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.

2 The composition of the Bench in South Africa: a historical perspective

Prior to 1994, judges were appointed by the State President, under section 10 of the Supreme Court Act,[2] although a widely held view was that de facto, the Minister of Justice made the appointments, which would merely be endorsed by the President.[3] As the process unfolded in later years, appointments came to be recommended by the Chief Justice, or the relevant Judge President of the division for which the appointment was to be made.[4] Knowledge of the process, identifying the potential candidates, including their selection and appointment belonged only to the inner circle.[5] As Sydney Kentridge observed,[6] political factors were relevant in determining judicial appointments and promotions. Based on the disenfranchisement of black people and their exclusion from the political process, black lawyers had no relevance in consideration for judicial appointments. Indeed, judicial appointments were invariably white and male. In 1991, at the dawn of constitutional democracy, South Africa appointed the first black person to the Bench. And the race and gender profile of the judiciary, as at April 27, 1994, the day of South Africa's first democratic election, reflected the following race and gender balance: Of the 165 judges, 160 were white men; three were black men, and two were white women. At that stage, there was no black woman judge in South Africa.

A prominent question at the advent of constitutional democracy was whether that was a judiciary which could dispense justice competently, efficiently and legitimately in the egalitarian society envisioned in the Constitution; a society based on the constitutional values of equality, freedom and human dignity and is faced with the most difficult task of transforming from:

'… a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief, or sex…'[7]

People in South Africa were not passive 'victims' of apartheid oppression and repression. They resisted it with intensity, many putting their lives and freedoms on the line. The judiciary was characterised by the majority of people as part of apartheid repression. Matters came to a head in the 1980's with the intensification of the struggle for democracy generally, and in particular, the resistance against the State's reactionary introduction of the state of emergency[8] and the accompanying wide-scale detentions without trial,[9]the regrettable general response of the judiciary and their enforcement of the repressive emergency regulations. In the context of the Westminster-type system of parliamentary sovereignty and the supremacy legislation with the absence of judicial review, the argument was always that the enforcement of repressive legislation was beyond the control of the judges. Obviously there have been exceptions, with some maverick judges outwitting the system with their contextual interpretation of the applicable laws and the regulations.[10] The lack of legitimacy and public confidence, suffered by the judiciary had at this stage become a crisis.

At the inception of constitutional democracy, a new legislature and executive were put in place, resulting from South Africa's first democratic elections. For obvious reasons, the judiciary could clearly not be replaced and therefore it survived. But in the reality of the new dispensation and the creation of a new egalitarian society envisioned in the Constitution, its transformation was a constitutional imperative.[11]

3 Judicial appointments and judicial transformation

The appointment of judges and the process it entails can therefore not be viewed outside of judicial transformation which is an integral part of the transformation of society in South Africa.[12] Needless to say, the idea of judicial transformation has engendered much debate, not only within the judiciary, but also within society at large. As Moerane, in his capacity as member of the JSC for a number of years [13] states, judicial transformation is differently characterised by different people as merely the appointment of judges where the demographics of South African society, in particular in relation to race and gender, are taken into account; ensuring that judicial officers are people who espouse to and promote the constitutional values and fundamental rights; fostering a culture of accountability among judges so that they realise that in their role and functions, they account to society as a whole, are part of society subject to their watchful eye, where it is expected that they too operate in tandem with other state actors to realise the constitutional vision; ensuring that the courts are accessible to all users and the process of rearranging the judicial structures and processes. Transformation of the judiciary, he opines, embraces all of these. I agree. Judicial reform has to be aligned with the constitutional vision for South Africa in both substance and form.

Thus, judicial transformation in South Africa must include a new judicial appointments procedure which is open and independent of external influence; changing the demographics of the Bench, in particular with regards to race and gender as critical aspects of shaping the form of a judiciary which serves an open and democratic society; appreciating that judicial competence and how judges manage their judicial power and independence are major aspects of enhancing access to justice and judicial accountability.[14] Enforcing and embracing the principles and values of a fundamentally new legal order is also a critical attitudinal change that will have substantive implications for the judicial interpretation of the law and the creation of a new constitutional jurisprudence.[15] These reforms are all no doubt necessary considerations for judicial transformation. Courts must therefore function efficiently so that judges can dispense justice to all, most competently. Fundamental to this principle is that when appointing judges consideration must be given to the need for the judiciary to reflect *broadly* the racial and gender composition of South Africa.[16]

4 Establishment of the Judicial Service Commission

In an open constitutional democracy based on the values of equality, freedom and human dignity, with a bill of fundamental human rights as the cornerstone clearly the judicial appointments procedure which operated throughout the apartheid era and the judiciary composed as it was as at 27 April, 1994 was wholly inadequate. The first step was to establish the JSC as an independent mechanism which not only makes recommendations regarding judicial appointments but would have the broad constitutional mandate of judicial transformation, which in my view includes the reconfiguration of the Bench in a manner that would

restore judicial independence and instil public trust and confidence in the judiciary and legitimacy for the justice system. Central to this role and function would be to realign the race and gender balance within the judiciary in a manner that would maximise the competence of the Bench and efficiency of the courts for optimum efficacy. Thus, how justice is dispensed and citizens experience the justice system is integral to the legitimacy of the judiciary. The JSC was established to fulfil this important role and function.[17]

5 Judicial appointments: procedural aspects

Relative to the judicial appointment procedure prior to 1994, the establishment of the JSC with its constitutionally created role and function indeed constituted the most radical break from the pre-1994 procedure for judicial appointments.[18] Headed by the Chief Justice, its independence, despite a heavier presence of members of the legislature and executive in its composition, and its procedures have important spin-offs for judicial independence.[19] The JSC also determines its own procedure, although the Constitution provides that its decisions be decided by the majority.[20]

Unlike the position before 1994, the procedures of the JSC allow for transparency in that nominations are invited openly from the general public whenever a vacancy arises. When candidates are interviewed for purposes of making recommendations for appointment by the President, they are interviewed publicly and in the presence of the media. This allows for greater public participation, debate and scrutiny. The JSC's deliberations are however insulated from the public glare in that they occur behind closed doors, an aspect of the procedure which has not gone down well with the media, in particular, lamenting that the reasons for the JSC's recommendations are often not clear. In general terms however, the open and independent aspects of the JSC's processes have been hailed as successful.

Regarding the role of the JSC in the actual appointment of judges to the Bench, when the President as head of the national executive appoints the Chief Justice and the Deputy Chief Justice, the JSC must be consulted, as well as the leaders of opposition parties in the National Assembly.[21]The same applies when the President and Deputy President of the Supreme Court of Appeal are appointed, except that in their case, the need to consult with the leaders of the opposition is not a constitutional imperative.[22] Other judges of the Constitutional Court are appointed by the President only after consulting the Chief Justice and the leaders of the opposition in the National Assembly.[23] The Chief Justice would have sat as head of the JSC and gets a second bite at the cherry in these appointments, when consulted in her or his capacity as head of the judiciary. Here, the JSC must provide a list of nominees with three additional names than the number of appointments to be made,[24] enhancing the President's opportunity for choice, should any of the nominees on the list of the JSC be found by the President to be unacceptable.[25]

The President, however, in this case, is required to advice the JSC accordingly with reasons for her or his finding, and whether any appointment still needs to be made.[26] In such a case, the JSC must supplement its list with further nominees from which the remaining appointments will be made.[27]

6 Appointment of judges: the considerations

The Constitution which envisions, rather than confirms the egalitarian society it creates provides in section 174(2) that it is peremptory, when judicial officers are appointed, to consider the need for the judiciary to reflect broadly the racial and gender composition of South Africa. It is in that context that consideration is given to the appointment of people who are appropriately qualified and are fit and proper to be appointed as judicial officers.[28]

The JSC is therefore an important institution, performing an equally important task. Thus, how the JSC applies these constitutional criteria for judicial appointment in order to achieve its constitutionally authorised objectives engenders much public interest, as it should. Among lawyers it often generates much debate.

The criteria of 'appropriately qualified' and 'fit and proper person'[29] are sufficiently broad for the JSC to determine what in the case of a particular candidate these criteria boil down to.

Assuming that the JSC has a broad strategic plan, as it should, in terms of which the transformation of the Bench is pursued, each judicial appointment session should aim to advance that strategic plan. The promotion of a diverse judiciary must be an important aspect of that strategy. Thus, each and every candidate who is up for consideration has to be appropriately qualified and be a fit and proper person for appointment. These considerations are all constitutional imperatives.[30] Thus in the pursuit of the creation of a diverse Bench which reflects broadly the race and gender profile of South Africa, the JSC may not recommend for appointment a candidate who is not considered to be appropriately qualified and is not a fit and proper person. Doing so would frustrate the objectives of judicial transformation.

Considering that the promotion of diversity on the Bench in South Africa is not an end in itself, but serves to enrich the jurisprudence of the courts, enhance the quality of judicial decisions and restore the legitimacy of the judiciary and public trust in the courts, if the JSC does not apply the criteria in a manner that would advance the constitutional goals of judicial transformation, it would be failing in its duty. Considering the particular paucity of women on the Bench, in South Africa, in my view, it would be reasonable and proper for the JSC to recommend for appointment a woman who is 'less qualified and experienced' than a 'highly qualified' man, if the appointment would advance the JSC's strategic transformation objectives at a particular point in time.

Needless to say, in view of the relativity of the concepts of 'qualified' and 'experienced' and 'less qualified' and 'less experienced', these considerations should not be understood to mean 'not qualified' and 'not experienced'. The approach fits in well with the method already adopted by the JSC that, although it places particular focus on diversity in judicial appointments, it is also a requirement that candidates who are appointed, show commitment to the values of the Constitution, and have the necessary skills to be appointed to judicial office. Further, in the context of South Africa, it may not be constitutionally unreasonable for the JSC to take a most drastic corrective action, devoting a particular session to the consideration of women only for judicial appointment, advancing the currently much needed gender balance in the judiciary and doing so having invited nominations for women only. And I say this, mindful of the need for caution and sensitivity in handling this sensitive area of judicial transformation. However, as Geoff Budlender warns:[31]

'We do need to take great care that the appointment process does not generate either the reality or the perception that white

males, however well qualified, need not apply…If that happens, the judiciary will be very seriously weakened at a high cost to us all.'

Indeed the JSC has made significant progress in remedying the skewed race and gender balance of the judiciary in South Africa, relative to the pre-1994 situation. According to reports[32] the composition of the Bench, reflects the following picture: of the 205 judges countrywide, 112 are black and 93 white. Of those only 42 are women, where 16 of those are African, four are coloured, eight are Indian and 14 are white. The first woman Judge President has now been recently also been appointed.

However, the position regarding the improved presence of women on the Bench is not sufficiently impressive. That might be the reflection of a problem that goes much deeper than just the fact that women do not readily avail themselves for judicial appointment. Significantly, and as has been suggested,[33] for valid reasons, fewer black people, women in particular, would choose to make a career in the practice of law which has traditionally been considered a logical career path to the Bench. Most proceed to commerce and industry, with more women entering legal academia. Recognising this particular challenge, for purposes of widening the pool from which the judiciary could draw, the Interim Constitution introduced the idea that those with at least ten years of practical experience would qualify for judicial appointment. Recognition was therefore given to the fact that although legal practice at the Bar may be helpful for appointment on the Bench, it is not a necessity.

Thus, the judiciary could draw from the attorneys' profession, civil society, the magistracy and from the academia, in addition to the Bench drawing only from the Bar which was the practice pre-1994. This has indeed brought a good level of diversity to the Bench, not only with regard to race and gender, but also so far as it concerns legal experience, attitude and outlook- in particular regarding the social context of the law.

Former Chief Justice Arthur Chaskalson,[34] commenting on the slowing down of the diversification pace of the Bench, had warned that:

'[W]e have already drawn deeply into the pool of existing candidates from these sections of the profession; we need to increase the size of the pool. It takes time for people to have the necessary experience and be in a position where they can accept a place on the Bench… I believe there is a need for positive action to ensure that the transformation keeps underway'.

It is in the context of that positive action that judicial education and training becomes necessary.

7 Judicial education and training: positive action

In his welcoming address at the first orientation course for new judges in 1997,[35] Mahomed CJ said:

'When I came to the Bar more than forty years ago, the idea that judges anywhere should be exposed to any structured programme of judicial orientation and education would have been heretical. The articulated and unarticulated premise on which the major legal systems of the world were based was that of a person was a fit and proper person to be appointed as a judge, it followed that he or she would absorb what was necessary from the evidence and the arguments presented in each case, and that there was no justification for exposing him or her to any programme of judicial education

That fundamental premise has taken a relentless toll over the years. The result has been a total reversal of the assumption.' [36]

It is now largely common cause among judges themselves that the positive action referred to by Chaskalson CJ above, will include continuous education and training for judges, so as to sharpen the competence and efficiency of the Bench. The need for sensitivity training, judicial accountability, how to manage judicial power and the judicial function, including the efficient and expeditious delivery of judgments, how to manage the nuanced aspects of the judicial function, including the judicial temperament, are critical as part of our society's reality. Importantly, the inculcation of fierce individual independence and the importance of legal competence, proper judicial insights and effective delivery of access to justice cannot be overemphasised.[37]

In all respects we have come some way, but still we have a long way to go. As matters stand, section 180 of the Constitution does envisage education and training programmes to be designed for judges and there are significant efforts in that regard. Under the auspices of the judicial education sub-committee of the JSC, judges arrange for themselves and aspirant judges seminars and other interaction on judicial training.[38]

In 2007, former Chief Justice Pius Langa initiated a nine-month training programme for aspirant women judges, with the objective of dealing with the serious shortage of women on the Bench, where they will be encouraged to make themselves available for consideration when vacancies in the High Court arise.[39] The programme is designed to expose women to judicial work, where the participants from the ranks of the magistracy and private practice are invited to apply if they have at least 10 years of practical experience constituted by a three-month theoretical component, and a six month practice in the High Court.

On completion of the programme, the women become part of the pool from which the High Courts will draw acting judges. Indeed Judges Presidents need to be encouraged to utilise the pool in that regard, providing women with the necessary exposure and therefore better chances of judicial appointment.

The constitutional imperatives[40] of judicial independence and accountability in the context of the separation of powers have always been a live issue in the debates on judicial transformation programmes. Whereas the need for judicial education generally no longer questionable, how it should proceed and the role of the executive particularly is still a subject of much debate. It is in that regard that the new South African Judicial Education Institute established by the South African Judicial Education Institute Act 18 of 2008 is a most welcome development.

Under the specific leadership of the Deputy Chief Justice, the Institute takes charge of the training of newly appointed judges and the programmes for continued judicial training systems of the Institute will therefore be the responsibility of the judiciary itself. The administrative (and financial) management, however, will be that of the Department of Justice and Constitutional Development. There is an argument that while the role of the Institute goes beyond merely enhancing the legal competence of judges and also deals with attitudinal changes and sensitivity training and other social context issues, a certain level of external government management, including that

of an administrative nature, is necessary.[41]

The questions that arise however are: what is the impact on judicial independence of executive involvement in the administrative and financial management of the Institute; how will that affect the independence of the judiciary as a whole; what needs to be done to separate judicial training from executive control; to what extent can the Institute proceed with its programmes, considering the urgency of the judicial transformation project, despite the current administrative and financial shortcomings; to what extent will the proposed amendment of section 165 of the Constitution, stating that 'the Chief Justice is the head of the judicial authority and exercises the final responsibility over the judicial functions of the courts', impact on the independent financial management of the judiciary as a whole and that of the Institute's training agenda and would that amendment finally be the answer to the judiciary's financial independence challenges, including budgetary issues.

Conclusion

The transformation of the judiciary is a constitutional imperative. It is necessary, and it is inevitable. The race and gender composition of the Bench is not the only factor of judicial transformation, and is not an end in itself, but has an important relevance for society as a whole and for the competence and effectiveness of the judiciary.

Relative to the race and gender composition of the Bench as at 27 April 1994, the latest statistical picture does show that despite the many controversies and debates within the judiciary itself and outside of it, which arose from our transformation efforts, we certainly did something right. Leaving it to the passage of time would not have achieved that result.

So far as the presence of women on the Bench is concerned, we have started to break important ground with the appointment of a woman as Judge President. However, frankly, and to put it plainly, the picture remains wholly unsatisfactory despite the passage of time.

In a society such as ours, where patriarchy is so deeply entrenched, affecting adversely the everyday lives of so many women, including women in the law, the strategic value of women's participation on the Bench and positions of power and authority should not be underestimated. Their development management style, the influence of the unique perspectives they bring to the adjudicative task and even the mere symbolism of their presence there could bring enormous returns for the transformation process itself and respect for women in society at large. The need for women both in the judiciary as a whole and in leadership positions in particular cannot be exaggerated. Although, we have come a long way, we must agree that we have just scratched the surface. We must step up our efforts. Some things must change.

Mindful of the need to treat the delicate task of judicial transformation with the necessary sensitivity and care, the position of women on the Bench has become rather desperate. That calls for our measures and approaches to become much more creative.[42]

Finally, efforts by the judiciary in isolation might no longer be sufficient. We must trace the root causes of the paucity of women on the Bench, a matter which could be placed on the agenda of the Institute early on. Women's development concerns in the legal profession might require to be addressed equally creatively, and coordinated with other efforts to confront the challenges regarding women on the Bench. Further coordination with the JSC, the Magistrates Commission and the legal academy might yield more impressive outcomes, whether in the short, medium or long term.

Endnotes

[1] The JSC, headed by the Chief Justice, is a creature of the new constitutional dispensation in South Africa. It is constituted by representatives of the judiciary, executive, legislature, the legal profession law academia and civil society. Its role and functions are assigned by section 178 of the Constitution. One of its main functions is the recommendation of candidates for appointment to the superior courts through an open and generally public process.

[2] Act 59 of 1959.

3 See Mpati JA (as he then was) in 'Transformation in the Judiciary – A Constitutional Imperative' Inaugural Lecture, University of the Free State, 6 October 2004, available at www.law.wits.ac.za/sca/speeches/mpati:pdf

[4] See Mahomed CJ, Van Heerden J, Chaskalson J, Langa J and MM Corbett 'The Legal System in South Africa, 1960-1994' (1998) 115 *SALJ* 22, 32.

[5] 'Transformation of the Judiciary – Fifteen Year Policy Review SA Presidency' Murray Wesson and Max Du Plessis (Paper commissioned by the Presidency as input into the 15-year review process) 2008.

[6] See his Special Series Lectures 'Telling the Truth about Law' (1982) *SALJ* 648, 652.

[7] Part of the Postscript to the Interim Constitution of 1993.

[8] For example, the emergency regulations made in terms of s 3 of the Public Safety Act 3 of 1953 as promulgated in Proc R109 of 12 June 1986.

[9] In terms of sections 28 and 29 of the Internal Security Act 74 of 1982.

[10] See for example, *Visagie v State President* 1989 (3) SA 859 (A).

[11] See generally, Chapter 8 of the Constitution, titled 'Courts and Administration of Justice.'

[12] See the Postscript of the Interim Constitution and the discussion under paragraph 2 above.

[13] MTK Moerane SC 'The Meaning of Transformation of the Judiciary in the New South African Context' (2003) 120 *SALJ* at 708.

[14] Above n 5.

[15] See Geoff Budlender 'Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa' (2005) 4 *SALJ* 715 at 716.

[16] See Section 174(2) of the Constitution.

[17] The JSC made its first appearance under the auspices of the Interim Constitution led by the Chief Justice, its composition is determined by section 178 of the Constitution

[18] See Section 178 of the Constitution for details of its composition. See also n 5 above at 6.

[19] Section 178(1)(h), (i) and (j) of the Constitution.

[20] Section 178(6) of the Constitution.

[21] Section 174(3) of the Constitution.

[22] Ibid.

[23] Section 174(4) of the Constitution.

[24] Section 174(4)(a) of the Constitution.

[25] Section 174(4)(b) of the Constitution.

[26] Ibid.

[27] Section 174(4)(c) of the Constitution.

[28] Section 174(1) of the Constitution.

[29] Ibid.

[30] There would therefore be no point in attempting to justify them in the context of South Africa where the notion is particularly compelling. See section 174(1) and (2) of the Constitution.

[31] Geoff Budlender 'Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa' (2005) 122 *SALJ*, 715 at 723.

[32] See 'Too few female judges- Radebe' report of 11 June 2009 available at: http://www.iol.co.za/news/south-africa/too-few-female-judges-radebe-1.446122

[33] MTK Moerane SC 'The Meaning of Transformation of the Judiciary in the New South African Context' (2003) 120 *SALJ*, 708 at 717. The most cited reason for the paucity of women and black women choosing to serve at bar is still the skewed racial briefing patterns, as a remnant of the apartheid era.

[34] See interview with Phillip van der Merwe and Barbara Whittle *De Rebus*, March 2002 at 12.

[35] Held in Magaliesburg on 21 July 1997.

[36] Ismail Mahomed 'Welcoming Address at the First Orientation Course for New

Judges' (1998) 115 *SALJ* 1.

[37] Ibid.

[38] MTK Moerane SC 'The Meaning of Transformation of the Judiciary in the New South African Context' (2003) 120 *SALJ* 708 at 717-718.

[39] See n 5 above at 10.

[40] Section 165(2) and (3) respectively.

[41] See in general the Justice College Draft Bill.

[42] The Canadian example is instructive. K Malleson in 'Creating a Judicial Appointments Commission: What Model Works Best? (2004) *Public Law* 102 at 106 says that between 1989-1995, over a period of six years, women presence on the Bench grew to a 40% representation, as a result of a new approach adopted by the Ontario Judicial Appointments Advisory Committee and the Attorney-General at the time. Through a coordinated effort to attract women for judicial appointment, in 1990 the Committee embarked on an open and active outreach programme, widely contacting women lawyers organisations to motivate and encourage the outstanding among them to apply for judicial appointment. In Canadian terms, this might have been a crude approach, but it was necessary and bore results.

Judicial decisions and allocation of resources

By Justice Nial Fennelly, Irish Supreme Court

Defining terms: the debate

About twenty years ago, Costello J[1] distinguished between claims which might 'be advanced in Leinster House' and those proper to made in 'the Four Courts. [2] The first of these two celebrated Dublin buildings is the former home of the Dukes of Leinster; it now houses the national parliament, the Oireachtas, which, as the Constitution says, has 'the sole and exclusive power of making laws for the State.[3] The second, the Four Courts, designed by our great classical architect, James Gandon, sits on the northern bank of the river. In it sit the High Court and the Supreme Court: there the Constitution says that the laws made in the other building are interpreted and applied.

It is universally agreed that there is a boundary, founded on deep principle, between judicial and legislative functions. According to a judgment of the Supreme Court, delivered as recently as July 2010, 'it is not for a court of law to make social policy as to where maternity services should be provided.'[4] There is less agreement about where the boundary lies.

Professor Jowell, in a thoughtful article has posed the question: 'What Decisions Should Judges Not Take?'[5] He discerns two underlying principles. The first derives from the constitutional principle that decisions about policy 'based as they are upon estimates of the greatest good, are in our democratic system, rightly taken by the greatest number.' The second argument for judicial restraint is 'from judicial capacity,' because 'there are limits to the adversarial decision-making process ideally to decide certain questions.' The latter principle has, Professor Jowell argues, two further aspects: the first concerns expertise, which is more likely to reside in the executive or legislative branch; the second is the absence of 'objective criteria by which to judge a matter.' The latter point echoes, in turn, the American notion of 'political question,' though the criteria for judging it include the availability of 'manageable judicial standards.'[6]

Rights and policies

In a purely legal sense, it is not difficult to distinguish between the respective notions of a legal right and of a desirable social policy. The very use of the term, 'right,' implies a corresponding obligation. The obligation is cognisable in law; it carries with it a right to redress; a State governed by the rule of law, must necessarily vest in independent courts all powers necessary to enforce rights even to the extent of compelling the State itself to grant redress or pay compensation or to comply with the terms of the courts' orders. The judicial function implies the existence of a right declared in objective legal terms by the text of a law.

Matters of policy are beyond the reach of the judicial branch. As the word implies, policy is for politicians. Policy decisions are, in principle, not justiciable. There may, however, be occasion for the exercise of judicial power when particular policy decisions implicate legally justiciable rights.

Constitutions: separation of powers

How these questions arise depends necessarily on the national constitutional context. Where parliament is sovereign, as in the United Kingdom, judges may only exercise such powers as are conferred on them by the law. In states governed by a written constitution, the scope for the exercise of discretionary judicial power may be greater. More usually, the judges acting pursuant to the Constitution exercise restraining power against government, protecting individuals from state encroachment on their zones of freedom. The more difficult question, now under discussion, is whether and when judges may directly invoke the Constitution empowering themselves to make positive orders requiring the State to take specified action. In Ireland, we have had a written constitution since 1922, though we now operate under the Constitution of 1937.

Irish courts attach great importance to the constitutionally based doctrine of separation of powers. Each of the 'powers of government, legislative, executive and judicial,' derives ' under God, from the people…'[7] The Supreme Court interpreted this Article from the very beginning as follows:

'The manifest object of this Article was to recognise and ordain that, in this State, all powers of government should be exercised in accordance with the well-recognised principle of the distribution of powers between the legislative, executive, and judicial organs of the State and to require that these powers should not be exercised otherwise.' [8]

The doctrine of separation of powers does not necessarily tell us,