Transparency and accountability in the judicial appointment process

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According to legend a Minister of Justice in the 1930s noted sardonically that judges, who have been appointed for political reasons, quite soon believe that they were appointed on merit. In this simple anecdote lies the germ of the issue of transparency and accountability in the judicial appointment process. Judges prefer to believe that they are appointed on merit; the public does not believe that they are but prefers that they should be; politicians have their own view – they tend to prefer judges who will act predictably especially when they are no longer in power.

The subject of this paper concerns judicial independence, more in particular institutional independence:

'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider – be it government, pressure group, individual or even another judge should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.'[1]

Absent a transparent appointment process, public trust in the existence of judicial independence is undermined.

In dealing with the appointment process of judges one must distinguish between systems that cater for career judges and those that do not. One may also find a difference in the appointment process of judges for higher and for lower courts. Ultimately the issue is whether the appointment of judges should, to a larger or lesser degree, be in the hands of elected politicians, ie (a) should the government of the day appoint judges and (b) what process should be followed. In what follows I shall concentrate on the appointment of judges, who are not career judges, to higher courts, and I shall discuss the matter principally with reference to the South African position. The advantage of my parochial focus is that it is possible to compare two systems in the same country: the old regime, based on English constitutional law; and the new regime, adopted in a democratic Constitution.[2]

The old regime

For nearly two centuries (1806-1994) the English constitutional system, including the judicial appointment system, applied in South Africa. Parliament was supreme. Superior courts were not part of the public service. Judges were appointed by the executive. Their salaries were determined by parliament and their tenure was protected. They could be impeached by a resolution of parliament (which in fact never happened). More often than not the Minister of Justice conferred with the head of a particular court about new appointments. The nomination emanated from either the head of court of the minister. The minister's recommendation was then placed before cabinet and thereafter the head of state would appoint the particular judge.

Judges were invariably drawn from the ranks of senior counsel (or silks; in English parlance, Queen's Counsel). This meant, generally, that only experienced court lawyers, who did not practise in partnership, became judges. Since one could not 'take silk' without the concurrence of the bar council, it meant that the legal profession was involved in determining who could be eligible for appointment.

Once appointed, a judge's 'advancement' to the position of head of that court was usually a matter of seniority. On the occasions when this principle was ignored the legal profession and the media, depending on the person overlooked, either raised a hue and cry or accepted the new appointment without demur.

Political affiliation (real or assumed) sometimes played a part in the appointment process but, as my introductory anecdote illustrates, it was and remains a risky business to engage in because judges like to establish their independence. In any event, the quality of judicial appointments reflects on the government of the day. It is also not possible to predict how candidates will turn out. 'Reputation is one thing, but it is no assurance against someone being bad tempered, too interventionist, too pompous, or too slow in judgments.'[3] When, during the late 1950s, the most senior appeal judge was overlooked because (so some believed – we will never know, there was no transparency) of anti-government bias, the new chief justice, on retirement a few years later, became the leader in the senate of the opposition. When the same judge was again overlooked, the former chief legal advisor of the previous government (then in opposition) and student friend of the minister was appointed. Those upset about the fact that the senior judge has been overlooked only refer to the second instance, never to the first.

In spite of the lack of transparency in the appointment system, the judge who was overlooked stated that –

'[t]he Superior Courts of South Africa have at least for many generations had characteristics which, rooted in the world's experience, are calculated to ensure, within the limits of human frailty, the efficient and honest administration of justice according to law. Our Courts are manned by full-time Judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of security and well-being of the State.'[4]

This was accepted, by some grudgingly, during the constitutional negotiations that led to democracy, and the existing judiciary remained in place.

The new regime

The birth of the Constitution had some unusual features: it was preceded by an agreement between different parties; they agreed on a number of constitutional principles; a constitutional assembly had to draft a constitution based on these principles; and the Constitutional Court had to certify that the constitution complied with them. Relevant for this paper are the following principles:

'The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government. The legal system shall ensure the equality of all before the law and an equitable legal process. . . . There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.'

The Judicial Service Commission

The Constitution introduced a new appointment system. Basic to this is the Judicial Service Commission ('JSC'). It consists of the Chief Justice, the President of the Supreme Court of Appeal, one Judge President, four practising lawyers, one teacher of law, six members of the National Assembly, four permanent delegates to the National Council of Provinces, four members designated by the President, and the Minister of Justice.

The practising lawyers and the teacher of law are designated by their professions. The Judge President is designated by the other Judges President. At least three members of the National Assembly must come from opposition parties; and the four presidential appointments are made after consultation with the leaders of all the political parties in the National Assembly.

The President appoints the Minister, the Chief Justice, the President of the Supreme Court of Appeal, and four members of the JSC, and he selects the Constitutional Court judges from a list prepared by the JSC. This raised the question whether the constitution of the JSC is in accordance with the constitutional principles because, it has been said, the political head of the executive play so large a role, directly and indirectly, in the appointment process. Yet the Constitutional Court held in this regard as follows:

'An essential part of the separation of powers is that there be an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required . . . 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. What is crucial 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. [The constitution] vests the judicial authority in the courts and protects the courts against any interference with that authority. Constitutionally, therefore, all judges are independent.'

In a later judgment it pointed out that the involvement of the executive or the legislature in the appointment of the judiciary is generally accepted internationally. A justice of the High Court of Australia is appointed by the Governor-General in Executive Council following consultation between the Attorney-General of the Commonwealth and Attorneys-General of the States. Judges of the Supreme Court of the USA are nominated 'by and with the advice and consent of the Senate' and appointed by the President. In Canada, judges are appointed by the Governor in Council by letters patent under the Great Seal. In Germany, half of the judges of the Federal Constitutional Court are elected by the Bundestag (House of Representatives) and half by the Bundesrat (the Federal Council of the Provinces) and the judges of each of the five Federal Supreme Courts are selected jointly by the appropriate Federal Minister and a selection committee composed of the appropriate Provincial (Land) ministers and an equal number of members elected by the Bundestag.

An interesting case is India. In 1998 its Supreme Court, exercising an advisory jurisdiction, created a collegium of judges that recommends names for appointment to the Supreme Court and another to review recommendations for appointment to the high courts. Political dissatisfaction led to a Bill, somewhat similar to the South African, which seeks to ensure transparency in judicial appointments.

Appointment procedure

The procedure followed by the JSC in appointing judges is as follows: an aspirant judge has to be nominated for appointment by whoever is prepared to do so. A committee of the JSC then prepares a shortlist of candidates. They are interviewed (or, in some cases, interrogated) in a meeting that is open to the public (although no-one attends them, not even the media). Then the JSC meets in committee and votes on the candidates. All that follows is confidential and although the Promotion of Access to Information Act applies to the JSC, the principles of natural justice recognised by the common law and the Constitution and adumbrated in the Promotion of Administrative Justice Act do not and its proceedings cannot thus be taken on review. For instance, a member cannot be disqualified because of bias.

Thus, although the nomination and the interview are transparent, the short-listing and ultimate voting are not. The JSC is also not accountable to anyone because it is faceless and no one knows who was for or against any particular candidate.

Acting judges

The use of part-time judges is a feature of the English court system and appointments are made 'to assist the work of the courts' and to 'give to possible candidates for full-time appointments the experience of sitting judicially and an opportunity to establish their suitability'.

In South Africa acting judges are appointed to fill temporary vacancies or the temporary absence or disability of particular judges. Acting judges have no security of tenure, and may therefore be perceived to lack an important guarantee of independence.

Acting appointments are made by the Minister after consultation with the senior judge of the court. The final decision is left to the Minister and it is assumed that the decision has to be taken in good faith with due regard to the advice given. But there is no reason to believe that an acting appointment can be attacked on the ground of bad faith or a failure to heed advice.

Acting appointments are essentially temporary appointments for temporary purposes and provide a valuable opportunity for assessing the qualities of potential judges. On the other hand, acting judges are aware that their performance is being watched and may tend to be over-zealous in proving a point. Their judgments during this period may be held against them.

When there is a vacancy, the JSC is under a duty to fill it. It may delay or defer an appointment until a suitable candidate is identified, but it is not supposed to abdicate its responsibility by allowing permanent vacancies to be filled indefinitely by acting judges. The obligation has not always been fulfilled.

Transformation and representivity

A citizen who is 'appropriately qualified' and a 'fit and proper person'

may be appointed as a judge. The Constitution states that the 'need for the judiciary to reflect broadly the racial and gender composition of the country must be considered when judicial officers are appointed.' The requirements of race and gender are currently impossible to meet. This requirement has led to the unfortunate and often unfair division of judicial appointees between 'transformation' judges and 'other' judges, ie, those appointed purely on merit.

The former Chief Justice of Australia, Sir Anthony Mason, said that it is simply not practicable to appoint a judiciary that approximates the composition of society as a whole: professional skills are not evenly distributed. Further, he said that the appointment of judges who are not highly skilled is more likely to undermine public confidence in the administration of justice than the appointment of an unrepresentative judiciary.[5] (This view does not find general acceptance in South Africa.)

A respected newspaper editor, Mr Barney Mthombothi, recently wrote:

'Our judiciary, like all sectors of society, have been consumed by issues of transformation, and rightly so. We have tended to look at the colour of the Bench, at the total exclusion of the much deeper and meaningful renewal of character, the values and culture that have to be reflected on the Bench. Are we so caught up with colour that we have forgotten about the character of the individuals appointed?'

(This view also does not find general acceptance.)

Conclusion

Turning then to an assessment of the two systems, it is well to remember the words of the Estonian author, Jaan Kross, who said that 'candour does not agree with good breeding. Not in the family, nor in the state, nor in international relations'. I shall tread carefully.

The idea often touted that judges should be appointed by the legal profession or by other judges is bad. As to the former, one cannot appoint those that have to be guarded as guardians. As far as the latter is concerned, it raises the old egg and chicken paradox: which was first? In other words, who is to appoint the first judges? That does not mean that judges and lawyers should not be participants in the process but it is difficult to agree with the International Bar Association that they should form a majority in any given appointment body.

The disadvantage of an old regime type system is its lack of transparency. The main advantage is political accountability. A government is accountable to the public for its appointments. It did not hide behind a faceless commission where the responsibility for an appointment or non-appointment cannot be pinned onto any particular person or party.

It failed in South Africa previously because the government was not representative of the people of the country. It will always fail in a multi-cultural country or a country with significant minority groups.

Under the old system it mattered not whether one aspired to become a judge and worked to that end. Ambition was not remunerated. The decision was made for you by the head of a particular court or by the government who decided to approach you to accept an appointment. It mattered not very much whether one was controversial or bold; and one was not as easily 'punished' as was Judge Bork for having expressed controversial opinions.[6] A public spectacle was not possible – Bork again. A candidate could not be required to state his or her position on any matter before being appointed. Since all possible appointees were from the same professional background, their strengths and weaknesses were known and could be assessed without much.

The litmus test is this: can it be said that, say, English judges are not independent and impartial? Can it be said that judges are now, under the new system, more independent and impartial than before? Not wishing to be a judge in my own cause I shall not answer the question about South Africa.

The general move internationally appears to be in the direction of something approximating the new regime in South Africa. This is quite apparent within the Commonwealth, India and Canada has been mentioned. Similar rumblings are found in England,* Australia and even in Hong Kong. Sir Anthony Mason sees the move as a result of the social theorist's view of the judicial function, which is in conflict with the professional view. The social theorist view is that a judge acts 'as a representative of that section of the community of which he is a member and that his decisions are simply a reflection of his personal philosophy and values'.

The new regime attempts to make the decision more democratic and more representative. It creates the impression that politicians do not have the final say and it wishes to promote judicial independence. It is more transparent than the old but politically less accountable.

The downside is that it caters for judicial ambition. Appointment committees tend (according to Sir Michael Kirby) to opt for the 'safe' or 'unknown' candidate rather than the intellectually vibrant, energetic or bold. How many questions can a candidate, who holds no opinion, be asked during an interview?

On a practical level: There is no doubt that the JSC rejects suitable candidates only because they are white and male. As a result, the Bars are unwilling to nominate anymore because their candidates are so often rejected; and prominent members of the Bar are not prepared to accept a nomination for fear of an unreasoned rejection in favour of a poor candidate. This in my view is a serious abdication of duty. It means that invariably a 'transformation candidate' will be appointed, even where there is no merit at all, because the alternatives are so mediocre. For the same reason suitable judges are not prepared to be nominated for appointment to higher courts. There are those who believe that a crash course creates a judge, and there are those who believe that this is a pious hope.

To conclude: transparency and accountability are matters of degree, judicial independence is not. The degree of transparency and accountability required depends on the culture and history of a country: judicial independence does not.

Endnotes

[1] *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) (Canadian Supreme Court).

[2] I have made copious use of three judgments of the Constitutional Court, sometimes more or less quoting from them. They are *In re Certification of the Constitution of the RSA; De Lange v Smuts;* and *Van Rooyen v State*. They can be found at www.law.wits.ac.za.

[3] RW Gotterson QC 'The appointment of judges' at www.jca.asn.au/GottersonPaper.html.

[4] *Minister of the Interior v Harris* (1952), a statement recently endorsed by the Constitutional Court.

[5] Sir Anthony Mason 'The appointment and removal of judges' in *Fragile Baitio n, Judicial independence in the nineties and beyond.*

[6] Michael Kirby 'Modes of appointment and training of judges – a common law perspective' at www.hcourt.gov.au/speeches/kirby.

* England has since the delivery of this address established a Judicial Appointment Commission – Editor.