer.com/2021/03/artificial-intelligence-job-interview-problems-bias-tips/amp/.

4 Adams 2022 https://www.linkedin.com/pulse/reliable-legal-decision-support-through-use-predictive-adams.

5 Adams 2022 https://www.linkedin.com/pulse/reliable-legal-decision-support-through-use-predictive-adams.

6 Bishop 2021 https://google.com/amp/s/observer.com/2021/03/artificial-intelligence-job-interview-problems-bias-tips/amp/.

and provide employers with more insight to facilitate faster decisions.[7] The submission by the CEO of Hirevue indicates that decision-making processes by humans ought to be done away with if not used in conjunction with AI- especially within the essential sphere of judicial appointments.

The independence of the judiciary has been described as "the ultimate shield against the incremental of our moral universe",[8] so overthrowing that shield will entail overthrowing of the foundations of the democracy in South Africa.[9] The protection of judicial independence is a process that requires more than just mere visible independence by the judiciary, such independence begins with the process of appointing judges.[10]

The process of appointing judges requires immaculate ethical standards because the judiciary is an independent organ of state and deals directly with the lives of South Africans. Such authority cannot be vested in a single person. The ethical standards of the Commission have however been openly doubted over the years. This is evidenced by the statements and publications that have been made over the course of time,[11] it can therefore be submitted that there's more that the Commission needs to do; if not regarding the Commission itself.

The interim Constitution brought several significant changes to the Republic of South Africa, one of which is the manner in which judicial appointments are made.[12] The establishment of the JSC by the interim Constitution of 1993 was a noteworthy innovation for the Republic of South Africa, which drew inspiration from the judicial service

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7 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.
8 Gravett 2017 *THRHR* 267-268.
9 Gravett 2017 *THRHR* 267-268.
10 Gravett 2017 *THRHR* 268.
11 Gravett 2017 *THRHR* 271-272.
12 Oxtoby 2021 *JAAS* 34.

commissions of other jurisdictions around the world.[13] The establishment of the JSC was based on the need and intention to create a broad-based structural system that would include lawyers, judges and politicians.[14]

1.2 Problem statement

The JSC is a Commission that has its own flaws, for instance, it has been unable to inspire confidence that it acts in the best interests of an independent judiciary.[15] Former Justice Johann Kriegler stated that the manner in which judges are recommended by the JSC has increased the threat posed to the independence of the judiciary.[16] Additionally, it has been submitted that the JSC is largely influenced by party politics, instead of being independent and unbiased.

The influence of politics on the Commission raises questions as to the legitimacy of the JSC and indicates that the Commission is materially politically influenced.[17] Notably, in the case of *Freedom Under Law v Acting Chairperson of the Judicial Service Commission*,[18] the JSC was found to have acted irrationally when investigating allegations of gross misconduct on part of judge and a court decision was granted to its detriment. The case is indicative of the ethics that are lax within the Commission, the same ethics that Artificial Intelligence will serve as a solution for, hence the dissertation will argue for the incorporation of artificial intelligence within the Commission.

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13 Hoexter and Olivier *The Judiciary in South Africa* 154.
14 Oxtoby 2021 *JAAS* 34; Msuya 2022 https://ddp.org.za/blog/2022/03/16/judicial-service-commission-and-its-role-in-promoting-political-accountability-in-sa/.
15 Gravett 2017 *THRHR* 268.
16 Gravett 2017 *THRHR* 268.
17 Gravett 2017 *THRHR* 268-269.
18 2011 3 SA 549 (SCA).

During early 2011, the JSC was deemed to have acted unconstitutionally by the Cape Bar Council, in a matter that was in front of the Western Cape High Court.[19] The matter involved the failure of the Commission to fill vacancies at the Western Cape High Court, including failure to provide reasons for its recommendations: the Commission argued that it was not legally required to provide reasons,[20] but its conduct was nonetheless deemed to be unconstitutional by the court.

Moreover, the JSC has acted blatantly unfairly during the conducting of interviews, on top of a lack of transparency in its selection and evaluation processes.[21] Here one has further indications of the ethical troubles inherent to the Commission's operations. Again, it reinforces the need to include AI. Artificial Intelligence has the ability to conduct the selection and evaluation processes with the highest degree of fairness and transparency (values that are lacking within the JSC), meaning that it can aid the troubles highlighted above.

The Commission's interviewing processes have been described as a charade, a sham, intrusive in nature and interrogative, among other and negatively descriptive phrases, that speak to the Commission's lack of moderate ethical standards.[22] This problem necessitates the conducting of research on AI serving as a supplement to the Commission because the ethics of the Commission are clearly not satiating. The Democratic Governance and Rights Unit also criticized the JSC by submitting that the Commission asks questions that lack relevance and by stating that the JSC's questioning lacks focus.[23]

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19 Radebe 2014 *PELJ* 1196.
20 Radebe 2014 *PELJ* 1196.
21 Gravett 2017 *THRHR* 269.
22 Gravett 2017 *THRHR* 271.
23 Gravett 2017 *THRHR* 272.

These issues are based on the emotional nature of human beings instead of a programmed artificial intelligence platform that undoubtedly lacks emotions.

In March 2013, former Justice Zak Jacoob referred to the approach used by the JSC in its appointment of judges as flawed mainly because it lacked clear guidelines regarding its interviewing procedures.[24] This is just one other opinion expressed by persons linked to the JSC and the judiciary of the Republic of South Africa. The *National Development Plan 2030,* which provides a long-term perspective on the goals that different sectors of the Republic ought to reach within a certain period of time, also acknowledges the faults and problems of the JSC: it states that the Commission unfortunately lacks consensus on the qualities and attributes required for judicial appointment.[25] Furthermore, the interviews of the Commission generally lack consistent time frames because some interviews were short while others were quite lengthy.[26]

These problems result from the fact that the judicial appointment process is mainly conducted personally by the relevant interviewing personnel, which raises the question of bias within the Commission, whereas artificial intelligence may just prove to be what is needed because it has the potential to remove bias from the situation.

Overall, the JSC suffers from serious flaws that can be solved by the introduction and use of artificial intelligence to the Commission's procedures and operation.

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24 Gravett 2017 *THRHR* 275.
25 Gravett 2017 *THRHR* 275.
26 Gravett 2017 *THRHR* 273.

1.3 Research question

To what extent, if any, can AI assist or enhance the interviewing procedures of the Judicial Service Commission?

1.4 Research aims and objectives

1.4.1 Aims

For purposes of this research, the aims are to:

a. provide a detailed discussion on the background of the JSC so as to indicate its importance;

b. discuss the relevant problems of the JSC;

c. demonstrate the need for the use of AI by the JSC;

d. identify and examine the extent to which AI can be used to appoint judges.

1.4.2 Objectives

The objectives are the measures that the researcher will undertake to achieve the goals of the study as itemised below:

a. discuss the problem of the absence of AI within the Commission;

b. unpack the Commission's problems so as to provide the necessary contextualisation of the recommendations made by the study;

c. show the potential solutions offered by the use of AI when it comes to judicial appointments;

d. provide recommendations and give advice on the potential use of AI by the JSC.

1.5 Premises, Assumptions and Hypothesis

1.5.1 Premises

The *Constitution of the Republic of South Africa* clearly establishes a JSC, but does not prescribe the inclusion of AI. AI may serve as an effective addition when included. The dissertation posits that the fact that the Constitution does not clearly establish the interviewing procedures of the Commission is motivation enough for the inclusion of AI in selecting proper candidates for judicial posts.

1.5.2 Assumptions

The research project is based on the following assumptions:

(a) AI has no flaws and/or defects;

(b) the JSC is biased and is largely influenced by politics and therefore lacks independence.

1.5.3 Hypothesis

As indicated, the JSC lacks ethical substance around the appointments it makes and its interviewing procedures. Since bias is at the root of this problem, the present research project will argue that AI, which contains less bias, should be employed by the JSC to enhance its ethical conduct. Moreover, it is assumed that the software could serve as a supplement to the Commission.

1.6 Research methodology

The research is centred on a desktop study conducted by means of a literature review, the following sources were examined:

1.6.1 Primary and secondary sources

The research project analyses relevant extant literature with a view to integrating the materials obtained for responding to its central question as outlined above. The primary sources include the *Constitution of the Republic of South Africa*, legislation and relevant judicial precedence. The secondary sources include journal articles, books and internet sources relating either to the entwined matters of AI, the JSC or judicial appointment. For purposes of this research project, the *Potchefstroom Electronic Law Journal Referencing* Style is used.

1.6.1.1 Relevant legislation

The Judicial Service Commission Act is used in as far as it is relevant to the study.

1.6.1.2 Relevant case law

Case law that is applicable to the JSC, judicial appointment(s) as well AI will also be used accordingly.

1.7 Statement regarding ethics

This research project adopts a qualitative research method in terms of examining and correctly citing relevant primary and secondary sources. The project utilizes no individual and/or group interviews as well as questionnaires as instruments for conducting research, since the discussions involved would be sensitive or embarrassing to the participants and

readers alike. This is done further to prevent criminal and/or other disclosures requiring legal action that may have had adverse effects on participants. No need therefore arose for making arrangements in respect of insurance and/or indemnity so as to counter potential legal liability of the North-West University.

1.8 Relevance for the Research Unit

This research focuses on the extent to which AI can facilitate a more ethical approach by the JSC. It therefore falls under the rubric of the Law, Justice and Sustainability Research Unit of the Faculty of Law, specifically the Justice in Practice Unit. Additionally, the research focuses on judicial appointments, therefore engaging the administrative law and constitutional law modules in the Faculty of Law.

1.9 Framework of the study

Chapter 1: Introduction

The first chapter of the dissertation introduces it by laying down the foundation of the discussion to follow. The problem statement, research question, objectives, framework as well as the method will be presented.

Chapter 2: Background and formation of the JSC

This chapter embodies a detailed discussion of the context and formation a JSC by a state (South Africa *et al*).

Chapter 3: Problems centred on the JSC

The problems inherent to the ethical aspects of the JSC, as outlined briefly above, will come into focus within this chapter.

Chapter 4: The use of AI by the JSC

This chapter will offer a brief and detailed examination of the JSC's potential utilization of AI.

Chapter 5: Conclusions and recommendations

This final chapter of the project offers the conclusions and recommendations that are centred on the said problems around ethics and AI in the JSC.

CHAPTER 2 THE CONTEXT AND RELEVANCE OF FORMING A JSC

2.1 Introduction

Prior to the South African democracy, the President of the country was the one who made judicial appointments. The appointments were usually made behind closed doors and based on the advice given by the Minister of Justice.[27] This serves as an indication of the vast amount of power that the Minister of Justice had just as much as it indicates the fact that no more stakeholder(s) were regarded for broader input.[28]

It ought to be noted that the judicial appointment processes were largely influenced by colonial powers that were ruling South Africa prior to the country's democratic dispensation. Historically, legal disputes within the country were used to being adjudicated and resolved by traditional courts which were used to applying consultative methods to resolve such disputes.[29] These courts were used to applying customary, traditional and(or) indigenous law- not statutory or common law like the courts today are.[30]

As stated previously, the Constitution introduced a variety of significant changes to the country, one important introduction being the manner used to appoint judicial officers to serve on the bench.[31] Additionally, the Constitution has been lauded by certain important figures all over the world. One of the figures referred to is the late and former justice of the Supreme Court of America, Justice Ruth Ginsburg, who asserted that the South

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27 Oxtoby 2021 *JAAS* 34-35
28 Oxtoby 2021 *JAAS* 34.
29 Oxtoby 2021 *JAAS* 35.
30 Oxtoby 2021 *JAAS* 35.
31 Oxtoby 2021 *JAAS* 34-35.

African Constitution is "a great piece of work".[32] This chapter seeks to provide on the context and relevance of forming a Judicial Service Commission- essential aspects of judicial appointments within the Republic and outside will also be discussed.

2.2 Context and relevance of forming a commission for judicial appointment processes

At the face of it, the context and relevance of forming a Commission for judicial appointments may prove to be employing suitable candidates. The context however goes beyond that because there are also constitutional principles to consider.[33] The main purpose however of forming a body mirroring the JSC is to employ suitable candidates to serve on the bench- this is why judicial appointments have been dubbed employment interviews.[34]

Judicial councils are argued to be bodies that are designed for purposes of carrying out the function of making judicial appointments, they are also argued to be bodies that are established to promote and discipline judges.[35] A large number of legal systems have formulated different methods of making judicial selections, this is essentially based on the efforts to try and "balance independence with accountability through institutional design".[36] Garoupa submits that the difference in systems that countries use to appoint judges is evidence of the fact that there is no consensus on the method to use in order to guarantee independence.[37]

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32 Oxtoby 2021 *JAAS* 34.
33 Mokgoro 2010 *Advocate* 45.
34 See s178 of the *Constitution of the Republic of South Africa*, 1996; Mokgoro 2010 *Advocate* 43 and
35 Garoupa 2009 *AJCL* 106.
36 Garoupa 2009 *AJCL* 104.
37 Garoupa 2009 *AJCL* 104.

On the day marked as South Africa's first ever democratic election (27 April 1994), the judiciary was predominantly white and made up of male judges- except for one white female and three male judges that were black.[38] These types of facts are what aggravated the democratic dispensation South Africa ended up entering into, including the constant change to the law (as with the landmark judgements that have been provided over the years).

Appointing judges serves as an undoubtedly vital mechanism for ensuring that judges play their extremely important role of adjudicating on legal disputes between private parties as well as disputes between the state and its subjects.[39] The process also ensures that there will be quality judgments from cases that include criminal trials as much as it ensures that the sentencing of those who have been found guilty by a court of law will be justifiable.[40] An important role that they judiciary plays is the reviewing of executive or administrative actions, which are most often than not challenged on the basis of being seen as unlawful and unreasonable- meaning that the Constitution comes into play.[41] Roth agrees that it is definitely crucial that the public maintains the confidence it has in the courts of law, in order for the latter to be able to maintain and be seen maintaining its "high standards of competency, impartiality and fairness".[42]

Former Justice of the South African Constitutional Court, Justice Yvonne Mkgoro, has submitted that the relevance of judicial appointments is found in the value of democracy.[43]

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38 Oxtoby 2021 *JAAS* 35.
39 Roth 2012 *Judicial Appointments* 9.
40 Roth 2012 *Judicial Appointments* 9.
41 Roth 2012 *Judicial Appointments* 9.
42 Roth 2012 *Judicial Appointments* 9.
43 Mokgoro 2010 *Advocate* 43.

In a democratic state, separation of powers as well as checks and balances are essential notions that are aligned with the need for an independent judiciary that will sustain such notions. Mokgoro submits that the notions referred to are highly essential for protection of the judicial independence of a country.[44] A diverse judiciary plays a significant role in the quest to effectively dispense justice.[45] The judiciary plays a role that has an important impact on the lives of the general public and such role is said to have increased and intensified significantly in recent years.[46] With the above submissions in cognisance, it can therefore be submitted that judicial appointments ought to be seen as fair and just because of constitutional principles etc.

Efforts invested in attempts to reform the appointment processes are not unique to any state, such efforts have been found in Canada, New Zealand, Australia and our very own Republic of South Africa.[47]

In 1996, Lord Bingham submitted that the crucial aspect in conducting successful judicial appointments rests in "an assumption shared by appointer, appointee and the public at large that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality".[48] In accordance with the submission by Lord Bingham, impartiality (despite not being synonymous with independence) is a principle considered to be at the heart of good judicial appointment processes and it is equally dubbed the "close blood tie" of such appointment processes.[49]

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44 Mokgoro 2010 *Advocate* 43.
45 Mokgoro 2010 *Advocate* 43.
46 Malleson 1998 *Amicus Curiae* 13.
47 Malleson 1998 *Amicus Curiae* 13.
48 Malleson 1998 *Amicus Curiae* 13.
49 Malleson 2004 *Amicus Curiae* 13.

Supporters of the formation of judicial appointment Commissions argue strongly that such Commissions produce competent judges, while their opposites submit that the Commissions tend to reduce the quality of the judiciary.[50]

Transformation of the judiciary is a constitutional mandate which is also regarded as being inevitable.[51] Race and gender within the judiciary are not the only factors worth paying careful attention to because they are neither ends in themselves. The factors are however importantly relevant for the society as a whole and for the general competence of the judiciary.[52] It ought to be submitted that the JSC has been subjected to criticism for failing to select an adequate number of female judges to serve as part of the judiciary.[53] On the other hand, there has also been criticism around the failure of the JSC to appoint white candidates that have experience serving in the judiciary, preferring to appoint blacks who are considered less experienced.[54]

Having a Commission that deals with judicial appointments enhances the legitimacy of judicial appointments without "exposing the judiciary to popular selection".[55] This inherently creates an obligation for the relevant people to ensure that processes of judicial appointments are carried out with due openness and transparency "by requiring advertisements of vacancies".[56] One of the reasons for the establishment of a judicial appointment commission is to ensure that there is transparency and fairness in relation to the processes of appointing judges.[57]

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50 Malleson 2004 *Amicus Curiae* 16.
51 Mokgoro 2010 *Advocate* 47.
52 Mokgoro 2010 *Advocate* 43.
53 Siyo and Mubangizi 2015 *PELJ* 824.
54 Siyo and Mubangizi 2015 *PELJ* 824.
55 Brewer, Dingemans and Slinn 2013 *CLA, CLEA and CMJA* 8.
56 Brewer, Dingemans and Slinn 2013 *CLA, CLEA and CMJA* 12.
57 Brewer, Dingemans and Slinn 2013 *CLA, CLEA and CMJA* 13.

Providing reports to Parliament on a regular basis is considered one of the ways in which transparency can be ensured.[58]

The establishment of a Commission has to be motivated by the intention to ensure that the independence of the judiciary is protected against inappropriate political influence, to fortify the quality of judicial appointments, to enhance fairness of the judicial selection and recruitment processes, to promote diversity within the judiciary and ultimately, to reinforce confidence of the public in the judicial system.[59] Checks and balances ensure that there is no situation of one arm of state acting *ultra vires*.[60] In this context, the composition of the JSC allows for the co-operation of the arms of state in the process of making judicial appointments, with the addition of other stakeholders that are members of the legal profession and academics.[61]

The judiciary of a country is vested with the power and authority to disperse justice to the country's citizens without fear or favour- this important function is only discharged effectively if such judiciary is able to exercise its independence without interference by outsiders.[62] The function of dispersing justice is not only meant to be carried out by the independent judges themselves, the appropriate organ of state to ensure the independence of the judiciary is the Judicial Service Commission.[63] The JSC is tasked with a number of functions, including the function of ensuring self-regulation of the judiciary.

In looking at the inclusion of AI within the interviewing procedures of the JSC, it ought to be a mandate to always remember that such inclusion should preach for the

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58 Brewer, Dingemans and Slinn 2013 *CLA, CLEA and CMJA* 13.
59 Malleson 2004 *Public Law* 1-2.
60 Malleson 2004 *Public Law* 2.
61 Siyo and Mubangizi 2015 *PELJ* 823.
62 Saba 2019 *ALSL* 105.
63 Sabs 2019 *ALSL* 105.

strengthening of judicial independence, diversifying of the judiciary as well as maintaining and enhancing the quality of judicial appointments- in order to essentially strengthen the confidence of the public in the system.[64]

Commissions that were established for judicial appointment processes do not generally have the final say in the making of judicial appointments.[65] It is considered rare for a Commission to make the final decision on who to appoint and more commonly, the Commission only makes a list of candidates that it recommends for final appointment by the executive.[66]

It goes without saying that the *Constitution of the Republic of South Africa* brought a vast number of changes to the country. Prior to the enactment of the Constitution within Republic, the Minister of Justice had enormous power because he or she was the one who made the final judicial appointment. During the last years of apartheid, the Minister of justice still had the authority to make the appointments, albeit upon consideration of the recommendations by the Chief Justice or Judge President of the relevant courts.[67]

A 'Judicial Council' or Commission' is dubbed an invention of civil law,[68] it has previously been associated with similar institutions that operate in common law countries such as the United States Federal Judicial Conference and judicial service boards of Commonwealth nations.[69] France was the first nation to introduce (in 1946) a body that would be responsible for the process of appointing of judges- referred to as the *Conseil*

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64 Malleson 2004 *Public Law* 5.
65 Malleson 2004 *Amicus Curiae* 15.
66 Malleson 2004 *Amicus Curiae* 15.
67 Oxtoby 2021 *JAAS* 35.
68 Saba 2019 *ALSL* 105.
69 Saba 2019 *ALSL* 105.

Superior de la Magistrature,[70] Italy then followed suit in 1958 by establishing its own body for judicial appointments and other important judicial mandates, named the *Consiglio Superiore della Magistrature*.[71]

2.2.1 Judicial independence and judicial appointments

History teaches us that what is generally accepted as the essence of judicial independence is the comprehensive freedom that judges have when having to preside over cases before them- this basically means that no outsider (it may be members of government or even a fellow judge) may interfere or attempt to interfere with the manner a judge uses to arrive at his or her decision.[72]

In 2007, the UK Government (in a consultation paper) acknowledged the vital importance of judicial independence to the rule of law and in particular, the confidence of the general public in judges as guardians of the law.[73] Roth submits that confidence in the judiciary results in social and economic benefits because it creates an assurance that appropriate action will be taken when rights have been infringed or when duties have not been fulfilled accordingly.[74] This is especially important in the criminal perspective because it provides the assurance that justice will be served when a crime has been alleged.[75]

The consultation paper referred to additionally submitted that ensuring appointments processes that do not result in the appointment of "politically biased judges, or judges who are, or feel, beholden to the appointing body or person, or to any individual or

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70 Saba 2019 *ALSL* 105.
71 Saba 2019 *ALSL* 105.
72 Harms 2010 *Advocate* 1.
73 Roth 2012 *Judicial Appointments* 10.
74 Roth 2012 *Judicial Appointments* 10.
75 Roth 2012 *Judicial Appointments* 10.

organisation" is an essential step towards securing judicial independence.[76] This important step in turn provides major assistance to the quest to ensure that judges who are appointed to the bench are those who are able to serve independently and without influence and other forms of improper pressure.[77]

Geyth submits that in accordance with the understanding of the legal community, judicial independence is perceived as not being "an intrinsic good or an end in itself, but as a means to achieve other ends".[78] This basically means that ensuring judicial independence results in the ensuring of other essential qualities required for the proper operation of the judiciary, it equally shows the (domino) effect of judicial independence as an important factor.

Former Justice Cameron submits that courts and legal scholars around the world understand judicial independence as referring to two things- firstly, the judiciary has to enjoy some level of organisational non-interference from the other two arms of the state in relation to its operation and secondly, the judiciary (as with its individual judges) ought to be able to arrive at their judicial decisions without any form of pressure or interference from external parties.[79]

Maganoe agrees that judges are human beings before they are considered judicial officers, they are therefore bound to make mistakes that can be attributed to their human

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76 Roth 2012 *Judicial Appointments* 10.
77 Roth 2012 *Judicial Appointments* 10.
78 Geyth 2008 *Daedalus* 1.
79 Cameron 2010 *Advocate* 25.

nature so they must therefore guard against this when fulfilling their official duties failure to do so poses a threat to judicial independence.[80]

Mokgoro holds that the process of appointing judges to the bench cannot be considered without reference being made to judicial transformation, which the author refers to as "an integral part of the transformation of society".[81]

Moremi agrees that the principle of judicial independence finds its existence and relevance in the *trias politica* doctrine.[82] The doctrine demands that the executive, legislative and judicial arms of the state discharge their duties independent of one another, through various human resources and subject to checks and balances- this is to guard against the abuse of power.[83] The author also agrees that it is imperative to emphasise the manner in which *trias politica* is enshrined in the Constitution",[84] for purposes of ensuring judicial independence.

Judicial independence is regarded a central goal that most legal systems have set for themselves, judicial appointment systems are equally regarded as crucial mechanisms that are able to assist such legal systems to achieve this goal.[85] The United States Institution for Peace (USIP) acknowledges the fact that judicial officers who depend, to a certain extent, on the people who appointed them are not reliable because they may

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80 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 40.

81 Mokgoro 2010 *Advocate* 44.

82 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 52.

83 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 52.

84 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 52.

85 USIP *Judicial Appointments and Judicial Independence* 1.

provide biased and bad decisions, this ultimately results in them undermining the legitimacy of the concerned legal system in its entirety.[86]

Lubet submits that judicial independence is an abstract principle and is ranked high in the list of democratic values.[87] The author proceeds by submitting that in the absence of an independent judiciary, many of citizens' rights and freedoms would amount to nought.[88]

Writing amid the Cold War, the late Justice Jackson has went as far as submitting that substantive laws that are severe to their subjects can be tolerated if they are implemented fairly and impartially.[89] Supportably, Jackson adds that one might even elect to subject him or herself to laws applied in good faith than to laws that are imposed by domination.[90] Ultimately, Lubet notes that the essential features and components of independence are impartiality and fairness,[91] these are qualities that ought to inform the decisions taken regarding the use of AI by the JSC.[92]

An independent judge presides over matters in an impartial manner, meaning that such Judge has to be free from external influences and equally immune to pressures from outside.[93] Moreover, an independent judge is the one who rules in good faith, who is determined to follow the law according to his or her understanding of same and also, it is one who is "unmindful of possible personal, political, or financial repercussions" of his

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86 USIP *Judicial Appointments and Judicial Independence* 1.
87 Lubet 1998 *LCP* 61.
88 Lubet 1998 *LCP* 61.
89 Lubet 1998 *LCP* 61.
90 Lubet 1998 *LCP* 61.
91 Lubet 1998 *LCP* 61.
92 Lubet 1998 *LCP* 61.
93 Lubet 1998 *LCP* 61.

or her judicial finding.[94] Research shows that a number of recommendations for judicial appointments made by the JSC have been resulting in the appointment of judges whose impartiality and fairness have been questioned many a time.

While there exists a somewhat "universal consensus" on the importance of judicial independence, legal systems are said to utilize a varied range of selection methods in their practices,[95] which often results in the reflection of marginally different conceptions of independence. The diversity of judicial appointment systems provides a suggestion that there exists no agreement on the best manner to use in order to guarantee independence.[96] One reason for the diversity referred to is the fact that judicial appointment systems also implicate other values that may be in some sort of contention with the notion of judicial independence.[97]

A concern related to judicial independence is the representation of the judiciary, several societies have raised concerns regarding the composition of the judiciary in relation to matters of ethnicity and gender.[98] The core concern is that the judiciary ought to essentially reflect, to a certain extent, the assortment and(or) diversity of the society in which it operates.[99] In absence of the core concern alluded to, "justice will be viewed as perpetuating dominance of one group over another".[100] This is basically the reason as to why several countries have opted to revise their judicial appointment systems- to ensure further diversity on the bench.[101]

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94 Lubet 1998 *LCP* 61.
95 USIP *Judicial Appointments and Judicial Independence* 1.
96 USIP *Judicial Appointments and Judicial Independence* 1.
97 USIP *Judicial Appointments and Judicial Independence* 1.
98 USIP *Judicial Appointments and Judicial Independence* 1.
99 USIP *Judicial Appointments and Judicial Independence* 1.
100 USIP *Judicial Appointments and Judicial Independence* 1.
101 USIP *Judicial Appointments and Judicial Independence* 1.

Judicial independence as a principle refers to independence of the judiciary from the other branches of government or politicians, it also includes independence from political philosophy or public pressure and lastly, it refers to the independence of an individual judge from superiors in the judicial hierarchy- this is to enable such judge to make decisions on each case on the basis of his or her own view of what the law requires.[102]

Judicial appointments may take place in four basic arrangements, one is "appointment by political institutions", two is "appointment by the judiciary itself", three is "appointment by a judicial council" (such as the South African Judicial Service Commission) and lastly, four is the appointment "through an electoral system".[103] Some countries also use different appointment methods and procedures to make appointments in different levels of court.[104]

Maganoe submits that a challenge which threatens the independence of the judiciary "is that of the human factor".[105] Judges are skilled to be professional in their duties, they also pledge themselves to be impartial, independent and of true intentions when interpreting laws and making decisions in their official capacity.[106] In pledging to be true when applying the intentions of lawmakers, it is prudent to acknowledge the fact that it is possible for preferences of judges to stand in the way of their factual impartiality.[107] In Zimbabwe, the then President Robert Mugabe has managed to place the Zimbabwean African National Union supporters in courts as the judiciary while also handing out gifts

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102 USIP *Judicial Appointments and Judicial Independence* 1.
103 USIP *Judicial Appointments and Judicial Independence* 2.
104 USIP *Judicial Appointments and Judicial Independence* 2.
105 Maganoe *The doctrine of Separation of Powers in South Africa with specific reference to the independence of the judiciary* 39.
106 Maganoe *The doctrine of Separation of Powers in South Africa with specific reference to the independence of the judiciary* 39.
107 Maganoe *The doctrine of Separation of Powers in South Africa with specific reference to the independence of the judiciary* 39.

in the form of land and money to ensure that the relevant judges remain loyal,[108] loyalty meaning the partiality of such judges in reaching their decisions. Moreover, it is submitted that independent judges have been removed from their offices using "psychological and physical threats of violence".[109]

Mberesi acknowledges the fact that independence of the judiciary is considered an essential tool to ensure democracy, the author however also provides that "the formula for measuring this notion is still unsettled".[110] Additionally, same proceeds to submit that as an abstract concept, "independence is measurable through court decisions and constitutional provisions".[111]

The importance of judicial independence in relation to judicial appointments has been discussed, this inevitably results in the analysis of judicial appointment processes in other countries.

2.3 An analysis of judicial appointments in other states

The process of making judicial appointments is unarguably essential and equally serves as a steppingstone towards the effectivity of a judiciary, this is why the judiciary has to be made up of the right personnel.[112] The essence of judicial appointments is the same

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108 Maganoe *The doctrine of Separation of Powers in South Africa with specific reference to the independence of the judiciary* 39.

109 Maganoe *The doctrine of Separation of Powers in South Africa with specific reference to the independence of the judiciary* 39.

110 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 22.

111 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 22.

112 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* v.

for each and every single country, some even more than others. With this context in cognisance, an analysis of judicial appointments in other countries follows.

2.3.1 Namibia

Namibia is considered the last country in the African continent to be colonized, it is also known to have gained its independence on the 21st day of March in 1990- upon being subjected to some 105 years of colonialism.[113]

The Constitution of the democratic Republic of Namibia was "drawn up by a Constituent Assembly of elected Namibians",[114] pursuant to Resolution 435 of the United Nations Security Council (UNSC)- agreed upon on the 29th day of September in 1978.[115] The resolution referred to was aimed at enhancing the plan of the UN in relation to the independence of Namibia and it was officially adopted unanimously by the Assembly for the people of Namibia on the 9th day of February during 1990.[116] In the past, the practice of appointing judges to the High Court or the Supreme Court was carried out "by the Judge-President or Chief Justice making a request to the President" and not on the basis of a recommendation by the Judicial Service Commission.[117]

During the 16th day of September in 1996, former President of the Namibian Republic (Sam Nujoma) announced his appointment of Ephraim Kasuto to serve as Namibia's Ombudsman.[118] However, the appointment was subsequently withdrawn, upon *The Namibian* (the largest daily newspaper in Namibia) revealing that the JSC had no

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113 Parker 1991 *CILJSA* 88.
114 Parker 1991 *CILJSA* 88.
115 Parker 1991 *CILJSA* 88.
116 Parker 1991 *CILJSA* 88.
117 Horn and Bösl *The Independence of Judiciary in Namibia* 235.
118 Horn and Bösl *The Independence of Judiciary in Namibia* 236.

knowledge of the appointment made- "let alone recommended it".[119] The appointment is submitted to have been made invalidly on the basis of "the lack of an appropriate recommendation by the Judicial Service Commission",[120] additionally, Horn and Bösl submit that the same outcome would apply to appointments of judges that are appointed without the JSC's recommendation.[121]

The integrity of the Namibian judicial appointment processes is fortified by the Judicial Service Commission- a constitutional body established to make all the recommendations for judicial appointments to the President.[122] The Commission was established by Article 85 of the Constitution of the Republic of Namibia and is made up of the Chief Justice (who serves as its chairperson), a judge (appointed by the President), the Attorney-General of the state and two members from the legal profession- nominated by professional organisations that were established to serve and protect "the interests of the legal profession in Namibia".[123]

The Commission was designed to ensure that it remains independent and free from any form of undue influence. In *S v Zemburuka*,[124] it was held that the composition of the Namibian JSC was designed to also exclude a process of political appointments- where the relevant incumbents may feel "obliged" to carry out the mandates of politicians rather

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119 Horn and Bösl *The Independence of Judiciary in Namibia* 237.
120 Horn and Bösl *The Independence of Judiciary in Namibia* 237.
121 Horn and Bösl *The Independence of Judiciary in Namibia* 237.
122 Horn and Bösl *The Independence of Judiciary in Namibia* 235.
123 Horn and Bösl *The Independence of Judiciary in Namibia* 234-235.
124 (2) 2003 NR 200 (HC) at 204J.

than fulfilling their judicial mandates, duties and functions independently, impartially and in accordance with nothing else but the Constitution and the relevant applicable laws.[125]

In providing a description of the organisational subjects of administrative law, Professor Wade refers to public service institutions as "public bodies".[126] The people who work in such public bodies (i.e. the Commissioners of the Judicial Service Commission) are governed by administrative law and are often referred to as public servants and (or) public officials.[127] Parker submits that these public service or "public bodies" should be generally understood to include all government departments and organizations that were established by the law to implement government policies.[128] What Parker means is simply that the work commissioners of the JSC do is of a public nature because they ultimately serve the interests of the public- this is why they need to hold themselves in the highest of standards.[129]

The Constitution of Namibia contains a process of judicial appointment that sees the President of the Republic being afforded the authority to make judicial appointments for the Supreme Court and High Court.[130] The President's appointment is made upon receiving recommendations from the Judicial Service Commission (JSC).[131] Judicial appointments in Superior Courts of the Namibian Republic are made by the President of the state, in terms of sub-article 32(4)(a) of the Constitution of the Republic of Namibia.[132]

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125 Horn and Bösl *The Independence of Judiciary in Namibia* 235.
126 Parker 1991 *CILJSA* 88.
127 Parker 1991 *CILJSA* 88.
128 Parker 1991 *CILJSA* 88.
129 Parker 1991 *CILJSA* 88.
130 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 84.
131 Article 82(1) of the *Constitution of the Republic of Namibia*, 1990.
132 *Constitution of the Republic of Namibia*, 1990

With regard to the composition of the Namibian JSC which the Namibian Republic established, there are five members: the Chief Justice of the Supreme Court, a Judge appointed by the President of the country, the Attorney-General and the nominees (who are legal practitioners) nominated by the country's organisations of the legal profession.[133] The members referred to are a clear indication of the fact that the Namibian Republic's JSC consists of members who are well-versed with the law and also, it equally emphasizes the fact that political influence within the JSC is expiated.[134]

Appointing people who are legally experienced assists with the ensuring of the standard of work the Commission is doing regarding the making of recommendations on who should service as a judicial officer, among some of the functions the Commission performs.[135]

An important fact to note about the JSC in Namibia is a provision within the Constitution, which expressly states that the structure of the judiciary of the Namibian Republic must be balanced- simply meaning that the JSC has to ensure that it appoints people who were previously disadvantaged as a regard to the country's past apartheid laws, among other things the Commission has to ensure.[136]

In the Republic of Namibia, the process of making a judicial appointment begins with the Chief Justice notifying the JSC about a vacancy that has become available within the

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133 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 85.

134 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 85.

135 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 85.

136 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 86.

Supreme Court.[137] In an instance where the vacancy becomes available within the office of the Chief Justice, the appointment of the judge is made by the President of Namibia and the appointed judge is obliged to consult with the Attorney-General to notify the JSC about the available vacancy.[138]

Upon learning of the available judicial vacancy, the JSC has to inform the relevant stakeholders and invite them to nominate a person who they wish to have considered for purposes of appointment to a judicial post within a stipulated time.[139] Moreover, the Chief Justice is mandated to submit a list of nominated candidates to the JSC, the JSC then proceeds to the organizing of private oral interviews.[140]

Members of the JSC engage privately behind closed doors in the name of discussing the suitability of each of the candidates and ultimately providing a recommendation of the most promising candidate to the President for appointment.[141] Transparency is ensured by the obligation on the JSC to furnish the President with reasons for the list of recommended candidates.[142]

The President exercises the authority of appointing judicial officers, but there is no obligation on him or her to make such an appointment,[143] this means that if the President

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137 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 86.

138 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 85.

139 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 86.

140 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 87.

141 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 87.

142 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 87.

143 S 5 of the *Judicial Service Commission Act* 18 of 1995.

does not want to appoint a recommended person, he or she can pick any person from the recommendations made by the JSC because the JSC's recommendation(s) can be repudiated by the President (on sound reasons that are reduced to writing).[144]

Horn and Bösl submit that "not once" in the history of the Namibian Supreme Court's existence has there ever been a minimum of at least three permanent judges.[145] This is because every year, the President of the Republic has elected to appoint acting judges to complement and serve with the permanent judges.[146] These remarks were made during the writing of the authors' book which ended up being published during 2008.

Additionally, Horn and Bösl proceed to submit that "legal practitioners with large private practices" and large amounts of clients may find it difficult to be appointed to serve on the bench as acting judicial officers because of the relatively small population that Namibia is made up of.[147] A local tabloid has even disclosed that an acting judicial officer "had sat on a case in which his private law firm was representing one of the litigants",[148] this essentially serves as a clear indication of the fact that judicial missteps are for each and every state that wishes to operate smoothly and not just for the Republic of South Africa.

The same tabloid referred to above has also reported that an acting judge "had adjudicated on a case" which involved one of his family members as a witness for one of the parties involved in the matter.[149] Whether serving as a permanent or an acting judge,

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144 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 88.
145 Horn and Bösl *The Independence of Judiciary in Namibia* 229.
146 Horn and Bösl *The Independence of Judiciary in Namibia* 229.
147 Horn and Bösl *The Independence of Judiciary in Namibia* 230.
148 Horn and Bösl *The Independence of Judiciary in Namibia* 230.
149 Horn and Bösl *The Independence of Judiciary in Namibia* 230.

one can recuse himself or herself from presiding over cases in which he or she may have an interest. Horn and Bösl however submit that in an instance where a judge who has a large volume of clients in his/her private practice recuses him or herself from a matter, his or her (judicial) appointment is rendered meaningless and the (short) tenure of appointment underutilised.[150]

2.3.1.1 Issues Namibia has encountered in its judicial appointment processes

One might argue that at the heart of the issues relating to judicial appointment processes in Namibia is the country's reliance on foreign judges, this argument can be made on the basis of the fact that the practice of appointing foreign judges to the Namibian judiciary has seen "the most shocking" judgments being delivered in the Supreme Court.[151] Contrary to this, it ought to be noted that Zimbabwean Political Analyst (Gibson Nyikadzino) has submitted that the appointment of Rita Makarau (Namibian judge) to serve as a judge is an indication that "countries can exchange expertise".[152]

During the writing of this research project, Namibia re-wrote its history by appointing female justices to its Supreme Court for the first time since gaining its independence. The appointment was consequently hailed as a step in the right direction by a lot of people,[153] with the Chairperson of the NWLA (the Namibia Women Lawyers Association)-

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150 Horn and Bösl *The Independence of Judiciary in Namibia* 230.

151 Angula 2023 https://www.google.com/amp/s/www.voanews.com/amp/namibia-appoints-female-justices-to-supreme-court-/7037139.html.

152 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

153 Angula 2023 https://www.google.com/amp/s/www.voanews.com/amp/namibia-appoints-female-justices-to-supreme-court-/7037139.html.

Ruth Herunga going as far as submitting that the appointment can be regarded as "the breaking of a glass ceiling".[154]

There has been concerns raised by Namibians towards the appointment of Rita Makarau to the highest court in the Namibian Republic.[155] The concerns were raised because of the factual link between Makarau and Zimbabwe's past president (Robert Mugabe), this sentiment can be deduced from the assertions that have been made by relevant parties.[156] The relevant parties referred to include the Independent Patriots for Change (IPC), the Namibian Economic Freedom Fighters (NEFF) and the Popular Democratic Movement (PDM).[157]

The IPC president (Panduleni Itula) has went as far as submitting that Makarau's judicial appointment amounts to the betrayal of Namibia's justice.[158] In addition to the submissions above, it has also been reported that during 2017, Makarau resigned from her position as Chairperson of the Zimbabwean Electoral Commission (ZEC)- just a few weeks upon the ousting of Mugabe by a military coup.[159]

Carmel submits that during 2019, two judicial officers of the Magistrate's Court were "ordered back to work" by the Supreme Court- this was after the two recused themselves

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154 Angula 2023 https://www.google.com/amp/s/www.voanews.com/amp/namibia-appoints-female-justices-to-supreme-court-/7037139.html.

155 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

156 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

157 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

158 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

159 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

from a number of cases that were partially heard.[160] The recusal made referenced to was motivated by what the pair referred to as "unfair treatment" by the JSC of the Namibian Republic.[161] It was argued that the judicial appointment body had informed the judges that they were not suitable to be appointed on a full-time basis to the Regional Court because the new regulations that were introduced restricted regional court appointments to judges "with certain qualifications".[162] In addition, the same judicial officers were requested to serve as acting judges in the relevant regional courts- which is somehow unfair, considering the fact that they were not considered suitable for full-time appointment.

In *Christian v The Judicial Service Commission and Others*,[163] it was summarily submitted that the judiciary should play an active role in protecting the sovereignty of the Namibian Republic, *in lieu* of jeopardizing same by appointing "foreign judges" who do not form part of the Namibian judiciary.[164] Simply put, the judiciary of a country ought to play a role in ensuring that such country maintains its sovereignty and independence. Additionally, the court held that in exercising judicial functions, a judge is not considered as being answerable to another judge (it may be the Judge President or the Chief Justice) because such judge "is only answerable to the Constitution and the law". [165]

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160 Rickard 2019 https://africanlii.org/articles/2019-03-21/carmel-rickrd/magistrates-recusal-protests-insurbodination-namibian-supreme-court.

161 Rickard 2019 https://africanlii.org/articles/2019-03-21/carmel-rickrd/magistrates-recusal-protests-insurbodination-namibian-supreme-court.

162 Rickard 2019 https://africanlii.org/articles/2019-03-21/carmel-rickrd/magistrates-recusal-protests-insurbodination-namibian-supreme-court.

163 HC-MD-CIV-MOT-REV-2020/0025.

164 HC-MD-CIV-MOT-REV-2020/0025.

165 At para 16.

Judicial appointments are most definitely important for each and every single country because in this day and age, humanity strives on economic power and a stable judiciary ultimately has a positive impact on the economy.[166]

Makarau's appointment as an acting judge of the Namibian Supreme Court was made on the basis of recommendations that were furnished to President Hage Geingob by the Judicial Service Commission (JSC) of Namibia.[167]

A Supreme Court bench (comprising of males only) is said to have recently overruled a judgment by the High Court- the judgment was granted in favour of a same-sex couple who wished to have their child (born through surrogacy) declared a citizen.[168] This screams discrimination when read, which basically serves as a difficulty in the quest to ensure the proper development of the judiciary.

2.3.2 The Republic of South Africa

For almost two centuries (1806-1994), the English constitutional system was applied in South Africa, meaning that Parliament was supreme.[169] Superior courts did not form part of public service, the executive appointed judges and their salaries were determined by

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166 Sobel and Hall 2007 *Cato Journal* 69.

167 Ndeyalane 2023 https://www.namibian.com.nza/opposition-questions-zim-judges-appointment-to-namibias-top-court/.

168 Angula 2023 https://www.google.com/amp/s/www.voanews.com/amp/namibia-appoints-female-justices-to-supreme-court-/7037139.html.

169 Harms 2010 *Advocate* 1.

parliament.[170] Additionally, the judges could be impeached by a parliament resolution (despite it never in fact happening).[171]

Notably, the Minister of Justice often consulted with the relevant head of a particular court regarding new judicial appointments and also, the consequent nomination was derived from either the head of a particular court or the minister.[172] The recommendation of the minister is then placed before cabinet and the head of state would subsequently make the appointment of the particular judge.[173]

In the past two decades or so, the legal system of the Republic of South Africa has shifted from one that is based on racism, sexism and authoritarianism to one that strives for the provision and protection of basic human rights.[174] The *Constitution of Republic of South Africa* embraces the classic range of political as well as civil rights as contained in the International Bill of Rights, it is equally a much heralded document all-over the world.[175]

As stated previously, the *Constitution of the Republic of South Africa* provides a list of important guidelines on all matter pertaining to South African citizens. It provides the basis for an essential restructuring of the South African legal system in its entirety.[176] Section 165(2) of the *Constitution of the Republic of South Africa* is a highly essential provision for purposes of this research project, this is because the section acknowledges

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170 Harms 2010 *Advocate* 1.
171 Harms 2010 *Advocate* 1.
172 Harms 2010 *Advocate* 1.
173 Harms 2010 *Advocate* 1.
174 Andrews 2006 *OHLJ* 565.
175 Andrews 2006 *OHLJ* 566.
176 Andrews 2006 *OHLJ* 565.

the independence of the courts by stating that same are independent and subject only to the constitution and the law.[177]

Additionally, the section mentioned above provides that the courts of law ought to apply the law "impartially and without fear, favour or prejudice".[178] Through legislative and other matters, organs of the state (which include the JSC) must assist and protect the courts to ensure that there is "independence, impartiality, dignity, accessibility and effectiveness" in as far as the courts of the country are concerned.[179]

The Constitution places an obligation of other organs of state to help and defend the courts,[180] this in addition to the obligation to help preserve the independence, impartiality, dignity, accessibility, and effectiveness of the courts- by legislative and other means.[181]

During the year 1994, there were two black judges and one female in the judiciary of the country- meaning that the judiciary predominantly had white judges, in exclusion of the two black ones and also, it equally means that the judiciary was predominantly male, in exclusion of the one female referred to.[182]

Judicial Commissions and(or) councils are bodies established to shift the appointment and promotion of judges away from political interference and other types of impediments

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177 Mberesi J *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 22.

178 Mberesi J *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 22.

179 Mberesi J *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 22.

180 See section 165 (1) and (2) of the *Constitution of the Republic of South Africa*, 1996.

181 Mberesi J *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 22.

182 Andrews 2006 *OHLJ* 566.

that may hinder judicial independence *inter alia*, while also ensuring a certain level of accountability.[183]

Andrews writes that even though the JSC has successfully appointed a considerable number of male judges that are black, it lacks the same success in appointing both black and white female judges.[184] This was written during 2006 and has been relevant to this present day, albeit not subsisting wholly or as much as it did before.

In a newspaper article written by legal journalist Carmel Rickard, attitudes expressed by the members of the JSC when interviewing females are said to have been regarded shameful.[185] This is contrary to the fact that the Constitution is based on the values of human dignity, equality and the advancement of human rights and freedoms.[186] Propelling the transformation of the judiciary is the consideration of gender, racial diversity and sexual orientation.[187] This consideration is underpinned by the assumption that a majority white judiciary cannot fully protect and uphold the basic human rights of a majority black population.[188]

In ensuring the protection and upholding of the principles of transparency and accountability in the Republic, the drafters of the initial Constitution believed that the old

183 Saba 2019 *ALSL* 107.
184 Andrews 2006 *OHLJ* 570.
185 Andrews 2006 *OHLJ* 571.
186 S 1 of the *Constitution of the Republic of South Africa*, 1996.
187 Andrews 2006 *OHLJ* 566.
188 Andrews 2006 *OHLJ* 566.

manner of making judicial appointments was no longer appropriate for a constitutional state.[189]

As stated above, under the apartheid system, judges were appointed by the President of the Republic in consultation with and on the recommendation of the Minister of Justice.[190] The process of appointing judges did not require any form of input from the judiciary, not even from the members of the legal fraternity or the general society.[191] The introduction of the *Constitution of the Republic of South Africa* entailed the establishment of the JSC and with it, change as to who gets involved in the judicial appointment process because presently, members of the legal profession, society and the political sphere are involved.[192]

When a vacancy arises in the JSC, the head of the court in which such vacancy exists will inform the JSC, will also publish such vacancy and the JSC will subsequently call for the nominations of candidates that are deemed suitable.[193] The nominations referred to are all meant to be reduced to writing and they must also include the nominated candidate's curriculum vitae, the applicant's letter of consent (consenting to the nomination) and a completed application form.[194] The application form is in a format of a questionnaire, meant to solicit information regarding the applicant's personal and professional life.[195]

The filled application form is then circulated among the JSC members concerned and a sub-committee is then appointed to convene and examine the applications.[196] A short-list

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189 Andrews 2006 *OHLJ* 567.
190 Andrews 2006 *OHLJ* 568.
191 Andrews 2006 *OHLJ* 568.
192 Andrews 2006 *OHLJ* 568.
193 Andrews 2006 *OHLJ* 568.
194 Andrews 2006 *OHLJ* 568.
195 Andrews 2006 *OHLJ* 568.
196 Andrews 2006 *OHLJ* 568.

of candidates meant to fill the relevant vacancy is then drawn up and distributed to the members of the JSC, once there has been a unanimous approval of the short-listed names, the list of candidates that are meant to be interviewed is then published.[197] The JSC ensures transparency by inviting comments on the shortlisted candidates before conducting the interviews of the short-listed candidates.[198]

2.3.3 Canada

In Canada, the Governor General (who appoints judges of the Supreme Court of Canada) and the Prime Minister (who appoints officers of the District, Superior and Country Courts of each province except the Probate Courts) are responsible for making judicial appointments to the Canadian judiciary.[199]

All judges of the Supreme Court of Canada are appointed by the Prime Minister.[200] The Independent Advisory Board for the Supreme Court of Canada (IABSCC) assesses all applications for a judicial position and subsequently compile a list of shortlisted candidates and submit it to the Minister of Justice for purposes of arranging a consultation with the Chief Justice and other parties.[201] The consultation is to express views on the suitability of the shortlisted candidates.

The Minister of Justice subsequently submits the recommendations to the Prime Minister for final appointment of suitable candidates as judicial officers of the state.[202] In the space

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197 Andrews 2006 *OHLJ* 568.
198 Andrews 2006 *OHLJ* 569.
199 S 96 of the *Constitution Act*, 1867; Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 76.
200 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 77; Prime Minister of Canada 2016 https://pm.gc.za.
201 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 78.
202 Prime Minister of Canada 2016 https://pm.gc.ca.

of a month, members of the advisory board should submit a report to the Prime Minister, detailing the manner in which the appointment was made and the expenses incurred during the appointment process.[203]

Upon the judicial appointment, the Chairperson of the Advisory Board, the Minister of Justice and the Prime Minister are required to appear at the House of Commons Standing Committee on Justice and Human Rights (HCSCJHR).[204] The three parties mentioned appeared at the HCSCJHR for purposes of explaining the manner in which the nominee was appointed into the judiciary and also, to indicate that he or she satisfied the essential legislative prerequisites.[205]

The appointed judicial officer must also appear at the HCSCJHR to answer questions that the members of the house may have, members of the Standing Senate Committee on Legal and Constitutional Affairs as well as delegates from the *Bloc Quebecois* and the Green Party.[206]

Maganoe submits that the mechanisms Canada uses to ensure that its judicial independence is always protected are akin to the provisions of section 165 of the Constitution of the Republic of South Africa- which guarantee judicial independence in the Republic.[207] Investigations of complaints about judicial conduct, *inter alia*, are handled

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203 Prime Minister of Canada 2016 https://pm.gc.ca.

204 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 78.

205 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 79.

206 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 79.

207 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.

by the Independent Canadian Judicial Council (ICJC),[208] which is composed entirely of members of the judiciary. In South Africa, the complaints and investigations are dealt with by the JSC- whose members are dominated by the ruling political party. The composition of the JSC clearly differs from that of the Canadian Judicial Council.

In Canada and the United States of America, the degree of political involvement and influence on judicial appointment processes is regarded lower at state level than at federal level where it is regarded high, this difference is generally attributed to judicial appointment Commissions that are established within the two mentioned states.[209]

The author goes on to acknowledge that there are similarities in the manner of appointing judges between South Africa and Canada, these include the fact that the authority of appointing judges in South Africa is vested in the executive arm of government.[210] Additionally, the judicial appointment decisions made by the executive can be challenged on good grounds, this is because such decisions are based on the advices and recommendations of judicial advisory committees and the Governors.[211]

Despite the political influence referred to, Canada is still considered a federation and that comprises of a "constitutional division of powers between the federal and provincial governments".[212] In order to allow the courts to fulfil their mandates (which include providing fair and just decisions while also disregarding extenuating factors that may

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208 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.

209 Malleson 1998 *Amicus Curiae* 15.

210 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.

211 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.

212 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.

prove to be materially influential to such decisions.[213] Judicial independence in the context of Canada demands that the courts serve as independent adjudicators of disputes regarding jurisdiction between the two levels of government.[214]

2.3.3.1 Issues Canada has encountered in its judicial appointment processes

Like many other countries striving to ensure the smooth operation of their judiciaries, Canada has encountered several issues that hindered the state's quest to reach full judicial potential.

Based on a study conducted on federal judicial appointments of Canada from 1984 to 1988, it was concluded that 48 percent of the appointees of government had a biased "political connection to the party in power".[215] The study also concluded that patronage was "pervasive" in the federal judicial appointments process and ultimately called for reforms to reduce it.[216] This serves as a clear indication of the fact that judicial appointment processes of the Canadian Republic have been unduly influenced since the early 1980s.

In addition to political affiliation playing a role in judicial selection, gender and group identity have been an issue worth considering in the process of making judicial appointments.[217] Upon the establishment of committees meant to screen candidates, the

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213 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.
214 Maganoe *The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary* 47.
215 Riddel, Hausegger and Matthew 2008 *UTLJ* 40.
216 Riddel, Hausegger and Matthew 2008 *UTLJ* 41.
217 Riddel, Hausegger and Hennigar 2013 *CJPS* 668.

federal government of the Canadian Republic ultimately decided to prioritize the addition of women to the bench.[218]

During 1991, Peter Russell and Jacob Ziegel decided to conduct a study of judicial appointments of the Mulroney government between 1984 and 1988, the study would be "based on questionnaire responses from individuals in law, politics, academia or the media" and those who might have been acquainted with the appointees.[219] The results from the study referred to indicated that 24.1% of appointees had "major" involvement with the Conservative party (which was running for elected office and equally active in party elections and leadership campaigns) and also indicated that some 23.2% had "minor" involvement with the Conservative party.[220]

In *The Queen v Marc Beauregard*,[221] the Supreme Court of Canada held that judicial independence belongs to the judge and the court in its entirety- the matter serves as an essential jurisprudential source because it is used to articulate on judicial independence within the Canadian Republic. In providing on judicial independence, the court submitted that same is the "lifeblood of constitutionalism in democratic societies".[222]

Moreover, the court explained that a source of judicial independence in Canada can be found in the preamble of the Constitution Act.[223] In considering the fact that judicial independence is a constitutional principle, it ought to also be noted that the preamble of

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218 Riddel, Hausegger and Hennigar 2013 *CJPS* 668.
219 Riddel, Hausegger and Matthew 2008 *UTLJ* 45.
220 Riddel, Hausegger and Matthew 2008 *UTLJ* 45.
221 (1986) 30 DLR (4th) 481 (SCC).
222 At para 24.
223 *Constitution Act*, 1867.

the Constitution of Canada submits that the Constitution of Canada has to be "similar in principle" to the Constitution of the United Kingdom.[224]

The Supreme Court of Canada submitted in *Mackeigan v Hickman* that requiring a judge to explain his or her decisions amounts to a violation of judicial independence, this is because such judge's right to the refusal of providing an explanation of how he or she arrived at his or her decisions "is essential to the personal independence" of same.[225] This submission basically entails that a judge has personal independence (which refers to such judge's ability to provide judgments only on the basis of one's own abilities and without interference).

During past years, there have been accusations of orders being granted as rewards to affiliates who are faithful to their parties.[226] The most notorious of the accusations were the ones made during the Gomery Inquiry, where a witness named Benoit Corbeil testified that some of the Quebec lawyers who had campaigned for the Liberal Party in during 2000 elections "were subsequently appointed" to serve on the bench.[227]

Riddel, Hausegger and Matthew submit that suggestions (of there being blatant patronage in the judicial appointment processes of the Canadian Republic) that were made during the 'Gomery Inquiry' sufficed to incite the House of Commons to form a Subcommittee that would focus on the processes used to appoint judicial personnel to the Federal Judiciary.[228]

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224 At para 29.
225 [1989] 2 S.C.R. 796.
226 Riddel, Hausegger and Matthew 2008 *UTLJ* 40.
227 Riddel, Hausegger and Matthew 2008 *UTLJ* 40.
228 Riddel, Hausegger and Matthew 2008 *UTLJ* 40.

Former Chief of the Court of Appeal in Nova Scotia (Constance Glube) has provided a testimony in which she testified to the Committee that relevant judicial appointment processes "were based not on merit, but rather on political considerations".[229]

Former Justice of the Supreme Court of Canada (Bertha Wilson) has asserted that "female judges will make a difference to judicial decision making",[230] meaning that at the time of making the assertions referred to, the Canadian bench did not have enough female judges- which ultimately results in one asking questions about the prudence of the judicial appointment processes being followed by the state.

The different forms of influence on judicial appointment processes may factually result in "different decisions by the chosen judges".[231] Findings from research conducted by Riddel, Hausegger and Hennigar are of the opinion that judges who receive appointment because of their political affiliations or gender are more likely to vote inversely on some cases.[232] The trio submit that the past profession of a judge may influence such judges judicial orders and overall decision making once they have been appointed to serve on the bench.[233]

Additionally, the authors hold that regardless of whether one realises the beneficial influence of judicial characteristics on judicial decision making or not, there is still much to do before one raises an argument "for or against changes in the judicial selection" processes.[234]

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229 Riddel, Hausegger and Matthew 2008 *UTLJ* 40.
230 Riddel, Hausegger and Hennigar 2013 *CJPS* 670.
231 Riddel, Hausegger and Hennigar 2013 *CJPS* 686-687.
232 Riddel, Hausegger and Hennigar 2013 *CJPS* 687.
233 Riddel, Hausegger and Hennigar 2013 *CJPS* 687.
234 Riddel, Hausegger and Hennigar 2013 *CJPS* 687.

Issues encountered by countries in relation to their judicial appointments processes and their judicial officers themselves vary, this creates the need to ensure that proper people are appointed to protect and serve the interests of societies in which they are based.

Lilley submits that a country's economic influence does not shield it from the repercussions of failing to make proper judicial appointment processes, he also proceeds to add that this is evinced by research findings that and continuously report on the judicial appointment processes of relative countries.[235]

Lilley reports that 73 of some 278 judges serving the Canadian criminal system are "semi-retired and work on a part-time basis".[236] He adds that consequent to the fact that 26% (in addition to the 19 judges that are missing) of all judges are part time appointees is the fact that "Ontario is in the worst shape of any province".[237] All of this leads to a backlog of cases that could and should be cleared away if the Justin Trudeau Liberals were doing their job of appointing judges. Their decision not to appoint means that people charged with serious crimes are let off the hook and to commit further offences.

During one Wednesday, the Toronto Sun reported the story of a young girl in Toronto who came forward to describe her years of physical, mental and sexual abuse by what was meant to be her father.[238] Following an investigation by police and social workers, charges were laid against the perpetrator in early 2021. After going through pre-trial hearings and having court dates scheduled and re-scheduled, the matter was cancelled

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235 Lilley 2023 https://www.google.com/amp/s/torontosun.com/opinion/columnists/trudeaus-failure-to-appoint-judges-sees-criminals-go-free/wcm/32962de1-d06a-42bc-9643-d6559623cba6/amp/.

236 Lilley 2023 https://www.google.com/amp/s/torontosun.com/opinion/columnists/trudeaus-failure-to-appoint-judges-sees-criminals-go-free/wcm/32962de1-d06a-42bc-9643-d6559623cba6/amp/.

237 Lilley 2023 https://www.google.com/amp/s/torontosun.com/opinion/columnists/trudeaus-failure-to-appoint-judges-sees-criminals-go-free/wcm/32962de1-d06a-42bc-9643-d6559623cba6/amp/.

238 Lilley 2023 https://www.google.com/amp/s/torontosun.com/opinion/columnists/trudeaus-failure-to-appoint-judges-sees-criminals-go-free/wcm/32962de1-d06a-42bc-9643-d6559623cba6/amp/.

due to there being inadequate judges. The girl and her family faced the prospect of the case being dropped without going to trial.[239] With this context in cognisance, it can certainly be argued that improper judicial appointments have a direct and negative impact on the subjects of a country.

2.3.4 United States of America

The United States of American is considered the most powerful country in the world, followed by China and Russia-[240] this inherently means that the decisions taken by any organ of the state are essential and are equally subject to public scrutiny because the USA is an influential nation.

In 1787, during the Philadelphia Constitutional Convention, Benjamin Franklin suggested that lawyers be the ones who decide on who should sit on the federal courts- this suggestion was made "in the midst of a debate over the selection of judges".[241]

John Duffy has claimed that several judges serving on the United States of America's Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences" appointed to their respective roles in a manner that is inconsistent with the Constitution, this claim was made because the official who made the appointments did not have the

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239 Lilley 2023 https://www.google.com/amp/s/torontosun.com/opinion/columnists/trudeaus-failure-to-appoint-judges-sees-criminals-go-free/wcm/32962de1-d06a-42bc-9643-d6559623cba6/amp/.

240 Kumar date unknown https://safalta.com/blog/top-10-most-powerful-countries-in-the-world#:~:text=1)%20United%20States%20of%20America%20economic%20strength%2C%20and%20cultural%20influence.

241 Epstein, Knight and Shvetsova 2001 *WMBRJ* 7.

required capacity or competence to make such them.[242] Duffy proceeds by concluding that the judgments made by such irregularly appointed judges are inherently invalid.[243]

Section 1 of Article I in the U.S Constitution states that all legislative powers granted by it "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives".[244] Section 3 of the same Article provides that the "Senate of the United States shall be composed of two Senators from each State". When ultimately combined, the House of Representatives and the Senate form the Congress of the United States.[245]

The Congress is granted the power to confirm or reject Presidential appointments, the right to enact legislation and even the right to declare war- including other substantial investigative powers.[246]

Article II, section 2 of the Constitution provides that the President of the country has the power to nominate judges and the Senate has the power to provide advise and consent for the appointment of such nomination(s). It must be noted that the Senate is composed of some 100 Senators, elected by the people of each of the states they represent,[247] this sheds light on the fact that judicial appointments in the United States of America are subject to a lot of scrutiny by officials prior to being confirmed or rejected. Additionally, it must be noted that confirmation by the Senate of a nomination by the President

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242 Horn and Bösl *The Independence of Judiciary in Namibia* 236.
243 Horn and Bösl *The Independence of Judiciary in Namibia* 236.
244 Section I (art. I) of the *Constitution of the United States*, 1789
245 Article I of the *Constitution of the United States*, 1789.
246 White House Government date unknown https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/.
247 White House Government date unknown https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/.

requires a majority vote- in an instance where a tie exists in voting then the Vice President, as the President of Senate, shall make the deciding vote.

Article III of the *Constitution of the United States of America* begins by stating succinctly that it was decreed by the people of America in the name of forming a "more perfect Union", establishing justice and ensuring "domestic Tranquility", providing "for the common defence", promoting "the general Welfare" and securing "the Blessings of Liberty to ourselves and our Posterity"- "our" being the people of the USA.[248] Most of the Commissions in North America produce reports annually and actively seek to inform the public about the work they do and openly provide responses to public enquiries.[249]

2.3.4.1 Issues the USA has encountered in its judicial appointment processes

Encountering issues in judicial appointment processes is something every country has experience of, the USA is undoubtedly unsusceptible to the issues referred to. Strong asserts that numerous studies have shown that the legitimacy perception of the general public on courts decreases according to the increment of politicization of the judicial appointment process.[250] Moreover, Strong submits that transgressions in judicial appointment processes also raise serious concerns as to whether or not the United States is continually adhering to the rule of law.[251]

Although there have been concerns raised in the United States about the politicization of judicial appointment processes, Strong holds that the situation has become unsustainable in the last few years.[252] During 2016 for instance, the Senate (who is regarded

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248 Art. III *Constitution of the United States of America*, 1789.
249 Malleson 1998 *Amicus Curiae* 15.
250 Strong 2020 *VJTL* 617.
251 Strong 2020 *VJTL* 617.
252 Strong 2020 *VJTL* 616.

Republican-led) declined to hold hearings for purposes of considering Judge Merrick Garland's nomination to serve on the Supreme Court- a move that has been referred to as "unprecedented".[253]

The year 2018 saw the same body (the Senate) proceeding "to hear and confirm the nomination of Judge Brett Kavanaugh",[254] despite there being significant concerns raised by a variety of individuals and institutions that include the American Bar Association "about his honesty, temperament, and ability to be fair".[255] In this instance, one can submit that the judicial appointment processes of the American Republic have their own issues that certainly include political interference.

Strong also submits that despite there being some individuals that believe the actions referred to and other similar actions as both necessary and proper, this form of behaviour serves as a threat to the democratic values of the United States since it reduces the respect for the Congress while also "casting shadows on the independence and impartiality of the judiciary".[256]

Wise reported in 2020 that at that time, the then president of the USA had appointed 55 appellate judges, 85 percent of which were white and the rest being male.[257] The author proceeded to note that from the total number of appointed judges referred to, not one

253 Strong 2020 *VJTL* 616.
254 Strong 2020 *VJTL* 616.
255 Strong 2020 *VJTL* 616.
256 Strong 2020 *VJTL* 617.
257 Wise 2020 https://www.theatlantic.com/ideas/archive/2020/10/americas-judiciary-doesnt-look-like-america/616692/.

is black.[258] These facts are relatively startling and are equally a hindrance to the successful diversification of the American judiciary.

Wise proceeds to submit that during 2017, 90 percent of the judges appointed to serve on the bench were white.[259] Moreover, according to the Federal Judicial Centre as reported during August 2020, 80 percent of all judges that were appointed federally were white.[260] During the years (2022 and 2023) of writing this research project, it is reported that black women account for 4 percent of all federal judges while 70 percent of federal judges are male and 78 percent are white.[261]

Wise concedes that four years from 2020, judicial appointments were happening quietly but nonetheless "covered" in a daily stridency of controversies and issues reported by the American media.[262]

During 2022, the then President Biden asserted that he had appointed more black women to serve as circuit judges than any "administration in American history", the previous record was three black women in eight years while Biden's administration was able to confirm "four in less than eight months".[263] These submissions are a clear indication of the fact that America has not been appointing black woman to serve on its benches,

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258 Wise 2020 https://www.theatlantic.com/ideas/archive/2020/10/americas-judiciary-doesnt-look-like-america/616692/.

259 Wise 2020 https://www.theatlantic.com/ideas/archive/2020/10/americas-judiciary-doesnt-look-like-america/616692/.

260 Wise 2020 https://www.theatlantic.com/ideas/archive/2020/10/americas-judiciary-doesnt-look-like-america/616692/.

261 ABA 2022 https:www.americanbar.org/news/abanews/aba-news-archives/2022/08/new-report-on-profession.

262 Wise 2020 https://www.theatlantic.com/ideas/archive/2020/10/americas-judiciary-doesnt-look-like-america/616692/.

263 Wheeler 2022 https://www.google.com/amp/s/www.brookings.edu/blog/fixgov/2022/01/27/bidens-first-year-judicial-appointments-impact/amp/.

which goes to the root of discrimination in America (dating back more than half a century ago).

It ought to be noted that judicial appointments of federal judges have a lifetime effect, meaning that the appointed judges still serve even after the president who appointed them has left his office.[264] This cannot be right though, no judge should be appointed to serve a lifetime contract because there are other suitably qualified people who would successfully serve as judicial officers- unless of course there are matters of the security of tenure.

According to Smith *et al*, "the studies executed and experience acquired by DPLF" serve as clear indication of the fact that the respect for judicial independence in America is lacking.[265] Even though threats to the independence of the American judiciary may emanate from a variety of sectors, Smith *et al* hold that "interference in the work of the judiciary" is fundamentally caused by other political influences.[266]

As a result of the attempts aimed at controlling the courts of justice through appointments that are politically motivated ("instead of nominating candidates based on their merit"), the members appointed to superior courts are not necessarily the most qualified- they are rather individuals that are politically affiliated to the governing party.[267] At the very least, according to Smith *et al*, this provides an impression that judicial officers

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264 Gramlich 2022 https://www.pewresearch.org/short-reads/2022/08/09/biden-has-appointed-more-federal-judges-than-any-president-since-jfk-at-this-point-in-his-tenure.
265 Smith *et al* 2013 *DPLF* 7.
266 Smith *et al* 2013 *DPLF* 7.
267 Smith *et al* 2013 *DPLF* 7.

appointed on the basis of their political links lack independence- meaning that there cannot be an effective separation of powers and proper protection of the rule of law.[268]

Smith *et al* argue that owing to the influence wielded by the higher courts over lower judges, particularly in decisions pertaining to "appointments, promotions and disciplinary matters", having control over the justices of the highest courts "guarantees the power to influence the entire judiciary".[269] Clearly a decision to appoint a judge to serve on the bench has an impact on the overall outlook of the judiciary- hence the need to ensure that whoever is appointed to adjudicate over matters is the right fit for the role of which he or she is appointed.

2.4 Conclusion

The second chapter of this research project provided a thorough examination of the justification behind the establishment of a Commission for judicial appointment processes. The process of appointing judges to serve on the bench is as important as the work those appointed judges do. This is because judgments that are delivered have a direct impact on the lives of many people, this is exactly why there is a need to appoint the relevant people to serve on the bench. The importance of judicial appointments is equally important in all states because judges do the same work across states- the work of interpreting the law in the best way possible and applying it in the same standards. The status and economic role of some countries emphasise the fact that judicial appointments are important for some countries than they are for others.

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268 Smith *et al* 2013 *DPLF* 7.
269 Smith *et al* 2013 *DPLF* 7.

CHAPTER 3 ISSUES CENTERED ON THE JSC

3.1 Introduction

The consequences of the past injustices of apartheid and the dominance of parliamentary sovereignty are general knowledge.[270] In the quest to develop the laws of the country, the past injustices South Africa experienced are often alluded to because they gave birth to the current laws that regulate the country, as with its citizens.

According to a former commissioner of the JSC, the deliberations of the JSC are "about intuition" because one has to ultimately go with their gut "on who will make a good judge", contrary to the fact that when the integrity and independence of the judiciary are at stake, a "superior selection criteria" rather than commissioners' 'intuition' and 'gut' has to be formulated.[271] Although the JSC has been lauded for its transparency when conducting interviews for candidates to serve as part of the judiciary, it has nonetheless been involved in a lot of legal cases and media scrutiny during recent years.[272]

Having issues that ultimately affect the JSC's smooth operation and fulfilment of the constitutional mandates does not in any manner imply that the JSC has not been successful. It has been argued that the judicial appointment processes in South Africa have more politicians than legal minds,[273] while some may argue that some of the politicians do have law degrees- this project is of the view that a degree does not

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270 Baker 2019 https://time.com/longform/south-africa-unequal-country.
271 Gravette 2017 *THRHR* 285.
272 Radebe 2014 *PELJ* 1196-1202; Malan 2014 *PELJ* 1974-1981.
273 Judges Matter 2021 *Is There Political Influence At Play in the Selection of Judges?* https://www.judgesmatter.co.za/opinions/influence-selection-of-judges/.

necessarily equate one to having a legal mind. considering the submissions made above, the issues surrounding the JSC will be discussed herein this chapter.

3.2 Looking at the missteps of the JSC

Issues pertaining to judicial appointments in South Africa date back as early as the country's year of democracy. It goes without saying that the apartheid dominance in South Africa motivated what was a judiciary that lacked diversity in its social background, demographic representation as well as professional careers.[274] An essential rationale that has been acknowledged for the establishment of the JSC is "to establish a system of judicial appointment that is more open and independent", this is achieved through the procedures of JSC-hence the need to ensure proper procedures.[275]

Proper procedures include the requiring of input from the legal profession (as with its members), the input referred to is furnished during the nomination stage when candidates are still being sought to fill the relevant judicial posts.[276] Input can also be sought during the stages of undergoing interviews and through comments on the suitability of candidates to serve on the bench.[277] In addition to the proper procedures made reference to above, Gee and Malleson note that one of the important changes brought by the *Crime and Courts Act* of 2013 was to amend section 63 of the *Constitutional Reform Act* of 2005 which states that the Judicial Appointments Commission (JAC) ought to select candidates for judicial office based 'solely on merit'".[278]

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274 Oxtoby 2017 *SLR* 540.
275 Oxtoby 2017 *SLR* 541.
276 Oxtoby 2017 *SLR* 542.
277 Oxtoby 2017 *SLR* 542.
278 Gee and Malleson 2014 https://ukconstitutionallaw.org/2014/05/06/graham-gee-and-kate-malleson-judicial-appointments-diversity-and-the-equal-merit-provision.

Involving commentary from members of the legal profession is particularly essential because such comments are comments from peers and are therefore more influential since they often relate to essential qualities that include a "candidate's work ethic and knowledge of the law".[279]

Upon the appointment of a less senior judge to serve as President of the Transvaal High Court, former Justice Piet van der Walt elected to announce during October 1998 that he was retiring. This retirement was aided by the fact that a less deserving judge was appointed over a more deserving one- which ultimately shows that the missteps of the JSC are motivation for suitable candidates to decide not to go through the judicial appointment processes of the Commission. The JSC has clearly been dealing with issues for years and change must therefore happen.[280]

Tilley, Ndlebe and Mbekezeli submit that in 1994, there was a deep lack of faith in the apartheid judiciary because of legitimate concerns regarding the ability of "conservative judges who had previously sentenced anti-apartheid activists to death" to interpret and apply legal framework that was based on human rights.[281]

During April 1998, a number of judges from KwaZulu-Natal implored the JSC "to appoint Justice William Booysen over Justice Tshabalala", alleging that Tshabalala would fail to command the respect of the other judges due to his "lack of experience".[282] On the first day of June 1999, it was reported that the then Deputy President Thabo Mbeki (who was also the country's incoming President-scheduled to be appointed as such on the 11th of

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279 Oxtoby 2017 *SLR* 542.
280 ICJ 2012 *ICJ* 6.
281 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.
282 ICJ 2012 *ICJ* 6.

June 2000) had vetoed the appointment of Justice Erwin Cameron in favour of Justice Sandile Ngcobo.[283] These are just some of the issues the JSC has had to deal with, issues pertaining to improper influence.

Again in 1998, Judges Matter noted that the then Chief Justice (Ismail Mohamed) had compiled a set of guidelines for purposes of assisting the JSC in carrying out its duties of interviewing and recommending judges.[284] The guidelines were termed the 'Mohamed Guidelines' and would go on to serve their purpose for subsequent years, until they "fell into disuse".[285]

In 2010, new guidelines were drawn up by the JSC- with the aim of providing further clarification of the qualities required by the JSC from candidates.[286] It is not apparent whether or not these guidelines are still being used today or not- especially considering the fact that none of the current JSC members were serving during the time of drawing up the guidelines.[287]

Again During 2010, the then Minister of Justice, Jeff Radebe appointed Mokotedi Mpshe as an acting judge for the North-West High Court, while Mpshe was an acting National Director of Public Prosecutions (NDPP).[288] Mpshe, in his capacity as acting NDPP,

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283 ICJ 2012 *ICJ* 6.

284 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

285 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

286 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

287 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

288 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 8.

subsequently withdrew the corruption charges that were laid against Jacob Zuma-allowing the latter to become the President of the Republic of South Africa.[289]

In 2011, a "very bitter public debate" arose around the appointment of Mogoeng Mogoeng to serve as the Chief Justice of South Africa.[290] The debate revolved around the sexist stereotypes that were argued to be reflected in Judge Mogoeng's judgments on gender-based violence.[291]

Acknowledging that the promotion of diversity within the judiciary of South Africa is not an end in itself but serves as a means to ensure the enrichment of the country's jurisprudence is essential to enhance the quality of judicial findings and to ultimately restore the legitimacy and trust of the society in the judiciary.[292] In an instance where the JSC does not apply the selection criteria in a manner that advances the constitutional values as set out in the Constitution, "it would be failing in its duty".[293] This basically means that failure of the JSC to carry-out its mandates amounts to a violation of the Constitution.

During 2016, in an interview for the Constitutional Court Oral History Project, retired Justice Albie Sachs described the interviews of the JSC as "an attack on his honour".[294] These remarks were made on the basis of an impression that was created during the interviewing of Sachs to serve as justice of the Constitutional Court, the impression

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289 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 8-9.
290 Bonthuys 2015 *FLS* 8.
291 Bonthuys 2015 *FLS* 8.
292 Mokgoro 2010 *Advocate* 45.
293 Mokgoro 2010 *Advocate* 45.
294 Cabe 2022 https://www.newframe.com/indecent-interviews-will-the-jsc-selfcorrect/.

created was that Sachs condoned the "abuse and ill-treatment" of ANC members that were captured at the time.[295]

The DGRU notes that in 2017, 32% of the judges that were serving in Superior Courts (Supreme Court of Appeal and Constitutional Court) were women, the Unit also notes that there has never been more than three women serving as judges in the Constitutional Court.[296]

On the back of the fact that the percentage of women in the Magistrates Courts was recorded at 40%, the DGRU holds that the percentage is dismal- especially considering that South Africa is a signatory to international obligations that mandates parity within influential government positions.[297]

Hou reports that during 2021, interviews to assess candidates meant to serve on a number of courts in different provinces of the country ranged from being clear efforts intended at assessing the fitness of one to serve as part of the judiciary and assessing the "appropriate legal attributes" as well as the "alignment to social justice and transformation", to what Hou refers to as "shallow, generic questions and outright bullying, theatrics and hostility".[298]

Judicial candidates have been publicly questioned on topics of "white male privilege", delays in the writing of judgments, unfitting grammar in judgments while some have

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295 Cabe 2022 https://www.newframe.com/indecent-interviews-will-the-jsc-selfcorrect/.
296 DGRU date unknown http://www.dgru.uct.ac.za/gender-transformation-judiciary-project.
297 DGRU date unknown http://www.dgru.uct.ac.za/gender-transformation-judiciary-project.
298 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

been "made to apologize" for having served a predominantly white and racist judiciary that was equally governed by "apartheid cruelties".[299]

In recent years, a candidate became popular on social media because she failed to provide answers to questions on the Plascon-Evans Rule.[300] Hou writes that "another candidate pled for 'mercy and forgiveness' for what she called 'an error in judgment' arising from her insistence to preside over a legal matter "at her local Spur steakhouse" and not at the court itself.[301] In addition to the insistence referred to, the candidate also faced questions regarding her ability to serve as a judge while parenting five young children.[302] All these issues emanate from the fact that the JSC interviews are public, the inconsistent line of questioning by commissioners and the overall bias that exists with the Commission (as with its commissioners).

In a study conducted by Judges Matter, it was found that the interviewing processes of the JSC are "fraught" with irregularities and they lack objective criteria or standards that would guide the decisions of the Commission regarding judicial appointments.[303] Ultimately, Judges Matter noted that issues such as the inconsistency of questions posed

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299 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

300 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

301 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

302 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

303 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

to candidates, the inconsistent length and allocated time for interviews as well as the impact of these issues on the decision to appoint ought to concern all of us.[304]

When one interview proceeds for about an hour and another one (in the same round of interviews) lasts for only 10 minutes, there will inevitably be questions raised regarding whether the JSC adheres to its criteria.[305] This is even more worrisome when one considers that the interviewee from the shorter interview ended up getting the job over the interviewee in the longer interview.

The study by Judges Matter was conducted on the basis of 123 transcripts of 119 candidates that were interviewed to serve in various High Courts throughout a period of five years between 2015 and 2019.[306] In analyzing the study by Judges Matter, Tilley, Ndlebe and Mbekezeli submit that they found "four major themes" that dictated the questions posed in most of the interviews- despite the inconsistency of their asking.[307] The themes revolve around (i) the experience one has as a judge (ii) the will to transform and diversify the judiciary (iii) legal questions that relate to a specific subject area as well as (iv) questions around the theme of jurisprudence (relative to a legal theory or understanding of the law).[308]

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304 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

305 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

306 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

307 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

308 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

From a total of 50 interviews that were considered during the study, it was found that candidates were asked questions that related only to two of the four themes referred to above.[309] Additionally and more importantly, Tilley, Ndlebe and Mbekezeli submit that interviews that had questions from (at least) two or more themes resulted in higher chances of there being recommendation for appointment when compared to ones that had questions from none, one or two.[310] This finding shows the essence of being diverse when posing interview questions- despite diversity being arguably lax in the JSC.

According to Tilley, Ndlebe and Mebekezeli, there exists a significant inconsistency in the manner of asking questions by the JSC and the ultimate impact such manner has on the decision of whether to appoint a candidate as a judge or not is undesirable.[311]

Mbekezeli admits that the costs of adding more judges to the existing number do not only concern the salaries of such judges, such costs also concern costs of the relevant court space and the processes of hiring secretaries for judges.[312] According to Mbekezeli, what is important however, is that South Africa needs "more judges – and fast".[313]

From the study conducted, it was also found that the length of interviews by the JSC differed significantly. Because the JSC usually schedules strict 40-minute-interviews, Tilley, Ndlebe and Mbekezeli submit that candidates who were interviewed for 40 minutes

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309 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

310 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

311 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

312 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

313 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

had prospects of being recommended for judicial appointment.[314] The authors add that as soon as an interview proceeded for longer than 1 hour, the chances of the candidate receiving recommendation (and consequent appointment) decreased significantly.[315] An example of the addition referred to is the finding that the interviewee of the shortest interview (which was three minutes) was ultimately recommended (by the JSC) and appointed (by the President) over the interviewee of the longest interview (which took place for more than 114 minutes (almost two hours).[316]

During interviews held by the JSC in April 2021, commissioners criticised candidates on their judgments that such commissioners felt were not in their favour. Moreover, there is a reported situation where a Muslim and a Jewish candidate were asked a question of whether their religions would deter them from fulfilling their judicial responsibilities.[317] In light of the situations referred to, the Council for the Advancement of the South African Constitution (CASAC) decided to take the JSC to court and request that the interviews referred to be set aside.[318] A court settlement was ultimately reached and interviews were conducted again- with one candidate withdrawing because of "the abuse and humiliation suffered".[319]

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314 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

315 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

316 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

317 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

318 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

319 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

The DGRU and Judges Matter have went as far as reiterating the fact that the processes of conducting public interviews ought to encourage public confidence in the judiciary because same must preserve "the dignity and reputation of all candidates" who declare themselves suitable for judicial positions.[320] Additionally, the public must believe that the judicial office is a highly respected position and that only the most qualified people (regardless of their backgrounds) will be selected to be a part of.[321] Even in an instance where a candidate does not receive appointment, "they must still command the respect and esteem of their peers and the public at large".[322] In this context, it is essential for commissioners to ensure that they adopt the highest standards, while also being robust and fair in their lines of questioning.[323]

A professor of law at the University of Limpopo (Omphemetse Sibanda) argues that there ought to be a limited number of politicians in the JSC since there have been reported instances where members of the JSC used the interviews as means to settle their political scores.[324] Additionally, the law expert submits that as soon as there are three politicians in the JSC, same is in trouble of being unduly influenced.[325]

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320 DGRU and Judges Matter 2022 *UCT* 8.
321 DGRU and Judges Matter 2022 *UCT* 8.
322 DGRU and Judges Matter 2022 *UCT* 8.
323 DGRU and Judges Matter 2022 *UCT* 8.
324 Chabalala 2023 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/judicial-service-commission-whould-have-limited-or-no-political-appointees-law-professor-argues-20230323.
325 Chabalala 2023 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/judicial-service-commission-whould-have-limited-or-no-political-appointees-law-professor-argues-20230323.

The legal scholar also asserted that if it were up to him, he would remove or limit the number of politicians in the JSC and substitute them with "people" who share the same minds and who would probably assist in identifying and appointing judges.[326]

Chabalala notes that News24 has reported a number of instances that include JSC members using interviews as means to get back at judges who previously found against them in court, against their political allies or their political leaders.[327] At time of writing, Chabalala also noted that the relevant proposal to amend section 178 of the Constitution (compiled by the Helen Suzman Foundation) had already been placed before Parliament and proposed fewer politicians serving the JSC.[328]

In relation to the Chief Justice vacancy that has been left unfilled for a long time, Cabe submits that the absence of a permanently employed Chief Justice and leader of the South African judiciary creates serious issues for South Africa- these include rendering the country's democracy vulnerable and judicial independence uncertain and "under sustained populist attack".[329]

The General Council of the Bar of Advocates is one of the parties that have voiced out their rejection of the JSC's missteps. The Council called for the recalling of Adv Dali Mpofu based on allegations that he has brought the legal fraternity into disrepute.[330]

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326 Chabalala 2023 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/judicial-service-commission-whould-have-limited-or-no-political-appointees-law-professor-argues-20230323.

327 Chabalala 2023 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/judicial-service-commission-whould-have-limited-or-no-political-appointees-law-professor-argues-20230323.

328 Chabalala 2023 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/judicial-service-commission-whould-have-limited-or-no-political-appointees-law-professor-argues-20230323.

329 Cabe 2022 https://www.newframe.com/indecent-interviews-will-the-jsc-selfcorrect/.

330 Cabe 2022 https://www.newframe.com/indecent-interviews-will-the-jsc-selfcorrect/.

Considering the fact that the JSC in South Africa is made up of some twenty-three to twenty-five (23-25) members, Moremi submits that this number renders the JSC unnecessarily large in its composition.[331] On the other hand, the NDP is of the view that this number has to be reduced significantly because the JSC is too large to function effectually and to be overwhelmed by political issues.[332] The author also proposes that the current structure of the JSC be reconsidered so as to determine whether same is able to execute its obligations or not.[333] Ultimately, Moremi recommends that the number of JSC members "be reduced to eleven" so as to be able to assist the JSC to reach its decisions by way of majority votes because eleven is an odd number.[334]

The fact that there is no mechanism to deal with commissioners who resist or disregard the rulings of the chairperson or those who continuously misconduct themselves is noted as a cause for concern by Judges Matter and the DGRU.[335] In this regard, the parties advise the JSC to establish an unequivocal Code of Conduct for Commissioners, comprising of a mechanism that enables the chairperson (on behalf of the JSC) to provide a letter to the electorate that elected the faulting commissioner- requesting same "to either discipline or recall" such errant commissioner.[336]

Importantly, it ought to be noted that CASAC has noted that in the quest to fulfil its mandate, the JSC has acted unlawfully by going beyond its mandate of conducting interviews for the Constitutional Court.[337] One of the important personnel the Council

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331 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 97.
332 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 97.
333 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 97.
334 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 97.
335 DGRU and Judges Matter 2022 *UCT* 9.
336 DGRU and Judges Matter 2022 *UCT* 9.
337 Rabkin 2021 https://select.timeslive.co.za/news/2021-06-03-jsc-commissioners-failed-dismally-during-concourt-interviews.

(Lawson Naidoo) even went as far as submitting that commissioners of the JSC asked "irrelevant and nonsensical questions" that resulted in candidates being subjected to prejudice.[338] Moreover, Naidoo also argued that the relevant commissioners of the JSC were using the interviews to settle their political scores.[339]

The interviews of candidates to serve the Office of the Chief Justice in South Africa have resulted in the expression of many differing views by concerned parties- many going as far as concluding that the JSC "urgently needs reform".[340] Corder argues that there have been clear attempts to "undermine the role of the Judicial Service Commission" by some of the commissioners who sit on it.[341]

Some of the commissioners referred to are argued to "have clearly and wilfully pursued" agendas that are personal or political when questioning candidates and it is argued that the Acting Chair (Justice Xola Petse) has also failed dismally to regulate the behaviour referred to.[342]

Immediate action to ensure the reviewing and remedying of the issues centred on the JSC is required and in this instance, Corder suggests that there be a mandatory training of commissioners for the role expected from them and such training must be standard practice before one assumes office as a commissioner of the JSC.[343] The Professor also

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338 Rabkin 2021 https://select.timeslive.co.za/news/2021-06-03-jsc-commissioners-failed-dismally-during-concourt-interviews.

339 Rabkin 2021 https://select.timeslive.co.za/news/2021-06-03-jsc-commissioners-failed-dismally-during-concourt-interviews.

340 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

341 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

342 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

343 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

proceeds to suggest that there be more emphasis on the explicit power to recall errant members of the Commission by their colleagues.[344] This basically means that commissioners who are deemed culpable of not abiding by the relevant law and principles ought to be tamed accordingly for their missteps.

Another suggestion for the betterment of the JSC and its processes is to increase "the diversity and expertise of its members" by ensuring the appointment of Presidential nominees that are "only from relevant bodies in civil society".[345] What this suggestion means is that the people who play a part in the JSC's appointment processes are people with legal knowledge and expertise because they are the ones who know exactly what the legal field demands from its fielders.

Corder also suggests that there be an elimination of television cameras from public interviews and there be reliance on radio.[346] The author argues that this "will ensure transparency" just as much as it will eliminate the temptation to grandstand.[347]

Lastly, Corder is of the view that "every opportunity to ensure that a culture of respect, tolerance, and non-partisanship" is maintained and established has to be sought to improve all aspects of the processes of the JSC- here Corder acknowledges the importance of the role played by the Chairperson.[348]

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344 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

345 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

346 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

347 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

348 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

It is also advisable for the JSC to review its membership and reduce the number of members of Parliament, while also maintaining representation from opposition parties.[349] In increasing the number of MPs in the JSC, the number of Judges can also be increased to two (incorporating 1 judge from each Constitutional Court and one judge from each SCA).[350]

3.3 Political influence on the JSC

Politics play an unarguably essential role in the protection, fulfilment and advancement of the law.[351] The influence of politics on South African law is enormous, especially in relation to the judicial appointment processes.[352]

Malleson submits that "the selection of judges on the basis of merit rather than political patronage" is an essential trait of a good process of judicial appointment.[353] Additionally, the author submits that in South Africa, "the size and political influence of the judiciary has increased" and this ultimately results in there also being a rise in the demands for change in the manner of appointing judges.[354]

The influence of politics on the judicial appointment processes of the Republic of South Africa dates back to the 1990s. During 1994, the then President of South Africa, Mr Nelson Mandela appointed Arthur Chaskalson to serve on the bench as the first President

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349 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

350 Corder 2022 https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process.

351 Whittington KE 2021 *Law and Politics: Critical Concepts in Political Science* http://www.princeton.edu/~kewhitt/lawandpolitics.

352 Moremi An Analysis of Political Influence on the Judicial Appointments Process in South Africa xi-xii.

353 Malleson 2004 *Public Law* 3.

354 Malleson 1998 *Amicus Curiae* 13.

of the Constitutional Court.[355] It ought to be noted that Mr Chaskalson formed part of the legal team that represented Nelson Mandela at the prominent Rivonia trial between 1963 and 1964.[356] One can only reasonably conceive that the relationship Chaskalson had with the then President ended up influencing the latter to appoint the former as head of the Constitutional Court.[357] A clear indication of political influence having a stamp since the years of striving for constitutional democracy in the Republic of South Africa.

In approaching the Johannesburg High Court for an order declaring the JSC interviews held for the Constitutional Court unlawful, Naidoo argued that the purpose of the said interviews ought to be determining "if a candidate is fit and proper for appointment and which candidates are the most suitable".[358] According to Naidoo, Considerations that are based on political party-affiliations and other agendas should serve no purpose because despite the JSC comprising of political figures, "their role is a constitutional one".[359]

Judicial appointments in the Republic of South Africa are inherently doomed to be manipulated by politics because at the top of the appointment hierarchy is the President of the country, who is a political figure, while on the other hand rests the Minister of Justice (another political figure).[360]

Out of the 23 members normally constituting the JSC, the General Council of the Bar of South Africa (GCBSA) submits that "the appointment of only six can be said to fall outside

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355 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 43.
356 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 43.
357 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 43.
358 Rabkin 2021 https://select.timeslive.co.za/news/2021-06-03-jsc-commissioners-failed-dismally-during-concourt-interviews.
359 Rabkin 2021 https://select.timeslive.co.za/news/2021-06-03-jsc-commissioners-failed-dismally-during-concourt-interviews.
360 Moremi *An Analysis if Political Influence on Judicial Appointments Process in South Africa* xi.

the direct control of the governing political party".[361] The six appointments referred to include the appointment of the country's top three judges (the Chief Justice, the Judge President of the SCA and a Judge President of the High Court- including three representatives from the opposing political party).[362]

The GCBSA argues that commissioners who make up and represent the JSC ought to emanate from positions of individuals who have reasons to ensure that the judiciary performs its duties in the highest of standards.[363] The Council proceeds to add that such commissioners should not be employed to the JSC on the basis of their political affiliation and also, they should have an ability to balance the interests of judicial excellence with those of judicial transformation.[364] What this means is that people who serve in the JSC ought to be people who have a direct interest in the advancement of the law of South Africa (this includes lawyers themselves).

According to the GCBSA, people in positions referred to above include practising lawyers- who are in the best position to tell who the good judges are and who are most likely to serve as judges.[365] Academics are also individuals who can be added to the group of practicing lawyers since they are argued to have an interest in the intellectual and academic excellence the judiciary.[366]

Another category of individuals who are said to have an interest in the excellent operation of the judiciary "are judicial officers themselves", including ordinary judges (from lower

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361 GCBSA 2009 *Advocate* 32.
362 GCBSA 2009 *Advocate* 32.
363 GCBSA 2009 *Advocate* 33.
364 GCBSA 2009 *Advocate* 33.
365 GCBSA 2009 *Advocate* 33.
366 GCBSA 2009 *Advocate* 33.

courts) that share the interest since they are unlikely to reduce the "status of the judicial bodies to which they belong" by admitting their ranks to "inferior candidates".[367]

In addition, the GCBSA also argues that the President should not be granted the power to appoint commissioners to serve on the JSC, the Council proceeds by adding that there is no basis for the Minister of Justice to hold a session with the JSC regarding its recommendations- nor is there a need for members of Parliament or the National Council of Provinces (NCOP) "to have any say in the appointment of judges".[368] In essence, section 178(1) of the Constitution of the Republic of South Africa allows for the breaching of the *trias politicas* principle by allowing parties from all the three branches of government to serve as commissioners.[369]

The appointment processes of the JSC ought to be independent and must also be followed without undue influence from third parties.[370] In providing his testimony at the Zondo Commission on State capture allegations, President Cyril Ramaphosa submitted that the influence of ANC members on the JSC may have more weight than the interviews themselves.[371]

Freedom Under Law (FUL) submits that there ought to be more judges and fewer politicians serving as appointees of the Commission if the country wishes to battle political influence on judicial appointments.[372]

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367 GCBSA 2009 *Advocate* 33.
368 GCBSA 2009 *Advocate* 33.
369 GCBSA 2009 *Advocate* 33.
370 Judges Matter 2021 https://www.judgesmatter.co.za/opinions/politival-influence-selection-of-judges.
371 Judges Matter 2021 https://www.judgesmatter.co.za/opinions/politival-influence-selection-of-judges.
372 Peterson 2022 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/more-judges-fewer-politicians-jsc-report-recommends-20221129.

Calli Solik (lead researcher and author of FUL) has submitted (in a report) that the problems of the JSC are diverse, arguing that they range from infrastructural and structural to procedural.[373]

The report compiled by Solik also submits that the difficulties of the JSC are caused by failure of the Commission "to adopt and apply appropriate guidelines" for its interviewing and appointment processes.[374] Additionally, the processes of the JSC have been found to have been "stymied" by political influence at different levels because the interviews that are being conducted are being used by commissioners "to air their political agendas".[375]

During 2021, Judges Matter reported that the ANC had a sum of eight (8) commissioners affiliated to it, from the total number of twelve (12) politicians.[376] From the remaining four (4), three (3) were members of the ANC- the fourth being the premier of the province in which the appointment was meant to be made.[377] Additionally, eight (8) out of the nine Premiers emanated from the ANC.[378] Owing to the significant impact of politics on judicial appointment processes, calls were made for the inclusion of more judges and lawyers within the JSC.[379]

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373 Peterson 2022 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/more-judges-fewer-politicians-jsc-report-recommends-20221129.

374 Peterson 2022 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/more-judges-fewer-politicians-jsc-report-recommends-20221129.

375 Peterson 2022 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/more-judges-fewer-politicians-jsc-report-recommends-20221129.

376 Judges Matter 2021 https://www.judgesmatter.co.za/opinions/politival-influence-selection-of-judges.

377 Judges Matter 2021 https://www.judgesmatter.co.za/opinions/politival-influence-selection-of-judges.

378 Judges Matter 2021 https://www.judgesmatter.co.za/opinions/politival-influence-selection-of-judges.

379 Judges Matter 2021 https://www.judgesmatter.co.za/opinions/politival-influence-selection-of-judges.

During early 2022, the JSC was accused of playing politics and overstepping the boundaries of the appointment of South Africa's next Chief Justice.[380] Congress of the People (COPE) and the President of the country (Cyril Ramaphosa) have stated that the JSC exceeded its mandate by recommending Justice Maya for the Chief Justice position.[381]

During interviews for the Chief Justice position, Gauteng Judge President (Dunstan Mlambo) is said to have been ambushed with allegations of sexual misconduct by Adv Dali Mpofu (a senior member of the Legal profession), who was aided by EFF leader and member of Parliament, Julius Malema.[382] Additionally, there is a "screaming match" that is said to have taken place between EFF leader (Julius Malema) and Justice Minister (Ronald Lamola) in which the former accused the latter of being a liar.[383] The influence of politics on the JSC raises questions of legitimacy pertaining to the Commission as much as it places emphasis on the fact that the Commission has material faults.[384]

The fact that the President of the country appoints judicial officers and the reality that the JSC comprises of a considerable number of politicians emanating from the Legislature could negatively affect the independence of the judiciary.[385] One can only pose a question; does the power to appoint vest with the right person? This question equally

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380 Chimombe 2022 https://www.sabcnews.com/sabcnews/jsc-accused-of-playing-politics-and-overstepping-its-mandate-regarding-chief-justice-role/.

381 Chimombe 2022 https://www.sabcnews.com/sabcnews/jsc-accused-of-playing-politics-and-overstepping-its-mandate-regarding-chief-justice-role/.

382 Mafora 2022 *A requiem for the Judicial Service Commission* https://www.google.com/amp/s/www.businesslive.co.za/amp/fm/opinion/2022-02-10-a-requiem-for-the-judicial-service-commission/.

383 Mafora D 2022 *A requiem for the Judicial Service Commission* https://www.google.com/amp/s/www.businesslive.co.za/amp/fm/opinion/2022-02-10-a-requiem-for-the-judicial-service-commission/.

384 Gravett 2017 *THRHR* 268-269.

385 Gravett 2017 *JCRDL* 268.

applies to the Minister of Justice, who also wields authority in as far as the appointments of judges and acting judges are concerned.[386]

Any judicial appointment motivated by political dominance is regarded a direct threat to the independence and effective functioning of the judiciary.[387] Threatening the independence of the judiciary means violating section 165(3) of the Constitution, which provides that no person or organ of state may interfere with the functioning of the courts.[388]

According to Smith, the active participation of politics in the process of appointing judicial officers compromises the independence of the judiciary and makes judicial officers fragile to political pressure.[389]

Hoexter and Olivier provide that the great number of politicians and political appointees within the JSC makes the JSC more likely to be influenced by political considerations in the process of making judicial appointments.[390] Moreover, Hoexter and Olivier submit that the composition of the JSC affords most of its members an opportunity to vote for candidates who are committed to the governing political party instead of those suitably qualified for positions.[391]

The JSC has been said to have been involved in controversy and it has, many a time, been said to lack legitimacy.[392] Some have criticized the JSC by submitting that it is

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386 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 3.
387 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 4
388 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 4.
389 Smith *Judges and Democratization* 53.
390 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 10.
391 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 10.
392 Gravette 2017 *THRHR* 268.

significantly influenced, if not straight-out controlled, by party politics. While some have made claims of a "partisan takeover" having taken place.[393]

CASAC submits that politicians on the JSC seem to use the interviews as a platform to express their grievances, argue settled matters and "score political points".[394]

The *National Development Plan 2030,* which is understood to provide a long-term perspective on the goals that different sectors of the Republic ought to reach within a certain period of time, also acknowledges the faults of the JSC by stating that the Commission unfortunately lacks consensus on the qualities and attributes required for judicial appointment.[395] Furthermore, the interviews of the Commission generally lack consistent time frames because some interviews were short while others were lengthy.[396] From case law, to opinions of judicial officers, the JSC is negatively criticized.

Gravette submits that the first step in revising the interviewing procedures of the JSC is "to conduct a job analysis to determine the knowledge, skills and abilities that those seeking judicial office should possess".[397] On the basis of the analysis referred to, a standard set of questions could then be organised to assess these knowledge, skills and abilities.[398] The fundamental question in the conducting of job analysis would be: "What are the qualities and attributes of the 'ideal South African judge'?".[399]

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393 Gravette 2017 *THRHR* 268.
394 Mafora 2022 https://www.google.com/amp/s/www.bysinesslive.co.za/amp/fm/opinion/2022-02-10-a-requiem-for-the-judicial-service-commission/.
395 Gravett 2017 *THRHR* 275.
396 Gravett 2017 *THRHR* 273.
397 Gravett 2017 *THRHR* 285.
398 Gravett 2017 *THRHR* 285.
399 Gravett 2017 *THRHR* 285.

Gravette submits that the JSC's lack of transparency and accountability relative to the general criteria for selection of candidates is consequent to the fact that the JSC is paralysed by the differing opinions held by commissioners about the qualities and attributes of the "ideal South African judge",[400] additionally, Gravette is of the opinion that it is relatively clear that the JSC lacks the institutional will to undertake the task of selecting candidates.[401] Roth argues that judges who have received appointment because of political reasons tend to soon believe that they were appointed on merit, which is in fact contrary to reality.[402] This misconception results in judges not properly executing their judicial mandate.

The sustainability of South Africa's constitutional democracy depends largely on the judiciary's ability to ensure that there is compliance with the Constitution.[403] The competence and credibility of the judiciary rests on the appointment of judges who possess the ability to reflect on the diversity of the country and act without fear or favor while also developing a jurisprudence which enhances constitutionalism.[404]

Ferreira reports that there have been reports suggesting that there be a reformation of the JSC, citing reasons that include the need to reduce the number of politicians in the Commission and the equal need to reduce the risk of judicial appointments being made under the dominance of bias.[405]

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400 Gravett 2017 *THRHR* 285.
401 Gravett 2017 *THRHR* 285.
402 Roth 2012 *Judicial Appointments* 1.
403 Tilley and Ndlebe 2021 *BJALS* 1.
404 Tilley and Ndlebe 2021 *BJALS* 1.
405 Ferreira 2022 google.com/amp/s/mg.co.za/news/2022-12-02-two-reports-urge-reform-of-jsc/%3famp.

Caution has been explicitly made by FUL and HSF regarding the threat posed by the JSC's "history of arbitrary, at times inexplicable, appointments"- including the "abuse of interviews" for what Ferreira refers to as "political ends".[406]

FUL argued that the performance of the JSC in executing its two primary mandates (appointing judicial personnel and holding same to account) in the last decade or so has "in many respects been dismal".[407]

Additionally, the advocacy group (FUL) has suggested that there be a reduction in the number of political commissioners because this would "go some way" in combatting the issue of one political organisation controlling the judicial appointment processes.[408]

In arguing for the reduction of political participants in the JSC, FUL conceded that amending section 178 of the Constitution (which provides on the composition of the JSC) "will in any event not address the problem of political interference completely".[409] What ought to happen is a shift in perspective, where "the unique and non-party-political function of the JSC" is recognised.[410]

Balthazar argues that there is no reason for the JSC to be made up of 10 direct politicians- in addition to the Minister of Justice.[411] The author proceeds by submitting that the

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406 Ferreira 2022 google.com/amp/s/mg.co.za/news/2022-12-02-two-reports-urge-reform-of-jsc/%3famp.

407 Ferreira 2022 google.com/amp/s/mg.co.za/news/2022-12-02-two-reports-urge-reform-of-jsc/%3famp.

408 Ferreira 2022 google.com/amp/s/mg.co.za/news/2022-12-02-two-reports-urge-reform-of-jsc/%3famp.

409 Ferreira 2022 google.com/amp/s/mg.co.za/news/2022-12-02-two-reports-urge-reform-of-jsc/%3famp.

410 Ferreira 2022 google.com/amp/s/mg.co.za/news/2022-12-02-two-reports-urge-reform-of-jsc/%3famp.

411 Balthazar 2022 https://www.dailymaverick.co.za/opinionista/2022-02-07-the-jsc-is-an-obstacle-to-promoting-a-constitutionally-ressilient-judiciary-it-must-be-reformed.

guidelines used by the JSC in the carrying out of its mandates ought to be revisited and crafted in a manner that binds the JSC to its decisions- so as to ensure consistency in decision-making.[412] In addition to the clear guidelines recommended, Balthazar also recommends that commissioners be subjected to compulsory training.[413]

Ultimately, Balthazar recommends that there be an amendment of the Constitution so as to enhance the operations of the JSC by focusing on importance aspects that include the composition of the JSC itself (i.e. the people who make up the Commission).[414] The recommendations proposed by Balthazar are not novel to the world of research, what is important is to get the message to the right people through the right channels.

In submitting their input on the draft "Summary of Criteria and Questioning Guidelines" that were released by the JSC on October 27th 2022, the DGRU and Judges Matter submit that a consistent theme of their submissions in recent years has been centred on the need for the JSC to develop a more detailed criteria which will be used to evaluate and select suitable candidates for judicial positions.[415] Importantly, the parties also add that the JSC's selection criteria should be applied at all the stages of the appointment process, even though the extent of the application may vary.[416]

The controversial manner used to appoint judges in South Africa has been criticized by a lot of people, some going as far as suggesting that the appointment system be completely

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412 Balthazar 2022 https://www.dailymaverick.co.za/opinionista/2022-02-07-the-jsc-is-an-obstacle-to-promoting-a-constitutionally-ressilient-judiciary-it-must-be-reformed.

413 Balthazar 2022 https://www.dailymaverick.co.za/opinionista/2022-02-07-the-jsc-is-an-obstacle-to-promoting-a-constitutionally-ressilient-judiciary-it-must-be-reformed.

414 Balthazar 2022 https://www.dailymaverick.co.za/opinionista/2022-02-07-the-jsc-is-an-obstacle-to-promoting-a-constitutionally-ressilient-judiciary-it-must-be-reformed.

415 DGRU and Judges Matter 2022 *UCT* 2.

416 DGRU and Judges Matter 2022 *UCT* 4.

revamped (which includes the booting of politicians from JSC).[417] Tilley, Ndlebe and Mbekezeli submit that the form of suggestion alluded to above may seem easy, they consequently ask if the suggestion will go towards remedying the right problem.[418]

Based on research published by Judges Matter in an international academic journal, it was found that the problems of the JSC "are deeper than meets the eye".[419] The research referred to above concludes by submitting that the first step towards fixing the missteps of the JSC is to develop "a clear set of criteria for judicial appointments".[420]

In order to ensure that the selection criteria is applied fairly and consistently throughout the stages, Judges Matter and DGRU submit that the finalised document that sets out the selection criteria and the one that has all the questions that are meant to solicit information from candidates are essential instruments.[421] The documents referred to are essential because they solicit all the information that is necessary for the JSC to assess and determine the suitability of candidates for judicial appointment.[422] This inevitably means that there must be a clear connection between the information requested by the questions posed and the manner used to consider such information.

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417 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

418 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

419 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

420 Tilley, Ndlebe and Mbekezeli 2022 https://www.dailymaverick.co.za/article/2022-04-03-judicial-appointments-process-research-shows-cause-for-much-concern-but-theres-hope/.

421 DGRU and Judges Matter 2022 *UCT* 4.

422 DGRU and Judges Matter 2022 *UCT* 4.

Issues of the JSC have been highlighted by some prominent figures over the course of time, this has resulted in litigations that have resulted in some very important judgements and legal interpretations.[423]

3.4 Judicial precedence on the issues of the JSC

Former Justice of the Constitutional Court, Justice Johann Kriegler, has stated that the manner used by the JSC in exercising its primary function of recommending candidates for judicial appointment has increased the threat to the independence of the judiciary.[424]

In *President of Republic of South Africa v South African Rugby Football Union*,[425] emphasis was placed on the fact that the impartiality of a judge serves as the foundation of a legal system that is just and fair. An independent judge is more probable to disperse fair justice.

In *South African Association of Personal Injury Lawyers v Heath*,[426] judicial independence and the doctrine of *trias politicas* were thoroughly explained when the court submitted that:

> The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they apply impartially without fear, favour or prejudice. No organ of state or other person may

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423 See *Cape Bar Council v Judicial Service Commission* [2012] 2 All SA 143 (WCC).
424 Gravette 2017 *THRHR* 268.
425 2000 1 SA 1(CC) at paras 35-48.
426 2001 1 SA 883 (CC).

> interfere with the functioning of the courts and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[427]

Judicial appointments clearly go beyond making the appointment, they go as far as the quality of the work produced by the relevant judge upon being appointed.

In 2009, Sandile Ngcobo was appointed to serve as the Chief Justice of the Constitutional Court by the then President Jacob Zuma.[428] On the other hand, there is *Zuma v National Director of Public Prosecutions*,[429] a legal dispute concerning Jacob Zuma in 2008- prior to his election as the President of the Republic of South Africa. In this case, the court had to determine the legality of warrants issued to search Mr Zuma's premises. Majority ruled that the relevant warrants were valid because they complied with the ambit of the search, Ngcobo was the only dissenting judge. Moremi contends that it is "academically disturbing" to think that Zuma appointed Ngcobo as the Chief Justice upon the judgment as a gesture of favouritism.[430]

The SCA has added to the list of findings highlighting the missteps of the JSC with its finding in *Freedom Under Law v Acting Chairperson of the Judicial Service Commission.*[431] In the case, it was found that the JSC had acted irrationally when fulfilling its constitutional mandate of investigating allegations of gross misconduct.[432] The two cases referred to are, at time of writing this research piece, a decade old but their significance still proves relevant today and shall continue being relevant for the longest of time.

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427 At para 26.
428 Misra-Dexter and February *Testing Democracy: Which Way is South Africa Going?* 206.
429 *Zuma v National Director of Public Prosecutions* 2009 (1) SACR 361 (SCA).
430 Moremi *A Critical Analysis of Political Influence on the Judicial Appointments Process in South Africa* 43-44.
431 2009 (1) SACR 361 (SCA).
432 Gravette 2017 *THRHR* 269.

In *Justice Alliance of South Africa v President of the Republic of South Africa and Others*,[433] the then President of South Africa (Mr Jacob Zuma) was taken to the highest court of the country (the Constitutional Court) for extending the term of office of Justice Ngcobo without initially consulting with the JSC and relevant members of political parties that are represented in Parliament.[434] A legitimate assumption is that the extension referred to was based on relevant influences that include political ones.

The JSC has been involved in a lot of cases regarding its unacceptable practices, among other missteps. In *Cape Bar Council v Judicial Service Commission*,[435] the Cape Bar Council accused the JSC of having acted unconstitutionally.[436] The JSC had failed to recommend candidates to fill vacancies at the Western Cape High Court and had equally failed to provide suitable reasons for its failure, despite having eligible candidates that were available for appointment.[437]

In March of 2013, former Justice Zak Jacoob referred to the approach used by the JSC in its interviewing of judicial candidates as flawed mainly because it lacked clear guidelines regarding its interviewing procedures.[438]

In *Nkabinde and Another v Judicial Service Commission*,[439] the court was faced with an application concerning the unethical conduct of the then Judge President of the Western

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433 2011 (5) SA 388 (CC)
434 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 124.
435 [2012] 2 ALL 143 (WCC).
436 Radebe 2011 *PELJ* 1196.
437 Radebe 2011 *PELJ* 1196.
438 Gravett 2017 *THRHR* 275.
439 [2016] All SA 415 (SCA).

Cape High Court.[440] The applicants had initially taken their complaints to the JSC, but they felt that the JSC did not handle their matter satisfactorily.[441]

The parties then decided to approach the Johannesburg High Court, which ultimately resulted in the appeal. In the high court, it was submitted that after the judgment in the prominent "Zuma/Thint" cases was reserved, the then Judge President of the Western Cape High Court separately communicated with each of the applicants in their different chambers at the Constitutional Court- with aims of persuading the respective Justices to provide verdicts that are to the advantage of the then President of the Republic of South Africa (Mr Jacob Zuma).[442] This is a case which supports the argument that the JSC has a lot of missteps- which include the dominance of politics and which equally demand proper correction.

In *Helen Suzman Foundation v Judicial Service Commission*,[443] the Constitutional Court of South Africa made several points that are highly essential to the JSC. The court submitted that the confidentiality and privacy of deliberations held by the JSC upon conducting interviews ensure the "independence, impartiality, dignity, accessibility and effectiveness" of the judiciary.[444] The case dealt with the disclosure of deliberations held by the JSC upon conducting interviews and ultimately upheld the appeal accordingly by ordering that the JSC disclose its deliberations to the Helen Suzman Foundation.

At some point during 2021, Rickard reported that an unexpected legal action against the JSC could not have been expected but was nonetheless initiated. The action criticised the

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440 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 71.
441 Moremi *An Analysis of Political Influence on the Judicial Appointments Process in South Africa* 71.
442 [2014] 4 All SA 637 (GJ), at para 2.
443 2018 (7) BCLR 763 (CC).
444 At para 201.

methods used by the JSC in conducting some of its interviews.[445] Additionally, the legal action referred to requested that the JSC re-consider the list of candidates it had sent to the President (this request was based on allegations of unfair and irrational processes).[446]

During 2022 (year of writing this researched work), the JSC still faced issues regarding the conduct of its members- for instance, during the interviewing of candidates for the Chief Justice position, it is submitted that Judge Maya was subjected to "sexist and insensitive" questions about her gender and not questions about her outstanding work as a judge.[447]

What is important to note is the fact that since its establishment, the JSC has faced a serious problem of failing to strictly adhere to clear guidelines.[448]

The analysis provided above includes cases decided more or a bit less than ten years ago, it therefore serves as a clear indication of the fact that the undue influence of politics on judicial appointments has been an issue within the JSC for quite a long time. Between 2020 and 2022, the JSC still faced criticism regarding its unacceptable practices. The criticism is backed by case law, among other authoritative sources.

During the writing of this research project, the Supreme Court of Appeal (SCA) had handed down a judgement in *Freedom Under Law v JSC*,[449] wherein the appellate court

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445 Rickard 2021 https://africanlii.org./articles/2021-06-11/carmel-rickard/judicial appointments-problems-spread-like-a-virus.

446 Rickard 2021 https://africanlii.org./articles/2021-06-11/carmel-rickard/judicial appointments-problems-spread-like-a-virus.

447 Mafora 2022 https://www.google.com/amp/s/www.bysinesslive.co.za/amp/fm/opinion/2022-02-10-a-requiem-for-the-judicial-service-commission/.

448 Balthazar 2022 https://www.dailymaverick.co.za/opinionista/2022-02-07-the-jsc-is-an-obstacle-to-promoting-a-constitutionally-ressilient-judiciary-it-must-be-reformed.

449 [2023] ZASCA 103.

provided critical criticism of the JSC in relation to the way the Commission carries out its mandates.[450] The matter dealt specifically with the JSC's mandate of dealing with complaints that are levelled against judges. Complaints, judicial appointments and political dominance- these scream red flags only.

Oxtoby submits that it is essential for judges to rest assured that are duly protected from "political retaliation" against their judgments,[451] which some people may deem unfair and unjust.

Another important case relative to the missteps of the JSC is *Hlophe v Judicial Service Commission*,[452] wherein the Johannesburg High Court had to decide on whether the decision of the JSC to find Hlophe guilty of gross misconduct was correct or not. Hlophe argued that the JSC had acted irregularly when it decided the matter and also, it was argued that the Commission used a procedure which had deficiencies that caused problems for the JSC.[453] The matter concerned Hlophe's visitation to the judges who were dealing with Mr Jacob Zuma's case, such visitation resulted in Hlophe raising Zuma's case and expressing his views on the matter- suggesting a favourable outcome to Mr Zuma.[454]

In *Speaker of the National Assembly v Public Protector and Others*,[455] the court had to provide lessons on separation of powers and whether a judge could be appointed to an independent panel.[456] Ultimately, the Constitutional Court held that the appointment of a

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450 Oxtoby 2023 https://www.dailymaverick.co.za/opinionista/2023-06-29-supreme-court-of-appeal-ruling-on-judge-motata-a-damning-indictment-of-the-jsc-/.
451 Oxtoby 2023 https://www.dailymaverick.co.za/opinionista/2023-06-29-supreme-court-of-appeal-ruling-on-judge-motata-a-damning-indictment-of-the-jsc-/.
452 (43482/2021) [2022] ZAGPJHC 276.
453 At para 2.
454 At para 4.
455 [2022] ZACC 1.
456 At para 3.

judge to an independent panel violates the principle of *trias politicas*. This judgment shows how important a judicial role is to constitutional law and the constitutionality of a state by explaining that a judge is only meant for the courts and not independent bodies (since there are very important constitutional principles to consider).

In *Seriti and Another v Judicial Service Commission and Others*,[457] the court noted that the controversy therein was based on the roles played by commissioners that were serving the Commission of enquiry into allegations of irregularities pertaining to the "procurement of arms for the Defence Force" between 1997 and 1999.[458] The case serves as a lesson of standards that ought to be maintained by commissioners, regardless of the work the commissioner does. A commissioner represents the Commission and ought to therefore serve his or her mandate in the highest possible standards.

3.5 Repercussions emanating from the missteps of the JSC

At the heart of the failure to conduct proper judicial appointments is the violation of human rights because the inability to conduct proper judicial appointments ultimately results in the violation of constitutionally protected rights (despite some not amounting to human rights *per se*). Section 237 of the Constitution requires all constitutional obligations (including the appointment of judges) to be "performed diligently and without delay".[459] Mbekezeli adds that one obvious impact the shortage of judges has is "the long delays in getting cases to court and resolved",[460] this serves as a violation of the constitutional right of access to justice. In divorce cases, what the delay means is that

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457 ZAGPJHC 330 (14 April 2023).

458 At para 1.

459 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

460 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

longer periods of uncertainty over crucial issues like child custody and maintenance will subsist. When the JSC is considered inefficient, unfair and untransparent in the execution of its mandates, worthy candidates are consequently discouraged from seeking consideration for judicial appointment- which ultimately hinders the quality of judicial precedence in the Republic of South Africa.

Another repercussion of the failure to appoint judges is the (negative) impact such failure has on the timeous delivering of judgments. Judge Sutherland has noted that the writing of judgments is normally left for weekends, court recesses and holidays because there is no time allocation of how long judges should prepare for cases and how long they should take to write judgments.[461] What this means is that the rate of providing judgments ends up being slower (this is evidenced by two Gauteng judges who were suspended for their slow delivery of judgments).[462]

JUSTICE Submits that the failure to make diverse appointments is attributed to the failure of relevant different candidates to put themselves up for consideration.[463] The report compiled by Justice proceeds to conclude that the failure of suitable and diverse candidates to apply for judicial appointment amounts to a failure of the system.[464] As a homosexual, being subjected to questions regarding your sexuality is not always an issue. The issue arises as soon as the questions are posed in a manner that suggests an answer that the candidate does not wish to provide. The last thing a country needs is quality

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461 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

462 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

463 JUSTICE 2017 *JUSTICE* 44.

464 JUSTICE 2017 *JUSTICE* 44.

judicial candidates electing not to apply for judicial vacancies because of their fear of being subjected to embarrassment.

Hou makes reference to a former law Professor at Wits University and now a private practice Advocate named James Grant, who submits that "There are many top-quality advocates who have acted as judges who will not subject themselves to the JSC interview process because it's harrowing, hostile and acrimonious".[465] Grant proceeds by stating that the "JSC interviewing panel should be reviewed" because political members on the panel do not in any manner enhance the selection process.[466] This ultimately results in the loss of some brilliant legal minds and gifted professionals from the legal fraternity as an essential service to the public.[467] Sachar argues that the judiciary cannot operate without the "trust and confidence of the people",[468] it is therefore essential for commissioners to behave with the highest standards of professionalism when executing their constitutional duties.

For purposes of improving the administration of justice within the Republic of South Africa, the JSC has went as far as recommending that two judges be suspended. Their suspension was because of their failure to deliver judgments for two years.[469] This basically means that there was no proper administration of justice by the judges referred to- which ultimately goes back to their judicial appointments.

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465 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

466 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

467 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

468 Sachar date unknown https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-publlic-confidence-in-the-rule-of-law

469 Mitchley 2023 https://www.google.com/amp/s/www.news24/southafrica/news/jsc-recommends-two-judges-who-failed-to-deliver-judgments-for-more-than-two-years-be-suspended-20230428

Nicole Fritz (of Freedom Under Law) submits that frail interviewing processes and feeble candidates who end up making it to the interview stages of the JSC "comes at the cost of integrity and the respect in which we hold the profession".[470]

Fritz adds by submitting that there is emphasis that needs to be made on the importance of screening candidates to ensure that candidates that will receive invites to attend interviews will attend same with the preceding knowledge of whether or not "they stand a real chance of being appointed" instead of being "set up for embarrassment".[471] According to Fritz, screening candidates does not only assist with the phasing out of weaker candidates just as much as it provides support to upcoming professionals- support to "arrive at JSC interviews as stand-out candidates".[472] Fritz submits that within the JSC, there is a clear need for a better comprehension of social justice, transformation, diversity as well as the different values that individuals bring.[473] The arguments advanced by Fritz indirectly support the idea that properly constructed AI platforms will assist greatly with the selection and appointment of judicial candidates.

There exists an idea that white men can act strict and rigorously in demanding situations, while black candidates and females are argued to be capable of offering other qualities that include "an ability to empathise or relate to the lived reality of South Africans".[474] This suggestion goes to the very core of the people of South Africa and the trauma with

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470 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

471 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

472 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

473 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

474 Hou 2021 https://www.dailymaverick.co.za/article/2021-10-08-lack-of-criteria-for-bench-appointments-a-fundamental-failure-in-judicial-service-commission-interview-process/.

which they have been forced to reconcile. In this instance, one can submit that the history of the Republic of South Africa is what hinders the judicial progress of same.

In addition to the JSC's failure to conduct proper interviews, Judges Matter submits that the JSC has been unable to effectively deal with the complaint levelled against Judge Makhubele.[475] According to Judges Matter, the failure referred to raises legitimate concerns regarding the manner used by the JSC when executing its constitutional mandate of holding judges accountable for their misconduct.[476]

Vakilifathi and Thad submit that their study found that judicial selection on the basis of one's merit is more likely to produce quality legal output because elected judges (or judges appointed because of their link to influential figures) are just as likely to issue judgments that are likely to be reversed in courts of appeal.[477] What this basically means is that judgments issued by judges who were appointed because of external influence are more likely to provide poor judgments- which ultimately results in the violation of constitutional rights such as the right to administrative action that is lawful, reasonable and procedurally fair (as contained in section 33 of the Constitution).

Mberesi argues that the process of making judicial appointments serves as a yardstick of ensuring that the judicial independence is protected.[478] When the process is not based on qualities such as honesty and transparency, unsuitable and unfit judges will be appointed

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475 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/the-jscs-failure-to-deal-with-judicial-misconduct-the-makhubele-case/.

476 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/the-jscs-failure-to-deal-with-judicial-misconduct-the-makhubele-case/.

477 Vakilifathi and Thad 2020 *The Forum* 4.

478 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 111.

to the bench and the author adds that "it is very unlikely for unfit judges to enhance and protect judicial independence".[479]

Additionally, Mberesi submits that a "judiciary which is not independent will rarely perform its constitutional mandate diligently as judges are expected to hear cases and adjudicate on them without fear, favour or prejudice".[480] An independent judge has to maintain public confidence in the bench and such confidence is considered a critical aspect in the "attainment of a modern democratic society".[481]

During 2019, Uhuru Kenyatta (President of Kenya) elected to appoint just six judges from the 40 that was recommended by the country's Judicial Service Commission.[482] The decision taken by the President resulted in what Rickard refers to as "a storm of litigation" from human rights and constitutional activists.[483] The issue of non-appointment referred to relates to the President of Kenya and not the JSC *per se*- the point made was on the basis of highlighting the consequences emanating from the difficulty that is attached to the process of making judicial appointments (an issue no country is immune from).

Mbekezeli argues that for the betterment of good governance and to ensure that constitutional duties are executed properly, it is vital for the president to confirm judicial appointments as soon as possible.[484] The author proceeds to reiterate the fact that section

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479 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 111.

480 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 111.

481 Mberesi *The Impact of the Process of Appointing Judges on Judicial Independence: A Comparative Study of South Africa and Zimbabwe* 111.

482 Rickard 2022 https://africanlii.org/articles/2022-08-05/carmel-rickard/judges-refused-appointment-suffer-unlawful-discrimination-says-kenyan-high-court.

483 Rickard 2022 https://africanlii.org/articles/2022-08-05/carmel-rickard/judges-refused-appointment-suffer-unlawful-discrimination-says-kenyan-high-court.

484 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

237 of the Constitution creates an obligation for constitutional obligations (including the role played by the President in relation to the appointment of judges) to be "performed diligently and without delay".[485] There exists no room for lack of fulfilment of constitutional mandates.

The timing of a judicial appointment has direct implications for the court concerned just as much it has such repercussions for the professional affairs of a certain candidate.[486] What this basically means is that failure to appoint means failure to provide proper administration of justice. Mbekezeli submits that South African courts take an awfully long time to adjudicate cases because the country has very few judges and is also below average in relation to the comparable emerging market economies that include Kenya, Mexico and Turkey.[487] Consequent to this is the increase of private litigation- which ultimately impoverishes our law and administration of justice.[488]

In some countries, politicians are argued to undermine the judiciary by delaying the confirmation of judicial appointments and not communicating same to the public.[489] In the Kenyan Republic, President Uhuru Kenyatta elected not to confirm the appointment a judge that was recommended by the JSC of Kenya- no explanation was provided for the election referred to.[490]

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485 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

486 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

487 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

488 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

489 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

490 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

On the other hand, the Indian President is said to have stored up a backlog of at least 353 unconfirmed judges.[491] Judicial appointment failures are known to every country, the manner of dealing with such failures however varies because some manage to resolve the issues while some fail outright.

Shange refers to a hopeful magistrate (Antolize Lamminga) who wished to be promoted to a role of being a judge on the High Courts of either Mpumalanga or Limpopo. The referenced judge ultimately decided to withdraw from the relevant interview processes of the JSC- referring to such processes as unfair.[492]

Lamminga decided to pull-out of the proceedings by writing an email to the JSC and the then acting Chief Justice (Raymond Zondo) read her withdrawal notice into record.[493] In the email by referred to, Lamminga submitted that during her appearance (for interview as a candidate judge for the Limpopo High Court) before the Commission, she was required to answer questions relating to a "long outstanding matter she had on her roll".[494]

The matter referred to was regarding a case of armed robbery which had been ongoing for some six years without being taken to trial. Stunned by this fact, Julius Malema

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491 Mbekezeli 2022 https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/opinion/2022-07-21-mbekezeli-benjamin-judicial-appointment-delays-a-potential-for-constitutional-delinquency.

492 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

493 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

494 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

provided criticism of Lamminga by arguing that "having matters outstanding" for such a long period of time amounts to the denial of justice.[495]

During the interviewing of Justice Unterhalter, commissioner Mvuzo Notyesi (who was part of the team that was pivotal to the proceedings of the JSC regarding the interviews for the role of serving as a Chief Justice) asked why Justice Unterhalter was part of the two judges that dismissed "a petition for leave to appeal to the SCA and yet participated in the same petition when it was brought to the Constitutional Court" where he was, at that time, serving as a judge.[496] Julius Malema subsequently joined Notyesi to proliferate the attack by suggesting that Unterhalter "compromised the legitimacy of the court".[497]

In adding the fact that a range of questions from other commissioners regarding Justice Unterhalter's lack of commitment to judicial transformation (which was evidenced by the black junior advocates- particularly black women) he had during his career as top 'silk' of the Bar followed Malema's suggestion, Shange asks why "neither Justice Rogers nor advocate Dodson were asked the same question".[498]

Shange submits that the number of petitions that arrive at the desk of each Constitutional Court Justice on a weekly basis is relatively huge, so Unterhalter's conduct was nothing more than "an unfortunate and inadvertent error".[499] In addition to this, the author

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495 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

496 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

497 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

498 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

499 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

submits that it is not as if there has never been an error by a nominated candidate during the JSC's rounds of interviews.[500] In this context, an important question arises as why so many commissioners were determined to exclude Justice Unterhalter from being considered for the relevant position.[501]

Corder submits that it is in the best interests of a constitutional system that has provided the judiciary with the authority to repel laws and order against decisions of government on grounds of such laws and decisions being "unconstitutional" to create a fair and just system to use when appointing judges and holding same accountable.[502] This submission by Corder is made on the basis of the fact that judicial appointments made have a direct impact on the quality of judgements a country's judiciary makes and the quality of legal education.

Corder refers to an important provision in the *Constitution of the Republic of South Africa* (section 1), which provides on the values that underpin South Africa's constitutional law by submitting that the JSC has a mandate of ensuring "accountability, responsiveness and openness" when carrying out its constitutional duties.[503]

As a result of an attempt to give a voice to all three branches of government, the legal profession as well the general public, Corder submits that the composition of the JSC has to be reduced (despite the reduction when the Commission sits for matters not relating

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500 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

501 Shange 2021 https://www.sowetanlive.co.za/news/south-africa/2021-10-08-judge-candidate-withdraws-from-jsc-interviews-labelling-them-unfair/.

502 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

503 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

to appointments).[504] Ultimately, the author asks 'how has this structure worked out in practice?' and answers by submitting that the structure has provided some terribly unsuccessful results.[505]

Despite there being some controversial moments between 1994 and 2009, Corder is of the opinion that "most would agree that the JSC did at least a reasonable job in appointing judges" because it has intensively pursued its quest for "demographic transformation of the judiciary".[506] Corder's submission is evidenced by the fact that during 2013, judges in excess of 60% were already serving South African courts- with more than 30% being women.[507]

Some commissioners of the JSC have clear tendencies to pursued their political agendas when interviewing candidates, this has a negative effect on "the tone and character of the interview sessions" just as much as it has surpassed the limits of civilization.[508] The Chief Justice (as chair of the JSC) is argued to have failed to address these tendencies, this is evidence by interviews sessions held in April 2021 where a debacle arose and resulted in a legal challenge.[509]

Summarily, Corder argues that the JSC runs a serious risk of failing to "attract and select good" legal minds for judicial appointments because a lot of potentially good candidates

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504 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

505 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

506 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

507 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

508 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

509 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

do not wish "to be bullied and disrespected" publicly in ways known to the public.[510] This is a very concerning fact to note.

Corder also notes the case of a Judge (Nkola Motata) that was found guilty of driving while intoxicated and ultimately held liable for gross misconduct.[511] The JSC decided not to recommend the impeachment of the said Judge by Parliament, it instead fined him a substantial amount while enabling him to continue receiving a "judicial salary" for the rest of his retirement life.[512] 16 years upon the incident occurred, the SCA found that Motata should have been properly sanctioned and undergone proceedings for his impeachment.[513] The SCA decided against the JSC because the Commission was found not have handled Motata's matter accordingly.

Judge Robert Henney has announced that some gang-related murder trials are unable to reach their stages of finalization because of the lack of judges available in the Western Cape High Court.[514] The relevant matters were postponed to 2024 and 2025 (this is a basic indication of a repercussion emanating from the JSC's failure to make judicial appointments effectively).

Mbekezeli notes the Gauteng and Western Cape high courts as having the largest number of judges within the country and for good reason (as Mbekezeli adds).[515] The good reason

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510 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

511 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

512 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

513 Corder 2021 https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/.

514 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

515 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

is simply because the courts have a high caseload. The Judiciary Annual Report for 2021 and 2022 reports that Gauteng decided some 55,578 civil disputes and 1,031 criminal cases, while Western Cape finalised 14,816 civil and 5,266 criminal cases.[516] The need for more judges to carry the load is regarded a "country-wide problem".[517]

According to Mbekezeli, the South African society "has grown more litigious" because many disputes that could've been resolved elsewhere end up in court.[518] The author proceeds by making examples of matters initiated to challenge outcomes of political party conferences or outcomes of votes in Parliamentary sittings.[519] Mbekezeli argues that many of these types of disputes are able to be resolved through the use of alternative dispute resolution measure that include negotiation.[520] In addition to the country having grown more litigious, the JSC is not satisfactorily doing its job of recommending judges for appointment.

Repercussions of the JSC's failure to recommend and appoint judges are more dire than one would like to admit, hence the need to conduct extensive research on the betterment of the Commission's recommendation and appointment procedures.

In addition to the South African population increasing, the murder rate (which serves as a reliable statistic) has increased steadily just as the "complexity of crime, for example

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516 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

517 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

518 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

519 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

520 Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

cybercrimes and corruption)". Despite the rise referred to, the number of judges has essentially remained the same since 2010.[521]

3.6 Conclusion

The South African JSC is clearly fraught with inconsistencies. The inconsistencies emanate from the commissioners of the Commission so an attempt to fix the issues of the JSC must be directed at the commissioners themselves. Judicial appointments are essential to the constitutionalism of the South African Republic because judgements provided by the appointed judges shape the lives of the subjects of South Africa just as much as they shape the path that South Africa is embarking on. The past injustices of South Africa ought to be used as motivation for the betterment of South African law, not for the disregarding of the law.

[521] Mbekezeli 2023 https://www.groundup.org.za/article/we-woefully-short-judges/?fbclid=IwAR2O5VxD-pp6z3NOYW13G24cp9A-NGO_UjDQi1_rYbJqMQ3fLzMgb-NpRY4.

CHAPTER 4 THE USE OF ARTIFICIAL INTELLIGENCE BY THE JSC

4.1 Introduction

As a point of departure, it ought to be noted that AI can be defined as "the use of technology that aims to reproduce human cognitive abilities to achieve goals by considering obstacles that may occur".[522] Another definition of AI is by Schatsky, Muraskin and Gurumurthy, who define it as 'the theory and development of computer systems that are able to perform tasks that normally require human intelligence'.[523] An additional definition of AI is "a computer or computer program capable of performing intelligent functions".[524] On the other hand, recruitment is defined as "an activity of finding, attracting and ensuring the availability of qualified and appropriate people to meet organizational needs".[525] Recruit and recruitment are used herein this dissertation to mean employ and employment respectively. Simply put, "AI recruiting is the use of AI-powered software across recruiting processes".[526] Alternatively, the processes of the JSC include recruitment in its natural form because they are normal interviews that are conducted *facie ad faciem*.

Artificial Intelligence was officially proposed by John McCarthy as a concept at the Dartmouth Conference, defining it as "the science and engineering of producing intelligent machines"- meaning that AI has already been researched for more than sixty

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522 Ulfa, Prihantono and Annas *Impact of Artificial Intelligence on Recruitment Process* 2.
523 Sourdin *Judges, Technology and Artificial Intelligence: The Artificial Judge* 66.
524 Karaboga and Vardarlier 2020 *BRSS* 1.
525 Ulfa, Prihantono and Annas *Impact of Artificial Intelligence on Recruitment Process* 3.
526 Marson 2022 https://www.techtarget.com/searchhrsoftware/tip/Using-AI-for-recruiting-Complete-guide-for-HR-pros.

(60) years.[527] This was upon publishing a paper entitled "Computing Machinery and intelligence".[528]

This chapter seeks to provide on the role of artificial intelligence in recruitment and selection processes of the JSC, which are argued to nothing more than employment interviews.

4.2 AI recruitment, human rights and ethics

4.2.1 AI recruitment and human rights

Alongside the reality of global competition in relation to the seizing of opportunities that come with the introduction of Artificial Intelligence (AI), many countries all over the world are actively "taking part in a 'race to AI'".[529] Recognizing and celebrating human diversity is an essential starting point in the quest to design AI systems that engage fairly and equitably with human reality.[530]

The fact that AI is developed by human beings who are not perfect in their judgment and who will also make mistakes in "designing, programming, and using AI solutions" is an important point to take note of.[531] These mistakes are argued to have the potential of resulting in the violation of human rights.[532] If a decision arrived at by an AI platform has an impact on human beings, especially in the selection and recruitment of employment

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527 Pienaar *Machine Learning in Predictive Analytics on Judicial Decision-Making* 8; Karaboga and Vardarlier 2020 BRSS 3.
528 Geetha and Bhanu 2018 *IJMET* 64.
529 Smuha 2021 *LIT* 1.
530 Nugent and Scott-Parker 2022 *TTAIS* 3.
531 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.
532 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.

candidates, then discrimination, equality and other rights may be at the centre of argumentation.[533]

Bigman *et al* submit that artificial intelligence algorithms embrace the promise to reduce inequalities across race and socioeconomic statuses.[534] Medical outcomes are considered one of the most significant areas of racial and economic inequalities because black and low-income earners are deemed more likely to die from a variety of diseases.[535] Algorithms are argued to have the ability to help in the quest to reduce the inequalities referred to, this is because "they are less likely than human doctors to make biased decisions".[536]

In addition to efficiency, the validity of the data fed into an AI in the name of enabling it to provide predictions serves as the primary determiner for judging the superseding potential of AI solutions over traditional recruitment practices.[537]

Data sets are argued to be susceptible to a lot of bias, therefore this eventually results in the increment of the likelihood of AI that is reliant on historic data failing to comprehend the aims of the data sets.[538] Over the past few years, the implementation of AI in recruitment ad selection processes has enhanced.[539] However, there has been a noticeable resistance from HR managers to invest in AI tools for their department.

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533 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.
534 Bigman *et al* 2021 *CHB* 1.
535 Bigman *et al* 2021 *CHB* 1.
536 Bigman *et al* 2021 *CHB* 1.
537 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.
538 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.
539 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 2.

Decisions made by AI platforms are typically based on specific data inputs.[540] The input used by an AI platform could possibly conflict with the human right to privacy if the data was obtained in a manner which violates ethical principles. This possibility is increased by the ability of AI to access the personal information of applicants with the use of a variety of software that includes facial recognition.[541]

It is relatively difficult for users of any AI platform to understand why the algorithm has decided in a certain way.[542] The right to information that is true and correct and the right to lodge a complaint when having been treated unfairly make it cardinal for AI recruiting to be open and transparent.[543]

In policing, the high level of error rates attributed to AI platforms ultimately results in false arrests being made and it also results in the discrimination of groups that are already marginalized.[544]

The right to privacy is a constitutional right which is enunciated in the *Constitution of the Republic of South Africa*,[545] this shows how essential this human right is because the constitution serves as the foundation of all laws regulating the Republic. This ultimately means that everyone who seeks to develop a platform for the betterment of human beings or organizational needs has to have the right to privacy and other rights at the back of their mind. Another important source of law which recognizes the importance of the right to privacy is the the Universal Declaration of Human Rights.[546]

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540 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.
541 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 4.
542 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 5.
543 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 5.
544 Busuioc *2020 PAR* 1.
545 See s 14 of the *Constitution of the Republic of South Africa*, 1996
546 See Articles 12, 18 and 19.

The German Federal Constitutional Court has submitted that personality as a right "belongs to the essence of human dignity", therefore, the right enjoys a form special protection against the infringement by others based on "commercial or artistic purposes".[547]

By incorporating and using AI to recruit and select candidates, applicants are said to come across increasingly invasive methods which are used to gather information, methods which are also expanding from the work life of applicants to their social and other spheres.[548] The large amount of data that requires collection and storage is argued to pose a threat of conflicting with privacy rights of applicants.[549]

Hunkenschroer and Kriebitz argue that there is a need for a realistic approach in as far as AI and human rights are concerned, this includes human rights and ethical principles not being interpreted in their most rigorous forms.[550] Instead, "an actionable approach must address human rights in recruiting" while also affording sufficient room for new developments in technology- which will inevitably result in adjusted processes, changes in responsibilities of recruiters and new requirements for applicants.[551]

The authors go on to submit that an outright and complete ethical condemnation of AI is not justified from a human rights perspective, this is because AI recruiting does not inherently conflict with human rights.[552] The researchers go on to argue for a realistic

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547 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 9.
548 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 10.
549 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 10.
550 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
551 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
552 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.

approach with which human rights and ethical principles will not be interpreted in their strictest forms.[553]

Whether AI recruitment conflicts with ethical principles depends (to a great extent) on the conditions under which the AI recruiting tools concerned are to be used.[554] There rest responsibilities on organizations to implement and realize human rights in as far as recruitment through AI is concerned.[555] Moreover, it is submitted that certain "AI properties challenge the fulfilment of these rights" and consequently deduce ethical implications for AI recruitment, implications which are said to be manifested in principles that include autonomy, non-discrimination, privacy, transparency as well as validity.[556]

In analysing judicial appointments in South Africa, it is submitted that the fact that there is "no algorithm that can be applied to test whether a candidate will be a good judge" needs to be acknowledged.[557] Gravette argues that "this statement begs the question: Why not?" because of the mere fact that "no one has gone through the trouble of formulating a set of criteria of the 'ideal South African judge'".[558]

What the submission above means is that the inexistence of a developed set of algorithms for purposes of making recommendations for judicial appointments does not necessarily mean that it is impossible to develop such a set of algorithms.[559] Additionally, Gravette

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553 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
554 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
555 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
556 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
557 Gravette 2017 *THRHR* 284.
558 Gravette 2017 *THRHR* 284.
559 Gravette 2017 *THRHR* 284.

submits that "a simple algorithm that is constructed on the back of an envelope is… certainly good enough to outdo expert judgment".[560]

A classic example of this principle is the algorithm that has saved hundreds of thousands of infants across the world. Physicians and midwives around the world used to rely on their clinical judgment to decide whether a new-born was in distress.[561] A lot of different practitioners were initially focused on different cues that include breathing problems or how soon the baby cried but because they did not have a standardized procedure, they regularly missed danger signs and many infants therefore died.[562]

One day, in responding to a question asked by one of her residents over breakfast about "how she would systematically assess a new-born", Dr Virginia Apgar noted down five variables (heart rate, reflex, muscle tone, respiration and colour) and three scores (0, 1, or 2 depending on the robustness of each sign). Apgar then started to assess infants according to this algorithm a minute after birth.[563] According to the Anaesthesiologist, a baby with a total score of 8 or above "was likely to be pink, squirming, crying, grimacing, with a pulse of 100 or more, and thus not in distress". Moreover, "a baby with a score of 4 or below was likely to be bluish, flaccid, passive, with a slow or weak pulse, and thus in need of immediate intervention".[564] In applying 'the Apgar score', delivery room personnel finally had a consistent formula to use when determining whether infants were in distress or not, this is why the algorithm is still being used every day in thousands of

560 Gravette 2017 *THRHR* 284.
561 Gravette 2017 *THRHR* 284
562 Gravette 2017 *THRHR* 284.
563 Gravette 2017 *THRHR* 284.
564 Gravette 2017 *THRHR* 285.

hospital delivery rooms all over the world and it has also been referred to as "an important contribution to reducing infant mortality".[565]

Realising gender equality and empowering women and girls requires that all women and young girls be granted full access to their basic rights and freedoms.[566] This important point, *inter alia*, is what led Gravette to arguing for structured and unstructured interviews to be used.

Gravette holds that how well candidates perform in their interviews serves as a meaningful reflection of the personal behaviour of interviewers.[567] Potential candidates are argued to appear as having the ability to perform better in their interviews and to also provide more information when interviewers show support and regard to such candidates' "non-verbal and paralinguistic behaviour".[568] In this context, the conduct of interviewers is argued to have the probability of both the quality of the information gathered through the interview as well as the quantity thereof.[569]

Over the years of conducting research, it has been found that candidates' appearances, their cosmetics and attire as well as their facial attractiveness have significant influence on interviewers' decisions during the phases of unstructured interview processes.[570] Additionally, candidates are regarded as being more qualified if they can successfully indicate positively responsive behaviour- including their enthusiasm, eye contact, warmth, voice modulation, energy, gestures and expressiveness.[571]

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565 Gravette 2017 *THRHR* 285.
566 Chauhan and Kaur 2022 *HLR* 50.
567 Gravette 2017 *THRHR* 280.
568 Gravette 2017 *THRHR* 280.
569 Gravette 2017 *THRHR* 280.
570 Gravette 2017 *THRHR* 280.
571 Gravette 2017 *THRHR* 280.

The reluctance of legal practitioners, judges and legal practitioners to formulate a criteria to make judicial appointments seems to be aggravated by a perception that the task of identifying the qualities sought in the country's judges is an unnerving one, a task that would require considering the "numerous qualities that are relevant to judicial office" and the "many types" of personalities that might make a good judge".[572] According to Gravette, the objection seems to be that "the variables are simply too numerous and the job of a judge simply too complex to be reduced to a manageable set of qualities".[573]

4.2.2 AI recruitment and ethics

The rise of new AI recruiting platforms and practices results in the creation of novel ethical quandaries, to be dealt with by organizations and the society at large.[574] It is argued that insufficient attention has been afforded to relevant ethical frameworks in the research of the ethical implications of recruiting by using AI.[575]

Hunkenschroer and Luetge have found that several ethical concerns are prevailing in existent research, while others have not been discussed sufficiently.[576] A lot of research output focuses on the bias by humans and algorithms, while research on the critical thoughts relating to the accountability of AI-based recruiting practices does not suffice.[577] Thus, a definitive discussion on the accountability of organizations using AI platforms in their recruitment practices- as important as it is in today's research on the ethics of AI, is relatively lax.[578]

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572 Gravette 2017 *THRHR* 285.
573 Gravette 2017 *THRHR* 285.
574 Hunkenschroer and Luetge *JBE* 993.
575 Hunkenschroer and Luetge *JBE* 1001.
576 Hunkenschroer and Luetge *JBE* 1001.
577 Hunkenschroer and Luetge *JBE* 1001.
578 Hunkenschroer and Luetge *JBE* 1000.

Ore and Sposato reveal their findings (that are based on reviewing literature), in that regard, they submit that the findings of the literature review they conducted were echoed by comments from the participants on their fears and reservations about the use of AI in recruitment and selection processes.[579] The fear referred to relates to incidences of discrimination, bias and ethical violations.

Notwithstanding the opportunities that the inclusion and use of AI can offer, there has been numerous concerns expressed regarding the ethics of employing AI to enhance the recruitment and selection processes,[580] these concerns can be attributed to the uproar caused by the recruitment tool developed by Amazon, which was biased against female applicants- resulting in Amazon retiring the technology.[581] AI platforms may generate serious conflicts with what the society typically refers to as ethical.[582] Ethical concerns relative to recruitment using AI include data privacy, accountability and transparency.[583] In response to the concerns referred to, a number of essential principles to follow in incorporating AI to the recruitment and selection processes have been put forward. The principles are motivated by the fact that a large number of groups in academia, governmental organs, the private industry and non-governmental organizations have published their own principles for the ethical use of AI (principles); the recognition of factors such as governance, legal compliance, social impact and engineering standards should be considered during the processes of creating and incorporating AI technologies (processes) as well as the need to standardize the use of AI, where such standardization

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579 Sposato 2021 *IJOA* 8.
580 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 1.
581 Kazim *et al* 2021 *J. Intell.* 2.
582 Hunkenschroer and Luetge *JBE* 977.
583 Hunkenschroer and Luetge *JBE* 978.

can be in the form of legal compliance, best practice within the meeting industry or another regulation specific to a sector (assurance and audit).[584]

Kazim *et al* provide that they are of the opinion that auditing will be critical to ensuring the integrity of algorithmic systems,[585] particularly the ones used in recruiting and selecting candidates. The researchers refer to the audits as "AI Audits". These audits would serve the purpose of assessing the relevant technologies against the trusted standards and frameworks that are relative to the practices- including data protection, impact assessments, governance as well as reporting.[586]

In addition, privacy, confidentiality, transparency, an opportunity to opt out, institutional review, and the respect for the dynamic nature of personal development have been identified as the five principles that have been identified as essential to the recruitment process.[587]

The use of AI is argued to have the potential of reducing human bias in the different stages that the recruiting process comprises of and should consequently be considered as a huge ethical enhancement tool.[588]

In the screening stage of the recruitment process, algorithms are argued to have the potential to reduce subjectivity by using algorithms that can screen all applicants against

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584 Kazim *et al* 2021 *J. Intell.* 2.
585 Kazim *et al* 2021 *J. Intell.* 2.
586 Kazim *et al* 2021 *J. Intell.* 2.
587 Hunkenschroer and Luetge *JBE* 990.
588 Hunkenschroer and Luetge *JBE* 994.

the same criteria.[589] In this instance, AI (rather than humans, who are constrained by time and biased) is able to evaluate all of the candidates.[590]

In the assessment stage of the recruitment process, the use of AI platforms can do away with human bias – or at least lessen it significantly.[591] Human intuition is arguably very good and accurate, but it is still based on subjective value assessment and therefore inherently comprises of natural bias,[592] which is meant to be done away with by the introduction of AI in recruitment processes.

The awareness and cognisance of recruiters and data scientists about the potential bias and shortcomings of their algorithms is essential when seeking to address the ethical challenges accompanying the use of AI in recruitment and selection processes.[593] The importance of ethical standards in any fraternity cannot be overstated, this notion is supported by Bigman *et al* when submitting that the results they found in their study suggest that self-interest is not the only motivation for people- adding that they are also motivated by broader ethical considerations.[594] Additionally, the researchers submit that "awareness of the potential race and class inequality" in decisions made through the inclusion of AI can reduce the unacceptance of decisions being made and consequently fasten the incorporation and use of algorithms.[595]

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589 Hunkenschroer and Luetge *JBE* 994.
590 Hunkenschroer and Luetge *JBE* 994.
591 Hunkenschroer and Luetge *JBE* 994.
592 Hunkenschroer and Luetge *JBE* 994.
593 Hunkenschroer and Luetge *JBE* 1000.
594 Bigman *et al* 2021 *CHB* 9.
595 Bigman *et al* 2021 *CHB* 9.

4.3 AI and the hiring processes

The letters AI are used interchangeably to mean "Artificial" or "Augmented" Intelligence,[596] but the terms are not synonymous. While "augmented" refers to the ability of technology to improve human capabilities, "artificial" carries the uncomfortable signification of something fake or cheaply amalgamated to near a more costly but preferable option.[597] The workplace is considered a defined space of interactions, in which the staff, managers, inputs and outputs can be assessed together.[598] Simply put, AI is a field that combines computer science and vigorous data-sets to enable problem solving. Problem-solving is, herein this researched work, argued to be a broad term that includes judicial appointment.

The use of AI in processes of Human Resources Management (HRM) has grown significantly in recent years, this is evidenced (for example) by IBM's ability to reduce costs and also improve its operations in HRM- using Blue Matching, CogniPay, and Watson Career Coach.[599] One of IBM's technological advancements, CogniPay, was designed to provide support by assisting managers to make "better decisions by assessing employee performance and providing information such as compensation levels and market demand".[600] Industries and business firms require personnel of a high calibre in order to accomplish the objectives framed by them for purposes of surviving in the competitive era.[601]

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596 JTC 2020 *Introduction to AI for Courts* 1.
597 JTC 2020 *Introduction to AI for Courts* 1.
598 Kazim *et al* 2021 *J. Intell* 1.
599 Son, Lee and Chang 2019 *BCRP* 2.
600 Son, Lee and Chang 2019 *BCRP* 2.
601 Geetha and Bhanu 2018 *IJMET* 63.

In order to remain competitive in the digital world, a lot of firms opt to search for bright and dynamic employees who have the potential to elevate the statuses of their employers.[602]

Having an effective recruitment strategy is argued to be pivotal in enabling recruiters to recruit and employ suitable individuals, which will play a role in assisting employers to manoeuvre the digital world while also developing the business environment.[603] This proves the fact that the recruitment strategy is an essential factor for every party wishing to hire skilled employees who could prove to be efficient and who could play essential role helping to accomplish the job objectives.[604]

The processes of the JSC are employment interviews and ought to be conducted as such, this is why Gravette makes a distinction between structured and unstructured interviews.[605] The author submits that unstructured interviews (which are by far the most prevalent type of employment interviews) are identified by their lack of standard format in relation to the interview processes themselves.[606] The author submits that there is no consistency in the length of unstructured interviews with the different candidates and "different candidates are asked quite different questions".[607] Moreover, the direction of the questioning is predominantly determined by the personal preferences of interviewers.[608]

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602 Geetha and Bhanu 2018 *IJMET* 63.
603 Geetha and Bhanu 2018 *IJMET* 63.
604 Geetha and Bhanu 2018 *IJMET* 63.
605 Gravette 2017 *THRHR* 276.
606 Gravette 2017 *THRHR* 276.
607 Gravette 2017 *THRHR* 276.
608 Gravette 2017 *THRHR* 276.

In providing on unstructured interviews, Gravette notes that such interviewers are guided by the personal and "often idiosyncratic" opinions of interviewers regarding what qualities are required for a particular position.[609]

The gathering of information, the judgment and the choice of applicants are considered highly subjective and "influenced by vague impressions of a candidate's overall 'fit'".[610] By analysis of the differentiating aspects between the types of interviews mentioned above, it is apparent that the JSC is designed to be structured but is unstructured in its practice.

Gravette also notes that "structure" in the interview process relates to the job-relatedness of the interview, standardisation of the process and the overall structured use of data to conduct proper evaluation of each candidate.[611]

The first step in conducting a structured interview process is "to conduct a job analysis" for purposes of determining the knowledge, skills and abilities that are required to perform the tasks required in the relevant position.[612] Based on the analysis, interview questions and rating scales can therefore be fashioned to measure the knowledge, skills and abilities required, it is therefore essential for the questions to be based solely on the duties and responsibilities of a relevant position.[613]

Gravette goes on to state that the actual structured interview ought to be highly standardised in that each of the candidates gets to answer the same set of questions.[614]

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609 Gravette 2017 *THRHR* 276.
610 Gravette 2017 *THRHR* 276.
611 Gravette 2017 *THRHR* 277.
612 Gravette 2017 *THRHR* 277.
613 Gravette 2017 *THRHR* 277.
614 Gravette 2017 *THRHR* 277.

This essentially means that each candidate is asked the exact type of questions and in the exact same order, however, the author goes on to also acknowledge that in asking the same basic set of questions, some form of flexibility is "allowed to tailor the interview to different candidates".[615] Ultimately, the key element of the interview structure is noted as the establishment of a standard process for evaluation.[616]

Gravette submits that a critical feature of structured interviews is the extensive training provided to interviewers.[617] The author notes however that this critical feature is more of a prerequisite to ensure that other components are implemented accordingly than it is a component of the structured interview itself.[618] In conducting structured interviews, it is also submitted that using the same interviewers across all candidates is important for a few reasons.[619]

In providing an analysis of the key aspects of structured and unstructured interviews, Gravette submits that "few would argue that JSC interviews are highly unstructured".[620] Additionally, the author submits that there is no consistency in the length of the JSC interviews, the questions posed to candidates and in the depth of probing into any issue.[621]

Gravette has submitted a lot of opinions on different aspects of the JSC's interviewing processes and, in this context, also submitted that studies on Human Resources suggest that there is more belief "in the validity of unstructured interviews than other screening

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615 Gravette 2017 *THRHR* 277.
616 Gravette 2017 *THRHR* 278.
617 Gravette 2017 *THRHR* 278.
618 Gravette 2017 *THRHR* 278.
619 Gravette 2017 *THRHR* 278.
620 Gravette 2017 *THRHR* 278.
621 Gravette 2017 *THRHR* 278.

methods", even when the overwhelming evidence being found clearly indicates that structured interviews are more superior than unstructured ones.[622]

Malcolm Gladwell has gone as far as explaining the reasons as to why interviewing specialists have unsurprisingly found it particularly tough to convince employers to implement structured interviews in their recruitment processes.[623] The author and journalist submits that the difficulty referred to above is because it:

> just doesn't feel right. For most of us, hiring someone is essentially a romantic process, in which the job interview functions as a desexualized version of a date. We are looking for someone with whom we have a certain chemistry, even if the coupling that results ends in tears and the pursuer and the pursued turn out to have nothing in common. We want the unlimited promise of a love affair. The structured interview, by contrast, seems to offer only the dry logic and practicality of an arranged marriage.[624]

According to Gravette's definition of structured and unstructured interviews, it can be submitted that the interviews of the JSC are designed to be structural but have been handled by the commissioners in a manner showing unstructured interviews.[625]

Technology has always held an influence within the recruitment scene, reducing costs and delivering increased effectiveness in recruiting candidates. This influence has been

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622 Gravette 2017 *THRHR* 282.
623 Gravette 2017 *THRHR* 282.
624 Gravette 2017 *THRHR* 282.
625 Gravette 2017 *THRHR* 278.

capitalized on by juristic persons who have opted to develop AI-driven recruitment solutions that include the accumulation of appropriate candidates.[626]

Algorithmic systems that are based on the literature of business psychology, particularly the studying of workforce intelligence, are argued to have the potential to revolutionize hiring through the use of recruitment tools that based on AI. Technology has always held an influence within the recruitment scene, reducing costs and delivering increased effectiveness in recruiting candidates. This influence has been capitalized on by juristic persons who have opted to develop AI-driven recruitment solutions that include the accumulation of appropriate candidates.[627]

In the development of AI, algorithms require substantial amounts of data-sets to be trained well- minor data-sets restrict the developing process, entailing the production of poor outcomes.[628] Over years, companies have moved to the digitization of the manners they use when assessing candidates, on the basis of electronic CVs and cover letters.[629] All of the information gathered can then be effectively supplied to an algorithm to enable it to learn the process of making good recruitment decisions.

In providing on the way AI will revolutionize the practice of law, Villasenor submits that "it would be a mistake" to minimize the importance of human intelligence by using the extra ordinary" advances of AI.[630] The author goes on to also admit that it would be an equal misstep to "dismiss" the role played by AI.[631]

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626 Kazim *et al* 2021 *J.Intell* 9.
627 Kazim *et al* 2021 *J. Intell.* 1.
628 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors that impact its pace of adoption* 13.
629 Aumüller-Wagner 2019 *ESPS* 5.
630 Villasenor 2023 https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/.
631 Villasenor 2023 https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/.

AI has been used to conduct interviews that are based on the use of chat-bots that include the likes of Paradox, to essentially analyse CVs (Textio), to go as far as estimating psychometric characteristics on the basis of images (Traitify), to conduct game-based assessments (HireVue) and to even conduct video interviews (Cammio) and video interview assessments (MyInterview).[632]

Algorithms are used for purposes of improving the internal and external operations of an organization, enabling it to remain competitive by it saving money and time- in contrast to methods individual recruiters use when going through hundreds of job applications.[633] It can be argued that algorithms used for recruiting are process innovations because they transformed the *status-quo* of recruitment processes, making them AI-based.[634]

For a considerable number of years, companies have been using traditional algorithms to scan resumes in attempts to look for preselected key words or phrases, today's AI technology however goes further than that.[635] Presently, chatbots and "resume-parsing tools" look for synonymous matches and related terms in order to provide a determination of a candidate's qualification.[636] Despite all the positives, the adoption of AI in hiring processes has been unexpectedly slow, with many scholars having made attempts to explain the roots of this unexpectedness.[637]

It ought to be noted that the growth of the AI industry was valued at $1.2 trillion in 2018, with a recorded percentage of 61% pertaining to organizations found to be implementing

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632 Kazim *et al* 2021 *J. Intell* 1.
633 Aumüller-Wagner 2019 *ESPS* 5.
634 Aumüller-Wagner 2019 *ESPS* 5.
635 Hunkenschroer and Luetge 2022 *JBE* 992.
636 Hunkenschroer and Luetge 2022 *JBE* 992.
637 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 3.

AI technologies in different parts of their business operations- this basically indicates the rapid growth of AI in recruitment ad selection processes.[638]

Recently, companies needed to handle large amounts of data from applications, conventional tools no longer find relevance. In this manner, digitalization results in relatively great potential for saving costs, avoiding biases in the selection of the candidates and increasing the efficiency in the hiring process.[639]

The last thing recruiters want is to fall behind their competitors, this may just encourage them to rapidly embrace and implement AI-based systems- in attempts to be a step ahead of the competition.[640] As soon as companies incorporate AI-based systems, an opportunity to benefit from the advantages of being a "first mover" consequently emerges. Being a leader in technological advancement is considered one of the advantages of being a "first mover" in the quest to adopt AI in recruitment and selection processes.[641]

Artificial Intelligence has a direct influence on the lives of millions of people around the world and such influence is expected to grow rapidly over the years, just as it has been.[642] AI applications are readily found in a lot of stages that recruitment processes are made up of, these include stages such as the writing of job ads, screening of resumes from applicants and the analysing of video interviews using face recognition software.[643] The

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638 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 14.

639 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 7.

640 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 14.

641 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 14.

642 Mehrabad and Brojeny 2007 *CIE* 307.

643 Hunkenschroer and Luetge 2022 *JBE* 977.

tools used for screening applications are considered highly efficient for streamlining recruitment and selection processes, especially for highly-rated employers who receive huge amounts of applications for each open position.[644] Concerns have been raised regarding the possibility of highly qualified applicants being overlooked in the midst of assessing applications to serve in a particular position,[645] while also raising concerns regarding the "technical robustness" and validity of assessment methods that are powered by AI.

Although research on AI recruiting has substantially increased in recent years, a complete understanding of the ethical part of recruiting as a developing context of AI is still lax.[646] Owing to the huge impact recruiting decisions have on people's lives, it is highly essential for companies to understand both the opportunities and the potential risks that AI recruiting platforms may create while also understanding how algorithmic decisions may be in complete disagreement with commands.[647]

The issue of bias in algorithms used to arrive at hiring decisions has attracted wide-ranging interests from researchers, particularly from a legal and technical perspective.[648] The existing ethical concerns are relative to AI recruiting and they include data privacy, transparency, and accountability.[649]

With the rapid growth and advancement of technologies comes the significant impact on the lives and careers of the general public. The use of the technologies referred to triggers a lot of ethical concerns (amongst other concerns that include bias and

644 Hunkenschroer and Luetge 2022 *JBE* 992.
645 Hunkenschroer and Luetge 2022 *JBE* 996.
646 Hunkenschroer and Luetge 2022 *JBE* 978.
647 Hunkenschroer and Luetge 2022 *JBE* 978.
648 Hunkenschroer and Luetge 2022 *JBE* 978.
649 Hunkenschroer and Luetge 2022 *JBE* 978.

discrimination). The ethicality and general legality of these AI advancements need to be largely understood, in order to enable better preparation for their normal utilization within the society.[650]

Given the novelty of the AI innovations erupting during the course of time within the practice of recruiting and selecting candidates to serve in positions, it is submitted that the study is based on a topic that is still emerging in academic literature.[651]

As a result of the advances in the development of technology, artificial intelligence has extended to a variety of business sectors and work-fields- the fields referred to include the estimation of credit worthiness, the criminal justice system as well as the pricing of goods.[652]

AI-based selection tools are considered attractive for organizations, as a result of their high speed and efficiency when compared to the traditional ways and practices of screening and assessing candidates and their applications.[653] These tools are equally considered valuable assets for the recruitment and selection processes in the "war for talent".[654]

Neufeind, O'Reilly and Ranft ask a question as to "how can we design a narrative that combines our enthusiasm for innovation and technological change with a commitment to individual security and fairness across society?".[655] The reality is that some people do not

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650 Hunkenschroer and Luetge 2022 *JBE* 977.
651 Hunkenschroer and Luetge 2022 *JBE* 977.
652 Hunkenschroer and Luetge 2022 *JBE* 977.
653 Hunkenschroer and Luetge 2022 *JBE* 977.
654 Hunkenschroer and Luetge 2022 *JBE* 977.
655 Neufeind, O'Reilly and Ranft *Work in the Digital Age: Challenges of the Four Industrial Revolution* xviii.

trust AI tools.[656] According to a consumer survey conducted in the U.S, 41.5% of attendants were found to have no trust in any kind of AI tool.[657] Davenport submits that the underlying reason for the lack of trust referred to could be attributed to "the overselling of AI capabilities from the vendor's side", he continues his stance by placing emphasis on the importance of full disclosure on how AI systems concerned will be used.[658]

Any industry, business or firm requires quality personnel to accomplish the framed objectives, for purposes of surviving within the competitive era. Recruiters have enthusiastically welcomed AI- 75% of them even going as far as asserting that the technology will shape the hiring processes of companies.[659] To streamline the recruitment processes, make them faster and more efficient, companies "increasingly deploy" artificial intelligence (AI).[660]

It is submitted that presently, more advanced technologies are being launched to eliminate less complicated tasks such as screening resumes, communicating via emails, setting up reminders and scheduling interviews.[661] The launching referred to is said to be beneficial because it has the potential to eliminate long-winded recruitment and selection tasks, especially the process of reviewing profiles of applicants including the scheduling of interviews.[662]

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656 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 13.
657 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 13.
658 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 13.
659 Johnson 2022 www.unleash.ai/artificial-intelligence/7-effective-uses-of-ai-in-recruitment/.
660 Hunkenschroer and Luetge 2022 *JBE* 977.
661 Sposato 2021 *IJOA* 3-4.
662 Sposato 2021 *IJOA* 4.

Recruiting through the use of AI is said to allow for access to more types of data than human recruiting.[663] It has also been asserted that AI can allow organisations to gain in-depth insight into talent requirements using strategies such as candidate sourcing, as facilitated by the scanning of resumes and the elimination of unconscious human bias in the screening of applicants to be able to recruit the best candidate for a specific role.[664] Recruitment through the use of AI is argued to conflict with a number of ethical principles, it is equally argued to be heavily dependent on the conditions in which the AI recruiting tools will be used.[665]

Practices based on AI allow recruiters to put all applicants through the exact same experience, which ultimately results in an increase in the consistency of candidate assessment.[666] The accuracy and validity of new AI methods of application assessment are however discussed controversially- employers do not essentially know exactly the exact characteristics that make an applicant a good fit for a particular role.[667] Studies have shown and continue to show a relatively minor correlation between a person's academic grades and their professional performance but a lot of companies make "above average grades a requirement" for applications to serve in their vacancies.[668]

A considerable number of arguments have been raised by researchers of the field, including an argument that the new AI technologies have the potential to increase accuracy of the selection and recruitment processes since hiring algorithms are able to predict a candidate's "work-related" behaviour and performance potential on the basis of

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663 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 10.
664 Sposato 2021 *IJOA* 4.
665 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 12.
666 Hunkenschroer and Luetge 2022 *JBE* 996.
667 Hunkenschroer and Luetge 2022 *JBE* 996.
668 Hunkenschroer and Luetge 2022 *JBE* 996.

the data pertaining to current top performers.[669] In this context, AI may just prove to be able to outperform human inferences regarding personalities because it can process a greater array of behavioural signals.[670]

It is predicted that by 2030, more than 70% of companies will have some form of AI in their operational structure.[671] Additionally, it has been predicted that AI leaders could see an increase of 20 to 25% in their economic benefits.[672]

When it comes to recruitment, AI is said to assume the central role by going through large amounts of CVs in the name of finding the right candidate.[673] There is wide agreement in existing literature that AI allows companies to make decisions more consistently across candidates and time.[674] There are instances where AI has proven to be capable of assisting with human decision-making processes in relation to the judiciary.[675]

It has been submitted that AI is the future of many things, recruitment and selection being no exception.[676] Recruiters face their toughest and most time-consuming mandate in sourcing candidates to serve in a specific office. Human Resources professionals have been increasingly looking at AI to optimize their recruitment processes.[677] Based on skills and experiences required for a vacancy, AI is said to be able to sort and select candidates

669 Hunkenschroer and Luetge 2022 *JBE* 996.
670 Hunkenschroer and Luetge 2022 *JBE* 996.
671 Di Pizio 2023 https://www.nasdaq.com/articles/70-of-companies-will-use-ai-by-2023-2-super-stocks-to-buy-right-now?time=1686735060.
672 Di Pizio 2023 https://www.nasdaq.com/articles/70-of-companies-will-use-ai-by-2023-2-super-stocks-to-buy-right-now?time=1686735060.
673 Hunkenschroer and Luetge 2022 *JBE* 993.
674 Hunkenschroer and Luetge 2022 *JBE* 996.
675 Jeevanandam 2023 https://indiaai.gov.in/article/exploring-ai-vs-human-judges-in-the-judiciary.
676 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
677 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.

based on their CVs.[678] Additionally, AI is said to be able to reduce bias by focusing solely on the skills and experiences of candidates- "thereby supporting a more diverse workforce".[679] Basically, AI should support and not replace human intelligence.[680] In support of the notion that AI should serve as an addition to the activities done by human beings and not to outright supplement human involvement is a submission by Bigman *et al*, who are of the view that in contexts where AI is used (e.g. the finance and military), it is always humans who bear the ultimate responsibility of making decisions.[681] This does not however negate the belief that people may eventually begin to prefer the use of AI systems in contexts of decision-making.[682]

Predictive Analytics is an AI - based software advancement which has proven to be essential within the judicial sphere.[683] Predictive analytics has the potential to facilitate the maintenance of the rule of law,[684] moreover, it can improve accuracy in decision-making processes-[685] this may just enhance and strengthen faith in the JSC. Notably, AI is also said to be able to recognize personalities by observing text and speech with language cues.[686]

It goes without saying that AI poses significant danger when used insensibly, therefore caution is important when using it.[687] Prior to deciding on which human activities to

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678 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
679 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
680 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
681 Bigman *et al* 2021 *CHB* 2.
682 Bigman *et al* 2021 *CHB* 2.
683 Adams 2022 https://www.linkedin.com/pulse/reliable-legal-decision-support-through-use-predictive-adams.
684 Adams 2022 https://www.linkedin.com/pulse/reliable-legal-decision-support-through-use-predictive-adams.
685 IES *Artificial Intelligence (AI) in the Job Interviews Process: Toolkit for Employers, Careers Advisers and Hiring Platforms* 3.
686 Karaboga and Vardarlier 2020 *BRSS* 5.
687 JTC 2020 *Introduction to AI for Courts* vii.

perform using AI systems, one should consider how the AI system could result in errors and the possible extent of the consequence of such errors.[688]

Factually, no automated process is perfect, the risks attached to the use of AI systems are alleviated through a variety of automation strategies that determine human oversight.[689] Caution is extremely essential when using Artificial Intelligence. Before deciding on which human processes to supplement using AI-enabled systems, errors and the extent of such errors should be considered by the users of the AI systems concerned.

Pim Haselager, Associate Professor at Radboud University in the Netherlands, has described the human errors referred to in three basic levels: human-in-the-loop, human-on-the-loop as well as human-out-of-the-loop.[690]

Human-in-the-loop means that no response or decision is provided or made without some form of human participation.[691] This participation may take the form of a human reviewing and approving a machine-generated response to a user question before the answer is delivered. The first step in "training" an AI system is often human "in-the-loop" until the system responds accurately to the point of there being no value added by the human.[692]

On the other hand, human-on-the-loop AI is where humans have the power to intervene and overrule an automated action before it takes place.

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688 JTC 2020 *Introduction to AI for Courts* vii.
689 JTC 2020 *Introduction to AI for Courts* 5.
690 JTC 2020 *Introduction to AI for Courts* 5.
691 JTC 2020 *Introduction to AI for Courts* 5.
692 JTC 2020 *Introduction to AI for Courts* 5.

The other end of the scope of human involvement includes systems that learn from user questions, identify links more efficiently than humans and those that provide automated responses directly to the user, leaving humans 'out-of-the-loop'.[693]

The employment interview is defined and generally accepted as a "face-to-face interaction" conducted to determine the qualifications of a particular individual for purposes of serving in a vacant position.[694] Thus, the interviews of the JSC for the filling of vacant judicial positions are nothing more than employment interviews and ought to be treated as such.[695] AI is said to have the ability to assist in assessing the profiles of current employees and identifying the gaps as well as hiring to specifically fill such gaps.[696]

Gladwell explains that interview specialists have admitted to the extraordinarily difficult task of convincing employers to adopt structured interviews by submitting that:

> It just doesn't feel right. For most of us, hiring someone is essentially a romantic process, in which the job interview functions as a desexualized version of a date. We are looking for someone with whom we have a certain chemistry, even if the coupling that results ends in tears and the pursuer and the pursued turn out to have nothing in common. We want the unlimited promise of a love affair. The structured interview, by contrast, seems to offer only the dry logic and practicality of an arranged marriage.[697]

These submissions are clearly in support of unstructured interviews, which this dissertation submits that ought not to be used predominantly by the JSC in interviewing candidates for judicial positions.

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693 JTC 2020 *Introduction to AI for Courts* 5.
694 Gravette 2017 *THRHR* 276.
695 Gravette 2017 *THRHR* 277.
696 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
697 Gravette 2017 *THRHR* 282.

The author has also noted that in the context of JSC interviews, the use of standard questions "would clearly be inappropriate".[698] Cohen supports these assertions by stating that this is because candidates emanate from different backgrounds, have different qualities and experiences so one cannot legitimately expect each candidate to be subjected to the same set of questions.[699]

In unstructured interviews, Gravette notes that the style (physicality) of candidates is more influential than the objective information of candidates. Moreover, research has proven that interviewers often reach their final decisions about candidates upon only "four minutes of a 30-minute interview"-[700] this is a worrisome fact to take note of. This proven finding is based on the fact that first impressions of candidates seem to be relatively prevalent.

Moreover, processes of structured interviews are made up of questions that are narrowly designed for job-relatedness. In this context, the importance of questions asked in structured interviews is to determine whether candidates (regardless of their background and experiences) have the skills, knowledge and attributes that are required for the judicial position concerned.[701] Moreover, if standardised questions produce positive results for recruitment in other industries, Gravette asks why such results will not be produced for the judiciary?[702]

Gravette holds that it is not suggested that each candidate be subjected to the same set of questions. The author however submits that each candidate should be asked the "same

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698 Gravette 2017 *THRHR* 282.
699 Gravette 2017 *THRHR* 282.
700 Gravette 2017 *THRHR* 280.
701 Gravette 2017 *THRHR* 282.
702 Gravette 2017 *THRHR* 282.

basic set of questions" (emphasis on 'basic'), with some limited flexibility that will allow the interview to accommodate the different candidates that will most probably have different sets of professional experiences and also, to follow interesting lines of questioning and discussions (so as to gain more information from candidates).[703]

It has been clearly demonstrated in the JSC's interviews of judicial candidates that the use of unstructured interviews results in there being a "tendency for interviewers to probe candidates for qualities that the interviewers either prefer or dislike".[704] In this context, standard questions are one of the prerequisites for ensuring that judicial candidates are treated fairly and equally during the interviewing stages. It can therefore be easily argued that the level of subjectiveness attached to the judicial appointments recommended by the JSC ultimately have a (negative) impact on the equality and fairness of the appointment processes.

According to Gravette, what is probably the biggest opposition to structured interview processes is the requirement that the commissioner (as its members) has to use statistical and not clinical predictions when rating the candidates.[705] In 1954, a psychologist named Paul Meehl elected to review the results of the 200 or so studies that were conducted for purposes of analysing whether human predictions that were based on subjective impressions of trained professionals produced more accurate results than statistical predictions made by combining a number of scores and ratings in accordance with predetermined rules.[706] The results of what Meehl termed his "disturbing little book", made up of approximately 200 studies reported that algorithms (as referred to as

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703 Gravette 2017 *THRHR* 282.
704 Gravette 2017 *THRHR* 282.
705 Gravette 2017 *THRHR* 283.
706 Gravette 2017 *THRHR* 283.

statistical predictions) have indicated significantly better accuracy as compared to human judgment (clinical predictions).[707]

In answering the question on why human judgment is inferior to algorithms, Gravette submits that one reason is because "humans are incorrigibly inconsistent" in making summary judgments of intricate information and situations.[708] This is because when asked to evaluate the same information twice, they often change their answers.[709]

When reviewing 41 separate studies conducted to determine the reliability of judgments made by auditors, psychologists, pathologists and other professionals, it was found that the inconsistency referred to above exists even when a case "is re-evaluated within a few minutes".[710]

Nobel-prize winning psychologist, Daniel Kahneman, has pointed out that "unreliable judgment cannot be valid predictors of anything".[711] Gravette adds on by stating that since people have inadequate "direct knowledge of the content of their own minds", they will never know if they would have reached a different conclusion under circumstances that are slightly different.[712] Additionally, Kahneman submits that in order to increase the accuracy of predictions, "final decisions should be left to formulas".[713] Based on the research conducted, Kahneman submits that using an interview as a means to make appointments ultimately results in the likelihood of lessening the accuracy of such

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707 Gravette 2017 *THRHR* 283.
708 Gravette 2017 *THRHR* 283.
709 Gravette 2017 *THRHR* 283.
710 Gravette 2017 *THRHR* 283.
711 Gravette 2017 *THRHR* 283.
712 Gravette 2017 *THRHR* 283.
713 Gravette 2017 *THRHR* 284.

appointment procedures- especially in an instance where the interviewers end up making the final decisions.[714]

When analysing judicial appointments in South Africa, Cohen submits that the fact that there is no algorithm that can be used to determine whether a candidate will be a good judge or not has to be taken needs to be duly acknowledged.[715] Gravette adds by submitting that this statement begs the question: Why is there none? the fact that no one has elected to formulate a criteria that can be used to measure candidates who are viable for judicial positions, it does not in any way mean that same cannot be done.[716]

Nowadays, job seekers are following the trend of to putting their profiles online using professional social media such as LinkedIn and Monster, this makes the headhunting process by HR managers much a lot more easier because all the data of profiles is available online.[717] Manually analysing the information relating to profiles of possible job candidates is relatively impossible for recruiters, but it proves to be easier and more efficient with the assistance of AI technology.[718] This proven fact is based on the fact that even an algorithm that has been created "on the back of an envelope" is definitely "good enough to outdo expert judgment".[719] This submission gives reference to the Apgar score that was created by Dr Virginia Apgar during 1953.

In using AI to recruit, it is pivotal to consider the dangers and pitfalls of using the intelligence. A noteworthy example emphasizing the dangers of using AI to recruit is the AI software unintentionally developed by Amazon- the software is said to have

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714 Gravette 2017 *THRHR* 284.
715 Gravette 2017 *THRHR* 284.
716 Gravette 2017 *THRHR* 284.
717 Ibrahim and Hassan 2019 *AJRBM* 18.
718 Ibrahim and Hassan 2019 *AJRBM* 18.
719 Gravette 2017 *THRHR* 282.

discriminated against women.[720] Should AI prioritize a candidate who has taken on a large number of responsibilities in a lesser company or one who has interned at a fortune 500 company? This is just one of the many questions posed in the name of finding answers towards the smooth inclusion of AI in human activities. Infusing AI with the recruitment process will do away with bias and increase the quality and speed of the process.[721] Moreover, the collaboration of man and machine can enable humans to perform their tasks with reduced human labour, mistakes and workload.[722]

AI has been found to boost the speed and efficiency of work processes.[723] Additionally, it has been submitted that technology-enabled recruitment processes modify the accepted hiring processes into a time & space-autonomous and collaborative hiring procedure.[724] AI has the ability to do away with discrimination, emotional components, preconception and also screen resumes to quickly match the right candidates.[725] Many AI experts assert that using AI technologies to recruit has the potential to save time and costs, to remove bias and improve accuracy, to increase efficiency and improve candidate experience and also, to ultimately reduce workload.[726] Additionally, some researchers are of the opinion that "AI tools cannot completely take over" the role played by humans

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720 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.

721 Hemalatha *et al Impact of Artificial Intelligence on Recruitment and Selection of Information Technology Companies* 61.

722 Hemalatha *et al Impact of Artificial Intelligence on Recruitment and Selection of Information Technology Companies* 62.

723 Hemalatha *et al Impact of Artificial Intelligence on Recruitment and Selection of Information Technology Companies* 62.

724 Hemalatha *et al Impact of Artificial Intelligence on Recruitment and Selection of Information Technology Companies* 62.

725 Hemalatha *et al Impact of Artificial Intelligence on Recruitment and Selection of Information Technology Companies* 62.

726 Hemalatha *et al Impact of Artificial Intelligence on Recruitment and Selection of Information Technology Companies* 62.

because emotions and moral values will always be missing in processes that include AI and also, it ought to be noted that "AI cannot make right-or-wrong decisions".[727]

It has been confirmed that on average, a single recruiter spends at least fifteen (15) hours a week attempting to find the right candidate to employ in a specific position.[728] Today AI draws in a lot of highly talented personnel by asking pertinent questions and making informed selections of who is regarded best qualified to fill positions.[729]

Recruitment experts are of the opinion that infusing the recruitment process with AI is the most efficient way to perfect the process, increase efficiency, remove bias, and find the best talent at the most appropriate time.[730] Factors considered when developing job-matching algorithms include job scope, educational background as well as the company culture.[731]

During the early era of the internet, communication via letters, phone calls and emails was the norm, today a new technology in AI called chat-bots is making this communication more efficient.[732] Chat-bots are being used to conduct interviews physically as part of the hiring process by enabling real-time personal engagement with candidates.[733] These bots use both natural language processing (NLP) and interview

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727 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 13.
728 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.
729 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.
730 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.
731 Ibrahim and Hassan 2019 *AJRBM* 18.
732 Ibrahim and Hassan 2019 *AJRBM* 18.
733 Ibrahim and Hassan 2019 *AJRBM* 18; Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.

analytics to assess the candidate's suitability by reading their soft skills and personality traits and also, to understand and respond to messages.[734]

Email, SMS, social media as well as other messaging apps are channels of communication that can use chat-bots to simplify communication between applicants and organizations-without difficulties of time and location.[735]

Travelling to attend job interviews is equated to gambling, this is because candidates spend money on travelling with the uncertainty of whether they will get the job or not.[736] With the use of video interviews growing significantly, interviews can be done anywhere, as long as there is good internet connection-this has the potential to save candidates time and money.[737]

AI technology that is said to have the ability to analyse facial expressions and body language patterns during video interviews can assist recruitment processes the interviewer can analyse the interview recordings at a later stage- this can result in more accurate and efficient decisions being arrived at.[738]

Candidate background checking is relatively a wearisome and time-consuming process, but it is nonetheless as important as the process of assessing skills of candidates. It has been found that 92% of organizations conduct background checks for purposes of reducing risks.[739] With background checking that is powered by AI, it is submitted that

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734 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment; Ibrahim and Hassan 2019 *AJRBM* 18-19.
735 Ibrahim and Hassan 2019 *AJRBM* 19.
736 Ibrahim and Hassan 2019 *AJRBM* 19.
737 Ibrahim and Hassan 2019 *AJRBM* 19.
738 Ibrahim and Hassan 2019 *AJRBM* 19.
739 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.

"organizations are assured of unbiased and private procedures that protect both the organization and the candidates".[740]

In as much as AI is changing the recruitment process and the role of the recruiter, human involvement is still relevant and cannot be excluded from the recruitment process, hence this dissertation argues for the addition of AI into the interviewing procedures of the JSC and not the outright phasing out of human involvement.[741]

While the use of AI may take a while to become a norm in processes of hiring and recruiting, it is not difficult to imagine the consequences of having CV-screening processes that are fully automated.[742] From an employer's point of view, interviews grant employers the opportunity to "connect" with candidates, and to also understand and assess situations in ways that a machine may not be able to.[743] This however does not change the fact that AI is our present and definitely our future.

The use of AI in recruitment and selection is still in the experimentation stages, with many HR professionals and candidates expressing doubtfulness towards the reliability of the software.[744] It is said that AI could perhaps be used to sort candidate profiles *inter alia*, while the interviews and final decision-making processes rest with the person vested with the authority to employ- this is because artificial intelligence should support and not replace human intelligence.[745]

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740 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.
741 Johnson https://www.unleash.ai/artificial-intelligence/7-effective-uses-off-ai-in-recruitment.
742 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
743 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
744 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.
745 Yoong 2022 https://hospitalityinsights.ehl.edu/ai-in-recruitment.

AI assists in reducing the time-consuming activities and automating the screening of resumes, matching certain job requirements with the skills of available candidates using more efficiency and effectiveness which enables decisions to be made on time by professionals.[746] A leading Luxury Vehicles Company from Sweden called Volvo turned its Motor Show in Brussels to a Job Fair by establishing a prominent mark for themselves using their "Recruiting Car".[747] Relevant candidates were interviewed by the AI integrated car for the position of service technicians at the Volvo plant and they had to go through the recruitment process by being asked questions related to the concepts, requesting them to identify the parts through simulation.[748]

AI is basically an innovative technology that causes machines to learn the ability to make decisions, think logically and react systematically,[749] this description screams benefits when read, benefits that will be relished for deploying the technology in recruitment processes.

Research clearly enunciates the notion that AI-based technologies most certainly possess the potential to increase the efficiency within the recruitment processes by replacing human intervention in relation to time-consuming tasks.[750] Additionally, it is submitted that recruiting through AI provides an "increased possibility of finding and hiring the right candidate".[751] It has also been submitted, based on a study conducted, that the adoption

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746 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 383.
747 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 383.
748 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 383.
749 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 383.
750 Sposato 2021 *IJOA* 2.
751 Sposato 2021 *IJOA* 2.

of AI in recruitment and selection processes is beneficial- with many possibilities to do "something helpful" or the "possibility to do something".[752]

Hunkenschroer and Kriebitz are not of the opinion that every single AI decision must be able to be explained to the last detail, this is because same is not expected from humans either.[753] An example made is that an interviewer cannot explain in detail or in a manner that can be quantified the reasons as to why a candidate is likeable to them or why they are of the opinion that a candidate would serve as a good addition to the team.[754]

Chat-bots are generally used to pick out basic information from resumes of candidates, which matches the requirements of a particular position with skill sets of the candidates. It is said that "Mya & Olivia are examples of Chat-bots, engaged on the company's official website to filter the first level of screening when candidates visit their websites and also help them in completing the application process, manage schedules, send periodical updates to candidates on application statuses, feedback system as well as instant responses to candidates on the basic queries".[755] Clearly chat-bots are being used positively for purposes of recruiting employees to serve organizational structures.

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752 Sposato 2021 *IJOA* 5.
753 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 10.
754 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 10.
755 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 383.

4.3.1 List of companies and platforms using AI to recruit

4.3.1.1 Interviewed

Interviewed is a company based in San Francisco and which used a variety of automated screening tools for programming tests, language skills and personality assessments which enable candidates to undergo simulations before selection.[756]

4.3.1.2 Entelo

Entelo goes through social profiles using predictive algorithms to find the most probable candidate to leave their current job.[757]

4.3.1.3 Zoom & Montage

These are AI-powered teleconferencing software platforms used to simplify recruiters' job of choosing suitable candidates using video conferencing. There is also provision for the screening of candidates for face to face across various rounds of interviews for the better understanding of such candidates.[758]

4.3.1.4 Textio

It is a platform that is based on the analysis of predictive data regarding the potentiality of candidates applying for jobs. The software platform analyzes the meaningful "language style of patterns from the posted documents, heading towards the accuracy of the predictions based on the advertisements posted by the relevant companies".[759]

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[756] Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.
[757] Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.
[758] Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.
[759] Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.

4.3.1.5 Panna

It is an AI-based recruitment platform of changing questions, expert evaluation, video conferencing, voice and face recognition which are configured to authenticate the applicants' video interviews and discover any strange movements or malpractice, investigating if someone is helping the candidate through other electronic devices.[760]

4.3.1.6 Harver

The company uses algorithms to calculate the score of a candidate regarding job profiles in accordance with the requirements of the company, to predict the chances of the selected candidate succeeding the role after being recruited.[761]

4.3.1.7 Magellan Health

This is a health-care company with more than 10 000 employees. It is a company that was looking for a way to enhance its candidate engagement and ended up implementing an AI recruiting platform that significantly increased its candidate experience.[762]

The list is *non numerus clausus* because there are other companies using AI to improve their hiring processes- what is important to note is the fact that AI, as the future of recruitment and selection, has already been incorporated- even though not fully.

The importance of making the right choice of words in CVs and job applications cannot be overemphasized because same has the ability to reinforce gender stereotypes- resulting in male job applicants being deemed more likely to be described as "superb",

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760 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.
761 Vedapradha, Hariharan and Shivakami 2019 *JSSM* 384.
762 Blehar 2022 https://www.phenom.com/blog/examples-companies-using-ai-recruiting-platform.

"exceptional", "outstanding" and "remarkable", which ultimately results in the increase of negative evaluations of female applicants.[763] Aumüller-Wagne submits that this proves to be (unfortunately) true where education, language proficiency as well as socio-economic status are most likely to affect the machine learning algorithm and its models.[764]

Aspects such as gendered wordings, the length of recommendation letters and the "ratio of applicant" diversity play an essential role of enhancing the training data used by recruiting algorithms.[765]

The process of determining the appropriate candidate to hire is often a costly and time-consuming one, it is no different with the one followed by the JSC. Given the fact that the JSC interviews a lot of candidates for a lot of judicial positions, it can undoubtedly be asserted that the budget for a day's work is of a considerable amount.

In addition to the large number of positions and candidates, the profile of jobs also plays a role in relation to the budget of interviews etc.

In an example, a statistic of job application for a position of civil engineer in Works Ministry of Malaysia during 2019 showed that from applications exceeding 17 000, only 2 575 candidates were shortlisted for interview to fill up a total of 74 vacancies.[766]

Due to making incorrect decisions or lacking objectivity when interviewing candidates during the hiring processes, recruitment processes may not proceed effectively, which ultimately results in financial and other losses.[767] Presently, a large number of businesses

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763 Aumüller-Wagne 2019 *ESPS* 8.
764 Aumüller-Wagne 2019 *ESPS* 8.
765 Aumüller-Wagne 2019 *ESPS* 8.
766 Ibrahim and Hassan 2019 *AJRBM* 18.
767 Karaboga and Vardarlier 2020 *BRSS* 1.

use the internet and software technologies to receive and evaluate applications of candidates.[768] Despite these technologies, it still takes time and costs for people to deal with all the recruitment processes.

One of the most important goals of a business is to be successful in its operations, this is why the process of selecting an employee with the necessities to successfully serve in a particular role is highly essential.[769] The processes of recruiting employees is summarised by Karaboga and Vardalier as follows:

(i) Examining candidate applications and conducting the first interview;

(ii) Filling out the application form;

(iii) Implementing tests for a candidate;

(iv) Conducting an interview;

(v) Examining of a candidate's past experiences and references;

(vi) Deciding on recruitment and furnishing the candidate with an offer;

(vii) Conducting the medicals, as well as other procedures;

(viii) Being placed in a job.[770]

The stages listed above are based on human intervention but it cannot be said that AI cannot be incorporated, given its proven capabilities- this is why the dissertation argues

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768 Karaboga and Vardarlier 2020 *BRSS* 1.
769 Karaboga and Vardarlier 2020 *BRSS* 2.
770 Karaboga and Vardarlier 2020 *BRSS* 2.

for the addition of AI and not the outright phasing out of human intervention in as far as the interviewing procedures of the JSC are concerned.

It is advised that it be a condition, for juristic persons seeking to use AI in their recruitment and selection processes, to be able to understand and explain how AI operates and what data and criteria are fed into an AI in order to enable the AI-based decision-making.[771] This also enhances the credibility of decisions arrived at by AI platforms being utilized and equally serves as a technical challenge because developing an AI platform which produces explainable results is relatively difficult.

The introduction of AI technologies creates societal risks, although AI technologies aim to augment human decision-making processes- leading to the reduction of incorrect conclusions, there is no doubt that AI will still arrive at those incorrect decisions sometimes.[772] The manner which AI uses to arrive at incorrect decisions is likely to be very dissimilar to the manner used by humans to arrive at their decisions.[773]

The general society wants and has the right to know the different kinds of risks that the inclusion of AI arrives with, Reed submits that purely statistical arguments that support the notion that "AI makes us safer" are failing to convince the wider population.[774]

4.4 Dangers of using AI in recruitment and selection processes

Too much of a good thing is bad, therefore as much as AI is said to be a great innovation etc, it still poses significant danger when used insensibly- hence the need to articulate

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771 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 11.
772 Reed 2018 *PTRSA* 2.
773 Reed 2018 *PTRSA* 2.
774 Reed 2018 *PTRSA* 2.

on its plausible dangers. A large variety of racial and economic inequalities exist across different nations,[775] wherefrom a number of different dangers emanate.

Reed asserts that transparency *ex post facto* can often be realised by retrospectively analysing the operations of the AI technology, the author proceeds by submitting that the transparency *ex post facto* "will be sufficient if the main goal is to compensate victims of incorrect decisions".[776] On the other hand, transparency *ex ante* is said to be more challenging since it can restrict the use of some of the AI technologies such as neural networks.[777]

Regulation should only demand transparency *ex ante* in instances where the AI casts risks to fundamental rights, or where the general society needs reassurance that the technology can be used safely.[778]

There are several factors that hamper growth in the use of AI within recruitment and selection processes, these include the fear of and lack of trust in AI serving the recruitment and selection processes, issues relative to the relevant organisation, the "limitations driven by the current level of development of the technology" as well as the possibility of AI products being biased.[779]

The rapid growth and use of AI by humans in their lives does not only bring positive aspects and outcomes, it also equally brings negative ones which if not duly prepared for may cause enormous damage and which are becoming apparent to the users of AI.[780]

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775 Bigman *et al* 2021 *CHB* 1.
776 Reed 2018 *PTRSA* 1.
777 Reed 2018 *PTRSA* 1.
778 Reed 2018 *PTRSA* 1.
779 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 13.
780 Chauhan and Kaur 2022 *HLR* 47.

The negative aspects and outcomes referred to become more solemn when there are human rights being threatened.[781]

Unbelievably, the science fiction made up of imaginary machines that control humans plays a role in AI not being used during recruitment and selection processes as much as the reality that incorporating AI will cause many people to lose their jobs.[782] A plethora of areas having a direct impact and influence on human lives have been impacted by the use of artificial intelligence, ultimately resulting in the eruption of "Pandora's box of legal concerns".[783]

In revealing their findings as based on their literature review, Ore and Sposato submit that the findings of the literature review they conducted were echoed by comments from the participants on their fears and reservations about the use of AI in recruitment and selection processes.[784]

Despite there being extensive research on the psychological effects of the traditional methods used to conduct job interviews, the fundamental criteria for the prediction of job predictions by newly developed AI tools has not been validated on a scientific level.[785] This basically means that firms are able to reject candidates on the basis of unexplained connections and make decisions based on factors that share no clear causal connection with job performance.[786]

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781 Chauhan and Kaur 2022 *HLR* 47.
782 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption* 13.
783 Chauhan and Kaur 2022 *HLR* 46.
784 Sposato 2021 *IJOA* 8.
785 Hunkenschroer and Luetge 2022 *JBE* 996.
786 Hunkenschroer and Luetge 2022 *JBE* 996.

It has been submitted that "An employee who is selected inaccurately in the recruitment process often leaves the job after a while because the job characteristics do not match them. In such a case, the business endures the second loss of cost and time to find and select employees".[787] This loss applies when AI has been used and even in a situation where it has not been. Additionally, risk arises when artificial intelligence begins to make machines that are smarter than humans.[788]

Some of the submissions against the use of AI in recruitment and selection processes include one that relates to the fact that technology indeed has limitations.[789] If AI platforms are certainly built by humans, human error can be built into the algorithm-contrary, one would prefer to have something that has been duly validated, meaning that it has been tested so one can rest knowing that no results will be skewed based on acquired human biases.[790]

As a prerequisite and a step towards curbing the danger posed by AI, it is important and advisable for recruiters to ensure that their programmers have data literacy and that the knowledge of hiring managers on how to use the relevant AI platforms.[791] Given the fact that any data concern can have a life-changing impact on applicants, companies are said to need "adequate levels of data and statistical skills" in order to ensure that the developed algorithms are valid and accurately developed.[792]

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787 Karaboga and Vardarlier 2020 *BRSS* 2.
788 Karaboga and Vardarlier 2020 *BRSS* 4.
789 Sposato 2021 *IJOA* 9.
790 Sposato 2021 *IJOA* 9.
791 Hunkenschroer and Luetge 2022 *JBE* 999.
792 Hunkenschroer and Luetge 2022 *JBE* 999.

There is a prevailing idea that using artificial intelligence when recruiting can cause incorrect decisions, lessen liaison and fail to capture details about candidates.[793] Moreover, human resources personnel are of the opinion that artificial intelligence can create the unemployment problem in human resources.[794] With this kind of consideration to take note of, people ultimately end up opposed to the idea of decisions being made by algorithms- basing their reservations on the potential adverse cost of efficiency and human lives.[795]

It is argued that recruitment through the use of AI serves as encouragement for applicants to apply for vacancies without making an assessment as to their suitability for such vacancies, thereby increasing unqualified applicants (which ultimately results in increased workload and loss of time since recruiters review a large number of unsuitable applications).[796]

Research has indicated that AI might not work equally for every one of its users, which consequently undermines its accuracy. Along these lines, several studies have indicated the rather poor performance of facial recognition software, as a result of suffering from differences in error rates throughout gender and race.[797]

Factually, a more complicated algorithm has the higher probability arriving at some highly accurate conclusions. Additionally, the more complicated the algorithm is equally the

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793 Karaboga and Vardarlier 2020 *BRSS* 15.
794 Karaboga and Vardarlier 2020 *BRSS* 15.
795 Bigman *et al* 2021 *CHB* 8.
796 Sposato 2021 *IJOA* 2.
797 Hunkenschroer and Luetge 2022 *JBE* 996.

harder it is to explain its conclusions- resulting in a "trade-of between accuracy and explainability".[798]

Concerns about the potential lack of validity and accuracy in AI conclusions create the question of whether it is ethical to use new AI tools as compared to long-standing psychometric assessments that have been scientifically developed and validated.[799]

It is said that there is an issue relating to the uncertainty of decisions made by AI as this relies mainly on data and not human approach while there are also concerns that AI may 'learn' to copy decisions that are based on human bias in the future.[800] This learning is argued to be as a result of machine learning- where patterns of decisions arrived at by humans will be analysed and replicated from time to time, resulting in the decisions made being as a result of human bias.[801]

Companies that do not develop algorithms in-house are strongly encouraged to refer to "professional test standards" and obtain whatever vital information about the tools being used.[802]

It is advised that the ethicality of designing the AI tools, which ought to include techniques that can be used to mitigate bias, plays a crucial role.[803] For instance, some AI software retailers remove any wording or phrase that can unconsciously predict the gender of a candidate from CVs to avoid unconscious bias, thereby improving equity.[804]

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798 Hunkenschroer and Luetge 2022 *JBE* 996.
799 Hunkenschroer and Luetge 2022 *JBE* 997.
800 Ibrahim and Hassan 2019 *AJRBM* 20.
801 Ibrahim and Hassan 2019 *AJRBM* 20.
802 Hunkenschroer and Luetge 2022 *JBE* 999.
803 Hunkenschroer and Luetge 2022 *JBE* 999.
804 Hunkenschroer and Luetge 2022 *JBE* 999.

As much as AI is said to be great at predicting patterns, human involvement in recruitment processes- especially in the screening of applicants is still highly relevant.[805] This is because AI may read insufficient data and end up in a process of suggesting the same types of candidates for an organization,[806] hence it has been referred to as "nothing more than an empty box"- unless data is fed into it.[807]

It is a fact that AI can only function when fed data, so its efficiency results from the amount of data it is fed since insufficient data results in inaccurate decisions. In a situation where a candidate uses a different word or phrase to describe a skill, if AI does not have enough data to realize that the skill is transferable then it may skip the right person for a specific job.[808] On the other hand, a lot of candidates learn how AI works and come to the realization of key words- in this instance, they end up putting those key words in their resumes in order to seem more qualified than they actually are, AI will not be able to tell the difference and it will still recommend them for posts.[809]

It is argued that with data sets being increasingly protected, companies run the risk of using cheap, non-responsive and therefore less valid data sets-[810] meaning that the AI concerned will produce outcomes with less validity. This serves as one of the several factors that are deemed capable of hampering the pace of the adoption of AI in recruitment and selection processes, factors that include the inherent lack of trust in AI,

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805 Harmon date unknown https://www.recruiter.com/recruiting/pros-and-cons-of-using-ai-in-recruiting.
806 Harmon date unknown https://www.recruiter.com/recruiting/pros-and-cons-of-using-ai-in-recruiting.
807 Wright and Atkinson The impact of Artificial Intelligence within the recruitment industry:Defining a new way of recruiting 6.
808 Harmon date unknown https://www.recruiter.com/recruiting/pros-and-cons-of-using-ai-in-recruiting.
809 Harmon date unknown https://www.recruiter.com/recruiting/pros-and-cons-of-using-ai-in-recruiting.
810 Wright and Atkinson *The impact of Artificial Intelligence within the recruitment industry: Defining a new way of recruiting* 6.

fear, issues that are deemed organizational, the possibility of machines exhibiting bias as well as the limitations driven by developmental levels of certain organizations.[811]

Advisedly, it is said that recruiters ought to pro-actively gather and use data relating to social categories in order to combat discriminatory practices. Authors argue that data scientists are able to detect, understand and remediate discrimination only when data-sets are labelled with social categories.[812]

It has also submitted that it is crucial for companies to invest not only in AI technology, but also in people who are mindful of both the opportunities and the risks associated with the use of AI in recruitment processes.[813]

AI is said to be bad at building solid relationships with candidates, however, AI can still help recruiters build the relationship by taking care of tasks that do not require a personal touch.[814] This is one of the reasons why AI cannot fully take the recruiter's place, it can however assist in reaching the employment decision faster.

Additionally, it has been submitted that AI will automate the repetitive tasks that humans do in recruiting and selecting candidates, however, human characteristics such as empathy and emotions will still be required for assessments and other activities such as negotiation.[815]

One valuable point to take not of is regarding the ethical opportunity mentioned in existent literature, pertaining to the ability of AI to establish transparency by timeously

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811 Kerey and D'Alessandro *AI in recruitment: an exploratory study into the factors the impact its pace of adoption 13*.
812 Hunkenschroer and Luetge 2022 *JBE* 999.
813 Hunkenschroer and Luetge 2022 *JBE* 1000.
814 Harmon date unknown https://www.recruiter.com/recruiting/pros-and-cons-of-using-ai-in-recruiting.
815 Sposato 2021 *IJOA* 3.

providing applicants with updates as well as feedback throughout the recruitment process and through the use of using chatbots, *inter alia*, which can be considered an essential aspect regarding the protection and enhancement of fair treatment.[816] Often, firms fall short of providing relevant information in a timely manner, or they provide no information other than confirmation that a candidate's application has been received- this can be very frustrating for candidates. In addition to progress updates, however, AI further enables firms to generate detailed feedback and give millions of job applicants data-driven insights on their strengths and developmental needs.

In using AI for any task, it is essential and wise to accept the fact that the error rate is never 0%,[817] meaning that errors are inevitable- just as they are when it is only humans that are doing the recruitment. What is important when using AI is to infuse AI decisions with good HR judgement- meaning that what is learned from AI has to be balance d with the organization's strategic direction,[818] being the constitutional mandate of the JSC and the founding values of same.

During April 2020, months into the COVID-19 pandemic, a poll (by Gartner, Inc.) comprising of some 334 leaders of the human resources fraternity found that 86% of organizations were incorporating novel virtual technology into their hiring practices.[819]

Some of the contentions against the use of AI in recruitment and selection processes include one that relates to the limitations of AI.[820] If AI platforms are certainly built by humans, human error can be built into the algorithm- contrarily, one would prefer to

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816 Hunkenschroer and Luetge 2022 *JBE* 997.
817 Farmiloe 2021 https://blog.hrm.org/blog/8-risks-and-rewards-with-ai-hr.
818 Farmiloe 2021 https://blog.hrm.org/blog/8-risks-and-rewards-with-ai-hr.
819 Drage and Mackereth 2022 *Springer* 2.
820 Sposato 2021 *IJOA* 9.

have something that has been duly validated, meaning that it has been tested so one can rest knowing that no results will be skewed on the basis of acquired human bias.[821]

Retorio and MyInterview are two HR video tools that were founded in 2018 and 2016 respectively, to simultaneously streamline and remove bias from recruitment.[822] With HireVue no longer using AI in its video hiring software platforms- following an external audit, other companies that include the likes of Retorio and MyInterview have elected to step in and fill the gap left as a result.[823]

It has been argued that when introducing AI to recruitment, one begins "to introduce a greater risk of bias being introduced", humans are however relatively biased and are hard to fix- but AI will be relatively easier to fix.[824]

4.4.1 AI bias in recruitment and selection

The issue of algorithmic bias as a problem that comes with the use of algorithms has been raised repeatedly during recent years.[825]

With the COVID-19 lockdown restrictions set to persist, the use of artificial intelligence (AI) increased rapidly across all domains- it has therefore been expected that HireVue would report a 614% increase in the hiring activities of their Japanese clients.[826]

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821 Sposato 2021 *IJOA* 9.
822 Drage and Mackereth 2022 *Springer* 2.
823 Drage and Mackereth 2022 *Springer* 2.
824 Wright and Atkinson *The impact of Artificial Intelligence within the recruitment industry:Defining a new way of recruiting* 16.
825 Aumüller-Wagner 2019 *ESPS* 6.
826 Drage and Mackereth 2022 *Springer* 2.

Over the past decades, governments and a variety of other national and international organizations have decided to make consistent efforts towards the establishment of systems and mechanisms to use in the name of resolving issues that relate to gender.[827] Developmental awareness "is seen as a transitory measure to address gender issues".[828] Gender equality is an important principle that acknowledges the idea that "everyone, irrespective of their gender, has an equitable chance to lead a joyful life".[829] Chauhan and Kaur submit that young girls and women also "have the right to engage equally and fully in all fields of human endeavours", additionally, they note that and any kind of discrimination results in the denial of gender equality.[830] They equally have the right to live their lives based on their own terms "like their male peers", this is regardless of the differences that are held within the society.[831] It is submitted that measures that are considered socially progressive ensure that everyone should have the same opportunities and resources irrespective of their gender.[832]

It has been advisedly submitted as a caution that recruitment using AI poses ethical concerns in relation to fairness and discrimination because of the existing possibility of alienating potential candidates from the recruitment process.[833]

It is also submitted that the possibility of coders intentionally or unknowingly inserting their cultural or personal biases into algorithmic platforms has been considered.[834] In contrary assertions, it has been submitted that the racism argued to be contained by AI

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827 Chauhan and Kaur 2022 *HLR* 50.
828 Chauhan and Kaur 2022 *HLR* 50.
829 Chauhan and Kaur 2022 *HLR* 50.
830 Chauhan and Kaur 2022 *HLR* 50.
831 Chauhan and Kaur 2022 *HLR* 50.
832 Chauhan and Kaur 2022 *HLR* 50.
833 Sposato 2021 *IJOA* 3.
834 Sposato 2021 *IJOA* 3.

is not inherent because AI merely adheres to the codes and criteria that are programmed by humans.[835] In this instance, the original source of the "algorithmic bias" is a human, either in the form of human bias that the AI reproduces or in the form of a programmer who (deliberately or unintentionally) programmed the AI in a racist manner.[836]

Bias is a trait which is argued to form a part of human nature, be it consciously or subconsciously.[837] It is argued that human behaviour somehow provides a reflection of preconceived notions since the AI acts in terms of the algorithms that have been fed to such AI.[838] The programming is created by humans, there are therefore possibilities that the personal preconceptions of programmers might be reflected in the assembling of the program.[839]

Notwithstanding the significant developments that have been aimed at the promotion of gender equality in organizations, most of such organizations' organizational hierarchies are argued to still be dominated by males.[840]

With the general public relying significantly on modern day technology, the manner of interacting with human resources is said to have been gradually changing.[841] Chauhan and Kaur submit that computers that have a limited capacity will interact with their surroundings as well as other individuals, adding also that "several of these devices will rely on machine learning techniques to decode the meaning and behavior hidden in

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835 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 8.
836 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 8.
837 Chauhan and Kaur 2022 *HLR* 54.
838 Chauhan and Kaur 2022 *HLR* 54.
839 Chauhan and Kaur 2022 *HLR* 54.
840 Chauhan and Kaur 2022 *HLR* 48.
841 Chauhan and Kaur 2022 *HLR* 48

sensor information"-this allows them to provide correct estimations and to also draw conclusions.[842]

Such conclusions will be arrived at on the basis of the programming or the algorithm on which they are based. Prejudice in any aspect that includes Artificial Intelligence tends to proliferate gender inequality in society today.[843] Bias in how algorithms are programmed is relatively evident, if the person who is alimenting information to the AI is doing so while discriminating against certain groups of people then AI would do the same.[844]

Bias in how algorithms are programmed is relatively evident, if the person who is alimenting information to the AI is doing so while discriminating against certain groups of people then AI would do the same.[845]

It is admitted that unfavourable outcomes have the possibility of occurring when AI is used for recruitment and selection of candidates to serve as employees, outcomes that bear an ethical risk.[846] A question consequently arises as to whether the "risk for such algorithmic bias should be considered unethical".[847]

Scientists are generally of the opinion that the processes currently being followed in the recruitment and selection of employees are nowhere near effective and unbiased because

842 Chauhan and Kaur 2022 *HLR* 48
843 Chauhan and Kaur 2022 *HLR* 48
844 Sposato 2021 *IJOA* 3.
845 Sposato 2021 *IJOA* 9.
846 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 8.
847 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 8.

it is argued that the selection and recruitment processes being used currently are not completely unbiased.[848]

Natural language processing algorithms for analyzing texts are said to have the ability to repeatedly display gender biases, such as associating the word "'doctor' with 'father' and 'nurse' with 'mother'".[849] Algorithms used for facial recognition have also been found to have been persistently displaying much higher error rates for minority groups.[850]

There have been multiple cases of face recognition software refusing to recognize faces of black people and even worse, going as far as grouping them as "gorillas".[851] The pain that comes with this is especially excruciating when algorithms are used to predict future criminals and exhibit a stout bias against black people, simply because black neighbourhoods are more monitored by police than white ones.[852]

Algorithmic bias has resulted in Google's translation AI fusing its translation services with gender stereotypes by translating the gender-neutral Turkish phrase of "they are a doctor" into "he is a doctor", while also translating "they are a nurse" into "she is a nurse".[853]

An algorithm used by the United States' criminal justice system has been said to be biased with respect to ethnicity because it found that Afro-Americans are almost twice as likely as whites to be labelled a higher risk, but not to re-offend.[854] Getting rid of bias in AI is

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848 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 8.
849 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 2.
850 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 2.
851 Aumüller-Wagne 2019 *ESPS* 6.
852 Aumüller-Wagne 2019 *ESPS* 6.
853 Aumüller-Wagne 2019 *ESPS* 6.
854 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.

difficult because there is not a single *causa* for the bias, one of the major *causus* is insufficient training data in which some demographic groups are underrepresented or just outright missing.[855] A study by MIT researchers has indicated that facial recognition technology has a higher error percentage for minority groups- specifically females.[856]

Another study found that an AI-powered facial recognition system had 99% accuracy in detecting male faces but could only detect a female face two times out of three. This difference in the performance was a result of the data-set that was used to train the software- 75% were male faces while 25% were female, with 80% of the total amount of images showing white persons.[857]

A non-profit organization based in the United States by the name ProPublica has recently found that lots of companies had used advertisement platforms that are inclusive of Facebook and Google, to essentially target job ads that are relative to certain genders and age-groups.[858]

It is argued that job ads in industries that are dominated by males are argued to generally contain more masculine phrases such as 'challenge', 'lead' or 'active', which ultimately serve as the roots of women finding themselves unlikely to be placed in certain positions.[859] The same sentiment can be said about job seekers that belong to ethnic

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855 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
856 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
857 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
858 Aumüller-Wagne 2019 *ESPS* 7.
859 Aumüller-Wagne 2019 *ESPS* 7.

minority groups that are trigged by the words that include 'integrity', 'sincerity' or 'modesty'.[860]

The data that AI is fed when recruiting is of the highest importance because there have even been concerns raised regarding a "remote video interview software that evaluates employability based on facial expressions, speech pattern and voice tone", which is equally argued to pose the threat of unfairly disqualifying disabled people.[861] AI technology that is said to have the ability to analyze facial expressions and body language patterns during video interviews is argued to equally have the ability to eliminate human bias factors during interviews.[862]

An even more concerning issue is regarding "Babylon", a British health app that was accused of placing its female users at risk. The accusation was based on the app's suggestion that females who had a sudden pain on their left arm and nausea should go to see a doctor within the next few days because it may be a result of depression or panic attack, while males who experienced the same discomfort should "immediately visit an emergency department based on the diagnosis of a possible heart attack".[863] The bias exists in the idea that the sudden pain referred to is not as serious for women as it is for men since men are advised to "immediately" visit an emergency department while women are advised to see a doctor "within the next few days".

Bias in AI is however not always a result of insufficient data being fed into an AI. Humans are argued to carry "(un)conscious biases" and therefore behave in accordance with

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860 Aumüller-Wagne 2019 *ESPS* 7.
861 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
862 Ibrahim and Hassan 2019 *AJRBM* 19.
863 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.

such.[864] Additionally, human biases are said to find their way into the historical data that used to train algorithms, this results in them being picked up by machine learning models. An example of this perspective is Amazon' recruiting algorithm, which learned that historically, the majority of technical roles were filled by males and ultimately penalized resumes that incorporated the word 'women'.[865] There also exists Google's job ads algorithm, which is said to have disproportionately showed ads of high paying jobs to men but not to women.[866]

During 2018, an AI and machine learning recruitment program developed by Amazon was disregarded for having been found to be biased against women.[867] This is a clear indication of the fact that the main thing for AI to do job matching efficiently by screening and analyzing patterns of applicants more efficiently is to basically feed it huge amounts of data.[868] Without these large amounts of data, the results provided by AI assisted recruitment tools might not be as positive as expected.

Wishkirchen *et al* argue that AI in recruitment and selection will remove bias by focusing solely on facts and not "emotions and sympathies".[869] This argument creates an impression that less emotions lead to more sensible and accurate outcomes. This dissertation argues that the idea by Wishkirchen is accurate. Another argument in support of the notion that AI can address bias focuses on the form of "gendered language" used

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[864] Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
[865] Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
[866] Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
[867] Parikh 2021 https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/10/14/understanding-bias-in-ai-enabled-hiring/?12deb2817b96.
[868] Ibrahim and Hassan 2019 *AJRBM* 20.
[869] Wright and Atkinson *The impact of Artificial Intelligence within the recruitment industry:Defining a new way of recruiting* 7.

in job descriptions, AI is said to have the potential of making them gender-neutral and more inclusive.[870]

Additionally, human bias (relative to the physical appearance or other attributes of applicants) can be reduced because AI can be taught to ignore people's personal attributes and focus solely on the skills and behaviours that are required for the filling of a particular vacancy.[871]

Hunkenschroer and Kriebitz have went as far as submitting that if one provides an argument that AI should be considered ethical in as far as its potential to lessen human bias is concerned, then they do not see an inherent conflict between human rights and recruitment using AI.[872]

Yarger *et al* submit the three factors that may lead to biased decisions in AI recruitment as bias in the principles of model design, bias in the selection of features, and bias in the training data.[873] Many have submitted that the use of AI in processes comes with the reduction of bias in such processes,[874] this is an accepted fact.

4.4.1.1 Disability bias

Scott-Parker argues that in considering disabled people, fairness does not really mean ensuring that the processes of recruiting candidates are more consistent and standardized, it refers to the ensuring that processes are made to be more flexible, in

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870 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 8.
871 Hunkenschroer and Luetge 2022 *JBE* 994.
872 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 9.
873 Hunkenschroer and Luetge 2022 *JBE* 994.
874 Bigman *et al* 2021 *CHB* 2.

order to generate equal opportunities for all applicants.[875] The discernment against disabled people is referred to by Scott-Parker as "disability bias" and it is said to be pivotal in the context of AI recruitment, but it has not yet been frequently referred to in the AI debate.[876]

Artificial Intelligence has the potential to bring significant impact to the lives and life chances of people living with disabilities.[877] The platform is however argued to pose a threat to disabled people that are seeking employment, this is because of issues relating to bias, among others as outlined.

According to the definition of persons with disabilities as contained in The United Nations Convention on the Rights of Persons with Disabilities (CRPD), people who have "long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" are included.[878]

Scott-Parker and Nugent attempt to define disability by submitting that a disability can be a life-long condition and it exists in different stages of one's life.[879] Additionally, it may be because of a significant occurrence or change. Disability impacts the life of one in different aspects and it can equally be conditional to the situation concerned.[880] Disabilities may include difficulty with mobility, hearing and sight- including dexterity

875 Nugent and Scott-Parker 2022 *TTAIS* 1.
876 Nugent and Scott-Parker 2022 *TTAIS* 1.
877 Nugent and Scott-Parker 2022 *TTAIS* 1.
878 Nugent and Scott-Parker 2022 *TTAIS* 2.
879 Nugent and Scott-Parker 2022 *TTAIS* 2.
880 Nugent and Scott-Parker 2022 *TTAIS* 2.

impairments and also, a disability may be invisible to the eye.[881] People with cognitive and impairments relative to their intellect, those with conditions relating to their mental health, people with facial disfigurements, those built with small stature are people who are generally regarded as being disabled.[882]

People with disabilities continue to be regularly disadvantaged in as far as the processes of seeking and securing employment are concerned.[883] Disabled people are said to go through experiences that include exclusion from the society and the economy itself. Nugent and Scott-Parker add that they are equally deemed to be more than twice as likely to be unemployed when weighed against people with no disabilities.[884]

The inclusion of disability in the work environment is impacted by several factors, this includes "the qualifications gap between disabled and able-bodied people due to systematic disadvantages in education, training, and previous work experience".[885]

4.4.2 AI discrimination in recruitment and selection

As a point of departure, it is essential to note that Gravette has submitted that the "greater the scope of subjectivity in the questioning of candidates, the greater the opportunity for discrimination".[886] This basically entails that there ought to be less subjectiveness in judicial appointment decisions if the appointment processes are to be constitutionally legitimate.

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881 Nugent and Scott-Parker 2022 *TTAIS* 2.
882 Nugent and Scott-Parker 2022 *TTAIS* 2.
883 Nugent and Scott-Parker 2022 *TTAIS* 3.
884 Nugent and Scott-Parker 2022 *TTAIS* 3.
885 Nugent and Scott-Parker 2022 *TTAIS* 3.
886 Gravette 2017 *THRHR* 282.

The potential discrimination as a result of using AI in recruitment and selection processes may hurt people of colour, people with disabilities, women and the society as it is. The possibility of hurting the people referred to is a result of the fact that algorithms can introduce bias and can even go as far as increasing discrimination, which ultimately affects the entire classes of individuals.[887] Reed submits that the list of fundamental rights that are "most obviously threatened by AI decisions" include the right not to be discriminated against on the basis of sex, race, religion and sexual orientation.[888]

Research shows that tests on traditional cognitive ability have led to the discrimination of underrepresented groups, such as candidates with a lower socioeconomic status.[889] To enhance diversity in the recruitment stages and to establish a culture of non-diversification, companies have often destressed cognitive tests in the processes of recruiting employees.[890]

In the health-care department of the United States of America, it was found that an algorithm used by a wide population had discriminated against black people in the process of estimating the level of care that is needed based on costs of health.[891] This was due to the fact that more money was being spent on white patients, therefore according to the algorithm, black patients were considered healthier and did not require the same amount of additional care.[892]

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887 Hunkenschroer and Luetge 2022 *JBE* 994.
888 Reed 2018 *PTRSA* 3.
889 Hunkenschroer and Luetge 2022 *JBE* 996.
890 Hunkenschroer and Luetge 2022 *JBE* 996.
891 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.
892 Ebert 2020 https://mostly.ai/blog/why-bias-in-ai-is-a-problem/.

Campolo *et al* conducted a critical approach to the analysis of the social and economic impact of AI and explain that machine learning programmes that are using existing data to reach decisions could result in "transferring and entrenching cultural and gender-based discrimination".[893]

Florentine made an example of how an AI algorithm can discriminate by stating that if an algorithm "found that Quarterbacks in American Football had a statistical relationship with high performance in sales roles based on data relating to mental skills, decision making and leadership it can generate the unintended consequence of eliminating all females from the process because they cannot be in an American Football Team".[894]

4.5 The regulation of AI in recruitment and selection processes

Literature is of the view that more governmental regulation is highly essential in the quest to respond to the new developments in recruitment and selection process.[895] Reed submits that the use of AI to supplement human decision-making "will inevitably create new risks" that come with unforeseeable consequences.[896] Other researchers provide that governments ought to make sure that they track the selection and recruitment processes and also check for possible infringement of underlying employment laws and human rights".[897]

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893 Wright and Atkinson *The impact of Artificial Intelligence within the recruitment industry:Defining a new way of recruiting* 7.

894 Wright and Atkinson *The impact of Artificial Intelligence within the recruitment industry: Defining a new way of recruiting* 7.

895 Hunkenschroer and Luetge 2022 *JBE* 999.

896 Reed 2018 *PTRSA* 1.

897 Reed 2018 *PTRSA* 1.

Reed goes on to argue that it is too early to attempt to establish a general system of regulating AI.[898] He, instead, suggests that "we should work incrementally within the existing" legal and regulatory frameworks which allocate responsibilities and liabilities to persons.[899] In instances where the inclusion and use of AI results in the creation of risks which current laws and regulations do not deal with, then the introduction of new-found regulation will be required.[900] In most cases however, the current systems are argued to be able to work effectively if the producers of the AI technology concerned "can provide sufficient transparency" in clarifying the manner in which decisions made by AI are arrived at.[901]

The concern regarding the inclusion and use of AI in recruitment and selection processes is that AI arrives with new and unknown risks which current laws may not be able to deal with.[902] In this context, it is submitted that new rules are required to try and lessen the risks that arrive with the use of AI.[903] One of the proposals made includes one that seeks to introduce transparency requirements for the use of AI, such a requirement "would be difficult to implement in practice" if there are uncertainties regarding its scope.[904] Buiten argues that the lack of a clearly defined scope would leave the industry with uncertainties as to whether or not its activities are covered by the regulation and would equally leave the definition of AI to the courts of law.[905]

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898 Reed 2018 *PTRSA* 1.
899 Reed 2018 *PTRSA* 1.
900 Reed 2018 *PTRSA* 1.
901 Reed 2018 *PTRSA* 1.
902 Buiten 2019 *EJRR* 45.
903 Buiten 2019 *EJRR* 45.
904 Buiten 2019 *EJRR* 45.
905 Buiten 2019 *EJRR* 45.

The general purpose of generating "benefits across a wide array of domains" is basically the reason AI has become as important as it is for governments all over the world today,[906] it is also the basis on which AI is considered "one of the most transformative forces of our time".[907] Moreover, the technology is expected to improve individual as well as economic and societal welfare of people it interacts with.[908]

Smuha submits that the "increased visibility" of the risks attached to AI has resulted in relatively loud calls for law makers to look further than the benefits of AI and instead also ensure the appropriate regulation of the technology- to ensure that the AI in use is 'trustworthy'.[909] The trustworthiness of an AI relates to issues that include legality and ethicality. Besides minimising the risks that come with using AI, the regulation referred to could also facilitate the society's acceptance of AI, boost certainty of the legal aspects of same while also contributing towards the advancement of "countries' position in the race" to the regulation of the technology.[910]

It is submitted that norms in the evolving industry are sensitive to concerns regarding bias but also lack clear guidance on how to respond to the relevant concerns.[911] Considering the fact that current regulation provides room for unethical behaviour of firms, employers are advised to think outside governmental law when developing and using predictive hiring tools.[912] Existent literature makes reference to a variety of

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906 Smuha 2021 *LIT* 3.
907 Smuha 2021 *LIT* 3.
908 Smuha 2021 *LIT* 3.
909 Smuha 2021 *LIT* 1.
910 Smuha 2021 *LIT* 1.
911 Hunkenschroer and Luetge 2022 *JBE* 999.
912 Hunkenschroer and Luetge 2022 *JBE* 999.

organizational standards that recruiters "may and should" implement in the name of ensuring the ethical use of AI in recruitment and selection processes.[913]

Initially, it is suggested that companies using AI tools in their recruitment and selection of candidates comply with privacy laws just as they would in traditional hiring processes.[914] This essentially means that organizations ought to fully protect and keep safe all sensitive data while also ensuring that the use or prediction of any private or sensitive information regarding a candidate in the recruiting process is avoided. Moreover, firms should pro-actively and fully brief candidates regarding the data that will be analysed by AI systems for purposes of obtaining their consent.[915]

Essentially, the problem that ought to be the target of regulation is that of "controlling undesirable risks".[916] For AI technologies that are submitted to be genuinely useful, Reed argues that empirical evidence that supports the fact that such technologies are more cost-effective and ideally more accurate when making decisions, as compared to humans, is likely to be existent.[917] Such evidence, however, will be based on a comparison with human-led decisions, whose insufficiencies are said to be tolerated by societies.[918] Solutions that are based on AI will have their own flaws and these will be less acceptable to the society if they produce wrong conclusions in instances where a human would have arrived at a correct conclusion.[919] According to Reed, the regulation of AI ought to

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913 Hunkenschroer and Luetge 2022 *JBE* 999.
914 Hunkenschroer and Luetge 2022 *JBE* 999.
915 Hunkenschroer and Luetge 2022 *JBE* 999.
916 Reed 2018 *PTRSA* 2.
917 Reed 2018 *PTRSA* 2.
918 Reed 2018 *PTRSA* 2.
919 Reed 2018 *PTRSA* 2.

therefore focus on possible risks that are new and which are consequent to the introduction of whatever AI solution.[920]

More importantly, recruiting firms are advised to pro-actively and openly provide meaningful information relating to the decision-making processes of hiring, including information about the techniques of algorithms and data sets used-this is to enhance transparency and to also craft effective policy.[921]

Reed submits that there are three arguments that have been raised against the inclusion and use of AI to augment human decision-making processes, the first one is that any regulatory body requires a clearly defined field of operation and equally a set of "overriding principles".[922] The principles referred to will serve the purpose of mitigating the risks posed by AI to the society, which the regulated aspects of the AI technology concerned create.[923] Until a time when the risks of AI are known, even though not entirely, Reed argues that "this is not achievable".[924] This denial is because of the fact that regulation is unable to control risks that are unknown to it and also, establishing a regulatory mandate on the basis of risks that are speculative seems unlikely to produce positive outcomes.[925]

Second of the three arguments referred to by Reed is that lawmakers are commonly unsuccessful at the regulation of prospects, particularly in the field of technology- this is

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920 Reed 2018 *PTRSA* 2.
921 Hunkenschroer and Luetge 2022 *JBE* 999.
922 Reed 2018 *PTRSA* 2.
923 Reed 2018 *PTRSA* 2.
924 Reed 2018 *PTRSA* 2.
925 Reed 2018 *PTRSA* 2.

evidenced by the fact that the "history of legislating prospects of digital technologies is deemed to be an almost complete failure.[926]

The third argument which Reed deems the most important is that a regulatory regimen which is aimed at dealing with the uses of AI would have an impossibly wide scope.[927] The researcher goes on to submit that the range of potential applications is far too diverse to easily comprehend, it would therefore be "foolish" to apply the same regulatory regime to autonomous vehicles as applied to smart refrigerators which go as far as ordering groceries based on consumption patterns.[928] If one thinks about it thoroughly, there actually exists no plausible- "let alone compelling" reason to provide for the regulation of smart refrigerators, the dynamics change however as soon as the lives of South Africans are directly impacted by AI advancements.[929]

Other researchers have called for human oversight on AI, stating that same is a prerequisite for any recruiter.[930] The researchers referred to call for human review during processes- in which experienced recruiters are granted the authority to over-see the selection and evaluation of candidates while also calling for decisions to be made by "an algorithm-informed human", rather than solely by an algorithm.[931]

In furthering the assurance and inspection of ethical standards, a variety of authors have referred to compliance tools that companies ought to establish and included an AI ethics board with a function of conducting over-sight and which is made up of representatives

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926 Reed 2018 *PTRSA* 2.
927 Reed 2018 *PTRSA* 2.
928 Reed 2018 *PTRSA* 2.
929 Reed 2018 *PTRSA* 2.
930 Hunkenschroer and Luetge 2022 *JBE* 999.
931 Hunkenschroer and Luetge 2022 *JBE* 999.

from relevant stakeholders who dispute the data and ethical proportions of algorithms and agree on boundaries for AI technology.[932] Other authors have went as far as recommending a clearly enunciated code of ethics for AI-related initiatives within a company or organisation.[933]

It has also been encouraged by authors for organisations to have diverse data science teams that are encouraged to enhance inclusion and equity in AI, particularly in the development processes of machine learning algorithms- assorted voices across gender and race must be present to raise questions and check for implied assumptions.[934]

In an instance where regulation does not prove to be enough in providing guidance to human behaviour, ethical thinking and awareness of the need to consciously use AI tools in recruiting and selecting candidates must be promoted beyond regulation.[935] The basis of preaching for the inclusion of AI in recruitment and selection process is to use the technological influence to reduce the time invested in recruitment while also reducing subjective decisions made during the processes.[936]

In certain instances, features of AI that include autonomy and intelligence are said to have the possibility to help in guiding humans to incorporate the technology in their laws. Responding to the question of how laws should respond to AI, Buiten proposes that there be taken a step back to decipher the concept.[937] The notion of AI as a mysterious concept may result in the reinforcement of the idea that it is an uncontrollable force that is busy

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932 Hunkenschroer and Luetge 2022 *JBE* 999.
933 Hunkenschroer and Luetge 2022 *JBE* 999.
934 Hunkenschroer and Luetge 2022 *JBE* 999.
935 Hunkenschroer and Luetge 2022 *JBE* 1000.
936 Aumüller-Wagne 2019 *ESPS* 1.
937 Buiten 2019 *EJRR* 46.

shaping our societies.[938] The researcher goes on to submit that part of the problem attached to the regulation of AI is the fact that "we cannot control what we do not understand" and proceeds to propose the opening of a "black box" of AI in order to try and identify the risks and "unknowns" of same.[939]

It ought to be noted that the incorporation of AI brings risks, as much as it ought to be noted that not all of the risks consequent to the use of AI are known.[940] Buiten notes that the policy challenges regarding AI can be narrowed down to the need to moderate unknown risks or those that are difficult to control,[941] the questions as to how these risks ought to be addressed deserves to be attended to. The first step towards addressing the risks referred to is to make them solid by considering fundamental computer systems.[942]

Proper regulation of AI would enhance the society's perception of safety, including the perception that humans remain in control.[943] Such regulation could also alleviate the novel risks that are consequent to the use of AI, however, improper regulation poses the risk of restraining the development and implementation of AI solutions that are helpful.[944] In this context, it is important to understand exactly what the regulation of AI can and cannot do so that it can be formulated accordingly.

It is equally important that those responsible for the production and use of AI technologies be actually able to comply with the regulation of AI and that such regulation

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938 Buiten 2019 *EJRR* 46.
939 Buiten 2019 *EJRR* 46.
940 Buiten 2019 *EJRR* 47.
941 Buiten 2019 *EJRR* 47.
942 Buiten 2019 *EJRR* 47.
943 Reed 2018 *PTRSA* 2.
944 Reed 2018 *PTRSA* 2.

does not suppress "worthwhile advances" in the technology.[945] Apart from sectors that are specifically regulated, the general approach by law and regulation is that "innovation is freely permitted", but that whoever is deemed responsible "must bear the consequences if that innovation causes certain types of harm".[946]

Reed is of the opinion that an improved strategy is to deal with the issue incrementally because some of the risks that are likely to be presented by the inclusion and use of AI technology are already apparent.[947] Legal and regulatory actions ought to be taken now to deal with these risks, other risks will become apparent as the use of the technology (AI) becomes common.[948] At some point in time, whether specific regulation is needed or not and the scope and focus of such regulation shall become apparent.[949] Presently however, humanity is "some distance away from that point".[950]

Implementing efforts that are aimed at understanding the risks resulting from the use of AI as well as providing legal and regulatory responses to such risks is relatively essential.[951] Reed submits that this is perceived to be achievable by ensuring the establishment of a new body which will be non-regulatory and will also exist for the sole purpose of dealing with the negative results of the use of AI in processes.[952] Conducting properly informed analysis of these hindrances towards the inclusion of AI in human-led processes will assist in ensuring that the current laws and regulatory practices are applied in the most appropriate manner.[953] It is important to be able to tell when regulation is in

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945 Reed 2018 *PTRSA* 2.
946 Reed 2018 *PTRSA* 2.
947 Reed 2018 *PTRSA* 3.
948 Reed 2018 *PTRSA* 3.
949 Reed 2018 *PTRSA* 3.
950 Reed 2018 *PTRSA* 3.
951 Reed 2018 *PTRSA* 3.
952 Reed 2018 *PTRSA* 3.
953 Reed 2018 *PTRSA* 3.

fact needed and when it is not, this ultimately decreases the likelihood of redundant and(or) ineffective regulation in the future.[954]

It is submitted that if our existing laws and regulatory principles can deal with AI innovation accordingly, no immediate change to same is needed.[955] This basically means that if such existing laws and regulations fail to properly regulate AI, humans will be left out in the cold to fend for themselves.

Reed submits that a person who has an obligation to ensure the preservation of fundamental human rights needs to know the basis on which an AI system arrives at its decision, this is to make sure that no breach arises as a result of relying on it.[956] In order to determine whether there ought to be liability for negligence in relation to an AI-based decision, the courts of law need to be told how an AI system arrived at its decision.[957] In this context, requiring transparency regarding the manner in which AI systems operate might be an appropriate provisional solution to some of the legal problems presented by the inclusion of AI,[958] this has already been recommended as a tool that may prove to be essential in ensuring proper regulation of AI.

The intentions behind the formulation of structured interviews provided on by Gravette is do away with any result of an interviewer's behaviour.[959] This is to ensure that the interview ultimately reveals an authentic reflection of who the applicant really is, instead of enunciating on the manner used to conduct the interview.[960]

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954 Reed 2018 *PTRSA* 3.
955 Reed 2018 *PTRSA* 2.
956 Reed 2018 *PTRSA* 6.
957 Reed 2018 *PTRSA* 6.
958 Reed 2018 *PTRSA* 6.
959 Gravette 2017 *THRHR* 279-280.
960 Gravette 2017 *THRHR* 279.

If transparency in the use of AI is to be achieved, Reed submits that it would help in explaining the options available and the choices the AI made between such options.[961] The author goes on to argue that this alone would provide great assistance to the resolution of questions as to the liability and responsibility of AI systems.[962] According to Reed, transparency would ideally go as far as explaining "how and why" the technology made its choices- this pertains to the reasoning part of the AI operation.[963]

In regulating AI, Reed is of the opinion that the law would need to provide a clear definition of what transparency really means- this may prove to be a bit tricky to do because transparency for AI decision-making processes is a complicated issue.[964] Zarsky adds that transparency as a concept can have a wide-range of meanings and it can be justified for a variety of purposes.[965] The purposes alluded to include limitation to serve as an incentive to the developers and users of the technology, for purposes of modifying or improving the technology used in response to the pressure from subjects of its decisions.[966] Additionally, the use of AI is also said to "enable suggestions for improvement to be made by external experts" and to notify its subjects about their information that is processed- which ultimately enables them to object and to also seek alternative decision-makers.[967].

China is one of the countries that have joined the race to adopt AI, this is evidenced by its adoption of the 'Next Generation AI Development Plan' in 2017.[968] The adoption was

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961 Reed 2018 *PTRSA* 6.
962 Reed 2018 *PTRSA* 6.
963 Reed 2018 *PTRSA* 6.
964 Reed 2018 *PTRSA* 6.
965 Reed 2018 *PTRSA* 6.
966 Reed 2018 *PTRSA* 6.
967 Reed 2018 *PTRSA* 6.
968 Smuha 2021 *LIT* 3.

motivated by the goal to become a global leader in the AI field by building on the advantage of being the "first-mover" in the development of the technology.[969] In Europe, the AI strategy that was published in 2018 states that the aim of the EU is to lead the way in the development and use of AI- for the betterment of all.[970] Moreover, the AI strategy (which was launched by the executive order of the then President Donald Trump during early 2019) of the USA has an objective of speeding up the nation's leadership in AI adoption.[971]

4.6 Conclusion

AI is the future of humanity, being ignorant to such fact is a mistake one cannot afford to make. Judicial appointments are employment processes and ought to be treated as such. Employment processes invoke the use of HRM systems that relate to the processes of recruiting and selecting proper candidates. The use of AI in processes of recruiting and selecting proper employment candidates demands that respect be paid to the dangers of such use. The use of AI by the JSC will not be a novel step because AI is already being successfully used by companies all over the world.

969 Smuha 2021 *LIT* 3.
970 Smuha 2021 *LIT* 3.
971 Smuha 2021 *LIT* 3.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The extent to which AI can serve as an addition to the interviewing procedures of the JSC is unarguably great.

It serves prudent to note the fact that judicial appointment processes in South Africa were largely influenced by colonial powers that were ruling the country during the apartheid era. The Constitution introduced a variety of significant changes to the country, one important introduction being the manner used to appoint judicial officers to serve on the bench. The context and relevance of forming a Commission goes beyond the basic employment of suitable candidates because there are also constitutional principles to consider. The relevance of judicial appointments is found in the value of democracy. The *trias politicas* doctrine is an essential notion that is aligned to the need for an independent judiciary that will respect and protect the separation of powers as well as checks and balances in a democratic state. Impartiality (though not synonymous with independence) is an important principle considered to be at the heart of good judicial appointment processes.

The addition of AI should strengthen judicial independence, diversify the composition of the judiciary and it should equally maintain and enhance the quality of judicial appointments- to essentially strengthen the public's confidence in the judiciary.[972] Judicial independence is the comprehensive freedom that judges will hear and decide cases with the assurance that no external party will intervene. The essence of judicial appointments is the same for every country- some more than others. Additionally, no country is immune

[972] Roth 2012 *Judicial Appointments* 9.

from failure in their judicial appointment processes, the important thing is to draw lessons from such failure.

It goes without saying that the apartheid dominance in South Africa gave birth to a judiciary that Oxtoby submits lacked diversity in its social background, demographic representation as well as professional careers. During 1994, the apartheid regime had left a deep lack of faith in the judiciary because of reasonable concerns regarding the aftermath of apartheid and parliamentary sovereignty. During 2023, there are still issues within the JSC regarding race, discrimination and bias (this project argues that bias from the use of AI will at least not be a novel issue for the Republic to deal with). All these, in addition to the lack of a formal structure to follow when seeking to interview judicial candidates, serve as motivation for attention to be paid to the processes of the JSC.

There exists a significant inconsistency in the manner of asking questions by the JSC.[973] Commissioners are said to have criticised candidates on the basis of judgments that certain politicians felt were not in their favour.[974] The interviews of the JSC must preserve "the dignity and reputation of all candidates" who declare themselves suitable for judicial positions, not tarnish the names and reputations of candidates.[975] The number of politicians within the JSC ought to be reduced because the work the Commission does is strictly associated with the legal field and not political science.[976] The appointment

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973 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

974 Judges Matter 2022 https://www.judgesmatter.co.za/opinions/new-research-on-the-jsc-appointments-process-shows-cause-for-concern-but-there-is-hope.

975 DGRU and Judges Matter 2022 *UCT* 8.

976 Chabalala 2023 https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/judicial-service-commission-whould-have-limited-or-no-political-appointees-law-professor-argues-20230323.

processes of the JSC ought to be independent and must also be followed without undue influence from third parties.[977]

The JSC has been taken to court many a time for its missteps. One example is the case of *Freedom Under Law v JSC*,[978] where the JSC was found to have acted irrationally. At the heart of the failure to conduct proper judicial appointments is the violation of the Constitution and constitutionally enshrined rights of Republic's subjects. Failure to timeously appoint judges means failure to properly disperse justice and grow South Africa's judicial precedence. South African courts takes an awfully long time to decide cases because of insufficient judges.

As much as AI is our present and future, it is important to note that same is developed by imperfect human beings who are susceptible to making errors when developing and using AI systems. These mistakes are argued to have the potential of resulting in the violation of important (human) rights. According to Hunkenschroer and Kriebitz, the right to information that is true and correct and the right to lodge a complaint when having been treated unfairly make it cardinal for recruitment using AI to be open and transparent.[979]

The rise of new AI recruiting practices results in the creation of new ethical difficulties for recruiters. The fear of using AI has been linked to incidences of discrimination, bias and ethical violations. The use of AI human resources management (which includes the conducting of interviews) has grown significantly in recent years. Neufeind, O'Reilly and Ranft ask a very important question as to how a narrative that "combines enthusiasm for innovation and technological change with a commitment to individual security and

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977 See *S v Zemburuka* (2) 2003 NR 200 (HC).
978 2011 3 SA 549 (SCA).
979 Hunkenschroer and Kriebitz 2022 *AI and Ethics* 5.

fairness across society" can be designed.[980] Ultimately, adding AI to recruitment procedures of the JSC has to be driven by the quest to protect the society by appointing quality judicial personnel.

The regulation of AI is demanded by the capabilities of same. Notably, the more complicated an algorithm is, the more accuracy there is to its conclusions. The fear that AI may learn to copy decisions that are based on human bias also plays a significant role in the quest to ensure proper regulatory measures for the use of AI. Gravette submits that the broader the scope of subjectivity in the questions posed to candidates, the greater the opportunity for discrimination to exist.[981] The use of AI must accommodate some very important (constitutional) rights by being properly regulated.[982]

5.2 Recommendations

5.2.1 The exclusion of political figures and inclusion of legal minds so as to decrease the composition of the JSC

One needs to take cognisance of the fact that the work of the JSC is to help enhance the quality of South Africa's jurisprudence. Proper judicial appointments result in proper judges serving the judiciary, which ultimately means proper administration of justice. Any form of influence on the judicial appointment processes ought to be eradicated accordingly because at the end of the day, there is law and there is politics. The number of politicians that are involved in judicial appointments processes ought to there be reduced significantly.

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980 Neufeind, O'Reilly and Ranft *Work in the Digital Age: Challenges of the Four Industrial Revolution* xviii.
981 Gravette 2017 *THRHR* 282.
982 Reed 2018 *PTRSA* 1.

5.2.2 Training for commissioners on their roles and responsibilities

The role played by commissioners of the JSC is a vital one, no one should even presume that a commissioner knows what is expected from him or her in relation to his or her role. The training referred to should preach professionalism and ethics, amongst other important principles that commissioners need to observe while serving.

5.2.3 The use of Artificial Intelligence

As per the title of this research project, the use of AI and algorithms to narrow down applications and candidates closest to suitability is argued to have capability to serve as an addition and to play a prudential role in improving the JSC, it is therefore recommended that it be used.

5.2.4 Training again for commissioners on how to serve in conjunction with AI

One important recommendation linked to the use of AI is training of commissioners to serve in conjunction with AI. This basically means that commissioners ought to be educated on the possible limitations and outcomes of the technological platform as well as how to properly deal with same.

5.2.5 Ratio decidendi

This recommendation is very important because it enhances the principles of openness and transparency. A candidate who does not receive judicial appointment into a relevant position ought to be provided with reasons as to why he or she was not a fitting candidate.

These recommendations are aimed at improving the JSC and its interviewing procedures so their strict application will prove fruitful because as outlined throughout this research project, the JSC is filled with inconsistencies that demand rectification.

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