There is something very wrong with our system of judicial discipline. In critical respects, it is simply not working.

Under the Constitution and the Judicial Service Commission (JSC) Act, the commission has two main roles: to appoint judges and to discipline them. There has, over the years, been much criticism of how the JSC has exercised its appointment function. But, while we may sometimes disagree with its choices in specific instances, while we may even think its approach is not the best, at least it works. Judges are interviewed and they are appointed.

Not so with its other function.

Yet the importance of the ability to hold judges accountable when they misbehave cannot be overstated. When we think of judicial independence, we think of security of tenure and constitutional protections. But a working mechanism to impeach a judge (when warranted) is also a component of judicial independence – without it, the conduct of an individual judge can discredit the whole of the judiciary in the eyes of South Africans. Public confidence is the judiciary’s greatest strength – that is why we have open courts and published judgments. Without public confidence, the judiciary is vulnerable and easily undermined.

The JSC Act envisages three different kinds of complaints against judges: spurious ones, ones that would be considered serious but not impeachable; and ones that, if established, would amount to impeachable conduct.

When it comes to spurious complaints, the system works somewhat. We hear every now and again – usually because a complainant is disgruntled – that a complaint has been dismissed by the Judicial Conduct Committee as spurious.

We also hear, less frequently, that a judge has been found to have committed misconduct that is not serious enough to warrant impeachment. Instead he or she has been reprimanded or sanctioned in some other way.

But when it comes to potentially impeachable conduct, it is another matter.

There have, thankfully, not been that many cases that the JSC has decided warranted impeachment processes. To my knowledge, there have been two instances in which the judges concerned resigned before the impeachment process got under way.

Then there is the case of Judge Nkola Motata, who was last year cleared by the JSC of a complaint of racism and misleading a court. But it took 10 years.

There is the case of the four judges of the Pretoria High Court – Ntsikelelo Poswa, Ferdi Preller, Moses Mavundla and George Webster, all of whom had been so dilatory in delivering judgments that the JSC felt their conduct was potentially impeachable. A tribunal was held in 2018 – with no public announcement, thus escaping the notice of the media – and we still await an announcement from the JSC. At the last set of JSC interviews, in October 2019, we heard an announcement was imminent. As I write, in February 2020, we have heard nothing.

Then there is the case of Judge President John Hlophe. The history here is long and complex but the salient fact is that 12 years later, the complaint is yet to be resolved.

When asked about this at a press conference last year, Chief Justice Mogoeng Mogoeng said it was not the JSC’s fault that these processes had dragged on and on. It was because of intervening litigation. The JSC could not stop people from exercising their rights to litigate, he said.

I am not satisfied with that answer. For one thing, all the litigation and the fight about the members of the tribunal ended in July 2018 and there is still no new tribunal established. When we enquire, we are told of a dispute around legal fees. Whoever is at fault here, that a dispute on fees can derail an investigation into potentially impeachable conduct for over a year is appalling.

Even without litigation, the process is ponderous. In Judge Mabel Jansen’s case, in which there was no intervening litigation, it took almost a year for the JSC to decide a tribunal was warranted. Yes, there are a number of steps that must be followed under the JSC Act, but still, why should these steps each take so long?
I have another concern about the answer given by the chief justice. I wonder whether judges have all of the same rights in litigation as other, ordinary citizens. Can judges adopt a Stalingrad approach, for example? I feel we should be entitled to expect more from our judges.

We know already that the JSC treated Judge Motata differently to an ordinary citizen. One of the complaints of judicial misconduct against Motata J was that, in his drunk driving case, he relied on a defence that he knew to be untrue. Ordinary criminal accused may use any defence at their disposal and leave it to the state to prove the charge. Not judges though. And the JSC agreed that, if established, this would amount to impeachable conduct.

Should judges not similarly be held to a higher standard when it comes to litigating over misconduct complaints?

I think for example about the way Constitutional Court justices Chris Jafta and Bess Nkabinde litigated over the complaint against Hlophe JP. They were not even the subject of the complaint; they were the witnesses. Yet they attacked the lawfulness of the tribunal in the high court, in the Supreme Court of Appeal – all the way to their very own court – and they lost at every step. When the Constitutional Court would not entertain their case, they even went so far as to apply to rescind the judgment.

It was their litigation that was responsible for a big chunk of the 12 years of delay in the complaint against Hlophe JP. And quite apart from the ethical questions, their dogged pursuit of a case that was found to be without merit by so many of their colleagues left people wondering about their competence. This cannot be a good thing for judges of the highest court.

I readily admit that this is not an easy question because of course judges are human beings and have rights. But if intervening litigation can give rise to such lengthy delays as to jeopardise the integrity of the system, this is something I think we need to think about.

Now there is a new complaint against Hlophe JP and his counter complaint again his deputy, Patricia Goliath. This complaint has exposed yet more troubling features of the JSC’s process. As I write, the judicial conduct committee is deliberating on whether to find that the complaints, if established, would amount to impeachable conduct. It has already been over a month since Goliath’s complaint was made. Then the JSC will still need to consider and decide the same question. It is only at this point that – if the complaints are considered impeachable – Hlophe JP and Goliath DJP could be suspended.

It seems we cannot rely on their own sense of probity to take special leave while the JSC decides. The chief justice too has thrown up his arms, saying there is nothing he can do. So, the Western Cape division must now go about its business, with its two leaders in bitter dispute, but still there at court every day and presumably still running the show. Other judges, potential witnesses, have been dragged in. It cannot be right.

As a journalist I spend a lot of time on Twitter, where a small army of anonymous accounts are working industriously to undermine the integrity of the judiciary – targeting, in particular, cases involving the public protector. Mixing little fact with much fiction, the damage they could do should not be underestimated.

This year the biggest case involving the public protector – her challenge to Parliament’s impeachment rules – is coming before the Western Cape High Court.

I’m not a panicky person, but this is all making me very anxious. 🙁

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