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Constitutional Court Appointment: The South African Process

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Introduction

An important part of the constitutional democracy project that characterizes post-apartheid South Africa is the establishment of a constitutional court. The strong constitutional culture entrenched in the new South Africa is to a large extent attributable to the establishment, work and stature of the Constitutional Court. The aim of this paper is to provide a brief overview of the appointment process to the Constitutional Court. It also touches on the most relevant issues pertaining to the appointment of judges in South Africa, which is not only applicable to the Constitutional Court but extends to all other courts in the country. As a point of departure, the paper introduces the Constitutional Court. It then proceeds to discuss the Judicial Service Commission, the body responsible for the appointment and dismissal of judges. The appointment process for judges is briefly discussed after which the role of provincial representation in the appointment of judges is evaluated. Finally, the issue of racial and gender transformation of the judiciary is given brief attention.

The Constitutional Court

The Constitutional Court (CC) exercises jurisdiction only over constitutional matters and issues connected with decisions on constitutional matters.¹ Declared by the Constitution as the highest court on constitutional matters,² the court consists of the Chief Justice, the Deputy Chief Justice and nine other judges.³ A matter before the court must be heard by at least eight judges.⁴ At all times, at least four members must be persons who were judges at the time of their appointment to the Constitutional Court.⁵ To date, the court has attracted judges, academics, activists, practising advocates and practising attorneys. Richard Calland notes that “the first batches of Constitutional Court judges have rich personal histories, and in many cases they too have professional and personal journeys scarred by apartheid”.⁶ The judges must be properly qualified and must be “fit and proper” South African citizens.⁷ This requirement cannot, however, be seen in isolation. Of great importance is the constitutionally sanctioned imperative of transformation, meaning that the judiciary needs broadly to reflect the racial and gender composition of South Africa.⁸

In contrast to the commonly held practice of appointing judges for life, a judge of the Constitutional Court in South Africa is appointed for one term of 12 years, but must retire at the age of 70, whichever occurs first.⁹ The constitution envisages the promulgation of an act of parliament that extends the term of office for constitutional court judges. This was realized in 2001 when the parliament promulgated the Judges’ Remuneration and Condition of Employment Act No 47 of 2001. The Act extended the term of the judges of the Constitutional Court to fifteen years in a situation where the twelve-year term has expired or they have reached the age of seventy before they have completed fifteen years of active service as a judge. This is subject to the exception that they do not reach the age of 75 before this point. In addition to the usual advantages of having fixed security of tenure, some argue that the periodic renewal of the court ensures a membership that “is more likely sensitive to the realities of South African society”.¹⁰

¹ Section 167 (3) (b) Constitution of South Africa, 1996 (hereafter referred to as Constitution).

² Section 167 (3) (a) Constitution.

³ Section 167 (1) Constitution.

⁴ Section 167 (2) Constitution.

⁵ Section 174 (5) Constitution.

⁶ Calland 2006: 223.

⁷ Section 174 (1) Constitution.

⁸ Section 174 (2) Constitution.

⁹ Section 176(1) Constitution.

¹⁰ Motala and Ramaphosa 2002: 58

Furthermore, “[w]ith the periodic renewal of the Court’s membership, there is no specter of a judiciary appointed for a life term, imposing opinions that belong to the previous era.”¹¹ Currently, there is a proposal to allow constitutional court judges to serve until they reach the age of 70, regardless of how long they had already served on constitutional court. This is criticised by some on the ground that it introduces the American model which allows the president who appoints the federal judges to maintain influence long after he or she has exited the political scene.

The Judicial Service Commission

In a definite break from the past where the appointment of judges was the exclusive domain of the executive,¹² the post-apartheid South African government has chosen to adopt the model that establishes a special body to deal with the appointment and dismissal of judges. In South Africa, this is called the Judicial Service Commission (JSC), a bulky, wieldy institution that plays an important role in the appointment and dismissal of judges. The JSC consist of three representatives of the judiciary (the Chief Justice, the President of the Supreme Court of Appeal and Judge President designated by the Judges President), the cabinet member responsible for the administration of justice (i.e. the minister of justice), four legal practitioners (nominated by the professions and appointed by the President), six members of the National Assembly, at least three of whom must be members of opposition parties, four members of the National Council of Provinces (i.e. the South African senate), one law teacher designated by the law teachers of the university law faculties, and four persons designated by the President.¹³ With its twenty-two members, the JSC, as an institution, provides a broadly based selection panel for appointments to the judiciary. Although some have suggested that the large size of the commission makes decision making difficult, others emphasize that it has allowed for the representation of different interest groups making it imperative for candidates to “win wide support from across the different groups” in order to be appointed to the bench.¹⁴

Although limiting the composition of a body responsible for the appointment of judges to members of the legal fraternity is no longer acceptable and there is a consensus that members outside the legal community must be included,¹⁵ it is often claimed that the parliament and the executive are over-represented on the JSC; that there is a disproportionately high number of politicians on the JSC. More specifically, the constitution allows the President ample opportunity to participate, both directly and indirectly, in selecting members of the JSC. The President appoints the Minister of Justice, the Chief Justice of the CC and four members of the JSC. The President also has the power, in terms of section 178(2) of the constitution, to select nominees of the professions if there is a disagreement within a profession as to who its nominees should be. The president, however, is only required to do this after consulting the profession concerned. It seems that at least nine members on the JSC are appointed by the legislature and the President. This also means that the ruling party is guaranteed a plurality voice on the JSC. As Calland has succinctly put it, the ruling party “does not have an explicit inbuilt majority” but “with three of

¹¹ Motala and Ramaphosa 2002: 58

¹² In apartheid South Africa, the selection process was entirely secret. The responsibility of appointing judges rested with the President, in consultation with Minister of Justice. Carmel Rickard notes that ‘all the appointments were decided on behind closed doors; there was no prior scrutiny by the public or the profession and the result was a bench that was largely a mirror of the political establishment: virtually all male, all middle-class and largely Afrikaans-speaking’. Rickards, C., “The South African judicial services Commission” (paper from the conference on Judicial reform: function, appointment and structure, centre for public Law, University of Cambridge, 4 October 2003) Online: http://www.law.cam.ac.uk/view_doc_info.php?class=12&order=doc_title=asc&doc=879&page=1&start=0 Cambridge university of Cambridge

¹³ Section 178 Constitution.

¹⁴ Malleon 1999.

¹⁵ Hatchard, Ndulo and Slinn 2004

each of the MPs' and NCOP's allocations, plus the minister of justice and the four persons designated by the president, totaling eleven, the ruling party virtually has veto power."¹⁶ The strong majority of non-lawyers and more specifically the domination of political representatives in the commission, some feared, "would preserve the role of political patronage and provide a means for the executive to maintain political control of the selection process".¹⁷ Marius Olivier and John Baloro argue that the plurality of politicians could "not only jeopardize the independence of the commission, but also the perception of independence. The impression could be created that the views of the majority party in Parliament will be sustained."¹⁸ The Constitutional Court does not, however, seem to think so.

In certifying the constitution, the Constitutional Court held that the mere fact that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with judicial independence. The court stated: "In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the executive or by Parliament or by both".¹⁹ For the court, the key to the separation of powers and the independence of the judiciary is that "the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive".²⁰ Pointing to the fact that the JSC consists of members of the judiciary, the legal profession and the opposition parties, the Court argued that the JSC "provides a check and balance to the power of the executive to make [judicial] appointments".²¹ Even the official opposition party, the Democratic Alliance, which is cognizant of what is in effect the dominance of the ruling party in the composition of the JSC, has no intention of seeking a constitutional amendment to reconfigure the JSC. In a paper that outlines the party's position on the current 'threats to judicial independence in South Africa, it "notes that many western democracies – France, Germany and the UK, for example – do not have such an independent process for appointing judges".²²

The appointment process

It seems that the actual process of appointment as adopted by the Commission has eased any apprehension that detractors may have about the dominance of the JSC by particular grouping. In contrast to the high level of secrecy that characterized the selection process during apartheid, the commission has made efforts to ensure that the process by which judges are selected to the Constitutional Court is as transparent as possible. Calland notes that "[w]hat is clear is that the process of open interviews that the JSC follows has introduced a large element of accountability into the system".²³

The commission's procedure for nominating judges is outlined in the Government Gazette (Government Notice R. 423, Government Gazette No. 24596), published by the Minister of Justice in 2003. The process of appointment is put into effect when the head of the relevant court informs the JSC that there is a vacancy. After the advertisement of the vacancy, the JSC will call for the nomination of suitable candidates. An application to nominate an individual to the vacancy must be in writing and accompanied by the relevant documents including the candidate's

¹⁶ Calland 2006:218.

¹⁷ Malleson 1999:39.

¹⁸ Olivier and Baloro 2001: 36.

¹⁹ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) para 123.*

²⁰ *Ibid.*

²¹ *Ibid para. 124.*

²² Democratic Alliance 2006: 16.

²³ Calland 2006: 218.

resumé, completed application form and letter of consent to the nomination. The application takes the form of a questionnaire that the nominator must complete by providing, among other things, information about the applicant's personal and professional life, financial interests, practice and other relevant experience. The applicant's contribution in the struggle against apartheid and his or her commitment to the principles underlying the constitution must also be included in the application form. Typical of any job application, the application and hence the nomination would not be complete without the inclusion of a letter from a professional organization stating or verifying the good behavior of the applicant. The completed application forms are then distributed to members of the JSC. The drawing up of a short list of the candidates, however, is left to a subcommittee appointed by the JSC. The short list must nevertheless be approved by the JSC. The names of the shortlisted candidates for interviews are then published.²⁴

With regard to the vetting process, one particular issue that has been raised as a major concern relates to the process of short listing of candidates by the sub-committee of the JSC. Basically, the decision-making process in relation to short-listing for interview is held in private. The names of the candidates who are nominated but not short-listed are not published. As a result, the criteria that the committee uses in the short listing of candidates are not known to the public. Therefore, the secrecy within which the vetting process takes place raises questions about whether the process could exclude people on the basis of their political or even sexual preferences.²⁵ At the very least, the secrecy has bred rumors and fueled speculation about how and on what basis decisions were made. This notwithstanding, the JSC continues to keep the public and the media in the dark by maintaining the secretive process of short listing by the sub-committee and not disclosing the identities of those who are not shortlisted. The commission argues that the non-disclosure policy protects the privacy of those individuals who were nominated but failed to make it to the short list.

In the early days of the JSC, one of the controversial issues with regard to how it should conduct its business was whether the interview should take place in private or public. Initially, the commission decided to conduct interviews in public. This was controversial and as a result the commission was forced to conduct the first round of interviews in closed session. But since then the commission has resorted to public interviews, which has now become a firmly established practice and an indication of the transparency with which the commission conducts its business. Even in cases where there is only a single candidate for the position, holding a public interview has become an indispensable requirement. In the latest round of judicial appointments, there was only one candidate contesting for judge president in North West and KwaZulu-Natal; that did not discourage the JSC from conducting a full scale public interview.²⁶ The transcripts of these reviews are also accessible on the Constitutional Court's website.

Following the interview, the JSC prepares a list and submits it to the President. The list must contain three more names than the number of appointments to be made. The President makes an appointment from the list and provides an explanation for the rejection of any of the nominees. The President may request the JSC to supplement the list if any of the nominees is unacceptable and an appointment remains to be made. The JSC must then supplement the list with further nominees and the President must make the remaining appointment from the list.²⁷ This process of appointment does not, however, apply to the appointment of the Chief Justice and the deputy

²⁴ The procedure applies both to those that are seeking judicial appointment for the first time and those that are seeking promotion to the higher courts or transfer to other courts.

²⁵ Andrews 2006

²⁶ "Despite being the only candidates for the job, [the two candidates] were not given an easy ride by the JSC." See Rabkin, F. (2010) Lack of judge candidates 'disturbing' *Business Day* 19 April 2010.

²⁷ Section 174(4) Constitution.

chief justice. Unlike other judges who are appointed by the President from a list of names submitted by the JSC, the role of the JSC is limited in the appointment of the two most senior positions of the judiciary. The appointment of the Chief justice and the deputy-chief justice is at the discretion of the President. The only requirement is that the President should make the appointments only after consulting the leaders of the parties represented in the National Assembly.²⁸

Provincial representation

Unlike the other two branches of government that reflect elements of federal arrangement by dividing executive and legislative powers between the national and subnational level of government, the judiciary is organized under a single hierarchical system. In other words, the subnational units do not have their own judiciary. While the Constitutional Court and the Supreme Court of Appeal exercising a nationwide jurisdiction, the higher courts exercise geographical jurisdiction, with at least one high court in each province. The absence of a parallel system of courts, however, has not excluded the representation of provincial interests in the appointment of judges.

The issue of provincial representation in the JSC was raised in a recent case that involved the JSC and a judge president of one of the high courts. Section 178(1) (k) of the constitution provides for the representation of provinces in the commission through their respective premiers, or their alternatives, when it considers matters relating to a high court in their respective provinces.²⁹ The case under consideration involved the judge president of Cape High Court.³⁰ Judge President John Hlophe was accused of trying to influence Constitutional Court judges in a case involving Jacob Zuma, the current president of South Africa. A hearing by the JSC eventually cleared the judge president of all allegations. Helen Zille, Premier of the Western Cape Province, where the Cape High Court is situated, challenged the decision before the Constitutional Court on the ground that she, as an *ad hoc* member, should have "acted as a commissioner" when it deliberated on the matter as it involves a specific high court of the province of which she is the premier. The Commission, she argued, was not properly and lawfully constituted when it decided on the Hlophe matter. The JSC, on the other hand, maintained that the matter is not about a specific high court but the conduct of a particular individual judge and there was no constitutional obligation on the JSC to invite the premier to the hearing. The question was, therefore, what would constitute "matters relating to a High Court."

Obviously, the composition of the High Court is a matter relating to a High Court. That is why the premier joins the JSC when it decides on appointments to the High Court in his or her province. Similarly, a disciplinary hearing against a judge relates to the composition of the court as it may result in the removal of the judge concerned and thereby affect the composition of the court. The implication is that a case that involves the possible removal of any judge is a matter relating to a high court and, as a result, the relevant premier must form part of such hearing.³¹ The court, therefore, agreed with the Premier and found that section 179(1) (k) of the constitution requires that the Premier must act as a commissioner when it decides on the disciplining of judges of that court as this is "unquestionably a matter which relates to a specific High Court of which

²⁸ section 174(3) Constitution.

²⁹ In addition to the Premier, the judge president of the specific high court must, as well, be invited to the Commission as *ad-hoc* member.

³⁰ Kamaldien, Y (2010) JSC says Zille's court challenge should be dismissed accessed on 28 April 2010 at <http://www.mg.co.za/article/2010-01-28-jsc-says-zilles-court-challenge-should-be-dismissed>

³¹ PDe Vos, P. (2009) *Where was Zille?* accessed on 14 April 2010 at www.constitutionallyspeaking.co.za .

the judge is a member because of the consequences of its outcome to that Court.”³² This means that provincial representation must be ensured both in the appointment and dismissal of judges of high courts.

The transformation of the judiciary

One important issue that continues to occupy the agenda of the commission is the extent to which it has been successful in ensuring the representativeness of the composition of the bench. As indicated earlier, the constitution makes the transformation of the judiciary a constitutional imperative by requiring the selectors to give due regard ”to the need for the South African judiciary to reflect broadly the racial and gender composition of South Africa.” This does not introduce a quota system. It does not mean that the composition of the judiciary should be re-designed to reflect exactly the proportions of the different population groups. Rather, it makes race and gender relevant factors that must be taken into account in the appointment of judges. The underlying premise is that the court, to do justice, must have the capacity to understand and relate to the experience of all South Africans. And doing so requires constituting the court ”from a wide enough spectrum of South African society.”

In post-apartheid South Africa, the transformation of the judiciary has become a thorny issue with some claiming that ”the pace of transformation is too slow” while others express their ”dismay” about what they regard as the overlooking of suitable white candidates and lament that pale male candidates should not apply to be judges.³³ The South African judiciary has traditionally been largely white, male and Afrikaner speaking, a reflection of the overwhelmingly white and male legal profession. In 1994, as South Africa started to move away from the apartheid era, of the 200 judges that presided at the different levels of the judiciary, more than 99 percent were white and male.³⁴ Since then, South Africa has come a long way in creating a diverse judiciary. The number of black judges has increased. According to a recent report, there are over 200 judges of whom more than one third is black. A significant proportion of the provincial Judges Presidents are black. In this regard, the Constitutional Court is the most diversified. The first round of constitutional court judges included three Black, one Indian and seven White people. Today, there are eight Black people on the court.

However, there seems to be a consensus that the transformation of the judiciary as regards gender leaves much to be desired. Women continue to be grossly under-represented on the Bench, making up less than 10% of the overall South African judiciary.³⁵ This has prompted the minister of justice to organize a conference examining questions regarding gender transformation of the judiciary and the appointment of female judges.³⁶ Although transformation of the judiciary as regards race has gone a long way compared to the transformation as regards gender, the need to address both racial and gender imbalance will continue to constitute an important factor in the

³² *Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others* (25467/2009) [2010] ZAWCHC 80 (31 March 2010) para 14.

³³ Carmel Rickard called on the Judicial Service Commission to “be frank with the legal profession and say that white male lawyers should no longer apply for positions on the Bench”. Rickard, C (2004), ‘The Bench is closed to pale males, struggle credentials or not’, *Sunday Times*, 18 July 2004.

³⁴ Andrews 2006.

³⁵ Andrews 2006.

³⁶ Minister of justice “opening address by Ms. Bridgette, MP, Minister of Justice and Constitutional development’ South Africa.

appointment process. In this regard, the need to address the racial and gender distortion in the legal profession is often emphasized because the profession represents the pool from which competent judges are drawn. As noted by one author, “[t]ransformation of the judiciary without transformation of the organized advocates’ profession (“the bar”) is, quite simply, a pipe dream.”³⁷

Conclusion

Under the aegis of the JSC, the process of appointments to the Constitutional Court and all other courts has moved away from the secrecy that characterized judicial selection during the apartheid regime and is now a much more transparent process. This transparency has mitigated any concern that arises from the plurality of politicians in the composition of JSC. As a result, it seems that there is no appetite for altering the composition of the JSC. This is not to say that concerns do not exist. The recent appointees to the JSC have raised eye brows, with some claiming that they cannot be expected to act impartially in discharging their duty as members of the commission. If this fear, real or perceived, continues, the demand for change in the composition of the JSC is likely to grow.

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