REPORT ON THE JSC INTERVIEWS IN CAPE TOWN, OCTOBER 2010

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Background

1. From the 4th to the 15th of October 2010, the Judicial Service Commission ("JSC") held interviews to recommend candidates to fill vacancies on the Supreme Court of Appeal, Labour Appeal Court, Competition Appeal Court, and High Court. Prior to these interviews, the DGRU was requested by the office of the Chief Justice to prepare a research report on the judicial records of the candidates.[1] This report discusses the interviews, and analyses the JSC's criteria for recommending candidates for judicial appointment.

2. An important event took place prior to the commencement of the interviews, when the JSC announced the criteria it uses when considering candidates for judicial appointment. DGRU is very encouraged by this development, as we have repeatedly argued that the JSC's previous failure to articulate such criteria causes problems, both in the running of interviews and in the public's perception of the appointment process.

3. As usual, the interviews and subsequent appointments produced much public comment, particularly in light of the announcement of the criteria,[2] which have been received with some scepticism.[3] Whilst we acknowledge that there are some shortcomings with the criteria, as will be discussed below, we view their announcement as a welcome development. DGRU has frequently submitted to the JSC that criteria are needed to guide the process of appointment and the conducting of interviews. Whether the criteria are applied in such a way as to ensure the best possible candidates are appointed is an issue that requires vigilance and constructive engagement from civil society, the legal profession and the general public.

4. The criteria do provide a yardstick against which the JSC's performance during the interviews may be measured. It also provides an opportunity for the DGRU to

[1] The report can be accessed at http://www.dgru.uct.ac.za/news/?id=17&t=int

[2] See Serjeant at the Bar, *JSC choices leave a lot to be explained*, available at http://www.mg.co.za/article/2010-11-15-jsc-choices-leave-a-lot-to-be-explained; Paul Hoffman, *Judicial Appointments: Time to let air and light into notorious 'smoke-filled room'*, available at http://www.businessday.co.za/Articles/Content.aspx?id=124048

[3] Paul Hoffman, *Criteria for choosing judges go beyond the constitution*, available at http://www.businessday.co.za/Articles/Content.aspx?id=123478 ; Franny Rabkin, *Criteria for choosing judges 'are worrisome'*, available at http://www.businessday.co.za/Articles/Content.aspx?id=124944 (quoting Judge Dennis Davis raising concerns about recent appointments, and the need for the public to be informed as to how the criteria are implemented).

comment on the criteria and their interpretation in general. Our discussion of the criteria should not be seen as a final comment – the nature of the criteria, and the interview process, mean that they can and should be subject to regular analysis and review.

5. Before considering the criteria specifically, we will begin with some general observations about the interviews.

6. It should first be said that the interviews were noticeably more focused than interviews the DGRU has previously observed. Interviews were generally conducted in closer accordance with the time allocated to them than has been the case in the JSC's previous sessions – one of our major criticisms of the April 2010 interviews concerned the seemingly unequal treatment of some candidates caused by interviews varying greatly in length. Questions also seem to be more focused on issues that were more obviously relevant to the candidates' judicial qualities, although we submit that there is scope for even greater precision in the questioning.
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7. We believe that it is no coincidence that the tighter focus of these interviews followed the public announcement of appointment criteria.

8. During several of the interviews, commissioners raised concerns at the lack of senior practitioners making themselves available for appointment, whilst noting some improvement in this situation from among the nominees for the October 2010 interviews. We suggest that part of this problem may have been caused by uncertainty over what candidates could expect from the JSC's interviewing procedures, and that many candidates may have feared that they would be subject to an 'interrogation', rather than an examination of their professional track records and a reasoned discussion of their judicial qualities. One of the reasons we welcome the JSC's announcement of criteria is that it should assist candidates in preparing for interviews, as they now ought to have a better sense of what to expect, and be able to prepare themselves accordingly. This in turn should increase public confidence in the appointment process.

Gender

9. Members of the JSC have frequently commented on the difficulties of advancing gender transformation. Concerns have been expressed about the small pool of candidates from which appointments can be made, and questions raised as to how more women can be encouraged to make themselves available for judicial appointment.

10. Numerous circumstances, both from within and outside the legal profession, present barriers to women being selected as judges. These include the difficulties many female practitioners experience in obtaining certain types of work, and thus not gaining the range and depth of experience which is available to many of their male counterparts; and the challenge of balancing a demanding working life with family responsibilities. Commentators have argued that barriers continue to be present even once women judges are appointed to the bench, particularly for those women who wish to continue to prioritise their family life.[4] The challenge of enabling women to balance work and family is one that faces South African society as a whole. As long as women continue to bear a disproportionate burden for bringing up children, this is likely to have an impact on the pool of female candidates available to the judiciary.

11. The JSC did not make recommendations to fill all the vacancies on certain courts. This appeared to be the case where there were reservations over certain candidates. Whilst this does raise concerns about whether sufficient suitable candidates are putting themselves forward for appointment, it is nonetheless encouraging to note that the JSC is not making recommendations for the sake of it, but is prepared to leave positions vacant if candidates do not meet the required standard.

Permissibly questions and forewarning candidates – the need for a consistent approach

12. Some of the more dramatic moments during this round of interviews took place when questions were put to candidates about aspects of their performance on a court, or about complaints which had been made about them. The JSC does not seem to have a consistent approach as to what questions may be put to candidates without forewarning them. Three examples from the interviews demonstrate this.

13. In an exchange widely reported in the media, questions were put to one candidate regarding allegations that he had overcharged for his services. When the source of this information was not revealed, the questions were disallowed. It was ruled that adverse comments should be put to a candidate prior to the interview, so that candidates could be fully prepared to answer the allegations.

14. However, in interviews of candidates for the Supreme Court of Appeal, it was put to some candidates that fellow judges on the SCA had not been impressed by the candidate's performance when acting on the court. Although this may be distinguished from the situation described in the previous paragraph, since in this instance the source was disclosed to the candidate (at least generically), there are

[4] Carmel Rickard, *Time to shape the space for women judges!* Legalbrief Today, 11 September 2007.

similarities: one candidate for the SCA responded that he had not previously heard these complaints about him. It thus appears that these adverse comments had not been put to the candidate prior to his interview. It was notable that, in a subsequent interview for a High Court position, a commissioner put a question to a candidate about an adverse report the commissioner had received about the candidate's conduct, and remarked before putting the question that he had advised the candidate about it the previous day, in order for the candidate to be prepared to respond.

15. Arguments may be made for and against both approaches. On the one hand, it is clearly desirable to protect candidates from being hijacked by allegations which they have not previously heard and may not be in a position to respond to for the first time in an interview setting. On the other hand, pre-warning candidates of concerns about their suitability for judicial office may enable them to prepare to avoid the allegation in a way that stops a serious concern from being adequately and satisfactorily ventilated. If the JSC is to follow the approach that candidates must be "pre-warned", then commissioners have a heightened responsibility to probe candidates' responses to such questions, in order to ensure that important issues reflecting on a candidate's suitability are not glossed over.

16. We suggest that, whatever approach the JSC opts to take, there ought to be clarity regarding which of these two approaches it will follow. This inconsistency raises the question of whether the JSC has a formal protocol to guide it during the interviews; or whether the rule that adverse comments must be put to a candidate prior to the interview is a practice that has developed through rulings by the chair of the JSC. If there is a formal protocol, it would seem to require more consistent application. If there is no protocol, we suggest that this heightens the danger of inconsistency, and therefore possible unfairness, in the questions which are put to the candidates.

17. It is clearly desirable that there is consistency in the scope of questioning which is permitted by the JSC. If it is felt that certain types of adverse comments require pre-disclosure and others do not, then these ought to be clearly identified and articulated. A clear awareness of what to expect from the JSC in questioning will help to de-mystify the JSC's working practices, and may help to make candidates more willing to put themselves forward for appointment. We therefore suggest that, if a formal protocol exists, it ought to be made public.

Openness of JSC proceedings

18. In the course of one of the interviews, a commissioner remarked that the process of selecting judges was "remarkably opaque", and suggested that the JSC should be more transparent in its decision-making. In considering this proposition, two

distinct phases may be identified in regard to openness: deliberations, and the announcement of decisions.

19. We welcome the call for openness and transparency in the judicial selection process. Nonetheless, we do not call for blanket transparency, and we acknowledge that there are good reasons to argue that the deliberation process ought not to be open to the public. There may be concerns that this would inhibit commissioners from speaking freely and frankly about candidates. Open deliberations may also have a negative effect on public confidence in the judiciary, if reasons for not selecting an individual judge are aired in public and that judge then returns to their court with possible stigma from the reasons for their non-selection hanging over them.

20. However, it is debateable whether these considerations apply when it comes to giving reasons for appointments. Greater clarity about the reasons for recommending the appointment of one candidate over another would surely add to the credibility and legitimacy of the process by reducing the opacity of the decision-making process and the rationale that lies behind it.

21. Another commissioner remarked that the fact that judges conference in private before giving a decision, and that some judicial decisions on petitions are given summarily, without reasons, does not detract from the legitimacy of the legal process. If this analogy was intended to suggest that the JSC's decisions ought not to be public or require reasons to be given, we respectfully disagree, and suggest that there are distinctions to be made – whilst judges may conference in private, this is usually followed by a written judgment, setting out fully the reasons for the decision. This clearly distinguishes that process from the JSC's nominations, where no reasoning is provided to justify the recommended appointments. Whilst it is true that some petitions are granted summarily, this is only true in relation to a small number of cases, and usually relates to a situation such as requesting leave to appeal, where litigants already have a written judgment determining their rights. There is nothing minor or purely procedural about the appointment of judges to our superior courts.

22. If the JSC does develop a practice of giving reasons for appointment, we submit that these ought not simply to be bald assertions that a particular candidate fulfilled the JSC's criteria. Whilst a justification equivalent to a detailed judgment ought not to be necessary, we would suggest that the JSC should at least ensure that the particular aspects of a candidate's record which fulfil the criteria are identified. Whilst this may be a time-consuming process, it may well benefit the JSC's decision making in the long run, by demanding that commissioners focus on what they are looking for in an ideal judge, and whether and how the candidates meet those criteria and, thereby, reducing the scope for arbitrary or capricious choices.

Explaining the basis on which recommendations for appointment are made would thus play a valuable role in clarifying how the criteria are to be applied, which can only be to the benefit of prospective judges, the legal profession, the general public and the JSC itself. However, we do recognise that there may be legitimate concerns about the practical ramifications of giving reasons for appointments.

23. We welcome the fact that this issue has been raised in the JSC (although perhaps not directly relevant to the candidate in whose interview it was raised). We encourage the JSC to continue to consider the matter, in light of the comments made in this section and having elicited further views on the subject from a wider set of stakeholders, including the legal profession and the judiciary itself.

What kind of judges are being appointed?

24. We have previously written of the need for the JSC to ensure that it appoints a sufficient diversity of judges, not just in terms of gender and racial representivity, but also to ensure that the bench benefits from the diversity of viewpoints which our country has to offer.[5] And members of the JSC are apparently alive to this – during one interview, one of the provincial premier's representatives remarked on the need for jurists from broader civil society to contribute to the South African legal system; and during another, a commissioner remarked that diversity of the bench allowed for different perspectives.

25. However, during certain interviews, some commissioners appeared to be wary of candidates with strong backgrounds in human rights activism. It seemed that this was based on a perception that the candidates' background would make them likely to be predisposed to find against government in socio-economic rights cases, or to place overly broad interpretations on socio-economic rights. For example, one question put to a candidate was that there might be a fear, in light of the candidate's background as a 'human rights activist' that he 'may tend to go overboard in favour of socio economic rights'. The candidate was then asked about a specific case relating to an urgent application, where an order had been made compelling a municipality to rebuild houses. Another commissioner put it to the same candidate that human rights have a very 'liberal' basis, which sometimes leads to an inability to understand the challenges faced by government.

26. It cannot be denied that democratic deference is an important aspect of judicial decision-making under our constitutional system, including in socio-economic rights cases. The Constitutional Court's jurisprudence, not to mention the wording of the

[5] See Sipondo and Oxtoby, Business Day 11 June 2010, available at http://www.businessday.co.za/Articles/Content.aspx?id=111652

socio-economic rights in the Constitution, make it clear that factors such as resource constraints and the reasonableness of government policy must be taken into account in, and indeed are central to, adjudicating socio-economic rights cases. Thus, candidates' views on these issues form an important part of their judicial philosophy, and are appropriate and relevant grounds for questioning.

27. However, the apparent premise that involvement in human rights activism may go so far as to disqualifying a candidate, is more troubling. There is an obvious danger that, were the JSC to follow this approach to its extreme but logical conclusion, the bench could becoming staffed with judges who are unduly executive-minded, and lacking in a diversity of views on socio-economic (and indeed other) rights. We submit that the bench needs a range of perspectives – judges may take different views on socio-economic rights, but provided that these views are within the range of established precedent and reasonable interpretations of the constitution, this diversity of viewpoints is not just unproblematic, but in fact healthy for our jurisprudence. We would suggest that, rather than imposing an effective 'presumption of bias' on candidates' with a human rights background, commissioners should explore the detail of candidates' records in order to establish whether they are likely to apply the law fairly and without favour, as our constitution requires. After all, principles of deference do not obviate the socio-economic rights in the constitution, to which our courts must continue to give effect.

The Criteria

28. In this section, we will discuss the criteria announced by the JSC, and offer both general comments, and comments in relation to the questions asked at the October 2010 interviews. In doing so, we will attempt to begin building an understanding of how these criteria seem to be understood by the JSC, although it should not be viewed as an attempt to provide rigid and final definitions of the criteria. As a guide to interpreting the guidelines, we refer extensively to Advocate Susannah Cowen's work on the qualities of the "ideal South African judge". [6] It will be apparent that there is some overlap between the criteria, and it will therefore be necessary to view the criteria holistically.

Criteria stated in the Constitution

29. As Cowen points out, an analysis of the constitutional criteria for judicial appointment is not limited to Section 174. In interpreting S174, meaning may be sought from other provisions in the constitution, particularly the requirements that

[6] Susannah Cowen, "Judicial selection: What qualities do we expect in a South African Judge?", DGRU, May 2010.

the judiciary be independent; subject only to the Constitution and the law; and apply the law impartially and without fear, favour or prejudice.[7]

30. It is notable that judicial independence is not specifically identified as one of the JSC's criteria. Cowen has argued that the concept is best considered as part of the "fit and proper" requirement,[8] and this report will deal with it on that basis.

An appropriately qualified person

31. Cowen argues that 'qualification', in this context, ought to be interpreted broadly, extending not just to an academic legal qualification, but to include skills and experience suitable for the task of judging.[9] Further criteria include the ability to adjudicate on a wide range of law, including constitutional and customary law matters. Appropriate experience will depend on the court to which a candidate is applying, although a general range of experience across different fields of law is desirable.[10] Cowen highlights skills which might be expected to be present in judges, including forensic ability, an understanding of procedure and the practical workings of the court, a broad and thorough understanding of substantive law, an appreciation of ethical standards, and independent mindedness.[11] Cowen points out that the real question is not so much whether a candidate has relevant experience, but whether they have the necessary skills. [12] These skills, Cowen suggests, include not only legal abilities and language, but also administrative and communication skills.[13]

32. Despite the announcement of the JSC's criteria, it remains unclear whether the JSC has indentified a particular type of experience as essential, or what range of experience is felt to be sufficient. It is also not clear what skills the JSC is looking for which will be acquired from such experience.[14]

[7] S165(2); Cowen p. 10.

[8] Cowen, p. 13.

[9] Cowen, p. 21.

[10] Cowen, pp. 23-24.

[11] Cowen, pp. 25-26.

[12] Cowen, pp. 26-27.

[13] Cowen, p. 29.

[14] Cowen, p. 27.

33. An issue that may be seen as relevant to the issue of appropriate qualification for judges are academic articles written by candidates. The terms of reference of the JSC's request for our report specifically asked for this to be highlighted, and candidates who had written academic articles were asked to discuss the content and arguments found in the articles. Whilst we welcome this approach, we feel that candidates could be asked more detailed questions about the articles – questions often merely asked candidates to describe what the articles were about. The JSC could also identify critical issues from the articles and question candidates on these, in order to examine candidates' thinking and philosophy on significant legal issues.

34. A line of questioning which also links to the criterion of experience was raised with candidates who had significant experience in a specialised court, who were seeking appointment to a court of general jurisdiction. It did not appear from the questioning as if the JSC regarded specialised experience as an impediment to appointment to a court of general jurisdiction, although it is not clear from the appointments ultimately made whether this is indeed the case. Incidentally, this again highlights, in our view, the need for some form of transparency and reasons to be given for the appointment of candidates.

35. One aspect of the 'qualification' requirement that emerges consistently is the JSC's need for candidates to have experience as acting judges. Candidates are almost inevitably questioned about their experience as acting judges, and the cases they have dealt with. It appears from these questions that the JSC values candidates for High Courts having dealt with as wide a range of cases as possible during their acting stints. If a candidate had not dealt with a particular kind of case (say, for instance, criminal appeals), commissioners will invariably note this.

36. There is a lot to be said for attaching weight to acting experience, as it provides a demonstrable record for candidates' abilities to be examined, and provides candidates with experience which will be invaluable should they ultimately be appointed to the bench. This is a particularly important factor in light of the broader pool of candidates from which judges are appointed post-1994.

37. However, commentators have pointed out that the method of appointment of acting judges raises potential separation of powers issues. The nature of the appointments process might potentially influence how acting judges decide cases – an acting judge aspiring for permanent appointment might, even if only subconsciously, decided cases in a way that they think would increase their chances of permanent appointment.

38. There is another concern with this emphasis on acting appointments. As much as acting experience is important, emphasis on it narrows the focus of judicial selection

to those in practice, as acting judges are mostly appointed from the bar or the side bar. This may contribute to a lack of diversity (in terms of life experience and mindset) on the bench.

39. Resolving this dilemma is a complicated matter that is not the responsibility of the JSC alone. We suggest that it is, however, important for the JSC to be alert to these issues, and take them into account in assessing candidates. For example, the circumstances discussed make it particularly important for the JSC to assess evidence of candidates' judicial independence while serving acting appointments, and to give due weight to it in making its decisions. Candidates ought to be given due credit for having made decisions that demonstrate independence of mind. If decisions are to be faulted, this ought to be on the basis of demonstrably incorrect application of the law (of course, this should always be so – but the particular status of acting judges makes it especially crucial in such instances).

A fit and proper person

40. Cowen suggests five relevant categories: independence, impartiality and fairness, integrity, judicial temperament and a commitment to constitutional values.[15] Regarding judicial integrity, Cowen identifies pertinent qualities as including a strong understanding of the rules and principles designed to avoid conflicts of interest.[16] Regarding judicial temperament, this may be seen as embracing characteristics of humility, open-mindedness, courtesy, patience and decisiveness.[17]

41. As to a candidate's commitment to constitutional values, Cowen points out that, as the Constitution is a transformative document underpinned by a set of values, it is justified to expect that judges will be personally committed to these values.[18] Issues which could be considered under this heading include a candidate's respect for the diversity of South African society; commitment to access to justice; the realisation of socio-economic rights and an commitment to the role of an active citizenry in a participatory democracy; the parameters of the deference owed by the judiciary to the executive; and a candidate's commitment to the transformative goals of the Constitution (whilst being cautious not to assesses political commitments).[19]

[15] Cowen, p. 34.

[16] Cowen, pp. 36-37.

[17] Cowen, p. 38.

[18] Cowen, p. 40.

[19] Cowen, pp. 40-51.

42. Some candidates were asked to articulate their 'judicial philosophy', understood as the values underlying the pattern of adjudication which emerges from their judgments. Candidates were almost always asked about how the judiciary should properly give effect to the powers it was given, for example to strike down legislation, and how candidates understood the principle of the separation of powers; some questions were asked about the understanding and appropriateness of judicial activism. The issue of the appropriate tone to be used in judgments, especially when overturning judgments of subordinate courts, was also raised frequently, and one candidate was asked to discuss the standard of behaviour which should be expected of judges in court.

43. The issue of judicial integrity was raised, although candidates tended to be asked what they felt about its importance, rather than about their understanding of what the concept meant. It was notable, therefore, that some candidates took the opportunity to discuss what they thought made up judicial integrity (factors such as hard work, honesty and humility were mentioned). Candidates who had been subject to disciplinary measures by professional bodies were asked to explain those matters. Questions relating to judicial independence were asked, including whether a candidate's previous career experience of working in the justice department could compromise their independence. One candidate for the Labour Appeal Court was asked about what role ideology played in the development of labour law jurisprudence. Candidates were also asked about the importance of public confidence in the judiciary, and whether public opinion had any role in adjudication.

44. Potential conflicts of interest were regularly raised, with candidates being asked questions about company ownership and directorships, and were on several occasions alerted to inconsistencies between their declarations and CIPRO records. One candidate was asked whether there had been a conflict of interest when he served on the board of an NGO whilst being the chair of the South African Human Rights Commission; and a candidate who practised as an attorney was asked whether hearing an application to strike an attorney off the role whilst he was serving as an acting judge had presented a conflict of interest.

45. Various lines of questioning explored the issue of candidates' commitment to constitutional values. Some candidates who had served as state prosecutors during the apartheid era were asked whether they had ever sought the death penalty. We note, however, that this question was not consistently put to all candidates who had served as prosecutors. We suggest that fairness to all candidates dictates that it should have been. The question itself may raise some eyebrows: it might be thought that actions taken within the confines of the previous legal system ought not to be held against candidates under the constitutional dispensation. On the other hand, it

might be said that an individual who embraced the imposition of the death penalty, and continued to do, ought not to be a judge subject to a constitution which does not permit the death penalty. Some commissioners pointed out that there were cases where the death penalty was compulsory upon conviction; whilst others argued that the law had always given scope for extenuating circumstances to be found. This question may provide a useful insight into a candidate's judicial philosophy, by requiring them to engage with the nature of the legal system under apartheid. If this question is asked, we suggest that candidates should be given the opportunity to show whether and how their thinking on capital punishment may have changed under the Constitutional dispensation (as some commissioners did in their follow-up questions).

46. Other issues which may be seen as relevant to a candidate's understanding of constitutional values that were canvassed included whether, as legal practitioners, they had spoken out against the apartheid legal system during the apartheid era; and what candidates see as obstacles to the transformation of the bench, how to broaden the pool of judicial candidates; and what role the candidate had played in mentoring and otherwise helping to advance transformation of the legal profession (the latter is likely to be directed particularly at those who hold leaderships positions at the bar or side-bar).

47. There appears to be a discrepancy between the JSC's scrutiny of candidates' judicial records before and after the constitutional era. Candidates seem to have been expected to play a role as human rights activists during the apartheid era; and yet (as discussed earlier in the report) there seems to be some discomfort with candidates who appear to show human rights activism under the current dispensation. Of course, the pre and post Constitutional systems are fundamentally different. But if the JSC expects candidates to have actively opposed apartheid, is it not also appropriate to expect candidates to act to ameliorate the inequality and injustice which continues to bedevil our society.

48. An issue which dominated one interview and which may be seen as bearing on whether the candidate was 'fit and proper' concerned the candidate's membership of a secret organisation (the "*ruiterwag*", which was described by commissioners as being a youth wing of the *broederbond*). This line of questioning is likely to produce mixed reactions – some may see it as being irrelevant to the candidate's ability to apply the law; others will not see how a candidate with such associations could possibly be a judge under the new constitutional dispensation.

49. We argue that there is a need for greater clarity from the JSC on what it expects from candidates in this regard. Judges have been appointed to senior positions on

our courts before despite previous membership of secret organisations,[20] whereas the candidate questioned on this issue in the October 2010 interviews was ultimately not appointed. Of course, there could be many other reasons for the non-appointment, and how a candidate deals with these associations in the course of their interview may be more important than the mere fact of such association. This further highlights the benefits of greater openness and the giving of reasons for the JSC's selections – it will be clear to applicants and the public exactly what the JSC's position is on past associations with such organisations, and prospective applicants will be aware of what is expected from them if they have previously associated with secret organisations. Of course, none of this should prevent commissioners from rigorously ensuring that candidates are not appointed if they have not embraced the new constitutional dispensation.

50. Candidates' views on the official language and language of record in the courts were also asked. Whilst we still feel that questions such as this can still tend to lead to very broad policy discussions that can go beyond the scope of assessing a candidate's suitability for appointment, is was noticeable that this seemed to be less pronounced than in previous interviews.

Would the appointment help to reflect the racial and gender composition of South Africa?

51. This requirement may be located in section 174(2) of the Constitution, which provides that "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed." Cowen argues that in considering how representation should be taken into account, three constitutional imperatives must be taken into account, namely non-discrimination, diversity and the requirement of race and gender representivity.[21] The requirement of non-discrimination is located in the equality clause of the Constitution (section 9), and demands that appointments are carried out in strict observance of the clause.[22] Regarding diversity, Cowen points out that whilst the constitution refers expressly only to race and gender as indicators of diversity, pursuing a broader diversity of the bench is a permissible goal for judicial selectors.[23] As Cowen points out, diversity should not be mistaken for "any attempt

[20] See for example the account of the interview of Judge Louis Harms for the position of Deputy President of the Supreme Court of Appeal, at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=106545&sn=Detail&pid=71619

[21] Cowen, p. 52.

[22] Cowen, pp. 52-54.

[23] Cowen p. 54.

to make the judiciary broadly representative of the social or political interests represented by different social groups."[24]

52. We have previously argued for an understanding of diversity that is broader than race and gender alone, and we reiterate our comments regarding the need for the selection of judges to take into account diverse views.

53. This is a difficult criterion about which to ask questions, since at its most basic level a candidate will simply reflect these requirements or not. However, the JSC has shown a commendable willingness to interrogate the matter more closely, by examining candidates' own commitment to furthering racial and gender equality, for example by looking at their mentoring of junior practitioners. In the October 2010 interviews, one candidate had remarked on her questionnaire that her appointment would promote gender quality, and was asked to explain how. Candidates were also asked to share their thoughts on why the pool of 'transformation candidates' is small, and what can be done to improve the situation. Although this may invite policy discussions that can become over-broad, these questions may also provide a useful way of ascertaining whether candidates are likely to make a valuable contribution to furthering transformation once appointed to the bench. There is still a tendency to put to some candidates that their appointment will advance transformation, which we feel tends to be an unhelpful and unnecessary question. We would prefer to see questions (examples of which are highlighted in this report) which help to establish how candidates will actively promote and further transformation, broadly understood.

Supplementary criteria

Is the proposed appointee a person of integrity?

54. We have suggested that this may be considered under the head of a 'fit and proper person'. Exactly how one classifies this requirement is not really significant – it is clear that it is a factor of great importance.

55. Additional questions which may be considered under this category included asking a candidate whether he had ever refused a brief, or would refuse to act for a client if that person's views were contrary to the constitution. Another candidate was asked about a pending lawsuit in which he was a party to a directorship dispute.

56. Whilst its importance is not in dispute, it seems that what is meant by integrity could do with being more fully defined.

[24] Cowen, p. 54.

Is the proposed appointee a person with the necessary energy and motivation?

57. This criterion seems to be largely uncontroversial. The JSC frequently questions candidates on judgements they may have reserved or otherwise delayed. From comments and questions by commissioners it is apparent that the JSC takes seriously the maxim that 'justice delayed is justice denied'. Candidates are asked about delays in giving judgments, either specifically regarding judgments they have written, or in terms of judgements from a particular court in general (this comes up frequently in relation to issues around systemic delays in the Labour Courts).

58. Other questions asked which explored this criterion included asking candidates about the number of judgements they had written during acting appointments to the Supreme Court of Appeal; and about the challenges facing the particular court to which they were applying, and how they would deal with these. Some candidates were queried about their state of health, with those suffering from medical conditions being questioned on the nature of the condition and its impact on their work. One candidate was criticised for omitting to disclose that the candidate suffered from diabetes.

Is the proposed appointee a competent person?

Technically competent:

Capacity to give expression to the values of the Constitution

59. Again, a certain overlap can be seen between these criteria and the constitutional requirement that an appointee be 'appropriately qualified.' Questions asked during the October 2010 interviews which may be seen as exploring candidates' technical competence included the candidates performance as an acting judge; questions about the doctrine of precedent, and when and how the courts ought to develop customary and common law. One candidate was questioned about the number of their judgements which had been taken on appeal (it was suggested that the number was high).

60. Regarding constitutional values, some candidates were asked specifically about judgments they had given relating to constitutional issues. The research report compiled by the DGRU had particular focus on judgments relating to constitutional issues at the request of the Chief Justice, so it is apparent that the JSC is searching for evidence of this skillset or aptitude in candidates' judicial track records. Candidates were also asked what they had contributed to furthering the

transformation of the judiciary; why they had not undertaken political work; and about the role of the judiciary in giving effect to socio-economic rights.

Is the proposed appointee an experienced person?

Technically experienced:

Experienced in regard to values and needs of the community

61. Experience may also be seen as an aspect of being 'appropriately qualified.'

62. Questions asked which relate to these criteria included questions which sought to clarify aspects of judgements given by candidates; as well as the reasons behind certain career moves and the implications of such moves for a candidate's legal experience. Candidates are frequently asked about the kind of cases they have dealt with, both in practice and on the bench. We observed that the JSC showed a welcome willingness to ask candidates to discuss judgements they had given, although we would still like to see such discussions playing an even more prominent role in the interviews.

63. The requirement of experience regarding the 'values and needs of the community' has drawn some criticism.[25] We have previously noted the prevalence of such questions in interviews prior to the JSC's criteria being announced, and noted some concerns with this line of questioning. While we fully appreciate the sentiment that lies behind the idea, and fully support the thinking, we suggested that there appeared to be an implicit assumption that candidates who have not been involved in community activities outside legal practice would not be able to appreciate the challenges facing the community, and we questioned the adequacy of any such assumption.

64. Having been included among the JSC's criteria, it was most striking to note how few questions were asked on this issue during the October 2010 interviews. Indeed, in many interviews it was not raised at all, and when such questions were asked, it tended to be asked by representatives of Provincial Premiers, attending interviews for their specific province's high courts. Permanent members of the JSC seldom appear to ask such questions.

65. Questions that were asked included asking a candidate to demonstrate what she had done for gender equality with her membership of a certain women's organisation. Questions about candidates' involvement in professional organisations (such as

[25] See Hoffman, *Criteria for choosing judges go beyond the constitution*. Hoffman seems particularly uneasy with what is meant by "the community".

Nadel or Advocates for Transformation) might also be seen as having a tenuous connection to experience of community needs.

66. The lack of questions relating to this requirement raises questions about its relevance and importance. But the questions that have been asked suggest that there may be something worthwhile to be explored. For example, it could prove to be a good way of exploring whether candidates are genuinely committed to certain constitutional values, or merely pay lip service by joining an organisation and then not taking part in its activities (we do not suggest that this was the case with any of the candidates in these interviews).

67. Concerns about what is meant by the "community" suggest that it will be desirable for this concept to be clarified and given deeper content. Additionally, we believe that it is appropriate that a lawyer's primary focus is on their practice. Legal practice is a demanding and time-consuming vocation. It is also not the case that, by devoting their attention to their practice, lawyers are therefore unaware of the challenges facing their community. Indeed, the cases taken on by some lawyers may make them more aware than most about such challenges (for example, a lawyer whose practice deals with evictions will be likely to be well versed in the challenges faced by communities affected by housing and access to land issues).

Does the proposed appointee possess appropriate potential

68. This criterion has also proved to be controversial. Some commentators have taken the view that judges ought to be appointed only when they are the 'finished product' .[26] We disagree: it is surely unrealistic to think that judges should be expected to be at the peak of their judicial powers when they are appointed to the bench. In every profession, and in every walk of life, people continue to 'grow' the longer they are in a job or a profession or trade. Rarely, if ever, can one said to be the 'finished article'; it is an entirely elusory, as well as inappropriate, notion. Judges can surely be expected to improve and develop as jurists with increased exposure to a variety of cases, and (hopefully) increasing confidence in their own abilities as judges. Furthermore, the JSC's insistence on experience as acting judges, whilst problematic in some respects, will help to provide a yardstick by which potential might be measured – namely, a candidate's performance as an acting judge.

69. Having said this, we do share some of the reservations about this criterion. As it stands, it is a very loose and open concept. Almost anyone has 'potential' of some

[26] Hoffman, *supra*, argues that the JSC should "[r]ather choose fully grown judges", as "the litigating public would surely prefer that judges do not do their "growing" at the expense of the unfortunate litigants who cross their paths during the "growth phase" of their development."

kind – what is important is for the JSC to articulate more fully exactly what it means – potential to be/ do what? It may be said that sufficient content can be given to a candidate's 'potential' by referring to the other criteria for appointment. Nonetheless, we suggest that this needs to be fully and clearly articulated. If not, the suspicion may be present in some observer's minds that the JSC has simply employed this term as an elastic, catch-all quality by which to justify controversial or unpopular selections. To assuage such fears, it would be helpful for the JSC to articulate what qualities or attributes it sees as constituting such 'potential', and how they might manifest themselves as distinct qualities not already evident in a candidate.

70. It was difficult to highlight any questions during the October 2010 interviews which specifically addressed this criteria, but this is perhaps unsurprising – potential can and should be inferred from the other questions and criteria employed by the JSC.

Symbolism: what message is given to the community at large by a particular appointment?

71. This criteria has also proved controversial, with questions being raised about its relevance to the judicial function.[27]

72. We submit that, on a broad view of the requirements for appointing judges under the constitution, having regard particularly to section 174 (2), this criterion can have an appropriate role to play. This has been illustrated in remarks made during interviews. In the October 2010 interview, a commissioner recounted an American judge visiting South Africa in 1992 and addressing students at the University of Zululand. When the judge made a remark to the effect that the students would one day become judges, the students laughed at how far-fetched the idea sounded. In the September 2009 interviews, one candidate (a black judge) recounted that court orderlies had once commented to him that they 'did not think their own people could be judges'. In striving to build a more representative judiciary, as contemplated by the constitution, appointments of judges from previously disadvantaged backgrounds do not merely improve the raw demographics of the bench; they can be salutary and inspirational. We do not think this is improper or inconsistent with the constitution.

73. Another aspect of symbolism which arose was through the question, described earlier, about how a candidate had used their 'symbolically powerful' role as a judge in the community. This suggests that the JSC sees the role of the judge as being one that transcends the courtroom, and suggests that this 'symbolism' also requires

[27] Hoffman, *supra*.

some active involvement by an aspirant judge in his or her community or by demonstrating leadership in broader society.

Conclusion

74. Whilst acknowledging that the JSC's criteria will continue to be elaborated on and developed, they do appear to be in general a sound basis on which to continue to develop clear, transparent principles on which judicial appointments may be based. An analysis of the questions asked during the October 2010 interviews suggest that the criteria have contributed to more relevant and focused questions being asked than has tended to be the case in previous interviews.

75. This is not to suggest that the process of judicial appointments does not continue to be problematic in many respects. The criteria, whilst a positive step, are vague and open ended, and it will remain to be seen whether the appointments made will fulfil the promise of even the best of the criteria. As we have highlighted, there are grounds for concern that the JSC might not be appointing as intellectually diverse a bench as it might. There remains a need for still greater consistency and clarity regarding the permissible scope of certain questions. All of this serves to underscore the argument that the judicial appointments process would benefit from greater transparency as to the reasons for appointments being made.

76. Significant progress has been made in meeting the challenge of developing a robust and sustainable set of operating principles and conventions to underpin the performance of the JSC's crucial constitutional mandate. Many dilemmas and knotty issues remain unresolved, however, and we respectfully submit that the JSC would benefit from affording itself the opportunity to think through these various matters as soon as possible.

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