

## THE JUDICIAL SERVICE COMMISSION

*Morné Olivier and Cora Hoexter*

The creation of a Judicial Service Commission (JSC) was a striking innovation in the interim Constitution of 1993. Though inspired by judicial commissions in other jurisdictions, the South African version was the product of political compromise and had some distinctive features. The first was its unusually large size; the second was the inclusion of a large number of political appointees (and the complete absence of lay members other than political appointees); and the third was its diverse functions. In addition to playing a major role in the selection of judges, the new institution would be responsible for making findings of judicial incapacity, incompetence or misconduct should the need arise, and would also advise the government on matters relating to the judiciary or the administration of justice. All of these features were replicated in the 1996 Constitution, which indeed increased the size of the commission by adding further ‘political’ members to it.

The importance of the JSC’s selection function was very evident from the start. The promise of a transparent and accountable method of choosing judges contrasted strongly with the opaque pre-1994 system of appointment by the head of state. Furthermore, even before the 1996 Constitution explicitly drew attention to it, no South African could fail to have been aware of the need to start changing the composition of the judiciary from a demographic point of view. One would thus expect the decisions of the JSC to have generated some controversy, and they have done so—particularly since 2009. Allegations that the JSC (or a dominant bloc within it) is working to a political agenda have become rife, and in recent years the rationality of some of the JSC’s selection decisions has been taken on review. This is not surprising, for it is not easy to discern the JSC’s own understanding of what the criteria for selection mean and how they are to be applied.

As to the second activity, the JSC’s role in relation to judicial misconduct has unfortunately proved to be far more significant than might have been envisaged initially—and its decisions far more controversial than one would have hoped. Indeed, at one stage the JSC (or a majority of its members) seemed to lack a serious commitment to the pursuit of judicial accountability. However, the JSC was also hampered to some extent by the absence of a detailed legislative framework governing judicial discipline, and the filling of this lacuna in 2010 has already had a salutary effect.

The JSC’s third function of giving general advice on judicial matters and the administration of justice has been largely neglected up to now. To some extent at least, the explanation for this may be that it has had more than enough to do in relation to its first two functions.

This chapter begins with a brief discussion of the genesis of the Judicial Service Commission in part 6.1. In part 6.2 we describe its various powers and functions in some detail. In part 6.3 we turn to its composition, a matter of considerable controversy and debate, and currently the subject of a private member's Bill in Parliament. After that we comment on the JSC's performance in relation to what have in practice been its two main activities: selecting judges (part 6.4) and making decisions about judicial misconduct (part 6.5). The chapter ends with a few concluding observations (part 6.6).

A matter not dealt with in this chapter is the Magistrates' Commission, as it were a judicial service commission for magistrates, which was mandated by s 109 of the interim Constitution<sup>1</sup> and established by s 2 of the Magistrates' Act 90 of 1993. In the context of the 1996 Constitution the Magistrates' Commission assists in giving effect to s 174(7), which states that judicial officers other than judges 'must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice'. Originally quite a small body, the commission is now even larger than the JSC; and it, too, is dominated by politicians and political appointees. Its powers and functions are dealt with in Chapter 10, which also offers some limited comparison with the JSC.<sup>2</sup>

## 6.1 GENESIS

Towards the end of the apartheid era it was increasingly acknowledged that there was a need to reform the unaccountable and racially exclusive process by which judges had been selected since Union in 1910.<sup>3</sup> The issue became more pressing during the constitutional negotiations, particularly as it became apparent that the courts might in future be wielding immense power as the ultimate interpreters of a democratic constitution.<sup>4</sup> Given all this, the introduction of a more transparent and accountable appointment process was almost inevitable.<sup>5</sup>

It also accorded with developments in the rest of the world. Internationally there was a definite trend away from unfettered executive powers of appointment and towards more inclusive and consultative processes, often involving an

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<sup>1</sup> Section 109 provided: 'There shall be a Magistrates Commission established by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly, and to ensure that no victimization or improper influencing of magistrates occurs.'

<sup>2</sup> See at 332.

<sup>3</sup> See eg D D Mokgatle 'The exclusion of blacks from the South African judicial system' (1987) 3 *SAJHR* 44; Anton Lubowski 'Democracy and the judiciary' in Hugh Corder (ed) *Democracy and the Judiciary* (1989) 13; Jeremy Gauntlett SC 'Appointing and promoting judges: Which way now?' (1990) 3 *Consultus* 23; Gawie Nienaber 'United States Supreme Court appointments: Implications for a future constitution in South Africa' (1991) 4 *Consultus* 19;

<sup>4</sup> See eg Christopher Forsyth 'Interpreting a Bill of Rights: The future task of a reformed judiciary?' (1991) 7 *SAJHR* 1.

<sup>5</sup> See generally Hugh Corder 'The appointment of judges: Some comparative ideas' (1992) *Stell LR* 207, perhaps the most important and most seminal contribution on the subject.

independent commission to represent various interest groups. A few of the established jurisdictions, most notably Canada and England,<sup>6</sup> were reviewing their existing selection and appointment processes and considering the commission model. Importantly, too, this model had found favour with judicial leaders in English-speaking Africa. The Banjul judicial seminar of 1987 had recommended that the selection of judges, including members of the senior judiciary, should involve a judicial service commission in some way, as had the Lusaka seminar the year before.<sup>7</sup> Furthermore, a number of developing or newly independent jurisdictions had already opted for a commission model, including Israel, Jamaica, Namibia, Nigeria and several other African countries.<sup>8</sup>

It was unsurprising, then, that in the drafting of the first democratic Constitution the Technical Committee on Constitutional Issues recommended that in future all judges of the Supreme Court should be appointed by the President acting on the advice of a judicial service commission.<sup>9</sup> This recommendation, which proved to be uncontroversial, eventually became s 104(1) of the interim Constitution. The committee initially recommended that the Chief Justice be appointed in the same way, but in a later draft this proposal was replaced by one that increased the President's say and concomitantly reduced the influence of the commission: the Chief Justice would be appointed by the President in consultation with the Cabinet and after consultation with the judicial service commission.<sup>10</sup> This later proposal became s 97(1) of the interim Constitution.

A more controversial issue was the technical committee's proposal of excluding the judicial service commission from the process of selecting judges of the Constitutional Court, including its President.<sup>11</sup> This proposal met with opposition from some of the negotiating parties, including the Democratic Party, which had always favoured the involvement of a commission in the selection of judges of the new court.<sup>12</sup> Further opposition from judges, members of the profession and academics resulted in a last-minute compromise thrashed out by the Democratic Party and the African National Congress, creating a role for the judicial service commission in the selection of some of the judges of the Constitutional Court.<sup>13</sup> That role came to be specified in s 99(5) of the interim Constitution.

Apart from its role in the selection and appointment of judges, details of how and why specific functions and powers came to be conferred on the JSC during the

<sup>6</sup> Institute for Public Policy Research *The Constitution of the United Kingdom* (1991), referred to by Corder (note 5 above) 217.

<sup>7</sup> See International Commission of Jurists *The Independence of the Judiciary and the Legal Profession in English-speaking Africa* (1987) 83 and 144–5 (hereafter *IJLPA*), referred to by Corder (note 5 above) 225.

<sup>8</sup> See Corder (note 5 above) 221ff for examples.

<sup>9</sup> Para 7.8 of the *Twelfth Report of the Technical Committee on Constitutional Issues to the Negotiating Council* 2 September 1993 (hereafter 'September report') and s 92(1) of the proposed interim Constitution dated 2 September 1993, attached to the September report (hereafter 'September draft'). See also s 94(1) of the later version of the proposed interim Constitution, dated 17 November 1993 (hereafter 'November draft').

<sup>10</sup> Section 87(1) of the November draft.

<sup>11</sup> Sections 89 and 87(2) respectively of the November draft.

<sup>12</sup> See Democratic Party proposals as referred to in Corder (note 5 above) 208.

<sup>13</sup> For more on this negotiation process, see Chapter 5 at 121.

constitutional negotiations are sketchy at best. Nevertheless, there are indications that a role in matters other than judicial selection had been envisaged all along. Both the September and November drafts<sup>14</sup> of the interim Constitution contained functions that went beyond the selection of judges, including that of advising the national and provincial governments on all matters relating to the judiciary and the administration of justice.<sup>15</sup> With some slight changes of wording here and there, these functions were retained in the interim Constitution. The allocation of such additional functions was common in other jurisdictions at the time, particularly in newly independent states. Indeed, as Corder indicated, the judicial service commission model generally went beyond the mere giving of advice on appointments to ‘general supervision of the administration of justice in the superior courts’.<sup>16</sup>

## 6.2 STATUS, POWERS AND FUNCTIONS

While neither of the two democratic Constitutions has dealt specifically with the nature and status of the JSC, its characteristics have been fleshed out somewhat in the case law. In the *First Certification* case the Constitutional Court described it as ‘an independent body’ and as providing a check and balance to the power of the executive to make judicial appointments.<sup>17</sup> In the *Cape Bar Council* case<sup>18</sup> the Supreme Court of Appeal confirmed that the JSC is an organ of state within part (b) of the definition in s 239 of the Constitution, so that ‘it is bound (by s 195 of the Constitution) to the values of transparency and accountability’. It is evidently also bound by the principle of openness.<sup>19</sup>

In what follows we describe the various powers and functions of the JSC under the interim and 1996 Constitutions and in terms of national legislation.

### (a) *The interim Constitution*

Section 105(2) of the interim Constitution conferred the following functions on the JSC:

- to make recommendations regarding the appointment, removal from office, term of office and tenure of Supreme Court judges;
- to make recommendations regarding the removal from office of Constitutional Court judges; and
- to advise the national and provincial governments on ‘all matters relating to the judiciary and the administration of justice’.

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<sup>14</sup> See note 9 above.

<sup>15</sup> See s 93(2) of the September draft and s 95(2) of the November draft.

<sup>16</sup> Corder (note 5 above) 226.

<sup>17</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) paras 128 and 124. The case is discussed further below at 170. See also *Van Rooyen v The State* 2002 (5) SA 246 (CC), where the Constitutional Court compared the Magistrates’ Commission with the JSC.

<sup>18</sup> *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) para 43.

<sup>19</sup> See *eTV (Pty) Ltd v Judicial Service Commission* 2010 (1) SA 537 (GSJ).