(http://www.dca.gov.uk/consult/lcoffice/judiciary.htm) at [114]-[144]; Peach *An Independent Scrutiny of the Appointment Process of Judges and Queen's Counsel in England and Wales* (London, 1999) (http://www.dca.gov.uk/judicial/peach/indexfr.htm); Street, ibid at 104, 125.

[14] Department of Constitutional Affairs *Constitutional Reform: a new way of appointing judges* (Consultation Paper) (July 2003) (http://www.dca.gov.uk/consult/jacommission/) at Foreword.

[15] *Gee v Pritchard* (1818) 2 Swans. 402 at 414 per Lord Eldon LC: 'Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.'

[16] http://www.judicialappointments.gov.uk/about-jac/157.htm

[17] Constitutional Reform Act 2005, paragraph 32, Schedule 12.

[18] See Constitutional Reform Act 2006 s 62 and Schedule 1; http://www.judicialombudsman.gov.uk/.

[19] Also see Constitutional Reform Act 2005 ss 82-84, 90-93, which apply the same process to Court of Appeal and High Court appointments.

[20] Malleson in Malleson & Russell (ed) ibid at 46-49.

[21] Constitutional Reform Act 2005 s 63(1).

[22] Paterson in Malleson & Russell (ed) ibid at 14-15.

[23] Street ibid *passim* and at 95.

[24] http://www.judicialappointments.gov.uk/about-jac/9.htm

[25] See http://www.dca.gov.uk/consult/jacommission/#f3.

[26] The statutory qualification for appointments are, for instance, set out in: Constitutional Reform Act 2005 s 25 (as from 01 October 2009); Supreme Court Act 1981 s 10; Courts Act 1971 s 16; County Courts Act 1984 s 9.

[27] http://www.judicialappointments.gov.uk/application-process/112.htm

[28] Solum 'Judicial Selection: Ideology vs Character' *Cardozo Law Review* (26.2) 659 at 674 (http://www.cardozolawreview.com/content/26-2/SOLUM.WEBSITE.pdf).

[29] Mallleson in Malleson & Russell (ed) ibid at 8-9.

[30] *Bolton v The Law Society* [1994] 1 WLR 512 at 518-519.

[31] http://www.judicialappointments.gov.uk/static/documents/Good_Character_Guidance_01_June_09.pdf.

[32] Solum, ibid.

[33] Judge *Diversity Conference Speech* (London, March 2009) (http://www.judiciary.gov.uk/docs/speeches/lcj-speech-diversity-conf.pdf) at 2.

[34] Malleson in Malleson & Russell (ed) ibid at 42; cf, Department of Constitutional Affairs (2003) at Foreword.

[35] Malleson ibid.

Judicial appointments in South Africa

By Justice DM Davis, judge of the Western Cape High Court and Judge President of the Competition Appeal Court

'Society is . . . entitled to demand from judges fidelity to those qualities in the judicial temper which legitimize the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous amongst them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate, but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility, and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other which comes from the consciousness of our own imperfection.' [1] Ismail Mahomed: Chief Justice of South Africa.

Under apartheid, judges were appointed by the State President.[2] It appears however that the State President acted generally as a rubber stamp for the Minister of Justice who, in effect, made judicial appointments.[3] In the latter years of apartheid, most of the appointments were made on the recommendation of the Chief Justice or the Judge President of the relevant division of the Supreme Court.[4] Judges were generally drawn from the ranks of senior counsel and were invariably white and male. In 1990 when the process of the political change commenced in South Africa the judiciary was exclusively white and with one exception, male. South Africa's first black judge, Ismail Mahomed, was appointed in 1991.[5]

Unquestionably, political factors played a significant role in these appointments. Sydney Kentridge wrote in 1982 that 'over the past thirty years political factors have been placed above merit – not only in appointments to the Bench but in promotions to the Appeal Court … And it must also be said that over the past thirty years … a number of judicial promotions have been made which are explicable solely on the ground of the political views and connections of the appointees and on no other conceivable ground.'[6]

Wesson and Du Plessis conclude their analysis of the apartheid judiciary as follows: 'At the conclusion of apartheid, the South African judiciary was therefore almost exclusively white and male; its composition had been influenced, to some extent at least, by political factors; it had been schooled in a tradition of parliamentary sovereignty with a concomitant emphasis upon literalism in the interpretation of statutes; and it had generally supported the status quo in an unjust system.'[7]

The democratic response

Understandably therefore, a new procedure was required to overcome the difficulties inherent in the process of appointment that had been used during the apartheid period. Briefly stated, the Constitution set out the following procedures. The President appoints the Chief Justice and Deputy Chief Justice after consulting the Judicial Service Commission (JSC) and the leaders of the political parties in the National Assembly. The same procedure applies in respect of the President and Deputy President of the Supreme Court of Appeal, with the difference that the leaders of the parties represented in the National Assembly need not be so consulted. The remaining judges of the Constitutional Court are appointed by the President after consulting the Chief Justice and the leaders of the parties represented in the National Assembly. But in these cases the JSC prepares a list of nominees consisting of three names more than the number of appointments to be made, from which list the President may make the appointments. The judges of all other courts are appointed by the President, on the advice of the JSC.[8]

So much for the procedural requirements. Section 174 of the Constitution deals expressly with the criteria for appointment. A candidate for judicial office must be 'appropriately qualified' and 'a fit and proper person.' Section 174(2) goes on to provide that when judges are appointed 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered.'

The role of the JSC

The JSC is the body which must provide substance to these skeletal criteria. It is necessary therefore to examine the nature of the JSC. Its creation was a product of political compromise during the constitutional negotiations. The African National Congress favoured the establishment of a politically dominated body while, unsurprisingly, the judges and legal profession favoured a body in which the legal community would be in the majority.[9] The compromise dictated the creation of a large body: twenty-three members of the Commission are drawn from the judiciary, the two branches of the legal profession, the national and regional legislatures, the executive, civil society and academia. The chair is taken by the Chief Justice. Of the twenty-three members, fifteen represent political interests, including the Minister of Justice, the National Assembly (three members from minority parties), the National Council of Provinces and presidential nominees. When matters relate to specific High Court judges, the Premier of the Province together with the Judge President of the Province also sit on the Commission.

Viewed accordingly, the system in which the JSC plays a central role represented a break from the pre-1994 system of unchecked executive power but also a rejection of a partisan system followed in the United States where a President is possessed of a wide discretion to choose federal judges although he is constrained by 'the advice and consent of the Senate.'[10]

In a comprehensive and important analysis of judicial selection, Susannah Cowen has written that after fifteen years of democracy, there is still insufficient public awareness about the qualities that those responsible for judicial selection apply when recommending the appointment of judges. While the JSC conducts its interviews in public, there is little transparency exhibited in the criteria used for selection. Cowen explains that tecently, a request was made to the JSC by the Open Democracy Advice Centre on behalf of the Democratic Rights and Governance Unit for documents reflecting the criteria used when deliberating on judicial selection. The JSC on 3 April 2009 responded thus:

'There are a wide variety of factors that are taken into account by the Screening Committee before deciding to include or exclude a particular nominee. These include but are not limited to the recommendation of the Judge President, the support of the candidate's professional body, the need to fulfil the constitutional mandate of the Judicial Service Commission (JSC) so as to ensure transformation of the Bench to reflect the ethnic and gender composition of the population, the particular judicial needs of the division concerned, the candidate's age and range of expertise, including whether he or a she has served as an Acting Judge in the division or at all, and the relative strength and merits of the various candidates in relation to one another.'[11]

It is difficult to divine the approach adopted by the JSC in recommending candidates for judicial appointment. Rarely are questions framed so as to afford a candidate an opportunity to explain his or her approach to adjudication, conception of the important constitutional values and the candidates' general judicial philosophy.[12] To what extent these issues would play a major role in the process of selection is itself doubtful, given that the JSC in one recent instance took less than an hour to select its group of seven nominees from a list of more than twenty.

The extent to which a body such as the JSC can probe a candidate's theory of adjudication, or appreciation of the role of a judge in a constitutional democracy and approach to the transformation of the South African legal system is of course a subject of comparative experience. For example, the standard response in to Senate Judiciary Committee hearings in the United States is to refrain from answering any controversial question on the basis that it may emerge in a case to be decided by the Court, on which the candidate could then be a member.

In discussing the tepid hearings which culminated in the elevation of Elena Kagan to the Supreme Court, Ronald Dworkin has written: 'Nominees should not be required to rank other justices or past decisions and they should not be required to discuss their intentions about highly controversial constitutional issues like abortion or the rights of accused terrorists. They should certainly be pressed to discuss constitutional theory and political principles at a more abstract level and that interrogation should be much deeper than the entirely superficial level at which questions were raised in the Kagan hearings.'[13]

Certainly in the US hearings but also at the JSC interviews Dworkin's idea that a principled intellectual engagement rarely, if ever, occurs and the public are left almost none the wiser about the broad judicial philosophy of those who are elevated to a very powerful office.

Representivity

Arguably the most controversial area regarding the approach to judicial appointments in South Africa turns on an interpretation of section 174(2) of the Constitution, namely '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa.' There should be no doubt, given an egregious history of 300 years of racism and sexism, that this is a noble and critical component for judicial appointment. A judiciary cannot lift the Constitution into the realm of widespread legitimacy unless it can claim the same legitimacy for itself. The majestic assertion in the Constitution against discrimination on the grounds of race in particular as well as gender and sexual orientation justify the implementation of the purpose behind section 174(2) of the Constitution.[14]

However, while JSC has done well in ensuring the creation of a non-racial judiciary, the same cannot be said of gender. Similarly the commitment to anti- discrimination on the grounds of sexual orientation is debatable. For example, Judge Kathy Satchwell, an outstanding candidate for the Constitutional Court , was later questioned by an attorney who contended that God-fearing South Africans would not be able to identify with her because of her sexual orientation.[15] The number of women judges who have been appointed since democracy dawned in South Africa is also disappointing, particularly in the light of the deeply held sexist attitudes that still prevail in the profession. It may be that we have moved considerably over the past century but the statement in 1914 by Judge Reginald Davis (mercifully not a relative) is a reminder :

'We cannot but think the common law wise in excluding women from the profession of law … the law of nature destines and qualifies the female sex for the bearing and nurture of children and our race and for the custody of the world … all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature and when

voluntary treason against it. The cruel chances of life sometime baffle both sexes and may leave women free from peculiar duties of their sex … but it is public policy to provide for the sex not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours.' [16]

That a racist and sexist history impels redress and a careful examination of demographic imbalances is clear; the meaning of representivity is another, more problematic issue.

Malleson notes the problem of representivity in this context:

'The need for judges to be independent and impartial means that we should not talk about a representative judiciary in the same way as we might the legislature and executive. Judges are not there to represent the interests of any particular group but to ensure that the law is applied fairly and equally to all.'[17]

Perhaps the real problem with this issue lies with the interpretation of section 174(2) of the Constitution. From the content of interviews and some appointments or refusal to appoint, the JSC may from time to time commence its enquiry by an examination of the racial and gender composition of the particular Court and the importance of the appointment insofar as the racial composition is concerned. In short, representivity then becomes the key determinant for an appointment and the balance of considerations, as outlined in this paper, being the implementation of the skeletal principles contained in section 174(1) of the Constitution, take a back seat.

Cowen highlights the problem clearly and by implication the way forward when she writes:

'While it may be that the section (section 174(2)) has been unhelpfully drafted, it is difficult to see both as a matter of interpretation and given our colonial and apartheid history why we should not strive for a Bench that is composed primarily of judges of African descent. That being said, we must strongly resist any interpretation that frustrates non- racialism and perpetuates apartheid's offensive racial practices.'[18]

Here lies the core difficulty: the judiciary should be broadly representative of the demography of South Africa, but, if at the same time, questions of race and gender representivity overwhelm the selection process, the possibility of a non-racial Bench in which the humanity of the judge rather than the race and gender thereof is the critical consideration becomes all the more difficult to attain. Of course this debate takes place within a far broader debate about how best to achieve a non-racial society. In applied form the debate has moved to questions of the use of race as a means to achieve equality in a society dogged by 300 years of racism. In my view a greater exploration of the concept of merit as a concept that takes account of the context in which , in this case, judges operate, may be a potential route to journey, however fraught that journey will be, given our history .[19]

Given the lack of transparency employed by the JSC, it is difficult to evaluate precisely, save for anecdotal evidence as suggested above, how the body balances the imperatives of section 174(1) and (2). The preferable approach, in my view, is to find candidates who are the very best in terms of criteria of merit which are established by the JSC. Merit, of course, is a contested concept and it would be wrong, as is so prevalent in the discourse of the legal community, to conflate the concept of merit with the standard of a middle-aged white senior counsel. To the contrary, life experience of the diversity of South Africa, empathy with the history of South Africa, a deep grasp of the constitutional values enshrined in the text and a true commitment to the transformation of South African society,[20] that is which affirms and promotes substantively the constitutional values of dignity, freedom and equality, should be yardsticks in the development of a standard which justifiably constitutes merit.

Assume however that this application of merit yields a ranking of candidates, the application of which may not ensure the requisite representivity. At this stage, the provisions of section 174(2) would apply to ensure that candidates who may not have been the first or second choice on the ranking by the JSC but that notwithstanding, comply with the test for merit and hence are appropriately qualified, are then appointed above the higher-ranked candidates in order that the requirement of the Constitution in terms of section 174(2) is met.

Conclusion

In general, the Judicial Service Commission has contributed significantly to the transformation of the South African Bench and to a process which is unquestionably superior to what preceded it. The fact that we can now debate these questions and the progress made toward the attainment of a more representative judiciary is evidence thereof. However, there are serious problems that merit attention, particularly as the judiciary's legitimacy is under increasing scrutiny as more politically charges battles are fought in the courts.[21]

The JSC's inability or unwillingness to disclose the criteria in terms of which it makes appointments has been unfortunate. This has been compounded in a few celebrated cases where some of the most distinguished lawyers produced in recent times in this country, all with deep commitment to the transformation of South African society, have failed to be appointed, even to the High Court. These cases certainly have, in my view, diminished the credibility of the appointment process. To recapitulate, the 30-40 minutes in which the JSC took last year to deliberate over which seven candidates from a list of over twenty judges and counsel should be placed on a list to be presented to President Zuma, did little to enhance the reputation of the existence of a deliberative process of appointment. Further, while the general composition of the JSC will presumably remain, it may be advisable to have fewer than twenty-three to twenty-five members. A reduced membership, even reflective of the present balance between politicians and the legal profession could assist to promote a more serious debate when judges are interviewed for selection.

Endnotes

[1] 'The independence of the judiciary' 1998 (115) *SALJ* 658 at 666

[2] See section 10 of The Supreme Court Act 59 of 1959.

[3] Murray Wesson and Max du Plessis 'The Transformation of The Judiciary: 15 year policy review', report commissioned by the South African Presidency at 3.

[4] See I Mohamed et al 'The Legal System in South Africa 1960 – 1994' 1998 (115) *SALJ* 22 at 32.

[5] I leave aside a few judges who were appointed to the TBVC 'countries'.

[6] 'Telling the truth about law' 1982 (99) *SALJ* 648 at 652.

[7] Wesson and Du Plessis at 4.

[8] See sections 174, 178 of the Constitution of the Republic of South Africa Act 108 of 1996.

[9] See Kate Malleson 'Assessing the performance of the Judicial Services Commission' (1999) 116 *SALJ* 36 at 38.

[10] Susannah Cowen 'Judicial Selection in South Africa' 2010 (soon to be published by Democratic Governance and Rights Unit, UCT) at 14

[11] Susannah Cowen above n 10 at 8. I have drawn heavily on this superb paper as I am in complete agreement with much of the argument developed therein. Cowen correctly notes that some of what the JSC looks for can be distilled from the contents of the questionnaire the candidate for judicial office must complete when standing for office. Cowen refers to a decision taken by the JSC in 1998 under the chair of Mahomed CJ to publish for the public record the substance of the discussion within the JSC in which it formulated criteria and guidelines for appointment. A report appears to have been prepared by Professor John Milton, then the law teacher's representative on the JSC, but it does not appear to have been published. Cowen suspects

that it might have been lost. In the Department of Justice's report ending 30 June 1999, mention is made of the JSC, in particular to the need for candidates to display integrity, energy, motivation, be both competent and experienced, both technically and in respect of the capacity and experience in giving content to the values of the Constitution, have appropriate potential and the ability to project an appropriate symbolic message to the community at large. See Cowen at n 20 on p 8. I have now had occasion to access a document undated but which would appear to reflect discussions of the JSC probably around 1998 in which criteria were debated by the JSC, led by Chief Justice Mahomed. Significantly for the purposes of this paper, the evaluation of candidates as proposed by the Chief Justice and accepted by the JSC included the potential of the candidate - that is the JSC should not be afraid to take a chance with a less experienced but talented black lawyer, symbolism - that is the concern rooted in legitimacy of the judiciary and intellectual transformation which clearly transcended questions of race. The question of experience was also debated and two concepts of experience were accepted: experience in the technical aspects of the law and experience in the values or needs of the community.

[12] See for example, Eusebius McKaiser *Business Day* 2 October 2009 in which the author takes the JSC to task for its inability to probe any of these key questions when the JSC last year conducted interviews for four vacancies on the Constitutional Court.

[13] *New York Review of Books* 19 August 2010.

[14] See Cowen supra at 58 for discussion of this point.

[15] *Cape Times* 28 August 2009.

[16] RPB Davis 'Women as Advocates and Attorneys' 1914(31) *SALJ* 383 at 384.

[17] Malleson as cited by Cowen at 50.

[18] Cowen at 57. What constitutes African descent may itself not be an easy issue to determine.

[19] For a comprehensive debate about these issues and consequent recommendations from which I have drawn, see Cowen at 58ff.

[20] Much of this could be tested by the record of the applicant – it is so easy to claim adherence to values when there is no difficulty or sacrifice required. The JSC questionnaire indicates that this record is important but, in practice there has been inconsistency in the treatment of candidates. Significantly in the document of the JSC of 1998 (see fn 8) issues of symbolism, experience not only of the technical aspects of law but of experience in the values and needs of the community and potential may be placed in the 'merit pot ' as I have suggested. Certainly these guidelines do not indicate that s 174(2) is the first enquiry, ie how many vacancies must initially be allocated solely by reference to demography. On 15 September 2010, the JSC issued the following statement regarding criteria to be appointed:

'The following criteria are used in the interview of candidates and in the evaluation exercise during the deliberations by the members of the Commission.

Criteria stated in the Constitution

1. Is the particular applicant an appropriately qualified person?
2. Is he or she a fit and proper person, and
3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

Supplementary Criteria

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
   (a) Technically competent
   (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
   (a) Technically experienced
   (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?'

This set of criteria appears to follow the 1998 JSC minute and supports the reading of sections 174(1) and (2) of the Constitution as advocated in this paper. In brief, these criteria all point to a determination of a fit and proper person for judicial appointment save, perhaps, for the criterion of symbolism which may be located in the representivity issues of s 174(2) even though the symbolism of appointment of candidates who meet the reconfigured fit and proper test is to not to be discounted. What is of interest is how the JSC applies these criteria.

[21] The turn from political warfare to lawfare has been marked in South Africa over the past decade and there is no sign of any diminution of the intensity. See for an exposition Dennis Davis and Michelle le Roux *Precedent and Possibility: the use and abuse of law in South Africa* (2008).

Judicial appointments

By Justice Yvonne Mokgoro, former judge of the Constitutional Court

1 Introduction

It may seem far-fetched, but the question of the appointment of judges has its relevance in the value of democracy in society, the importance of the idea of separation of powers, checks and balances in a democracy, and an independent judiciary to sustain that separation of powers. The role of the judiciary in strengthening democracy and the appointment of independent-minded judges to serve is an equally important aspect of democracy. In diverse societies, the diversity of the Bench is a significant imperative for the effective dispensation of justice. All of the above form a critical context of any discussion of the appointment of judges in a diverse society.

In South Africa, there is a particular twist to that context arising from its apartheid history. That leads to the question: what would it take to create a competent and effective judiciary for South Africa and what are the constitutional imperatives to achieve that goal. A further question is what role does the appointment of judges play in achieving that goal.

I will resist the temptation to take the discussion too far back, lest it seems like undue engagement in equally undue justification. I will therefore confine the discussion of the appointment of judges in South Africa only in its historical context.

Judicial appointments in South Africa, regarded by some as a major tool in the transformation of the judiciary in South Africa, often engenders not only much interest, but an equal amount of controversy generally within South African society, particularly among judges themselves. Every session of the Judicial Service Commission (JSC)[1] which has on its agenda judicial appointments is often closely watched. To appreciate fully the importance of this process and the interest it generates, it is necessary to view the process of the appointment of judges as integral to the transformation of the judiciary. That must in turn be viewed in its historical context and the transformation of South African society generally, as envisaged in the Constitution.