



APPOINTMENT OF HIGH COURT JUDGES

Submission to the Judicial Service Commission: The Democratic Governance & Rights Unit University of Cape Town

1. Members of the Commission may recall the submission and research report compiled by the Democratic Governance and Rights Unit (“DGRU”) and presented to the Commission prior to the nomination of candidates for appointment to the Constitutional Court in September 2009. It is beyond the scope of the DGRU’s mandate to prepare a similar report, examining the judicial record of all the candidates for High Court and Labour Court positions. However, the process the Commission follows in advising on appointments to the High Court, in accordance with its constitutional mandate, remains an important one.
2. The DGRU is of the view that the appointment of judges to all levels of the judiciary ought to be governed by the same broad considerations, although certain specific factors will clearly have to be taken into account for specialist courts. This submission seeks to offer a modest contribution to assist the JSC as it conducts the process, by reiterating the DGRU’s thoughts on the attributes for an ‘ideal South African judge’.

3. First, what are the attributes that should be found in the 'ideal' South African judge and which together inform and constitute the two constitutional lodestars for appointment, namely according to section 174(1) of the Constitution, that judges must be "fit and proper" and "appropriately qualified"?
4. On this, we submit that the following attributes represent a principled approach to answering this difficult question¹. The criteria that a candidate be 'fit and proper' for appointment might be distilled into five categories:
 - 4.1 A commitment to constitutional values and to apply the underlying values of the Constitution (human dignity, freedom and equality), with empathy and compassion, and with due regard to the separation of powers and the vision of social transformation articulated by the Constitution.
 - 4.2 Independence of mind: Judges must have the courage and disposition to act independently and free from partisan political influence and private interests alike².
 - 4.3 A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice.
 - 4.4 High standards of ethics and honesty: For the rule of law to be respected, the reputation and probity of the bench should be a non-negotiable pre-requisite.
 - 4.5 Judicial temperament: Though a somewhat elastic term, this may encompass qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.
5. The criteria that candidates be "appropriately qualified" might be understood as referring to a candidate's formal qualifications, experience and potential. In our September 2009 submission, we emphasised that Constitutional Court judges must be qualified not only in respect of the general body of law, but that they must be equipped to give meaning to constitutional values. We are of the view that judges in all courts should demonstrate sensitivity to constitutional values, in order to fulfil the Constitutional injunction that the Bill of Rights be promoted

¹ This set of attributes draws on the research of Susannah Cowen, a practising advocate and Senior Research Associate of the DGRU. Her paper, *What Makes an Ideal South African Judge?* will be published soon.

² While individuals may well hold, or have held, political or ideological affiliations, and while a judge's values will influence their approach to adjudication, 'independence of mind' refers to the capacity to put the Constitution first and to not slavishly follow 'the line' of any one political or private party or interest.

in the interpretation of legislation and the development of common and customary law.

6. The JSC is obliged not only to consider whether candidates meet these criteria, but – importantly – also to consider the need for the judiciary to reflect both the racial and gender composition of the South African population. This is, of course, an obligation which is fundamental to the legitimacy of the South African legal system.
7. In terms of the relationship between sections 174(1) and (2), we submit that while there is no hierarchy amongst the two sets of provisions, and neither should succumb to the other, nor does it represent a ‘zero sum game’. Candidates must be “fit and proper”, and “appropriately qualified”, but due consideration must also be given to the “need for the judiciary to reflect broadly the racial and gender composition of South Africa”. If sections 174(1) and (2) are applied correctly, choosing an ideal judge and achieving equity, diversity and representation is necessarily an inter-related and complementary process.
8. Clearly, the process of interviewing candidates provides an opportunity to assess whether or not they meet the constitutional standard set in section 174(1). Questions should, we respectfully submit, be directed in a consistent fashion towards criteria such as those that we outline in paragraph 4 above. In particular, we suggest that it will be necessary for commissioners to ask questions about a candidate’s “judicial philosophy”. We understand “judicial philosophy” to include a candidate’s commitment to constitutional values, as well as their views on issues such as the role of the judiciary, constitutional interpretation, and ethical and ideological issues relevant to the judicial function.
9. When attending the Constitutional Court interviews in September 2009, DGRU researchers were heartened to observe that certain candidates were questioned in some detail on their judicial philosophy. However, it was also observed that the questioning was not always consistent, in that some candidates were not asked questions that enabled them to set out their judicial philosophy. We submit that this was exacerbated by certain candidates being asked questions that did not seem relevant in establishing their suitability for the bench.
10. We hope that this submission may be of some assistance in helping the Commission in making full use of the opportunity to interview the Candidates most effectively and wish to reiterate that we offer these thoughts in the absence of any more detailed set of published criteria from the JSC itself. This lacuna, we respectfully submit, continues to represent a serious diminution of the transparency and accountability of the process. If the public are not clear upon what basis the JSC is making its choices, and formulating its recommendations, it is likely to undermine the credibility and legitimacy of its

decision-making. It also limits the ability of the non-governmental sector to participate meaningfully in the process.

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