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*Judging judges: Comparing South Africa's Judicial Conduct Tribunal with
New Zealand's Judicial Conduct Panel, with lessons for New Zealand.*

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Abstract

This paper concerns the difficult task of judging judges. The first part deals with South African law by discussing the role of the Judicial Services Commission in disciplining judges. This part also critically evaluates the ongoing Tribunals. The second part deals with New Zealand law by discussing the role of the Commissioner and the Attorney-General regarding the Panel. This part also analyses the investigative role of the Panel. The third part draws comparative lessons. The first concerns diversity in Tribunal and Panel membership. The second concerns separating conduct from law and policy. Is it non-compliance with the framework or the framework itself?

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I. Introduction

This paper concerns the difficult task of judging judges. The central question in conduct inquiries is whether it is possible to separate conduct issues from law and policy issues.¹ The paper compares South Africa's Judicial Conduct Tribunal (Tribunal) with New Zealand's Judicial Conduct Panel (Panel). While South Africa with its supreme Constitution has three ongoing Tribunals in respect of several judges, New Zealand with its parliamentary supremacy has no current Panels.

The first part deals with South African law. This part sets out its fundamental structure and discusses the role of the Judicial Services Commission (JSC) regarding the Tribunal. The paper then critically evaluates the ongoing Tribunals.

The second part deals with New Zealand law. This part sets out its fundamental structure and discusses the role of the Judicial Conduct Commissioner (Commissioner) and the Attorney-General regarding the Panel. The paper then discusses the investigative role of the Panel.

The third part draws lessons from the preceding parts. The first concerns diversity in Tribunal and Panel membership; South Africa has gender diversity and New Zealand has lay diversity. The second concerns fencing off conduct issues from law and policy issues. The paper concludes that judicial misconduct is more about non-compliance with the applicable framework than the framework itself.

A. South Africa

1. Fundamental Structure

South Africa has a codified Constitution that is the supreme law.² The Constitution guarantees judicial independence. It provides for judicial authority in that judges are independent and subject only to the Constitution and the law;³ it also provides that Constitutional Court justices are appointed for non-renewal terms of office.⁴ But the Constitution also ensures accountability; it provides for the removal of judges from office on

¹ Mai Chen *Public Law Toolbox: Solving Problems with Government* (LexisNexis, Wellington, 2012) at 652.

² Constitution of the Republic of South Africa, 1996, s 2.

³ Constitution, s 165(2).

⁴ Constitution, s 176(1).

grounds of incapacity, gross incompetence, or gross misconduct;⁵ removal can only take place by vote of at least two-thirds of the National Assembly.⁶

The Constitution is silent on judicial misconduct that falls short of the ultimate sanction of removal.⁷ Professor Corder provides an explanation for this silence. The traditional common law approach to judicial discipline was that of collegiality and peer pressure amongst the judges. But the onset of the Constitution and the appointment of judges from diverse constituencies has arguably “weakened” the sense of shared propriety amongst judges.⁸ One of the JSC’s functions is to discipline judges and it is arguable that the body has stepped into the shoes of judicial peer pressure. The JSC has the powers and functions assigned to it by the Constitution and national legislation.⁹ The Judicial Service Commission Act (JSC Act) is such national legislation.¹⁰

Disciplining judges implicates the doctrine of separation of powers. This doctrine concerns the distribution of power between the legislature, the executive, and the judiciary.¹¹ Parliament makes laws, the executive administers them, and the courts interpret and apply them.¹² The doctrine is not rigidly defined, nor is it absolute.¹³ Separation of powers does not appear by name in the Constitution; it is nonetheless the “dominant organising principle of state power”.¹⁴

2. *Judicial Service Commission*

The JSC is an organ of State bound by public administration principles.¹⁵ One of its constitutional functions is the making of findings in respect of the grounds for removal of judges.¹⁶

⁵ Constitution, s 177(1)(a).

⁶ Constitution, s 177(1)(b).

⁷ Hugh Corder “Judicial Accountability” in Olivier and Hoexter *The Judiciary in South Africa* (Juta, Cape Town, 2014) at 213.

⁸ Corder, n 7, at 213.

⁹ Constitution, s 178(4).

¹⁰ Judicial Services Commission Act, 1994 (Act No. 9 of 1994).

¹¹ Dikgang Moseneke, Deputy Chief Justice of South Africa “Separation of Powers: Have the Courts Crossed the Line?” (Inaugural Annual Law Dean’s Distinguished Lecture, University of the Western Cape, Cape Town, 17 July 2015) at 5.

¹² Moseneke, n 11, at 6.

¹³ Moseneke, n 11, at 6.

¹⁴ Moseneke, n 11, at 8.

¹⁵ *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* (818/11) [2012] ZASCA 115 (14 September 2012) para 43.

3. Judicial Conduct Tribunal

(a) The 2008 amendment

The JSC's powers and functions are dealt with in the amended JSC Act, which commenced in June 2010. The long title of the Act describes its objective and can be used in determining the constitutional validity of the Act.¹⁷ The long title reads:

To regulate matters incidental to the establishment of the Judicial Service Commission by the Constitution of the Republic of South Africa, 1996; to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; to provide for the establishment and maintenance of a register of judges' registrable interests; to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected therewith.

Section 8 establishes the Judicial Conduct Committee (JCC) and its composition. Section 12 provides for a Code of Conduct. This Code has now been published.¹⁸ The Code deals with judicial independence and provides that judges must not ask for or accept a special favour or dispensation from the executive.¹⁹ Judges must act honourably and in a manner befitting a judge.²⁰ Judges are required to be diligent in handing down judgments promptly and without undue delay.²¹ Judges must exercise restraint and debates amongst judges are confidential.²² The Code deals with association and states that judges must not belong to any political party.²³ Returning to the amended JSC Act, the JCC may recommend the appointment of a

¹⁶ Constitution, s 177(1)(a).

¹⁷ *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* (CCT 77/08) [2009] ZACC 11 (7 May 2009) para 43.

¹⁸ "Code of Judicial Conduct" (18 October 2012) 865 *Government Gazette* 35802.

¹⁹ Code, art 4.

²⁰ Code, art 5.

²¹ Code, art 10.

²² Code, art 11.

²³ Code, art 12.

Tribunal in respect of “impeachable complaints”;²⁴ the JSC may request the Chief Justice to appoint a Tribunal;²⁵ and the JSC must consider the Tribunal’s report.²⁶

Chapter 3 deals with Tribunals. The Chief Justice must appoint a Tribunal whenever requested to do so.²⁷ Section 22 deals with the composition of the Tribunal; there must be two judges, one of whom is designated Tribunal President, and one other person from a list maintained by the Executive Secretary; this third person must be a non-judicial member but not a layperson.²⁸ Section 22(2) requires that at least one member must be a woman. Section 24(1) authorises the Tribunal President to appoint a member of the prosecuting authority²⁹ to collect and adduce evidence on behalf of the Tribunal.

The amended JSC Act obliges the Chief Justice to make rules regulating the Tribunal’s procedures.³⁰ The Rules have now been published.³¹ At the hearing, the evidence leader may address the Tribunal, examine and cross-examine witnesses, and address the Tribunal at the close of proceedings.³² The proceedings of the Tribunal are to be recorded.³³

The objects of the Tribunal are to inquire into allegations of incapacity, gross incompetence, or gross misconduct.³⁴ The Tribunal does so by collecting evidence, conducting a hearing, making findings of fact, and making determinations on the merits.³⁵ The Tribunal proceeds in an inquisitorial manner and there is no onus on any person to prove or dispute any fact.³⁶

The Tribunal must submit a report to the JSC. The report must contain the findings and the reasons for them, a copy of the hearing, and all other relevant documentation.³⁷

²⁴ Amended JSC Act, s 16.

²⁵ Amended JSC Act, s 19.

²⁶ Amended JSC Act, s 20.

²⁷ Amended JSC Act, s 21(1).

²⁸ Amended JSC Act, s 22(1).

²⁹ National Prosecuting Authority Act, 1998 (Act No. 32 of 1998).

³⁰ Amended JSC Act, s 25.

³¹ “Rules to Regulate Procedures before Judicial Conduct Tribunals” (18 October 2012) 864 *Government Gazette* 35802.

³² Tribunal Rules 2012, r 7.

³³ Tribunal Rules 2012, r 9.

³⁴ Amended JSC Act, s 26.

³⁵ Amended JSC Act, s 26(1)(a).

³⁶ Amended JSC Act, s 26(2).

³⁷ Amended JSC Act, s 33(1).

(b) The Hlophe JP matter

(i) Litigation history

In March 2008 the Constitutional Court heard argument in four matters relating to the prosecution of the current President Jacob Zuma as well as Thint (Pty) Ltd on corruption charges. Before reserved judgment was handed down, Hlophe JP approached two justices (Nkabinde J and Jafta AJ) separately in chambers. It was alleged that Hlophe JP had improperly attempted to influence the justices. There are conflicting versions as to exactly what transpired in chambers. On 30 May 2008 the Constitutional Court justices lodged a complaint with the JSC. There have been several court cases; the matter has gone through the entire superior court structure once and is likely to do so again.³⁸

(ii) The Labuschagne Tribunal

In February 2013 the JSC released a media briefing. The Chief Justice named retired judge Labuschagne as Tribunal President. The other members are a judge and practising attorney.³⁹ The Tribunal proceedings commenced but not for long. Preliminary objections were raised but were dismissed resulting in an application for review of the Tribunal's decision.

In *Nkabinde and Another v JSC and Others*,⁴⁰ the applicants sought to review the JSC's decisions of April and October 2012 to request the appointment of a Tribunal; the review was based on grounds of retrospectivity and non-compliance with formalities. The applicants also challenged the constitutionality of section 24(1) of the amended JSC Act.⁴¹ The applicants claimed that the JSC had changed the "rules of engagement" and incorrectly applied the amended JSC Act retrospectively.⁴² While the trigger event occurred in 2008, the amended JSC Act only commenced in 2010.

³⁸ See *Langa v Hlophe* (697/08) [2009] ZASCA 36 (31 March 2009); *Hlophe v Judicial Service Commission and Others* (19006/09) [2009] ZAGPJHC 19 (1 June 2009); *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* (52/2011) [2011] ZASCA 59 (31 March 2011); *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province* (537/10) [2011] ZASCA 53 (31 March 2011); *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other* (CCT 41/11, CCT 46/11) [2012] ZACC 4 (30 March 2012).

³⁹ JSC "Media Briefing" (press statement, Johannesburg, South Africa, 22 February 2013).

⁴⁰ *Nkabinde and Another v Judicial Service Commission President of the Judicial Conduct Tribunal and Others* (13/39093) [2014] ZAGPJHC 217 (26 September 2014).

⁴¹ At para 7.

⁴² At para 42.

Regarding retrospectivity, the court referred to another judgment in the Poswa J matter. The court held that the amended JSC Act distinguished lodgement of a complaint from the investigation of an allegation.⁴³ The legislature would have been aware of the complaint in the Hlophe matter when it was enacting the amendment Act.⁴⁴ The amended JSC Act contemplates investigation of allegations of gross misconduct but not for lesser complaints; a prospective interpretation would undermine its stated purpose.⁴⁵ The new procedures did not abolish one forum for another but rather the “procedures, structures and mechanisms” created by the amendment constitute a more effective way of carrying out the Tribunal’s investigative function.⁴⁶ No vested rights had been violated.⁴⁷

The court then dealt with the issue of non-compliance with formalities for the lodging of a complaint. The requirement of an affidavit was directory in respect of impeachable conduct.⁴⁸ Any defect had been cured by the evidence on record.⁴⁹

The court then considered the constitutional challenge, which was based on separation of powers and judicial independence. The court noted that while the applicants objected to a non-judicial person leading evidence, they were apparently unconcerned with the third non-judicial member of the Tribunal. This was inconsistent.⁵⁰ There were also considerations of cost and convenience in using prosecutors instead of legal practitioners.⁵¹ Section 24(1) is not peremptory.⁵² The prosecutor’s role was “neither necessary, nor defined, nor adversarial, in the usual sense”.⁵³ The application was dismissed.

A recent publication entitled *The Judiciary in South Africa* has criticised the JSC’s handling of the matter. Writing before the *Nkabinde* case had even been heard, the authors correctly summed up the “Hlophe saga” as follows:⁵⁴

⁴³ At para 89.

⁴⁴ At para 90.

⁴⁵ At para 90.

⁴⁶ At para 91.

⁴⁷ At para 93.

⁴⁸ At para 99.

⁴⁹ At para 102.

⁵⁰ At para 109.

⁵¹ At para 110.

⁵² At para 112.

⁵³ At para 116.

⁵⁴ Olivier and Hoexter, n 7, at 194 – 195 footnotes omitted.

The remarkable and long-running Hlophe saga has had many damaging effects. It has tarnished the image of South Africa’s judiciary at home and abroad, and has sapped public confidence in it. It has exacerbated racial tensions in the legal community even though, as Corder has pointed out, most of the complainants have been black South Africans. Above all, it has called into question the competence and effectiveness of the JSC in the context of judicial discipline. The record suggests that the JSC’s handling of the Hlophe affair has been characterised far too often by blundering, irresolution and irrationality. More disquietening still, certain episodes in the saga suggest ‘a fundamental unwillingness to confront seriously and pursue to their logical conclusion allegations of great moment which go to ... fitness to hold judicial office’, at least on the part of some members of the JSC. This has encouraged suspicions that a political agenda is being pursued by some commissioners, and has added fuel to the campaign for radical change in the composition of the body.

Regrettably, the dismissal of the review application in *Nkabinde* has not brought finality to the matter. Recent press clippings reveal that Justices Nkabinde and Jafta have now appealed to the Supreme Court of Appeal.⁵⁵ The JSC filed opposing papers in February 2015.⁵⁶ The matter has yet to be set down for hearing. It is likely to go all the way to the Constitutional Court.

(c) The Motata J matter

(i) Litigation history

The judge was arrested in the early hours of 6 January 2007 after having reversed his Jaguar into a boundary wall. He was charged with driving while under the influence of intoxicating liquor. The judge appealed his conviction. In *Motata v S*⁵⁷ the court held that it was “extremely improbable” that a sober High Court judge would use the kind of bad language

⁵⁵ Franny Rabkin “Top judges seek to appeal” *Business Day* (online ed., South Africa, 21 January 2015).

⁵⁶ Monique van Eeden “SCA asked to dismiss appeal by ConCourt judges” *Litigator* (online ed., South Africa, 26 February 2015).

⁵⁷ *Motata v S* (A345/2010) [2010] ZAGPJHC 134 (29 November 2010).

that the appellant did on the night in question; the appellant repeatedly used the f-word and made racist remarks.⁵⁸ The appeal was dismissed.

*Motata v Minister of Justice and Others*⁵⁹ concerned a complaint lodged with the JSC based on the judge's racist remarks.⁶⁰ The Code of Judicial Conduct was still to be approved by Parliament. The applicant argued that there was no legal basis on which he could be charged.⁶¹ The court held that if this were correct then no judge could be found guilty until the Code had been formally approved.⁶² The application was dismissed.

(ii) The Jappie Tribunal

According to the JSC's media briefing in February 2013 the Chief Justice named the then Jappie DJP as Tribunal President along with another judge and practising attorney.⁶³ But the Tribunal has been held in abeyance pending the outcome of the *Nkabinde* case.⁶⁴ There is no end in sight more than eight years after the trigger event.

(d) The Preller, Poswa, Mavundla, and Webster JJ matters

(i) Litigation history

This matter affects four High Court judges and concerns the violation of an ethical duty to deliver reserve judgments timeously. In *Poswa v President of the RSA and Others*⁶⁵ the facts were that the judge had delayed in delivering judgments for periods in excess of 12 months after the matter had been heard.⁶⁶ Various complaints were forwarded to the JSC during

⁵⁸ At para 9.

⁵⁹ *Motata v Minister of Justice and Constitutional Development and Others* (66300/11) [2012] ZAGPPHC 196 (7 September 2012).

⁶⁰ At para 3.

⁶¹ At para 11.

⁶² At para 15.

⁶³ JSC Media Briefing, n 39.

⁶⁴ Franny Rabkin "Judge Motata proceedings put on hold" *Business Day* (online ed., South Africa, 22 February 2014).

⁶⁵ *Poswa v President of the Republic of South Africa and Others* (2013/30021) [2014] ZAGPJHC 218 (15 September 2014).

⁶⁶ At para 12.

December 2008 and January 2009.⁶⁷ Incidentally, the applicant was boarded on medical grounds and discharged from active service with retrospective effect from 1 August 2011.⁶⁸

The applicant complained that the JSC had taken too long in prosecuting the complaints against him. The court noted that to complain about delay on the part of the JSC when the judge had delayed in delivering judgment “smacks of impertinence”.⁶⁹ The court held that there was no authority for the “extraordinary proposition” relied on by the applicant, namely, that he could interdict the JSC from executing its statutory duty regarding the complaints lodged with it.⁷⁰ But the “crux of the matter” was whether the JSC was correct in applying the new procedural provisions of the amended JSC Act to complaints lodged prior to June 2010.⁷¹ The court’s reasoning has already been dealt with. An additional reason for rejecting the argument based on retrospectivity is that section 17 contains beneficial provisions that increase the remedial steps that may be taken by the Tribunal.⁷² Why deny the judge the benefit of these provisions? The application was dismissed.

(ii) Nkabinde Tribunal

According to the JSC’s media briefing in February 2013 the Chief Justice named Constitutional Court justice Nkabinde as Tribunal President along with another judge and practising advocate.⁷³ But the Tribunal has been held in abeyance pending the outcome of the *Nkabinde* case. There is again no end in sight approximately seven years after the trigger event.

4. Tentative Conclusions

This paper argues that the ongoing Tribunals demonstrate that the current problems in the judiciary are not the result of the legal framework but rather non-compliance with the framework on the part of individual judges. But what is even more revealing is the absence of any meaningful protest or even commentary from the legal profession on the misconduct described above. This paper submits that at least part of the fault for non-compliance lies with

⁶⁷ At para 18.

⁶⁸ At para 44.

⁶⁹ At para 50.

⁷⁰ At para 54.

⁷¹ At para 56.

⁷² At para 73.2.

⁷³ JSC Media Brief, n 39.

the legal profession and its failure to hold judges to account. As already noted, Professor Corder explains that the appointment of judges from diverse constituencies has weakened the sense of shared propriety amongst judges; the traditional common law approach of judicial peer pressure is no longer effective. It appears that it was left to the JSC to discipline judges but it was unrealistic to expect the JSC alone to deal with such a difficult task. Furthermore, Olivier and Hoexter have already noted the suspicions of a political agenda on the part of some commissioners on the JSC. Rather, the legal profession should have responded to the erosion of judicial integrity from the outset. If judges know that their legal kin are keeping a weather eye on their conduct then it is more likely that they will refrain from conduct unbecoming of their honourable office. This paper will return to this point further below.

The same concerns do not appear to apply in New Zealand. As will be seen immediately below, the constitutional arrangements in New Zealand are markedly different from those in South Africa. But it is argued that this difference does not explain the fact that there are no current Panels in New Zealand. Perhaps there is a stronger sense of shared propriety amongst judges and the broader legal profession that ensures greater compliance with the legal framework than is the case in South Africa. And this sense of propriety has been developed over a long period of time. It must also be said that New Zealand has not had to contend with the same transformational upheaval as South Africa.

B. New Zealand

1. Fundamental Structure

Sir Geoffrey Palmer QC's recent book entitled *Reform: A Memoir* describes New Zealand's "Constitution" as being "unique" and "odd".⁷⁴ Palmer also notes that New Zealand does not have a "Constitution" in the same sense as America⁷⁵ or South Africa. In New Zealand, laws can be changed by a simple parliamentary majority except for a provision in the Constitution Act 1986 and five provisions in the Electoral Act 1993.⁷⁶ Palmer outlines the constitution as follows:⁷⁷

⁷⁴ Sir Geoffrey Palmer QC *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 337.

⁷⁵ At 338.

⁷⁶ At 338.

⁷⁷ At 339 footnote omitted.

In a nutshell here is how the constitution of New Zealand works. The Parliament passes laws, levies taxes and controls government expenditure. Elections are required to be held every three years and they are held under a system of mixed-member proportional representation (MMP). The Cabinet, the members of whom must be members of Parliament, governs. Members of Cabinet must maintain the confidence of Parliament in order to remain in office. The public service operates under the authority of ministers and must carry out their decisions. The courts operate independently of both Parliament and the executive branch of government, which consists of Cabinet and the public service. Parliament creates the law and the courts decide disputes according to these statutes, but the role of interpreting the law in any particular case falls to the courts, not to Parliament. If the result is not to Parliament's liking, it can amend the law. The judiciary is shielded by law from interference by ministers. The judiciary is the main protector of the important constitutional norm of the rule of law. Clearly, public power is not distributed evenly among these three branches of government. Parliament has most power.

The Constitution Act provides for the grounds of removal of a judge. But the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (Panel Act) provides that the Attorney-General has "absolute discretion" in determining whether a resolution for removal should be put before the House of Representatives.⁷⁸ This narrows the constitutional provision for removal since, prior to the Panel Act, a parliamentarian could introduce a measure for removal of a judge.⁷⁹ Section 23 of the Constitution Act reads as follows:

23 Protection of Judges against removal from office

A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.

⁷⁸ Panel Act, s 33(1).

⁷⁹ Chen *Public Law Toolbox*, n 1, at 879.

Although section 23 concerns judicial accountability, the section heading refers to “[p]rotection of Judges” thereby indicating a different concern.⁸⁰ The sanction may prove difficult to implement; it appears to be directed at the general conduct of judges rather than their specific decisions.⁸¹ Another difficulty is that “misbehaviour” is a diffuse concept.⁸² The interpretation of “misbehaviour” directly affects judicial independence. Narrow interpretation would result in a judge being removed only in extreme circumstances. Wide interpretation would expose judges to an increased possibility of removal.⁸³

Since 2010 there have been no matters warranting reference to the Panel.⁸⁴ Some have argued that this makes a formal complaint system unnecessary. But the alternative inference is that judicial misconduct has been dealt with behind closed doors amongst an inner circle.⁸⁵

Dr Matthew Palmer QC has described New Zealand’s constitution as comprising various key “office-holders” relevant to the interpretation of constitutional instruments.⁸⁶ Two such officeholders are the Commissioner and the Attorney-General.⁸⁷

2. Commissioner

The Commissioner’s functions are to receive complaints and deal with them in the manner that the Panel Act requires, to conduct preliminary examinations where appropriate, and to recommend the appointment of a Panel where appropriate.⁸⁸ The Commissioner must act independently.⁸⁹

In conducting a preliminary examination, the Commissioner must form an opinion (a) whether the subject-matter of the complaint, if substantiated, warrants consideration of

⁸⁰ Andrew Beck “Great Power and Great Responsibility” [2009] NZLJ 295 at 296.

⁸¹ At 296.

⁸² Grant Illingworth QC “The Judicial Conduct Commissioner” [2011] NZLJ 35 at 36.

⁸³ At 39.

⁸⁴ Sir David Gascoigne QC *Annual Report for 2014 / 2015* (Office of the Judicial Conduct Commissioner, Wellington, 21 August 2015) at 5.

⁸⁵ Illingworth, n 82, at 35.

⁸⁶ Dr Matthew Palmer QC “Constitutional Realism” (2006) 54 *American Journal of Comparative Law* 587 at 608.

⁸⁷ At 614.

⁸⁸ Panel Act, s 8(1).

⁸⁹ Panel Act, s 9.

removal or (b) whether there are grounds for dismissing the complaint.⁹⁰ When the Commissioner has formed such an opinion he is required to take one of three steps:⁹¹ dismiss the complaint,⁹² refer it to the Head of Bench,⁹³ or recommend the appointment of a Panel.⁹⁴

3. *Attorney-General*

The Attorney-General may appoint a Panel to inquire into and report on any matter relating to the conduct of the judge.⁹⁵ Section 22(1) of the Panel Act reads as follows:

A Judicial Conduct Panel consists of the following persons appointed by the Attorney-General:

- (a) 2 members, being—
 - (i) Judges; or
 - (ii) a Judge and a retired Judge; or
 - (iii) a member who is a Judge or a retired Judge, and a member who is a barrister or solicitor who has held a practising certificate as such for not less than 7 years; and
- (b) a lay member (not being a Judge, a retired Judge, or a barrister or solicitor).

One of the functions of the Panel is that it “must conduct a hearing into the matter or matters referred to it by the Attorney-General.”⁹⁶

The Panel must report to the Attorney-General at the end of the inquiry.⁹⁷ The report must contain the following: (a) the findings of fact, (b) the opinion as to whether removal is justified or not, and (c) the reasons for the conclusion.⁹⁸

⁹⁰ Panel Act, s 15(1).

⁹¹ Panel Act, s 15(5).

⁹² Panel Act, s 16.

⁹³ Panel Act, s 17.

⁹⁴ Panel Act, s 18.

⁹⁵ Panel Act, s 21(1).

⁹⁶ Panel Act, s 24(2).

⁹⁷ Panel Act, s 32(1).

⁹⁸ Panel Act, s 32(2).

4. Judicial Conduct Panel

The closest that New Zealand has come to an inquiry is *Wilson v Attorney-General*.⁹⁹ The plaintiff was a judge of the Supreme Court. In 2007, and when still a judge of the Court of Appeal, the plaintiff sat on an appeal involving Mr Galbraith QC, a close friend and business associate. Saxmere lost the case and unsuccessfully appealed to the Supreme Court on the merits. Saxmere then launched an application to the Supreme Court based on the plaintiff's alleged bias. This was unsuccessful. But Saxmere's second application resulted in recall of the earlier judgment.¹⁰⁰

The High Court made various pronouncements on the nature of the Panel. First, the Panel is independent of the executive; the Chief Justice is consulted on its membership, which must include at least one judge.¹⁰¹ Second, the Panel inquiry may differ from the Attorney-General's referral in two respects, namely, (a) that Special Counsel brings independent judgment to bear on the matter and must act in the public interest and (b) the Panel may inquire into other matters regarding the judge during the course of its inquiry.¹⁰² Third, the Panel can be described as a "special tribunal".¹⁰³ Fourth, it is not for the Commissioner to have the final say regarding the applicable standard because he would not know the facts; the standard is to be set by the Panel and ultimately the House.¹⁰⁴ Fifth, the assessment of culpability and the gravity of the judge's non-disclosure really depends on where his conduct sits on a factual spectrum: at the one end is good faith and the other is misbehaviour warranting removal; the task of placing the judge's conduct on the spectrum is one for the Panel and not the Commissioner.¹⁰⁵

The effect of the Commissioner's limited fact finding powers comes to the fore in cases where a complaint gives rise to a material dispute of fact.¹⁰⁶ In such cases the Commissioner will likely decide to recommend an inquiry by the Panel. The Wilson report was only

⁹⁹ *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC).

¹⁰⁰ At paras 1 – 3 and 10 – 17.

¹⁰¹ At para 40.

¹⁰² At para 48.

¹⁰³ At para 49.

¹⁰⁴ At para 64.

¹⁰⁵ At para 90.

¹⁰⁶ The Hon. Justice McGrath "Accountability of the Judiciary" (2014) 25 *Public Law Review* 134 at 144.

provisional but it led to the Justice’s resignation.¹⁰⁷ A further concern is that judges faced with adverse provisional findings may view judicial review as the only meaningful way of challenging the report rather than an inquiry.¹⁰⁸

5. *Tentative Conclusions*

While this paper has identified some concerns with the legal framework for judging judges in New Zealand, it is apparent that the judiciary does not suffer from the same levels of misconduct as in South Africa. This paper submits that the manner in which the judiciary is organised does not necessarily determine the level of performance and stability of the judicial system.

This paper’s main point of comparison between South Africa and New Zealand bears repetition. While South Africa with its supreme Constitution has three ongoing Tribunals in respect of several judges, New Zealand with its parliamentary supremacy has no current Panels. This comparison presents two main lessons for New Zealand. The first concerns the different kinds of diversity in the composition of the Tribunal and Panel. As will be argued below, this difference is in some respects the product of the difference between constitutional supremacy and parliamentary supremacy. The second lesson concerns the attempt to answer the perplexing question whether misconduct is the result of the legal framework or non-compliance with the legal framework. As will be argued below, the problem of judicial misconduct in South Africa is not rooted in its constitutional arrangements but rather in the lack of shared propriety in the legal profession in general and amongst legal practitioners in particular.

C. Lessons for New Zealand

1. The Two Faces of Diversity

While South Africa and New Zealand both guarantee diversity in their respective Tribunals and Panels, the nature of this diversity is different. South Africa guarantees gender diversity by providing that at least one member of every Tribunal must be a woman. But all the members are legally qualified; they are either judicial officers or legal practitioners. In

¹⁰⁷ At 144.

¹⁰⁸ At 144.

contrast, New Zealand does not require gender diversity but instead requires lay diversity. The Panel must consist of at least one layperson thereby representing the non-legal community in judicial misconduct matters.

(a) Gender diversity on the Tribunal

Diversity is a hallmark feature of the Constitution. The preamble states that South Africans are united in diversity. The Constitution guarantees various kinds of diversity such as linguistic diversity, political diversity, cultural diversity, race and gender diversity in judicial appointments, and, especially, diversity in legal decision-making.¹⁰⁹ Regarding the last type of diversity mentioned, section 180(c) of the Constitution reads as follows:

180. Other matters concerning administration of justice

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including - (c) the participation of people other than judicial officers in court decisions.

Some brief historical context is required. Milton Seligson SC has argued that the reintroduction of lay assessors in the lower courts toward the end of apartheid was done in order “to involve the black majority in the all-white court system which was seen by many as illegitimate and unrepresentative.”¹¹⁰ But the experiment was not successful.¹¹¹

Further to the above, it is clear from section 180(c) that lay participation is confined to “court decisions”. But the Constitution also clearly distinguishes between courts, tribunals and other fora. Section 34 of the Bill of Rights reads as follows:

34. Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

¹⁰⁹ Constitution, ss 6, 19, 31, 174(2), and 180(c) respectively.

¹¹⁰ Milton Seligson SC “Lay participation in South Africa from apartheid to majority rule” (2001) 72 *International Review of Penal Law* 273 at 273.

¹¹¹ At 273.

This paper argues that section 180(c) must be read with section 34. Lay participation is only allowed in court decisions and a “court” is different from a “tribunal”. This is more than just a terminological point. The Constitution has made the distinction and it cannot be ignored. And the Constitution provides that any law inconsistent with it is invalid.¹¹² Therefore, it is submitted that the amended JSC Act could not have provided for lay membership on the Tribunal since it is not a court. In other words, there is no constitutional basis for lay participation.

Yet the legislature was still bound by the broader constitutional requirement for diversity in the composition of the Tribunal. And there is good reason for it to have prioritised gender diversity over other forms of diversity. Recently, the Commission for Gender Equality, a constitutional institution, recommended the drafting of a law on gender transformation in the judiciary.¹¹³ This demonstrates the level of concern over the issue of gender representation in judicial matters; this concern existed prior to the amended JSC Act and has grown more and more pressing with each year that passes by.

(b) Lay diversity on the Panel

When the Judicial Matters Bill was being debated in the House, the concern was raised that the provision for a lay member of the Panel might lead to political interference in the judiciary.¹¹⁴ This may pose a threat to judicial independence. But as the High Court held in *Wilson, supra*, the Panel is independent of the executive; the Chief Justice is consulted on its membership. The reality is that the legislature had to make a choice as to which kind of diversity it would promote on the Panel; there can only be three members; judicial officers and legal practitioners make up the majority; there was an issue over the third member and, arguably, the legislature promoted the public legitimacy of the Panel by opting for lay representation. In addition, the use of non-lawyers in legal decision-making may increasingly be the way of the future. For example, the Chief Justice of Delaware recently said that it is possible that “de-lawyering” of problem-solving courts would be required.¹¹⁵

¹¹² Constitution, s 2.

¹¹³ Bongani Majola “CGE recommends law on gender transformation in judiciary - The Presidency” (press statement, The Presidency, Pretoria, South Africa, 22 September 2015).

¹¹⁴ (2 September 2003) 611 NZPD 8308.

¹¹⁵ Debra Cassens Weiss “‘De-lawyering’ of problem-solving courts suggested by Delaware chief justice” *ABA Journal* (online ed., America, 11 February 2013).

While there is no guarantee of gender diversity on the Panel, it may well be that the Attorney-General would appoint at least one woman to the Panel in practice. Furthermore, it bears repeating that the closest New Zealand has come to a Panel is the Justice Wilson matter and that ended in the justice's resignation.

So it is at least arguable from the above that the different kinds of diversity in New Zealand and South Africa are in some respects the product of the difference between constitutional supremacy and parliamentary supremacy. The same is not necessarily the case in explaining the different levels of judicial misconduct between the two countries.

2. *Where is the Perimeter? Fencing Off Conduct from Law and Policy*

The central question regarding conduct inquiries is whether it is possible to ring fence conduct issues from other issues such as law and policy. Is misconduct the result of the legal framework or non-compliance with the legal framework? Despite South Africa's respected Constitution there are still three ongoing Tribunals in respect of several judges. It is unclear how a better legal framework would prevent conduct such as the alleged improper influencing of justices pending reserved judgment. This type of conduct is more the result of non-compliance with the applicable framework.

(a) Judicial culture in South Africa

How do judges view themselves? While some view the judiciary as forming a "secular priesthood", this does not entitle the judiciary to "pontificate" to others.¹¹⁶ This is particularly so in matters relating to misconduct. How can Judge Motata preside over a drunk driving case having been convicted of the same offence himself? There has also been criticism of this conception of the judiciary. One judge went so far as to renounce "the ridiculousness of the idea of a secular priesthood" whether consisting of "politicians, judges or bureaucrats".¹¹⁷

Recently, the Deputy Chief Justice Moseneke reaffirmed the apolitical nature of the judiciary. During the latest round of JSC interviews, Moseneke DCJ reminded the candidates that they

¹¹⁶ *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 January 2009) para 19.

¹¹⁷ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* (2011/30368) [2012] ZAGPJHC 230 (15 November 2012) para 109.

were legally required to resign membership of their political party if elevated to the bench.¹¹⁸ Moseneke DCJ is reported to have put it to one of the candidates in the following terms: "Just for the record, it is unlawful for a judge to be a member of a political organisation".¹¹⁹ This contrasts starkly with the equivalent system in Switzerland. Sir Geoffrey Palmer QC recently introduced a student symposium on the judiciary as an institution and one of the articles compared Switzerland with New Zealand.¹²⁰ In Switzerland, judges are not only required to be members of a political party but are also required to pay over part of their salary to the party.¹²¹ And yet Switzerland is successful and the judiciary performs well.¹²² Sir Palmer analysed the article as follows:

So the learning must be that there is more than one way to organise the judiciary and it cannot be assumed that the New Zealand way is the only one that can be successful. Political culture develops slowly over time and the Swiss seem to be able to handle fairly easily issues that we may think would fatally impair the independence of the judiciary.

This paper submits that it is unlikely that South Africa would easily handle political patronage of the judiciary and vice versa. As demonstrated further above, the organisation of the judiciary in South Africa is not the problem. Rather, the problem lies in non-compliance with the framework. What is the cause of this non-compliance?

(b) Brief explanations for non-compliance

Part of the explanation may be the difficulties experienced in transforming a country. This paper has already dealt with Professor Corder's observation that the onset of the Constitution and the appointment of judges from diverse constituencies arguably "weakened" the sense of shared propriety amongst judges. The bonds of judicial peer pressure have been loosened. This is clear from the fact that Judge President Hlophe took his superiors, the Constitutional Court justices, to court in unprecedented litigation; he even went so far as to aver that Justices

¹¹⁸ Jenni Evans "Judges can't belong to political parties–Moseneke" *News24* (online ed., South Africa, 7 October 2015).

¹¹⁹ Evans, *supra*.

¹²⁰ Sir Geoffrey Palmer QC "The Judiciary as an Institution" (2015) 46 *VUWLR* 1.

¹²¹ At 7.

¹²² At 7.

Nkabinde and Jafta had been pressurised into making the complaint and that there may have been a “political motive” to get rid of him.¹²³

There is a further historical point to be made about the difficulties in transforming the judiciary and the differing views on the legitimacy of that institution. This historical perspective is amply demonstrated by a case heard in 1995 and coincidentally presided over by Judge Hlophe. In *S v Collier*¹²⁴ there was an appeal against the magistrate’s refusal to recuse himself from the trial of the appellant. The appellant contended that the magistrate had erred in refusing recusal so as to allow the appellant to be tried by a non-white magistrate representative of his community.¹²⁵ Judge Hlophe held as follows:¹²⁶

[T]he mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or judge could ever administer justice fairly and even-handedly in a matter involving a white accused.

This paper relies on *Collier* in order to demonstrate that the judiciary was seen as an illegitimate institution by many in South Africa. And the differing views on the nature of the judiciary and its role in society may, in part, explain the lack of a unified response to the numerous instances of alleged gross misconduct on the bench. This, in turn, may explain the unaccountable conduct on the part of some judges as well as their pettifoggery in taking every conceivable legal point available to them. This paper submits that no amount of legislative clarity could have prevented Judge Motata from reversing his Jaguar into the boundary wall. But a unified and outspoken legal profession could have called on the judge to resign gracefully for the good of the judiciary. This is what Justice Wilson did in New Zealand without even being asked to do so.

This paper argues that the explanation for the levels of judicial misconduct may lie in the role of the legal profession in holding the judiciary to account. Or failing to hold it to account. In

¹²³ *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* (52/2011) [2011] ZASCA 59 (31 March 2011) para 6.

¹²⁴ *S v Collier* 1995 (8) BCLR 975 (C).

¹²⁵ At 11.

¹²⁶ At 13.

August 2009 retired Constitutional Court judge Johann Kriegler offered some explanations for the Hlophe JP controversy during a public lecture regarding judicial independence and transformation.¹²⁷ He argued that Hlophe JP was not the problem but was rather a “manifestation of the problem”.¹²⁸ He then observed that transformation means different things to different people; the collective memory of oppression under Apartheid is still very much present in South Africa.¹²⁹ But judicial independence was nonetheless “absolutely essential”.¹³⁰ He then identified two external threats to judicial independence; the first emanated from the governing party, the second from the JSC.¹³¹ Regarding the JSC, Kriegler argued that while it looked like the “best solution” on paper, it was not the “ideal solution in practice”.¹³² He went so far as to say that the manner in which the JSC had exercised its “quasi-disciplinary” function had actually increased the threat to judicial independence.¹³³ But, crucially, he went even further and criticised the serious omissions of the legal profession in not speaking out about the Hlophe saga. Kriegler said as follows:

What did the legal profession do in the Hlophe case? Did it insist that this man was unfit for public office? On the contrary, it ran a mile. It knew what the facts were. There is not a lawyer in the country who has studied the facts who doesn't know as well as I do, and Judge Hlophe knows what the situation was with his secret payment of close to half a million rands. We know! The legal profession looked the other way. And they left me to stand there alone. And I hold it against the legal profession – not because they did me an injustice. I'm prepared, as you can see, to take the slings and arrows again because I believe it has to be said. But I think that it did the administration of justice and the independence of the judiciary and the cause of transformation harm, in not speaking out when it should have spoken out. Because everybody knows that the only reason John Hlophe was not prosecuted last time round was because of the colour of his skin. And the Bar did nothing!

¹²⁷ Johann Kriegler, retired Constitutional Court justice “Can Judicial Independence Survive Transformation?” (Public Lecture, University of Witwatersrand, Johannesburg, 18 August 2009). Public lecture downloaded from <www.constitutionallyspeaking.co.za> accessed on 11/10/2015.

¹²⁸ Kriegler, n 127.

¹²⁹ Kriegler, n 127.

¹³⁰ Kriegler, n 127.

¹³¹ Kriegler, n 127.

¹³² Kriegler, n 127.

¹³³ Kriegler, n 127.

These are bold words. But they are justified. This paper agrees with Kriegler’s view that a substantial contributor to the tarnished reputation of the judiciary is the lack of a concerted response from the legal profession. It is submitted that one of the primary reasons for this is division within the legal profession.

There is plenty of evidence supporting the above submission. Only last year, the profession was in crisis in KwaZulu-Natal; their law society shut down with the result that no new practitioners could be admitted and enrolled, nor could any existing practitioners be disciplined or struck from the roll.¹³⁴ The law society had become “dysfunctional” due to “in-fighting” amongst council members.¹³⁵ One legal practitioner is reported to have commented as follows: “This is a disgrace – that qualified, admitted lawyers whose job is dispute resolution cannot resolve what is clearly a political fight. It’s not on. It’s childish.”¹³⁶ The origin of the dispute appears to have been a proposal to fund a new lawyer’s association, namely, the South African Attorneys Association.¹³⁷ One of the reasons for the view that the dispute was the result of a “political fight” may be the change in composition of the council during the 1990s. The council had expanded to 20 seats with the National Democratic Lawyers Association and the Black Lawyers Association together holding half of the seats and “traditional” members holding the remaining half.¹³⁸ Before long the national umbrella body, the Law Society of South Africa, resolved that the “Council of the KwaZulu-Natal Law Society must immediately resume its statutory obligations to protect the public and to carry out the regulation of its members”.¹³⁹ This paper submits that the crisis in KwaZulu-Natal evidences the kind of division that exists within the legal profession. It is further submitted that this division is the proximate cause of the legal profession’s silence on the issue of judicial misconduct. Simply put, if the profession is preoccupied with in-fighting then it is unlikely to hold the judges to account for their actions.

This paper does not intend to exonerate the individual judges of their misconduct. They must be held to account for their actions. Instead, this paper proposes that the inaction of the legal

¹³⁴ Kamini Padayachee and Tania Broughton “KZN law society in turmoil” *IOL News* (online ed., South Africa, 9 July 2014).

¹³⁵ Padayachee and Broughton, n 134.

¹³⁶ Padayachee and Broughton, n 134.

¹³⁷ Padayachee and Broughton, n 134.

¹³⁸ Padayachee and Broughton, n 134.

¹³⁹ Max Boqwana and Ettienne Barnard “KZN Law Society must get its act together – Law Society of SA” (press statement, The Law Society of South Africa, Pretoria, South Africa, 10 July 2014).

profession and, more specifically, of legal practitioners has greatly exacerbated the problem. This inaction is arguably the result of division with the profession. Had the judges in question felt direct and sustained peer pressure from legal practitioners appearing before them in court on a daily basis, then it is submitted that South Africa would not be facing the crisis of public confidence in the judiciary that it faces today.

II. Conclusion

This paper concerned the difficult task of judging judges. The central question in conduct inquiries is whether it is possible to separate conduct issues from law and policy issues. The paper compared South Africa's Tribunal with New Zealand's Panel.

The first part dealt with South African law. This part set out its fundamental structure and discussed the role of the JSC regarding the Tribunal. The paper then critically evaluated the ongoing Tribunals. It was tentatively concluded that the legal profession should have responded to the erosion of judicial integrity from the outset.

The second part dealt with New Zealand law. This part set out its fundamental structure and discussed the role of the Commissioner and the Attorney-General regarding the Panel. The paper then discussed the investigative role of the Panel. It was tentatively concluded that the manner in which the judiciary is organised does not necessarily determine the level of performance and stability of the judicial system.

The third part drew lessons from the preceding parts. The first concerned diversity in Tribunal and Panel membership; South Africa has gender diversity and New Zealand has lay diversity. The second concerned fencing off conduct issues from law and policy issues. The paper concluded that judicial misconduct is more about non-compliance with the applicable framework than the framework itself. And it was also concluded that non-compliance in South Africa is at least partly caused by inaction on the part of the legal profession in holding judges to account.

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