The Judicial Service Commission: quis custodiet custodes?

There are serious problems with the composition, structure and functioning of the Judicial Service Commission, argues Frans Rautenbach, Cape Bar. Is there an alternative?

Recent history suggests that there are gaping holes in the legislation relating to the composition of the Judicial Services Commission (JSC), its functioning and the appointment and disciplining of judges.

Section 178 of the Constitution provides for the composition of the JSC. Of the 23 members normally constituting the JSC for purposes of new appointments, the appointment of only six can be said to fall outside the direct control of the governing party or the President. These are the three top judges (the Chief Justice, the Judge President of the SCA and a Judge President representing the Judges President of the High Court) and three representatives of the opposition in Parliament. Other than these, all of the positions on the JSC are either members of government (the Minister of Justice, three governing party members of the National Assembly and four members of the National Council of Provinces) or are appointed by government (two advocates, two attorneys and four more delegates directly appointed by the President).

The section provides that legal practitioners shall be represented by -

'(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President...'

In the case of law lecturers, it provides that there shall be –

'(g) one teacher of law designated by teachers of law at South African universities'.

Noticeable in terms of all three categories of lawyers, is that there is no constitutional provision that they should be elected by their representative bodies, or in any other way democratically elected so as to represent their professions. All that is required in respect of advocates and attorneys is that they should be 'nominated from within the ... profession'. That means that the President can call for nominations from within the profession, but holds the final decision as to the appointment of the relevant representatives.

It is true that section 178(2) provides that if more practitioners are nominated than vacancies to be filled, the President must select whom he wants to appoint 'after consulting the relevant profession.....taking into account the need to ensure that those appointed represent the professions as a whole.' It is however possible for the President to go through the motions of consultation and pay lip service to the principle of representivity, and still appoint loyalists to the vacant positions. There is no requirement of democratic elections, nor does the section specify what criteria determine whether the professions are represented 'as a whole'.

In the case of teachers of law, the provision is ambiguous in that it makes no provision for any election by a representative body, save to state that the relevant representative must be 'designated by teachers of law'. Which teachers of law? Who decides who has the power so to designate them? The provision is at best unclear, at worst open to abuse.

With regard to the disciplining of judges, section 177 of the Constitution provides that:

'(1) a judge may be removed from office only if –

(a) the judicial service commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the national assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members.

(2) the president must remove a judge from office upon adoption of a resolution calling for that judge to be removed.'

A number of difficulties are apparent when this section is read. At first blush it may seem that as if the JSC has the power to remove a judge. That appears to be wrong however, as the conjunctive 'and' links the two subsections. In other words, a judge may only be removed if both the JSC finds him/her guilty of gross misconduct etc, *and* the National Assembly decides with a two-thirds majority to remove him/her.

This means that a judge who finds favour with the ruling party,

can possibly never be removed from office, no matter how gross his incompetence or misconduct. That is surely an untenable situation.

To exacerbate this, the composition of the JSC is open to political manipulation, as pointed out above. Moreover, it appears that section 177, as does the rest of the Constitution, places no obligation on the JSC even to consider a complaint from the public about the performance or behaviour of a judge. Unless it can be contended that section 177 contains an implied provision to the effect that all legitimate complaints about the behaviour or competence of judges must be considered by the JSC, it is unclear where the obligation compelling the JSC so to consider a complaint, can be found.

Since the JSC is directly responsible for the nomination of judges to be appointed to the various courts, the possibility of political manipulation of the composition of the JSC is particularly worrying. This is the case all the more in view of the provisions of section 174 requiring a balancing act between racial- and gender-based transformation and appropriate qualifications. There is very little preventing a politically biased JSC from paying lip service to the principle of appropriate qualifications, whilst seeking refuge in the principle of transformation to justify appointments of judges who may be politically compromised or subject to political manipulation, or simply incompetent.

A constitution must protect the citizenry of a country against the excesses of government, including the worst imaginable. Although the goodwill of government is an important contributor to the success of a constitution, it should not be taken for granted. With that in mind, the constitution should make it as difficult as possible for the government to interfere in the appointment of judges, or to fail to dismiss them when that is called for.

The question is what mechanisms we can propose that will at the same time ensure the composition of an independent JSC, impose an obligation on the JSC to consider all legitimate complaints made to it and prevent serious disciplinary and similar complaints from being bogged down in a political decision-making process.

The representatives of the JSC should come from the ranks of persons who have an incentive to ensure that the service rendered by the Bench is of the highest order. They should not serve on the JSC on account of their political affiliation. Secondly, they should have an incentive to balance the interests of judicial excellence with transformation.

The users of the court system are primarily practising lawyers – both attorneys and counsel. They self-evidently have an interest in high quality judicial service. This includes qualities such as -

- the efficiency of service provided by the courts;
- the ability to engage litigants, in terms of hearing both sides of a case, and demonstrably applying the court's mind to all relevant questions of law and fact;
- the predictability and legal correctness of decisions.

Nobody knows better than practising lawyers who the good judges are in terms of these criteria, and who amongst their colleagues are most likely to fulfil these criteria. To this group could possibly be added academics, who self-evidently have an interest in the intellectual rigour and academic excellence of a good judiciary.

Another category of persons who have an interest in judicial excellence, are judicial officers themselves. Self-evidently the top echelon of judicial officers (the Chief Justice, the Judge President of the SCA and the Judges President of the Provincial Divisions) have such an interest. Also ordinary judges in the lower courts share that interest in that they are unlikely to water down the status of the judicial bodies to which they belong by admitting to their ranks inferior candidates.

There is no room for political appointees to the JSC. Of all bodies, this gateway to the courts, which are in turn the guardians of our constitutional dispensation, must be free from any suggestion of political interference. The President should have no power to appoint any representative to the JSC. By the same token, there is no justification for the Minister of Justice to have session on the JSC, nor should members of Parliament or the National Council of Provinces have any say in the appointment of judges. In its current form, section 178(1) allows for a breach of the principle of separation of powers. There is no point in legislating for the independence of the Bench, if many of those who appoint the Bench are henchmen of the political powers that be.

Attorneys' and advocates' representatives, and also those of the academic world, should be elected by their respective Bars and Law Societies. There should be equal representation from the Bar, the attorneys' profession and the Bench.

Section 177, dealing with the removal of judges, should be amended to place an obligation on the JSC to consider all serious complaints about judges and to hear evidence subject to cross-examination. Dismissal of a judge should be effected by the JSC – and two thirds of the House of Assembly in the alternative - on the same grounds as presently apply under this section.

How to ensure transformation in these circumstances? Since the majority of lawyers and judges are still white males, it will be contended that that will entrench the currently skewed representation of various demographic groups on the Bench. One possible way to address this problem, is to impose a race and gender quota on the composition of the JSC. Such a quota system could either be imposed immediately, so that the JSC by law must be representative of the various races and both genders from the word go. Alternatively, targets could be set for the development of the demographic representation of the JSC over the next five or ten years. Either way the current constitutional imperative calling upon the JSC to consider racial and gender representivity of the Bench in its appointments, must stay.

But the real solution is to recognise the true problem with transformation, which is one of education and training. Ideally speaking, some 80% of the Bench should be black. That target will only realistically be achieved if at least 80% of all attorneys and counsel with sufficient experience to be appointed to the Bench are black. That in turn will only be possible if at least 80% of candidates qualifying as attorneys and counsel are black. That in turn will only be possible if at least 80% of legal graduates are black, and that only if at least 80% of learners with matric exemption are black.

If enough quality candidates of all race groups become available to be appointed as judges, there will be no need to fret about racial representation on the Bench. The Bench will select itself through the principle of quality. The newly-passed South African Judicial Education Institute Act 14 of 2008 is a commendable step in the right direction, implementing as it does, section 180(a) of the Constitution which provides for national legislation providing for training programmes for judicial officers. More could be done, perhaps by addressing racist briefing patterns at the Bar, and by way of more scholarships for deserving candidates for legal study. But fundamentally, at the heart of the problem of judicial representation is the dysfunctional education system of South Africa. And for that, as we probably all agree, there is just no quick fix.

But in the meantime the choice that faces us is this: government must be persuaded to rethink the crucial provisions of the Constitution discussed here, or we will be at the mercy of its goodwill – which is exactly what the Constitution should have avoided in the first place