

JUDICIAL SELECTION **IN SOUTH AFRICA**

A	INTRODUCTION	2
1.	Judicial Selection: A Timely Debate	2
B	CRITERIA FOR JUDICIAL SELECTION	
2.	The Constitution's General Requirements	10
3.	The Implications for Judicial Independence	12
4.	An Appropriately Qualified Person	21
5.	A Fit and Proper Person	34
6.	Non-discrimination, Diversity and Representivity	52
C	PROCESS AND SYSTEMS	61
7.	Introduction	61
8.	Peer Review	64
9.	Collation of Information about Candidates	80
10.	Involvement of Government and Non-Governmental Agencies	85
11.	Rules of Engagement	89
12.	Transparency	95
13.	Resources and Conclusion	100

A. INTRODUCTION

CHAPTER ONE: JUDICIAL SELECTION, A TIMELY DEBATE*

What qualities do we expect in a South African judge? The question warrants examination because a principled public discourse about the criteria for judicial selection can strengthen our democracy, our commitment to the rule of law and the protection of human rights. It is a question that should concern all who play a role in judicial selection because the quality of decision-making is enhanced when decision-makers are clear about the criteria to be applied.

In the first part of this paper, the criteria for judicial selection are considered by asking what the Constitution requires. The second part of the paper explores what procedural and systemic mechanisms we might use to assess a candidate's suitability for judicial office, bearing these qualities in mind and some of the institutional challenges that we face.

Any attempt to give meaning to the provisions of the Constitution will be informed by accounts of history and a set of values. Because reasonable people might differ about what these are and their implications for interpreting the Constitution, it is best to be explicit about assumptions that are made, so that, through public debate, we might arrive at the best answers. To this end, reliance is placed not only on textual and contextual indicators of meaning within the Constitution itself but on academic and extra-curial judicial perspectives about the transformative project of the Constitution and current challenges. Without purporting to conduct any comprehensive comparative analysis, some insights are also drawn from features of the judicial selection process in the United States of America and to a lesser extent, the United Kingdom and Australia.¹ The comparative perspective is incomplete not only

* Thanks are owed to many people for assistance with this paper. Many colleagues and friends made themselves available for formal interviews or informal discussion. Particular thanks are, however, owed to Theunis Roux (now at UNSW, Sydney) who assisted me greatly in developing my ideas about judicial selection and a theory of adjudication.

because these systems are only touched upon, but because a comparative approach would also require examination of jurisdictions more closely linked to the South African developmental and transitional context.

The task of identifying the qualities we seek in our judges may not be illusory but it is a daunting one. While some qualities are obvious, there are numerous qualities that are relevant to judicial office just as there are many types of personality that might make a good judge. It is relatively easy to say, for example, that a candidate for judicial office must have integrity, but what that means practically, and how one assesses it, requires careful consideration of a vast literature and much wisdom about judicial ethics.² It also needs to be acknowledged that there is no algorithm that can be applied to test whether a candidate will be a good judge. This paper thus cannot, nor does it, purport to be either definitive or comprehensive. Rather it is a modest attempt to explore some of the questions that arise and that warrant broader discussion in what is inevitably highly contested and dynamic terrain.³

Fortunately, there are other people – eminently more qualified –who have already paved the way for discussion.⁴ At the outset, some inspiration may be found in the words of South Africa’s first two post-democratic Chief Justices, Chief Justice Mohamed and Chief Justice Chaskalson.

¹ The choice of jurisdiction is unsystematic. Material was drawn from research conducted during visits to the UK, the US and Australia between March and July 2009. Interviews were conducted in the US with members of staff of the Senate Judiciary Committee, the Justice Ministry, the American Bar Association, various non-profit organisations, judges and members of the media. An interview was held in Sydney in May 2009 with the former Chief Justice of Australia, Murray Gleeson and in March 2009, in London with Prof Kate Maleson, Queen Mary, University of London.

² See for example, the *Bangalore Principles of Judicial Conduct 2002* and the *Guideline for Judges of South Africa: Judicial Ethics in South Africa* issued in 2000 by the Chief Justice, the President of the Constitutional Court, the Judges President of the high courts and the Labour Appeal Court and the President of the Land Claims Court. Both of these documents refer to other relevant documents and literature.

³ The need to sound these words of caution was emphasized by Bernard L Shientag in the third Benjamin N Cardozo Lecture he delivered in 1944, under the auspices of the Association of the Bar of the City of New York entitled ‘*The Personality of a Judge and the Part it Plays in the Administration of Justice*’ published in booklet form by Vail-Ballou Press Inc, Binghamton, New York at pp 1-4. Further reference is made to this penetrating, albeit now quite quaint, lecture below.

⁴ Because many remarks about judicial selection are made not in accessible journals but in speeches and news articles, and closed or specialised symposia, it has not been possible for present purposes to conduct any comprehensive literature review.

Chief Justice Mohamed made the following remarks in an address to the International Commission of Jurists in Cape Town on 21 July 1998:⁵

*'[S]ociety is ... entitled to demand from Judges fidelity to those qualities in the judicial temper which legitimize the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous among them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility, and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other which comes from the consciousness of our own imperfection'*⁶

More recently, Chief Justice Chaskalson reminded us of qualities relevant to the appointment of a Chief Justice.⁷

"Racism will not be an issue. Nor will commitment to transformation. (All will be committed to that.) The merits of the candidates, their qualities of leadership and institution-building, their commitment to the values of the Constitution, their independence and integrity, the impact their appointment might have on the standing of the Constitutional Court, and other relevant factors, will no doubt be considered."

While the criteria for judicial selection ought to be the subject of on-going debate, the timing of the release of this paper is not insignificant. Notably, it has been finalized not long after President Jacob Zuma's appointment in October 2009 of Chief Justice Sandile Ngcobo and four new Constitutional Court justices.⁸ The appointment of a new Chief Justice may mean many things, but importantly, it signals new leadership of the JSC and thus an opportunity to re-evaluate the JSC's selection criteria, processes and 'rules of engagement'.⁹

⁵ 'The Independence of the Judiciary' 1998 *SALJ* 115 658 at 666.

⁶ These qualities were emphasised by recently appointed Chief Justice Ngcobo during his interview before the Judicial Services Commission in September 2009. Chief Justice Ngcobo also highlighted a candidate's 'capacity to grow' and 'willingness to stand alone on occasion' as relevant qualities.

⁷ "Does Hlophe approve of campaign on his behalf" *Cape Times* 25 June 2009.

⁸ In October 2009 the tenure of Chief Justice Langa, Justice Mokgoro, Justice O'Regan and Justice Sachs ended. The new appointments announced by President Zuma were Justice Froneman, Justice Jafta, Justice Khampepe and Justice Mogoeng.

⁹ The term is borrowed from Chief Justice Ngcobo himself, with permission.

The four new appointments were made following a three-day interview process involving 21 candidates conducted by the JSC at Kliptown, Soweto, the place where the Freedom Charter, the forerunner of the Constitution, was adopted in 1955.¹⁰ The Kliptown hearings were momentous not only because of the deep symbolism of the venue but because it was the first time that appointments were made following the completion by Constitutional Court judges of the prescribed fifteen year tenure period. Until then Constitutional Court judges had vacated office because they had reached the age of compulsory retirement. That explained both why four vacancies arose simultaneously and why questions about selection criteria, judicial philosophy and transformation featured more prominently than in any selection debate since President Mandela appointed the first Constitutional Court in 1994.

The occasion was momentous too because the JSC, as an institution, has been mired in controversy relating to its investigation of complaints concerning Western Cape Judge President John Hlophe and his own candidature for a place on the Constitutional Court.¹¹ The integrity of the JSCs judicial selection function, and more particularly its selection criteria and evaluation processes were thus under the scrutiny of many. Although it is beyond the ambit of this paper to conduct any comprehensive review of the Kliptown hearings, many insights can be gleaned from the events that took place.

Kliptown aside, there are at least three reasons why it is now timely – fifteen years into democracy – to consider our approach to judicial selection.

Firstly, because the accord struck during the democratic transition in 1994 contemplated the *gradual*, and *not* the immediate, racial and gender transformation of

¹⁰ Only Chief Justice Ngcobo was interviewed for the position of Chief Justice. The interviews took place from 20 to 22 September 2009.

¹¹ Over a fifteen-month period preceding the Kliptown hearings, the JSC had investigated a complaint lodged by judges of the Constitutional Court concerning an alleged attempt by the Judge President to influence the outcome of a Constitutional Court decision which related to the legality of search and seizure operations conducted in respect of the prosecution of President Jacob Zuma. The JSC also investigated a counter-complaint lodged by the Judge President in respect of the manner in which the Constitutional Court judges lodged the complaint. The JSC had, a few years back, investigated a separate complaint concerning the receipt of payments by the Judge President from a private company, in circumstances where the Judge President had also granted leave to that company to sue Judge Desai, also of the Western Cape High Court.

the judiciary,¹² it is important that we periodically review whether our approach to transformation of the judiciary is appropriate and working.¹³ That would best be done in the light of some consensus about what qualities we are looking for in a South African judge.¹⁴ That means that there is a need for debate, which assumes some importance in view of the desire recently expressed by, amongst others, the Minister of Justice, Jeff Thamsanqa Radebe, to accelerate transformation of the judiciary.¹⁵

Secondly, although we are fifteen years into democracy, it appears that there is insufficient public awareness about the qualities that those responsible for judicial selection look for when appointing judges.¹⁶ A notable feature of the South African

¹² The transitional provisions of the interim Constitution provided that judges in office at the time that Constitution took effect would remain in office. (Section 241(2)). The existing courts remained in tact. (Section 241(1)) For comment on the relevant provisions, see D Basson *South Africa's Interim Constitution: Text and Notes* (1994) Juta 304 *et seq.* The only fundamental institutional change to the court structure was the establishment of a Constitutional Court to sit as the final arbiter on constitutional matters. Appointments to the Constitutional Court were made with due regard to the need for that Court to be 'independent and competent and representative in respect of race and gender.' (Section 99(5)(d)). See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) Juta 197. Under the final Constitution, when any judicial officer is appointed, the need for the judiciary to reflect broadly the racial and gender composition of the judiciary must be considered. See section 174(2) of the Constitution. For a compelling pre-negotiations argument why judicial reform rather than a 'clean sweep of the judiciary' was justified, see Forsythe *'Interpreting a bill of rights: the future task of a reformed judiciary?'* (1991) 7 SAJHR 1, 15-17. The positions adopted by parties to the negotiations are probably best reflected in the records of the Constitutional Assembly, which at the time of writing were not readily accessible.

¹³ The office of the Presidency has recently conducted a fifteen-year policy review for which purposes a report was commissioned to provide *'a conceptual analysis of the transformation of the judiciary'*. Amongst other topics, the report deals with judicial selection. The report, expressing the views of its authors, was prepared by Dr Murray Wesson and Prof Max du Plessis was sourced on 16 July 2009 at www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf and is referred to as *'the Wesson / du Plessis report'*.

¹⁴ There are of course many dimensions to the debate about judicial transformation, judicial selection being only one of them. President Zuma recently stated that '(w)hen we talk of judicial transformation and access to justice, we are talking about three issues in particular. We want to ensure that even the poorest of the poor do enjoy access to justice. Secondly, that the justice that people access is of a high standard and thirdly that justice is attained without undue delay.' 'Justice for all: Strengthening a Transforming Judiciary to Enhance Access to Justice' Keynote address to the Second Judicial Conference for South African Judges held in Pretoria on 6 July 2009. See too the Wesson / Du Plessis report supra n 13 for other considerations germane to judicial transformation.

¹⁵ Whether it is desirable to *accelerate* the pace of transformation of the judiciary in the sense of its racial and gender composition, is a matter warranting measured assessment. It may well be. However, Dr Wesson and Professor du Plessis point out that South Africa has generally made impressive strides towards transforming the judiciary and compare the paltry representation of black and female judges in 1994 (a total of four judges) with recent statistics showing less than 50% (89 out of 201 superior court judges) are now white men and 50% are white, that is including white female judges. (*The Wesson / Du Plessis report*, supra n 13, pp 2 and 9.) In 2002 former Chief Justice Chaskalson (then Chairperson of the Judicial Service Commission) cautioned that selectors had already 'drawn deeply into the pool of existing candidates' for transformation purposes and that there is a need to increase the size of the pool, which might take time. (*The Wesson / Du Plessis report*, p 9, referring to *'The De Rebus Interview'* (2002) 409 *De Rebus* 10.) For Minister Radebe's remarks, see his interview with *Mail and Guardian* journalist *'Tackling transformation of the judiciary'* 9 July 2009: <http://www.mg.co.za/article/2009-06-12-tackling-transformation-of-the-judiciary> sourced on 10 July 2009. There appears to be some consensus in important quarters that the pace of transformation of the gender composition of the judiciary may be unsatisfactory. Remarks to this effect have been made in recent years by former Chief Justice Chaskalson, Chief Justice Langa as well as Minister Radebe and former Minister of Justice, Brigitte Mabandla.

¹⁶ A remarkable feature of the American tradition is its open discussion about judicial selection in the media and public life. By comparison, though there are signs of change evidenced most recently during the Kiptown hearings, there is relatively little public discussion about judicial selection in South Africa. Though in part driven by its controversially politicised and ideological nature, the American tradition arguably also manifests a healthy interest in matters of great public concern. A notable recent illustration was the unscheduled announcement made by President Obama within minutes of the retirement of Justice Souter from the American Supreme Court in which President Obama *'praised Mr*

selection process that promotes transparency is that the JSC conducts its interview process in public.¹⁷ There is however, little transparency in respect of the criteria used for selection. There are various ways of achieving such transparency, including holding deliberations (and not only interviews) in public and giving reasons for decisions taken in any specific case. Whatever the merits of the arguments for and against them,¹⁸ this paper focuses on a third approach, namely public understanding about what criteria - in general terms rather than in a specific case - are considered relevant.

Openness about the general criteria used for judicial selection serves many interests. It enables a principled public debate about the adequacy of the criteria used, it enables those who nominate candidates or comment on nominees to do so optimally, it enables those who may wish to make themselves available for judicial office to assess their own candidacy, and it enables the media to perform their responsibility to inform the public and generate informed public debate on these matters. Perhaps most critically, however, decision-making is always enhanced when those who take decisions are clear about the criteria that are to be used. Because it is the independence and quality of our legal system that is at stake, accountability is thus serving particularly important ends.

A recent request made to the JSC by the Open Democracy Advice Centre on behalf of the Democratic Rights and Governance Unit for documents reflecting the criteria used when deliberating on judicial selection, yielded the following answer, dated 3 April 2009: *‘There are a wide variety of factors that are taken into account by the Screening Committee before deciding to include or exclude a particular nominee.*

Souter’s tenure, and laid out what he was looking in making a nomination’. The New York Times, May 2 2009. Also helpful are the published statements of Senate Judiciary Committee members who spell out the qualities they look for when vetting presidential nominees. See www.gpoaccess.gov/congress/senate/judiciary/index.

¹⁷ South Africa’s model has been praised for this reason by some: see the comments by Kate Malleson in *The Legal System* (3 ed) (2007) Oxford 216. Compare the remarks of Sir Sydney Kentridge in *‘The Highest Court: Selecting the Judges’* (2003) 62 *Cambridge Law Journal* 55. The JSC’s shift from apartheid government style secrecy was applauded by Constitutional Court candidate Azhar Cachalia during the Kliptown hearings.

¹⁸ These issues came under the spotlight at the Kliptown hearings when the JSC announced its shortlist of seven candidates for President Zuma’s consideration after only one hour of deliberation in respect of 21 candidates. For some discussion of the issues, see *‘Transformation of the Judiciary – a Constitutional Imperative’*, inaugural lecture by President of the Supreme Court of Appeal, Judge Mpati, University of the Free State, 6 October 2004: www.supremecourtsofappeal/speeches/mpati.pdf (sourced on 17 July 2009) and Sydney Kentridge, *supra* n 17, who presents a privacy argument against giving reasons for specific decisions.

These include but are not limited to the recommendation of the Judge President, the support of the candidate's professional body, the need to fulfill the constitutional mandate of the Judicial Service Commission so as to ensure transformation of the Bench to reflect the ethnic and gender composition of the population, the particular judicial needs of the division concerned, the candidate's age and range of expertise, including whether he/she has served as an acting judge in the division or at all, and the relative strengths and merits of the various candidates in relation to one another.'

What is notable in the JSC's answer is that it does not refer to the qualities sought in a South African judge. That does not necessarily mean that judicial selectors do not know what qualities they seek.¹⁹ However, both the President's office and the JSC should make their criteria publicly known and subject to scrutiny.²⁰

The third reason why discussion about judicial selection criteria is timely arises from the tenor of public debate about transformation of the judiciary in recent years some of which has touched on judicial selection.²¹ The debates have been many, varied and complex and it would be unwise to attempt briefly to summarise their content, dimensions or implications here, important as that discussion might be. However, it is probably true to say that many South Africans, black and white, are concerned that the debates and the manner in which we are discussing the issues reveal fundamental

¹⁹ A sense of what the JSC is looking for can be distilled from the contents of the questionnaire that a candidate for judicial office must complete when standing for office. These can be sourced on the website of the Constitutional Court: <http://www.constitutionalcourt.org.za/site/Admin/judicial.htm>. Some of the questions asked during interview also provide hints about what qualities are being sought but for the most part one is left to speculate about the import of questions.

²⁰ According to a report from the Department of Justice on the 'Activities of the Judicial Service Commission for the year ended 30 June 1999,' (sourced on 9 September 2009 at www.doj.gov.za/reports/1999) a decision was taken by the JSC in 1998 (then under the Chairmanship of Chief Justice Mahomed) to publish for the public record the substance of the discussion within the JSC (on 12 October 1998) in which it formulated criteria and guidelines for appointment. A report to that end appears to have been prepared by Prof Milton, then on the JSC, but it does not appear to have been published by the JSC as contemplated. Indeed, it appears to have been lost by the JSC. (Discussions with JSC staff, September 2009) The thinking at the time was that it was important to promote a better understanding of the workings of the JSC. Some indication of the criteria is reflected in the Department of Justice Report which refers to the need for candidates to display integrity and energy and motivation, be both "competent" and "experienced" (technically and in respect of capacity and experience in giving content to the values of the Constitution), have appropriate potential and to project an appropriate symbolic message to the community at large. These are referred to further below.

²¹ Reference might be made to the recent debate about Hlophe JP's candidacy for a position on the Constitutional Court; the debate about the probity of a social remark attributed to Deputy Chief Justice Moseneke alleged to have undermined perceptions of his impartiality in context of President Zuma's recent search and seizure litigation; the labeling by political players of judges and courts as 'counter-revolutionary', also in context of litigation concerning the prosecution of President Zuma; and debates about whether insufficiently experienced judges are at times being appointed as judges in the name of transformation or whether perceived lack of confidence in the judiciary in some quarters merely manifests racism and sexism.

discord about the principles at stake and what we mean when talk about a transformed judiciary. While debate should be encouraged it is troubling that it is often coloured by racial disharmony that continues to pervade not only our legal system, but society more broadly. Not only are we at risk of compromising the value of non-racialism embraced in Section 1 of the Constitution, but we risk allowing racial disharmony to distort how we frame the debate on crucial issues. Worse still, we are allowing racial disharmony to censor some, and possibly many, of us, from speaking at all. If we are to realise the democratic ideals embraced in the Constitution, including a strong and independent transformed judiciary, we must surely all now confront the challenge to transcend discourse at times steeped in discriminatory attitudes and seek a dialogue based on mutual respect and aimed at forging some consensus about the underlying principles at stake.

Ideally, that discussion should be broad-based, involving not only those responsible for judicial selection but the many sectors of society with an interest in the administration of justice. The JSC itself is composed of representatives of the judiciary, the legal profession including attorneys, academic and advocates, political parties represented in parliament, members of the national and provincial executive and presidential appointees. Each sector has a responsibility to define its role and approach, as does the JSC collectively. There is also an important role in judicial selection that can be played by other government agencies and non-governmental organisations.²²

The appropriate starting point for discussion about what qualities South African judges should display is the Constitution, because the Constitution is the supreme law. It is to that question that we now turn.

²² The American example again provides an interesting comparison in that governmental and non-governmental organisations play a role, albeit circumscribed, in identifying possible candidates and commenting on nominees' records.

B. CRITERIA FOR JUDICIAL SELECTION

CHAPTER TWO: THE CONSTITUTION'S GENERAL REQUIREMENTS

Before a South African judge takes office, he or she swears or affirms²³ '(to) be faithful to the Republic of South Africa, (to) uphold and protect the Constitution and the human rights entrenched in it, and (to) administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.' These commitments contain the essence of what we expect of our judges.

However, the Constitution deals expressly with the criteria for appointment of judicial officers.²⁴ Two essential criteria appear from section 174(1),²⁵ these being that a person must be 'appropriately qualified' and 'a fit and proper person' to be a judge. These can be regarded as essential or necessary criteria in the sense that a person who is not appropriately qualified or is not a fit and proper person may not be appointed as a judicial officer.

Because the Constitution does not expressly detail the content of these criteria, we are enjoined to interpret them. Though the terms beg more questions than they answer, their meaning should in the first place be sourced from the Constitution itself, and more particularly by considering the nature of the judicial function and the powers that vest in judges. Perhaps most fundamentally, the Constitution requires that the judiciary be independent, must protect the Constitution and uphold rights, and must apply the law impartially and without fear, favour or prejudice.²⁶

The Constitution also place important responsibilities on judicial selectors in respect of non-discrimination, diversity and, perhaps most prominently in public debate,

²³ Section 174(8) provides: '*Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.*'

²⁴ Section 174.

²⁵ Section 174(1) provides: '*Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.*'

²⁶ Section 165(2).

racial and gender representivity. The Constitution's protection of the right to equality, in section 9, mandates that there is no room for discrimination in the process of judicial selection, and, arguably, also enables selectors to seek to enhance the diversity of the judiciary. On the question of race and gender representivity, the Constitution is clear. It ordains specifically that when judicial officers are appointed 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered.'²⁷

We now proceed to deal in more detail with the constitutional requirements. These are dealt with under three categories: a) an appropriately qualified person, b) a fit and proper person and c) discrimination, diversity and racial and gender representivity. However, at the outset and because of its centrality to the success of the constitutional enterprise, certain remarks are made about judicial independence and its implications for judicial selection.

²⁷ Section 174(2).

CHAPTER THREE: THE IMPLICATIONS OF JUDICIAL INDEPENDENCE

*'The independence of the judiciary is crucial. It constitutes the ultimate shield against that incremental and invisible corrosion of our moral universe, which is so much more menacing than direct confrontation with visible waves of barbarism. ...Subvert that independence and you subvert the very foundations of a constitutional democracy. Attack the independence of Judges and you attack the very foundations of the freedoms articulated by the Constitution to protect humankind from injustice, tyranny and brutality.'*²⁸

In his keynote address to the Second Judicial Conference for South African Judges in July 2009, President Zuma emphasised the importance of preserving judicial independence through the process of transformation.²⁹ He said: *'Let me from the outset state that the transformation of the judiciary should be advanced and undertaken without interfering with the principle of judicial independence. An independent judiciary is one of the cornerstones of any democracy. As the Executive we respect without reservation, the principle of judicial independence and the rule of law.'*

Once it is accepted, as the Constitution requires, that the judiciary's independence must be secured, it is axiomatic that South African judicial officers must have both the courage and the disposition to act with an independent mind. Of course, the grant of secure tenure to judges provides an important means of protecting judicial independence,³⁰ but it is insufficient: Independent-mindedness is an essential quality, which some people display and others do not. Former Chief Justice Arthur Chaskalson put it in these words:³¹

²⁸ Chief Justice Mohamed, supra n 5, in an address to the International Commission of Jurists, Cape Town, 21 July 1998.

²⁹ Supra n 14.

³⁰ South African judges hold office, in the usual course, either for fixed tenure periods or until the statutory age of retirement. South African judges can only be removed from office on the grounds of incapacity, gross incompetence or if guilty of gross misconduct under the procedures in Section 177 of the Constitution. Other means of protecting judicial independence are also important, such as limits on what non-judicial functions can be performed by judges, what financial interests may be held, and in what circumstances. These are dealt with in the *Guidelines for Judges of South Africa*, n 2 and in the Judicial Service Commission Act 9 of 1994 as amended by the Judicial Service Commission Amendment Act 20 of 2008. The former was considered by the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and others* 2001(1) SA 883 (CC).

³¹ E-mail communication with the author 7 September 2009.

“Tenure is an essential component of ‘independence’ but it is not a sufficient guarantee of independence. Tenure of compliant judges would be a disaster. Independence is a state of mind. It should be part of the culture of courts as institutions, and needs continually to be nourished and reinforced. Assessing the independence and integrity of candidates is an essential part of the JSC’s work and should be foregrounded in the consideration of all judicial appointments.”

Under our constitutional framework, independent-mindedness is best regarded as an incident of the requirement that a candidate for judicial selection be a ‘fit and proper’ person to be a judge and will be dealt with further in that section. For present purposes, the argument is advanced that flowing from the independence of the judiciary, there are various lines of enquiry that might broadly be termed ‘political’ that ought not generally be regarded as relevant to judicial selection. If this is so, we should identify what these are. As Forsythe anticipated in 1991, because the exercise of the courts’ constitutional powers places *‘the judiciary ... closer to the centre ... of political controversy ... politicians will attempt to ensure that judges sympathetic to their political concerns are appointed to the bench.’*³²

Indeed, clarity is crucial because there is significant representation of politicians on the JSC and because the Presidency, which ultimately appoints judges, is a political office.³³ Indeed, given the composition of the JSC, South Africa’s system of proportional representation and the ANC’s dominance in the political landscape, political representatives on the JSC who are either ANC members of parliament or who are appointed by members who hold office by virtue of their membership of the ANC, currently have a majority of JSC seats, albeit by a small margin. Given the nature of the judicial selection and JSC members’ obligation to select judicial officers in light of specified criteria and an application process involving consideration of both a written record and an interview, it would probably be unlawful for the ANC, or any other political party with JSC representation, to implement a party whip voting system. Rather, each JSC member must exercise an independent mind based on a

³² Supra n 12 p 19.

³³ According to section 178 of the Constitution, when the JSC performs its judicial selection functions, it sits with its full membership component of 23 members or 25 when considering matters relating to a specific High Court. Of the 23 members, 15 members represent political interests including the Minister of Justice, the National Assembly (including 3 from minority parties), the National Council of Provinces and nominees of the President’s office. When matters relating to a specific High Court are considered, the Premier of the province concerned also sits.

candidate's qualities as revealed by the record and interview. Be that as it may, political parties can and will caucus and an appreciation of the boundaries within which their power ought to be exercised is thus critical.

We should bear in mind that the very purpose of establishing a broad-based commission to select judges was to counterbalance executive power and thereby preserve judicial independence.³⁴ The Constitutional Assembly not only chose to discontinue the pre-1994 system of unchecked executive power³⁵ but also rejected the openly partisan system followed in the United States, where a directly elected President has wide discretion to choose federal judges albeit with the 'advice and consent' of the Senate. The JSC on the other hand is constrained to select judges who are 'appropriately qualified' and 'fit and proper' to be judges, within the meaning of the Constitution.

We can safely assume that that choice was at least in part informed by the apartheid government's less than honourable history of partisan judicial selection which we can ill afford to replicate now.³⁶ Although the role that courts played in the apartheid machinery cannot glibly be summarised and is contested terrain,³⁷ it is now accepted that judges were, at times, appointed because of their political ideologies or party allegiances.³⁸ Indeed, the National Party's agenda was revealed in the 1950s constitutional crisis when, after suffering judicial blows to its attempts to remove 'coloured' people from the common voters' roll in the Cape, it increased the size of

³⁴ As the Constitutional Court held in *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996(4) SA 744 (CC) at para 124: 'As an institution it provides a broad based selection panel for appointments to the Judiciary and provides a check and balance to the power of the Executive to make such appointments.'

³⁵ For a summary of the system pre 1994, see the *Wesson / Du Plessis report*, supra n 13, p 3.

³⁶ Avoiding political influence in judicial selection is one factor advanced in favour of the creation of a Judicial Appointments Commission in the United Kingdom. See Malleon K 'Creating a Judicial Appointments Commission: Which Model Works' *Public Law* Spring 2004 102 – 121. See too Malleon K *The New Judiciary: the effects of expansion and activism* Ashgate 1999 145-147.

³⁷ *Wesson / Du Plessis report*, supra n 13, p 3. That report refers to 'The Truth and Reconciliation Commission and the Bench, Legal Practitioners and Legal Academics' (1998) 115 *SALJ* 15; Corbett 'Presentation to the TRC' (1998) 115 *SALJ* 18 and Davis, Marcus and Klaaren 'The administration of justice' *Annual Survey of South African Law* (1997) 788-9. See too Dugard *Human Rights and the South African Legal Order* (1978) Princeton University Press. For an evaluation of the performance of the Appellate Division from 1910 to 1950, see Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910 – 1950* (1984) Juta.

³⁸ Sir Sydney Kentridge for example has remarked that 'during the 45 years of apartheid government the standing of the South African Supreme Court had been diminished by far too many appointments of judges whose only apparent qualification for the bench was their adherence to the party in power.' Supra n 17.

the Appellate Division.³⁹ As Forsythe accounts, the then Minister of Justice had discussions with at least two of the five new judges appointed about their attitude to the Appellate Division's decision in the Harris case.⁴⁰

The challenge is thus to clarify the boundaries that protect judicial independence from political influence in the judicial selection process. At least three separate but interrelated lines of enquiry ought to be highlighted. These relate to (a) a candidate's support for any political party; (b) decisions a candidate might make as a judge (c) a candidate's commitment to constitutional values.

As to the first, there can be no dispute that at the very least, a candidate's allegiances to any political party should not be treated as relevant as they were under apartheid. That would offend judicial independence, the separation of powers and the rule of law at a most elementary level. As Justice Cameron wrote in 1990, if judges were accountable to majority sentiment they could not perform their important responsibilities of ensuring that executive power is exercised only according to law and protecting (human) rights.⁴¹ There is simply no place for judicial selection based on 'subservience to majority' or as under apartheid to 'executive feeling'.⁴²

A second constraint on judicial selectors flowing not only from judicial independence but the very nature of the adjudicative function is that judges ought not to be vetted based on how they might decide a particular case. Judges are called upon, in the usual course, to determine actual and live disputes not abstract questions of law.⁴³ When judges decide disputes, they usually do so, based on the facts, evidence and legal

³⁹ See Forsythe supra n 12 at p20, or for a fuller account, Forsythe *In Danger for Their Talents: a study of the Appellate Division of the Supreme Court of South Africa 1950-1980* (1985).

⁴⁰ Forsythe supra n 12 at p20. The Harris case, also known as the Vote case declared invalid the Separate Representation of Voters Act, which sought to remove coloured voters from the common voters' roll in the Cape. *Harris v Minister of Interior* 1952(2) SA 472 (A). See generally: I Loveland *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* (1999) Hart Chapters 7-10; Gauntlett 'Since the Law Makes the King' in Cowen on Law (2008) Juta pp 48-52.

⁴¹ 'Judicial Accountability in South Africa' (1990) 6 *SAJHR* 254.

⁴² The terms are borrowed from Cameron, id.

⁴³ That principle is located in section 21A(1) of the Supreme Court Act 59 of 1959. It also applies in constitutional cases as held in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and others* 2001(3) SA 1 (CC) at para 9. Courts have a residual discretion to decide abstract questions of law.

arguments that are placed before them.⁴⁴ If selectors were to assess how a candidate might reason about a case of a particular or controversial sort in the abstract, they would in effect be asking how he or she would decide a case in advance and without reference to its particular circumstances. Judges don't do that: It would compromise the very nature of judicial office.

The objection was well put by US Supreme Court Justice Ruth Bader Ginsberg in her confirmation hearing before the Senate Judiciary Committee⁴⁵ in the following terms:

'Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously. Judges in our system are bound to decide concrete cases, not abstract issue. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process. Similarly, because you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue were I in your shoes – were I a legislator – are not what you will be closely examining. As Justice Oliver Wendell Holmes counseled, '[O]ne of the most sacred duties of a judge is not to read [her] convictions in [the Constitution].' I have tried and I will continue to try to follow the model Justice Holmes set in holding that duty sacred.'

Indeed it now seems accepted that candidates undergoing the confirmation process in the United States are not expected to answer questions that seek to ascertain how a controversial case might be decided. While senators will persist in asking questions to that effect,⁴⁶ stock answers reflecting the sentiments expressed by Justice Ginsberg routinely and appropriately end such lines of enquiry during the hearings.⁴⁷

⁴⁴ There are circumstances when courts can or must raise legal questions of their own accord.

⁴⁵ Justice Ginsberg was nominated by President Clinton. Transcripts of the Senate Judiciary Committee hearings can be accessed at www.gpoaccess.gov/congress/senate/judiciary/index.

⁴⁶ A candidates' record (i.e. judgments, academic writings and speeches) is routinely scrutinised by Democrats and Republicans alike for evidence of what is neutrally described as their 'judicial philosophy' but which is usually code for assessing partisan sentiment on matters close to American hearts, such as abortion, affirmative action, state power and increasingly, executive power.

⁴⁷ That is apparent from a reading of many sample transcripts of the Senate hearings. These can be accessed online at the site cited at n 45 above and was a feature of the Sotomayor hearings conducted in July 2009. Journalist Linda Greenhouse

It is perhaps an encouraging sign that during the Kliptown hearings in September 2009, few questions were asked openly seeking a candidate's view on issues that might arise in future controversies. Where candidates were asked such questions and declined to indicate a view anticipating that a related case might come before a court in future, the explanation appeared to be accepted by the JSC.⁴⁸

The third issue raises the most difficult questions and concerns the legitimate interest judicial selectors have in evaluating a candidate's commitment to constitutional values. The threat to judicial independence arises because adjudication, and especially constitutional adjudication, presupposes that judges will reason about moral and ideological precepts and values. It might thus be tempting for judicial selectors to believe that this provides free licence to vet candidates by assessing whether their morality, ideology and values accord with those of the selector, or the institution or political party represented by the selector on the JSC, rather than what the Constitution demands. That this challenge arises in circumstances where judges exercise power under a written constitution with a court-enforceable bill of rights is thus to be expected.⁴⁹

While there has been little discussion to date about the permissible boundaries of questioning about a candidates' 'judicial philosophy',⁵⁰ the Kliptown hearings provided the best opportunity since President Mandela appointed the first

explains that '(t)he general view (in the US) is that judges should not commit to particular outcomes in cases that will foreseeably come before the Court.' E-mail interview with author, 21 April 2009.

⁴⁸ An example from Chief Justice Ngcobo's interview illustrates the both the point and the difficulty. The Chief Justice was asked by ANC MP Mr Burgess whether military courts are part of the judiciary and whether the requirements of judicial independence relate to such courts. Chief Justice Ngcobo's response was that he thought it inappropriate to express a view on a matter that is likely to come before the Court. Mr Burgess did not expressly indicate the specific concern underlying his question but it may have related to controversy at the time about incidents surrounding an unprotected strike action by SANDF members. The Chief Justice was willing to indicate his personal view on whether it would be consistent with judicial office for a judge to go on strike but distinguished his personal view from his view on what the Constitution requires, a matter on which he declined to comment. Mr Burgess had also asked whether the Chief Justice thought that judges have the right to strike.

⁴⁹ See Maleson *The New Judiciary*, n 36 97 regarding a similar debate in the United Kingdom after the introduction of the Human Rights Act of 1998. Maleson seeks to draw a distinction between 'party impartiality' and 'issue impartiality' arguing that there is a strong argument for saying whether a judge supports a particular party should not be relevant in judicial selection but that there is some scope for consideration of 'issue partiality'.

⁵⁰ The term 'judicial philosophy' is used in public and formal discourse about judicial selection in the United States to refer to a candidates' views on matters such as the judicial role, constitutional interpretation and moral and ideological issues germane to law.

Constitutional Court in 1994 for JSC members to evaluate candidates on these issues and to develop its approach to assessing candidates' commitment to constitutional values.

What was perhaps most remarkable was that there was very little debate about candidates' 'judicial philosophy', which suggests that judicial selectors probably need to develop their capacity and resources to engage with candidates about these issues, which in turn would require the JSC to be better resourced so that candidates' records can be properly examined.⁵¹ It also requires a greater level of public and media discourse about relevant questions. Given that our constitutional democracy is still young, it is perhaps not surprising that we still have some way to go.

Indeed, it was only Minister Radebe who consistently posed questions to candidates about a judgment he or she had penned which dealt with a range of matters 'close to the hearts of South Africans, such as affirmative action, discrimination, minimum sentencing, unlawful occupation, fair trial rights and children's rights.'⁵² Importantly, the questions were not framed in a manner that would elicit politically correct answers, but rather in a manner that afforded a candidate an opportunity to explain the approach he or she had adopted to reasoning about important constitutional values. Save for Minister Radebe's questions, candidates' 'judicial philosophy' was raised inconsistently and often only indirectly. A notable exception was the interview of President of the Competition Appeal Court and Western Cape High Court Judge Dennis Davis, which was characterised by lively debate about judicial activism,⁵³ the role of courts in controlling private power and the relationship between a class and

⁵¹ For purposes of the Kliptown hearings, the Democratic Rights and Governance Unit prepared a resource tool entitled 'A Study of the Judicial Records of Nominees for the Constitutional Court' which provided a record, albeit incomplete, of the main decisions relating to constitutional matters of each of the nominees.

⁵² Minister Radebe asked Chief Justice Ngcobo to explain his 'judicial philosophy' to the JSC.

⁵³ The notion of 'judicial activism' itself warrants examination. Again it is a term used in discourse about judicial selection in the United States. 'Judicial activism' is sometimes caricatured as anathema to many conservatives and Republicans who prefer judges to adopt literalist interpretations of the Constitution honouring the intentions of the founding fathers because, it is said, these interpretations facilitate acceptable outcomes in particular relating to matters such as abortion. Liberals and Democrats are often more comfortable with judges who adopt interpretations of the Constitution to meet the social demands of the day. But the caricature and the terms are deeply contested amongst critical thinkers in the US. The meaning of the term in South Africa is similarly unclear and requires careful definition if anything is to be made of it. For example, it cannot be said that literalist interpretations of law cannot yield desirable results, as anti-apartheid lawyers proved in attempts to resist influx control laws. See in this regard Davis and Le Roux *Precedent and Possibility* Double Storey 2008. And many notions that might be termed 'activist' are deeply rooted in our constitutional jurisprudence, for example the duty on judges to provide litigants with effective relief and to develop the common law consistently with the Bill of Rights.

race – based analysis of law.⁵⁴ Various candidates were questioned directly about their views on the adequacy of the Constitutional Court’s protection of socio-economic rights, and, although at times only indirectly and cursorily, about the role of the judiciary in the separation of powers and its proper relationship to the Executive and Parliament.⁵⁵

Some further consideration is given to some of the many issues that might arise when evaluating a candidate’s commitment to constitutional values when dealing with the criterion of a ‘fit and proper’ judicial candidate. Examples referred to are respect for the diversity of South African society; a commitment to access to justice, the realization of social and economic rights and an active citizenry in a participatory democracy; an appreciation for the demands and limits of deference owed by the judiciary to the executive; and a commitment to the transformative goals of the Constitution. Such consideration can only be cursory and limited not only because there are so many, often contested, values and moral questions underlying the constitutional text and particularly the bill of rights, but because different challenges face different generations at different times in history.

In that section, it is argued that, in principle, the line between permissible and impermissible questioning and vetting ought to be informed not only by the Constitution’s requirement of judicial independence and the values articulated in its text, but also by a theory of adjudication which appreciates the role of judges in a constitutional democracy. Although adjudication, and especially constitutional adjudication, at times requires judges to reason according to moral principles, there are boundaries in which judicial power is and ought to be exercised, albeit highly contested terrain. On the one extreme, judicial formalists argue that judges mechanically apply law, reason only accordingly to law and have little discretion to

⁵⁴ In Eusebius McKaiser’s article ‘Less than 60 minutes to affirm growing mistrust of the JSC’ Business Day, 25 September 2009 he commented that: ‘Davis, of course, was lucky to be the only candidate to be extensively engaged on his jurisprudential philosophy’. The article provides some sense of the interview. See too Judge Davis’ reply: ‘No monopoly upon critical thought’ Business Day 2 October 2009.

⁵⁵ This featured prominently in the interview of Chief Justice Ngcobo who acknowledged the potential for tension between courts and other branches of government arising from the distinct roles each branch of government plays and the power that courts can exercise on issues perceived as political in nature. He spoke of the need for ‘constitutional dialogue’ between the branches of government in the performance of their functions.

apply moral standards in resolving disputes. On the other extreme, some argue that judges both do and should resolve cases to achieve predetermined moral or political outcomes, most notably the critical legal scholars. Between the two extremes is a complex but important debate that reveals that it is as unhelpful to take refuge in notions of judicial formalism that fail to acknowledge the role that values and morality play in adjudication as it is to assert bluntly that politics has free reign.⁵⁶ The real challenge is to engender a social understanding of the nature of adjudication and the boundaries of the judicial role, which enables judicial selectors to draw an appropriate line between permissible questioning about constitutional 'values' and impermissible questioning in respect of matters 'political'.⁵⁷

We now turn to consider in more detail what is meant by an 'appropriately qualified' candidate.

⁵⁶ In this debate, alarm is not infrequently expressed about the prospect of South Africa following in the footsteps of controversially politicised federal appointment system in the US where a candidate's position on issues that divide Democrats and Republicans (eg abortion, the death penalty, state powers, security, affirmative action and fair trial rights) dominates political struggle and discourse about selection. There are at least three important differences between the South African and American contexts that reveal why we need not and should not succumb to partisan selection battles: a) the contrast between a JSC selection process based on set criteria and the US' discretionary executive / parliamentary process (see above); b) the relatively detailed and clear provisions in the South African constitution on controversial questions such as abortion, affirmative action and fair trial rights; and c) controversy on issues 'close to the hearts of South Africans' is not drawn on partisan lines as markedly as in the US. And importantly, we can still learn from the US experience: an impulsive rejection of anything associated with America wrongly assumes that US judicial selection is concerned only with politics.

⁵⁷ The distinction between 'values' and 'politics' was drawn by former Chief Justice Arthur Chaskalson: personal interview 18 September 2009.

CHAPTER FOUR: AN APPROPRIATELY QUALIFIED PERSON

Given South Africa's history, not least of exclusive access by a white minority to the legal profession and the judiciary, the race and class based inequalities in our education system and society more broadly, and the ongoing need to tackle deeply rooted racist and sexist attitudes, it is hardly surprising that public discourse about the meaning of 'appropriate qualification' is contested and fraught. As was recently highlighted during a symposium organized by the University of Johannesburg, the idea of 'merit' is value laden and means different things to different people.⁵⁸ The challenge, in essence, is to give appropriate meaning to the idea of 'merit' which is responsive to the multi-faceted needs and challenges facing South Africa's judiciary, the legal profession, litigants and society more broadly. It must also be simultaneously dynamic and rigorous. It must be dynamic because it must respond to changing needs. And it must be rigorous because the judiciary plays such an important role in the public and private sphere alike.

The term 'appropriately qualified' raises various interpretive questions. Firstly, what is meant by 'qualified'? Does it refer narrowly to the completion of a tertiary degree in law?⁵⁹ A broader interpretation is probably the correct one, referring not only to an academic legal qualification, but also to skill and experience that 'makes a person suitable for (the) particular position or task (of judging)'.⁶⁰ To this end, President of the Supreme Court of Appeal, Mpati P recently expressed the view that '(t)he requirement of 'suitably qualified' is not defined, but cannot be interpreted as being a reference to academic qualifications only. Legal knowledge and experience must form part of that requirement.'⁶¹

⁵⁸ See report of Franny Rabkin Business Day 4 January 2010 referring to comments made by Tshepo Madlingozi (that merit is not a value free or objective concept) and former Chief Justice Arthur Chaskalson (that merit means different things to different people). The fact its meaning may be contested does not mean that it is not objective.

⁵⁹ One definition of a qualification is 'an official record of achievement awarded on the successful completion of a course of training or passing of an examination'. www.thefreedictionary.com/qualification

⁶⁰ Id.

⁶¹ Supra n 18.

The broader interpretation is consistent both with the South African tradition and current practice. South African judges – as in other systems, drawing, as we do, on the Anglo-American tradition – have historically been sourced from the pool of experienced and skilled lawyers. This tradition can be contrasted with what prevails in some continental European traditions that have ‘career judiciaries’, which entails specific judicial education and training. Although various judicial training initiatives are underway in South Africa,⁶² we remain heavily reliant on experience as the primary means of acquiring the relevant skills. As for current practice, although there is an important debate whether the JSC and the President are appointing sufficiently experienced judges,⁶³ it is clear that the JSC’s processes are designed to assess not only candidates’ qualifications but also the adequacy of their skills and experience.⁶⁴

However, even if the broader interpretation of ‘qualified’ is correct, what lies at the heart of the matter is what constitutes an ‘appropriately’ qualified candidate.

Perhaps most obviously, it is appropriate that a judge is trained and has experience and skill *in law* because the Constitution vests in judges ‘judicial authority’. Of similar importance, because law embraces many fields, a judge with general jurisdiction must be equipped to adjudicate disputes in a broad range of fields. Every field of law may have important consequences for litigants, who need to have well-founded confidence that the judge deciding their case will do so ably: the legitimacy and success of the legal system depends on it.⁶⁵ That is so whether the case concerns

⁶² Some of these are referred to in the *Wesson / Du Plessis report* above n 13. The promulgation of the South African Judicial Training Institute Act will enable the establishment of an institute to train aspirant and serving judges.

⁶³ The important debate about whether and if so, how frequently, insufficiently experienced judges are being appointed is unhelpfully often conducted in a racialised fashion. The sentiments of Sir Sydney Kentridge and President of the Supreme Court of Appeal Mpati P (supra n 18) highlight some of the issues. In his inaugural lecture at the University of the Free State, Mpati P said ‘*Sir Sydney Kentridge comments in this regard that the Judicial Service Commission had succeeded in eliminating some poorly qualified candidates who might otherwise have hoped for political favour, but that it (JSC) has not been sufficiently rigorous in ensuring that legal knowledge and experience accompany the other qualities needed for the transformation of the judiciary.*’ (Footnote refers to Sir Sydney Kentridge; *The Highest Court : Selecting the Judges* (The Second Sir David Williams Lecture, Cambridge, 10th May 2002, supra n 17) *This is indeed so, I agree, but in a country with a past history as ours there are bound to be lapses such as observed by Sir Sydney Kentridge.*’ The issue also arose during the Kliptown hearings, for example, Supreme Court of Appeal Judge Azhar Cachalia was questioned, with apparent criticism, about a statement he had written to the effect that some newly appointed judges are battling with writing judgments. Without reading the statement which was tendered to the JSC by the candidate, no comment can be made on its contents. But if there is truth to the statement, it is difficult to see why it should be criticized rather than the problem dealt with.

⁶⁴ That much can be gleaned from the application form that is completed by candidates for judicial office. See above n 19.

⁶⁵ Former Australian Chief Justice Murray Gleeson has suggested that one indicator of confidence in the system is that held by the losers of a case, who include not only litigants and lawyers but also judges and decision-makers, who are taken on appeal and review. Interview with the author, Sydney 19 June 2009.

abuse of state power, a customary law dispute, a parent's access to a child, an accused who faces life imprisonment or a complex commercial dispute.

Under the constitutional dispensation all judges need to be equipped to undertake constitutional adjudication,⁶⁶ which often requires judges to engage in moral reasoning in giving content to the normative value system underlying the Constitution and to test government action. Judge Davis of the Cape High Court has suggested that this means that judges need to be sufficiently schooled in what he terms '*the philosophical approach*'.⁶⁷ Sir Sydney Kentridge has suggested (in context of the UK Human Rights Act) that: '*experience of public law should count more heavily. Broad jurisprudential interests will be more desirable than ever.*'⁶⁸ Arguably, public law experience is now, more than ever, relevant to navigating the difficult line between judicial and executive or administrative authority, but the debate on how we assess relevant skills still needs to take place.

Another important dimension of constitutional adjudication and the transformative project of the Constitution is the place that it accords to customary law. As the Constitutional Court has held, while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law and its validity determined by the Constitution: '*This approach avoids the mistakes which were committed in the past ... and which led in part to the fossilization and codification of customary law which in turn led to its marginalization. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in the words of Mokgoro J, '[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community.*'⁶⁹ In order for customary law to resume its proper place in our legal order, South African judges

⁶⁶ That is increasingly so as the Constitution reaches into all areas of law.

⁶⁷ 'Jurisprudence' in *Cowen on Law* 2008, Juta p. 143. Those skills have assumed particular relevance in light of the shift under the new constitutional dispensation from a formalist and literalist approach to constitutional and legislative interpretation. See in this regard the Wesson / Du Plessis report, supra n 13 pp 3-5.

⁶⁸ Supra, n 17 p 63.

⁶⁹ *Bhe v Magistrate Khayelitsha and others* 2005(1) SA 580 (CC) at para 43 referring to *Alexkor Ltd and Another v Richtersveld Community and Others*.

must increasingly be equipped to adjudicate customary law claims,⁷⁰ insofar as customary law disputes are adjudicated in the courts.

While all judges must surely be equipped to adjudicate constitutional questions, it is arguably not necessary for every judge to have experience in every field. What is ‘appropriate’ will depend in part on the court to which a candidate is being considered for appointment.

Thus if a candidate is being considered for a specialist court such as the labour courts, the land claim courts or the competition courts, it is obviously appropriate if their training and experience is in the relevant fields as, indeed, the applicable legislation requires.⁷¹ And, it is not surprising that in jurisdictions where specialist courts feature prominently, specialist experience will inform how appointments are made. In Australia, one finds, amongst others, family courts and administrative courts (such as environment and planning courts), and it is expected that candidates for appointment to those courts will have substantial experience in the practice of the relevant law.⁷²

However, on the whole South African courts have general jurisdiction or require general experience. That applies also to the Constitutional Court. Although its jurisdiction relates to constitutional matters, these will often arise from and in context of cases from courts with general or specialist jurisdiction; thus the need for Constitutional Court judges to have a broad range of experience. It follows that it would be ideal if judges on the High Court, the Supreme Court of Appeal and Constitutional Court are skilled across the range of legal fields that are commonly litigated.

⁷⁰ Under Section 15(3) of the Constitution, legislation recognising traditional or religious systems of marriage, personal or family law may be enacted and if this occurs, judges may be called upon to adjudicate those claims.

⁷¹ By way of example, section 153 of the Labour Relations Act 66 of 1995 requires Labour Court judges to be either High Court judges or legal practitioners who have ‘knowledge, experience and expertise in labour law’. Judges of the Land Claims Court must have either 10 years experience as a legal practitioners or by reason of their training and experience have expertise in law and relevant land matters: see section 23 of the Restitution of Land Rights Act 22 of 1994. Section 25 of the Competition Act 89 of 1998 requires members of the Competition Tribunal, amongst other qualities, to have ‘suitable qualifications and experience in economics, law, commerce, industry or public affairs.’

⁷² Interview with former Chief Justice of Australia, Murray Gleeson, Sydney, 19 June 2009, who indicated that in the family law context relevant considerations would include experience in the area as well as qualities such as empathy. It is argued below that empathy is a quality relevant to judging more broadly, not only in this field.

While we should aim for that ideal, it is unrealistic to expect every candidate to be all things, and practically unnecessary in each instance. Because the Constitutional Court and the Supreme Court of Appeal sit as full benches, it might be legitimate if we aimed to ensure that there is, overall, an adequate pool of expertise, with sufficient depth, across the legal fields on those benches. High Court judges, on the other hand, usually sit alone or on two or three judge appeal or review benches, and the need for each candidate to have broad experience is thus more acute unless a practice is adopted within High Court divisions to develop specialist pools of judges who will in the usual course be allocated matters in specialised areas. Nevertheless, whichever court is involved (save perhaps in specialist courts), it might be considered 'appropriate' for a candidate to have a reasonably broad range and depth of skills and experience across the legal fields. Because some fields of law arise more commonly in litigation (perhaps commercial law, public law and criminal law) skill and experience in identified areas can legitimately be regarded as essential.

A dominant feature of the post transition South African debate about judicial selection relates to the *nature* of prior experience that qualifies a candidate for appointment. Where historically South African judges were drawn at least for the most part from the ranks of usually senior counsel,⁷³ since the transition, and partly with the purpose of promoting diversity within the Bench, judges are now also drawn from the attorneys' profession, the magistracy and academia.⁷⁴ Although the fit between the skills required to succeed in these professions and roles and to be a good High Court or appellate judge differ in each case, it can hardly be contested that there are skills developed in each realm that are relevant to the exercise of the judicial function.

Thus, magistrates have experience in judging: They have applied the law, must know the rules of procedure and evidence and have managed courtrooms and trials. Regional court magistrates will have experience in serious criminal matters. Academics may be skilled in synthesising the law and may have a deep and thorough

⁷³ Corder, *supra* n 37 p 23. At the time that Corder wrote, he recorded that there had 'apparently been eight appointments from outside the Bar since 1910, each greeted with protest from the organised Bar.' See too Carpenter *Introduction to South African Constitutional Law* (1987) 257: 'Although judges were appointed by the State President on the recommendation of the Minister of Justice 'the practice of appointing them from the ranks of practicing senior advocates was very rarely departed from...', a notable exception being Dr Steyn who later became Chief Justice.

⁷⁴ See Wesson / Du Plessis report *supra* n 13 p 9 .

appreciation of its theoretical and moral underpinnings including of its procedures.⁷⁵ Good legal practitioners, and more particularly those with litigation experience, acquire many skills that we hope to see in judges:⁷⁶ forensic ability, an appreciation of the practical workings of court procedure, a thorough and general knowledge of law, an appreciation of the ethical duties and rules designed to protect the integrity of the legal process⁷⁷ and independent mindedness.⁷⁸

By expanding and reconceptualising what Malleson calls ‘the candidate pool’, we have accepted that ‘*the candidate pool and the definition of merit are interdependent*’.⁷⁹ The benefit that we gain is to open the doors of the judiciary to a wider group of potentially qualified people. Not only does that enhance our ability to improve the diversity of the judiciary and to do so more rapidly,⁸⁰ but, in theory, it means greater competition which may improve our chances of selecting the best candidates.⁸¹ We ought, however, to appreciate that the process is a dynamic one that should respond to the needs of the judiciary and the realities within any professional sphere over time.⁸²

⁷⁵ At least in the early years after the transition, academics – though possibly lacking in practical experience, may have been relatively well-placed to adjudicate constitutional disputes as few practitioners (and indeed judges appointed pre-1994) had either legal knowledge or experience in public law. Fifteen years into democracy, many senior practitioners and, one assumes, most pre-1994 judicial appointees who remain on the bench, have acquired knowledge and skills in public law under the Constitution.

⁷⁶ The remarks of the UK General Council of the Bar in 1989 in its response to a Green Paper ‘*Quality of Justice*’ circulating at the time are apposite: ‘*The strength and independence of the Judges derives from the circumstances in which they have been trained. Their training has consisted of an entire professional life in the Court, in strong competition with other barristers, in regular practice of the examination and cross-examination of witness, in weighing and summarising evidence, in exposition of the law, and in testing Socratic dialogue with the Judges. ...*’ *Quality of Justice: The Bar’s Response* (1989) Butterworths p 183. (For independence, see n 78 below) It is nevertheless worth heeding Justice Cameron’s caution in 1990 that while sourcing judges from the advocates profession in the past ensured a ‘*high level of professionalism amongst judges and a good grasp of the formal and procedural aspects of justice ... (m)any lawyers exhibit a considerable degree of complacency about the legal profession’s devotion to justice and its aptitude for meeting social needs.*’ *Supra* n 41 p256.

⁷⁷ Important amongst these are duties of honesty, preservation of legal professional privilege and rules about conflict of interests.

⁷⁸ The point is usually made in respect of counsel in the manner expressed by the UK General Council of the Bar *supra* n 76 as follows: ‘*Independence*’ arises particularly (1) the fact that barristers are independent of ties with solicitors, and of influence and pressure from Government, and (2) from the requirement to adhere to the ‘cab-rank’ rule.

⁷⁹ Malleson ‘Rethinking the merit principle in judicial selection’ *Journal of Law and Society* 33 (2006) 1 p 137.

⁸⁰ For complex reasons that warrant separate treatment, there are still relatively small numbers of senior black and female members of the practicing legal profession. Much work still needs to be done to develop a strong and diverse candidate pool.

⁸¹ Malleson makes a similar point, *supra* n 79 p 137.

⁸² It has only been a short time since attorneys who have practised continually for a minimum of three years can appear in the High Court: Rights of Appearance in Courts Act 62 of 1995. While it is still uncommon for attorneys to do so that might change and thus more attorneys will have litigation experience similar to advocates. Patterns of specialisation in legal practice are also relevant.

However, while it is no doubt true that there is a range of prior experience that may qualify a person appropriately for judicial office, we are arguably focusing on the wrong question. The fact a candidate has experience of a relevant sort is not enough: the question must surely be whether the candidate possesses the relevant skills and in adequate measure. Drawing on the qualities identified by Chief Justice Mohamed, selectors should thus be asking whether a candidate has the qualities or skills of, for example, ‘scholarship’, ‘forensic skill’ and ‘capacity for articulation’ and if so, of an appropriate level.

It is this enquiry that requires us to ask what are the specific needs and challenges of the South African judiciary, legal profession and litigants, and at a given time. And we cannot assume that the definition of merit in the past is what is good for us now or in the future. An important illustration of the point is ‘language skills’ given that our country is one with eleven official languages and a history where the dominance of English and Afrikaans is steeped in oppression.⁸³

In its answer to the PAIA request, referred to above, the JSC referred to the following two criteria relevant to these considerations: *‘the candidates’ ... range of expertise including whether he or she has acted in the division concerned, or at all, and the relative merits and strengths of the candidates in relation to one another.’* Although it is not clear, it may be assumed that the reference to ‘range of experience’ entails a value being placed on a *broad* range of relevant experience.⁸⁴ As argued above, that is indeed desirable although it is unclear whether the JSC has identified any type of experience that is regarded as essential and what range is regarded as sufficient. Moreover, the JSC does not say what skills are regarded as necessary deriving from that experience and thus how it assesses merit. Rather the suggestion is that candidates are assessed against each other, and not against a perception of an ideal judge that we seek to select.

⁸³ During the Kliptown hearings, JSC members raised this difficult question with many candidates.

⁸⁴ That conclusion is supported by the questions asked of candidates in the JSC questionnaires (supra n 19) although the way in which breadth of experience is scrutinised in deliberations is not known.

If that is the approach, it might be contrasted with that adopted by the American Bar Association in vetting the professional qualifications of candidates considered for nomination by the President for federal judicial office.⁸⁵ One of the three qualities that the ABA evaluates is ‘professional competence’.⁸⁶ The ABA explains:

‘(This) encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience. The Committee believes that ordinarily a nominee to the federal bench should have at least twelve years’ experience in the practice of law. In evaluating the professional qualifications of a nominee, the Committee recognizes that substantial courtroom and trial experience as a lawyer or trial judge is important. Distinguished accomplishment in the field of law or experience that is similar to in-court trial work – such as appearing before or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses – may compensate for a nominee’s lack of substantial court room experience. In addition, in evaluating a nominee’s professional experience, the Committee may take into consideration whether opportunities for advancement in the profession for women and members of minority groups were limited.’

It might also be contrasted with the approach adopted by the new Judicial Appointment Commission in the United Kingdom.⁸⁷ New criteria for what makes a good judge have been used since October 2006, set out in a document entitled ‘Qualities and Abilities’.⁸⁸ The qualities and abilities fall under five headings: intellectual capacity, personal qualities, an ability to understand and deal fairly, authority and communication skills and efficiency. If one extracts those relevant to assessing skills that derive from or manifest in one’s training and experience, at least the following are relevant: a high level of expertise in a chosen area or profession, ability quickly to absorb and analyse information and appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where

⁸⁵ The ABA’s practice of evaluating the professional qualifications of federal judicial nominees commenced in 1948 when an independent committee of the ABA started to evaluate the professional qualifications of federal judicial nominees and to submit its evaluations to the Senate. The ABA explains: ‘In 1953, at the request of President Dwight D. Eisenhower, the ABA committee started to evaluate the professional qualifications of potential nominees to assist him in resisting growing pressures to repay political debts by appointing persons who might not have the professional qualifications to exercise the important responsibilities of the Third Branch. From 1953-2000, the ABA Standing Committee evaluated the professional qualifications of potential nominees for nine administrations, Democratic and Republican alike.’ Although under President George W Bush the ABA was sidelined, it has resumed its historical role under President Barack Obama. See <http://www.abanet.org/scfedjud/fjcfaq.pdf> (sourced on 17 July 2009).

⁸⁶ It also evaluates judicial temperament and integrity.

⁸⁷ See generally <http://www.judicialappointments.gov.uk>.

⁸⁸ According to statute, judges must be appointed on merit.

necessary, sound judgement and ability and willingness to learn and develop professionally.

In concluding this section, it would seem that there are at least four distinct questions that arise within the South African context.

Firstly, we need to identify the skills that are desirable in a judge that might manifest in or derive from training or experience? Drawing on the material dealt with above, the following might be used as a guide: forensic skill, intellectual capacity, writing and analytical abilities, knowledge of the law and its underlying principles, knowledge of court-room procedures, language skills, capacity for articulation, the ability to run a court room⁸⁹ and breadth of professional experience. Knowledge of the law and its underlying principles ought to include knowledge of constitutional law.

It should not, however, be forgotten that it is not only skills relating to legal acumen and language that are relevant to judicial office. Administrative capacity and communication skills are also important because the way a judge administers justice and communicates with litigants has a direct impact on access to justice especially in a context where language and financial means remain real barriers to courts for most people. It is thus not surprising that these considerations permeate South Africa's Guideline for Judges, which regulates judicial conduct once in office.⁹⁰

The criteria used by the ABA in guidelines it has developed for evaluating judges' performance in office are similarly illuminating. These are punctuality and preparation for court, maintaining control of the court room, appropriate enforcement of court rules orders and deadlines, making decisions and rulings in a prompt, timely manner, managing his / her calendar efficiently, using settlement conferences and alternative dispute resolutions mechanisms as appropriate, demonstrating appropriate innovation and using technology to improve the administration of justice, fostering a

⁸⁹ This is a quality that former Australian Chief Justice Murray Gleeson emphasised. Interview with the author, Sydney, 19 June 2009.

⁹⁰ *Supra* n 2. See for example item 7 (duties to enhance public understanding of judicial proceedings), item 11 (duty to dispose of court business diligently and efficiently) and item 14 (duty to give judgment without undue delay).

productive work environment with other judges and court staff, utilizing recruitment, hiring and promotion policies and practices to ensure that a pool of qualified applicants for court employment is broad and diverse and acting to ensure that disabilities and linguistic and cultural differences do not limit access to the justice system.⁹¹ The UK's Judicial Appointment Commission specifically identifies 'authority and communication skills' as meaning 'ability to explain the procedure and any decisions reached clearly and succinctly to all those involved, ability to inspire respect and confidence and ability to maintain authority when challenged.'⁹²

Secondly, we need to find a means of determining what constitutes 'sufficient' or 'adequate' skill in respect of each. Put differently, what is the threshold that we regard as appropriate? The objective, of course, must be to ensure that judges of the highest caliber possible are appointed. As President Zuma stated in his keynote address to the Second Judicial Conference of South African Judges, transformation of the judiciary and access to justice means that litigants must have access to a high standard of justice.⁹³ In the second part of this paper, it is suggested that the best way to assess whether a candidate has both the requisite skills and in adequate measure is to trigger a comprehensive and fair process of peer review modeled (with appropriate adaption to the South African context) on the system implemented by the ABA. Candidates are rated by the ABA as well qualified, qualified or not qualified. 'Well-qualified' designates that the nominee is at the top of the legal profession in his or her community, has outstanding legal ability and breadth of experience, where 'qualified' designates that the nominee satisfies standards of professional competence and is qualified 'to perform satisfactorily all of the duties and responsibilities of a federal judge'.⁹⁴ It is well-qualified candidates who ought ideally to be appointed. There are other possible approaches: for example, the UK Judicial Appointment Commission has introduced a qualifying test 'designed to assess candidates' ability to perform in a judicial role, by analysing case studies, identifying issues and applying the law.'⁹⁵

⁹¹ Guidelines for the Evaluation of Judicial Performance With Commentary: www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf

⁹² See www.judicialappointments.gov.uk

⁹³ Supra n 14.

⁹⁴ 'Backgrounder' of the American Bar Association Standing Committee on the Federal Judiciary, p 6: http://www.abanet.org/scfedjud/federal_judiciary09.pdf

⁹⁵ www.judicialappointments.gov.uk

Thirdly, a view must be taken on whether it is ‘appropriate’ that a candidate has experience with the practical workings of the courts and litigation and if so, how much. Experience in litigation is the primary way that a person obtains forensic skill, a practical knowledge of how court room procedures work and the ability to run a court-room. It is however not the only way as the US example shows: the ABA considers experience such as appearing before or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses as potentially relevant. The questions asked in the JSC questionnaire suggest that indeed the JSC does look for extensive litigation, or equivalent, experience,⁹⁶ but again, it is not known what general criteria are applied in the deliberations process.

It must generally be so that a candidate for judicial office should have reasonable, and preferably considerable, exposure to litigation, or other equivalent experience. It is important not only because it enables the acquisition of relevant skills, but because it engenders confidence amongst litigants in the legal process. Former Australian Chief Justice Murray Gleeson suggests that the choices made by parties referring disputes which can be resolved according to law⁹⁷ to arbitration reveal the type of judge in which a litigant has confidence.⁹⁸ In South Africa that is, most often, a senior litigator or a retired judge, in other words, those with considerable court-room exposure. The need for judges to inspire litigants’ confidence in their ability to run the court-room cannot be under-estimated and bears directly on the public’s perception of the integrity of the judicial system.

If we are going to depart from this general approach in any case, there must be systems in place to preserve public confidence in the system and ensure that quality justice is delivered. One option, which has unfortunately not been rigorously pursued, is to provide new judges who have inadequate litigation experience with training and

⁹⁶ Supra n 19.

⁹⁷ Different considerations will apply when the dispute is to be resolved according to specialist knowledge in a field, such as standards to be expected in the building industry.

⁹⁸ Interview, Sydney, 19 June 2009.

support.⁹⁹ The approach that appears to have been adopted to date rather is to require candidates – whether experienced in the courtroom or not – to serve as an acting Judge. As appears from the JSC response to the PAIA request, such service is regarded as relevant to selection. Indeed, it is not uncommon at least in some divisions for non-practitioners and relatively inexperienced practitioners to act for short periods. Notionally, that approach does provide selectors with an opportunity to assess (amongst other things) whether a candidate – presumably otherwise well qualified – has the ability to run a courtroom. Arguably, the cost to the system is low if a candidate ill suited to the position acts for a short period unsuccessfully.

Yet while this may be a valid approach in small doses, two caveats are warranted. Firstly, it would be desirable if aspirant candidates are strongly encouraged to embark on pursuits that do provide reasonable, or better – considerable - litigation, or equivalent exposure. Indeed it may be desirable to set a guideline (like the 12 year benchmark used by the ABA).¹⁰⁰ Secondly, the question should *always* be not whether a candidate has acted but whether the candidate possesses the requisite knowledge, ability and skills – for example, in this case, the ability to run a court room, a working knowledge of court procedure and forensic skill.

Fourthly, thought must be given to how enduring discrimination in the legal profession should affect the assessment of relevant prior experience. The practical reality remains that race and gender (amongst other factors) do affect what work, and thus what experience and exposure, a person in practice will get. Thus a woman who has been in practice for 20 years may have had exposure to only limited fields of law such as family law¹⁰¹ or public law.¹⁰² It also remains the case that, save where the State or parastatals are litigants, commercial litigators will often still brief white male counsel. But the black and female counsel who have had limited exposure may have

⁹⁹ It may be that the enactment of the South African Judicial Training Institute Act will create further opportunities in this regard.

¹⁰⁰ Under the interim Constitution a benchmark of 10 years of legal practice or academic work was in place for certain Constitutional Court appointments. Some specialist courts require a minimum amount of experience, for example the Land Claims Court.

¹⁰¹ Historically, women tended to be entrusted primarily family law work and it remains the case, at least in the advocates' profession that very talented women have practices mainly in the family law field.

¹⁰² More recently, some female advocates have started specialising in public law, which tends to be motion court work and not trial work. Relatively few women have practices in commercial law although the numbers are growing.

acquired the relevant skills and have aptitude and ability to acquire knowledge in other fields quickly. Care must thus be taken when assessing whether a candidate is appropriately qualified to ensure that discrimination that still pervades legal practice and the profession more broadly is not unfairly held against a candidate.¹⁰³ The principle articulated in the ABA guidelines, modified to the South African context, may thus be appropriate namely that *‘in evaluating a nominee’s professional experience, the Committee may take into consideration whether opportunities for advancement in the profession for women and members of minority groups were limited.’*

We now turn to consider the requirement that a candidate be a ‘fit and proper’ person.

¹⁰³ The critical issue of course is when it would be unfair to do so.

CHAPTER 5: A FIT AND PROPER PERSON

There is no ‘correct’ way to categorise those qualities that relate to fitness and propriety for judicial office.¹⁰⁴ The approach suggested here draws in the first place from the express requirements of the Constitution. Five categories are identified: independence, impartiality and fairness, integrity, judicial temperament and commitment to constitutional values.

Independence

‘There can be no government of law without a fearless, independent, judiciary. The independence of the judge is the chief of all the cardinal judicial virtues. He must be entirely free from all external influence and subservient only to his own conscience.’¹⁰⁵

The centrality of the quality of independent-mindedness is reflected in South Africa’s Guideline for Judges:¹⁰⁶ *‘A judge should uphold the independence of the judiciary ... and should maintain an independence of mind in the performance of judicial duties.’* Thus, a ‘fit and proper’ candidate for judicial office must be a person who has the courage and disposition to do so.

Independent mindedness is a quality displayed both in response to external pressures, whether from political, commercial or private interests, and internal desires, such as a desire for popularity.¹⁰⁷ Thus as Shientag warns that ‘the subtlest poison to which a judge may succumb’ need not be external, but may be driven by ‘pressure from within’. He writes: *‘Every man craves praise, although some call it recognition. A*

¹⁰⁴ Shientag, in his piece, *The Personality of a Judge* (supra n 3) chose eight ‘judicial virtues’ but noted at p 20: *‘The list is not definitive. You may call some by other names; you may omit some and add others; you may arrange them in a different order.’* The virtues he chose as the ‘cardinal virtues’ are the virtue of independence, the virtue of courtesy and patience, the virtue of dignity, including the judge’s sense of humour, the virtue of open-mindedness, the virtue of impartiality, the virtue of thoroughness and decisiveness, the virtue of an understanding heart and the virtue of social consciousness. (See p 21)

¹⁰⁵ Shientag supra n 3 p 21.

¹⁰⁶ Supra n 2, item 1.

¹⁰⁷ Former Australian Chief Justice Murray Gleeson expressed the view to the author that a desire for popularity is a quality that often undermines independent-mindedness. Interview with the author: Sydney 19 June 2009.

*deep instinct of human nature is the yearning to be appreciated. Within normal limits that craving is not only natural, but desirable. It becomes reprehensible when the judge woos popularity by his decisions, or by his conduct on the Bench.*¹⁰⁸

Though judges may have to resist attempts at influence from political, commercial and private interests alike, the need for independence is perhaps most stark when judges are called upon to decide cases with political consequences¹⁰⁹ or to make unpopular decisions.¹¹⁰ As held by Chaskalson P in *S v Makwanyane*¹¹¹: ‘*This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.*’ The same point may be made about favour with politicians or the ruling party.

Fairness and impartiality

Because courts are obliged to adjudicate between competing rights and interests impartially and ‘without fear, favour or prejudice,’¹¹² judges, if they are ‘fit and proper’ must not only act independently, but must be able to act fairly and impartially. A disposition towards fairness and impartiality are thus essential qualities for a judge derived from the Constitution.

According to Shientag, ‘*Impartiality implies an appreciation and understanding of the differing attitudes and viewpoints of those involved in a controversy. ...*’¹¹³ He regards it as one of the most important but most difficult virtues to attain:

¹⁰⁸ Supra n 3 pp 23-24.

¹⁰⁹ The best examples are, perhaps, the recent cases relating to the prosecution of President Zuma. There are however many others: much political controversy surrounded the Constitutional Court’s adjudication of the State’s obligation to provide anti-retrovirals for purposes of preventing mother to child transmission of HIV. See *Minister of Health v Treatment Action Campaign* 2002(5) SA 721 (CC).

¹¹⁰ A classic example is the death penalty decision of the Constitutional Court: *S v Makwanyane and another* 1995(3) SA 391 (CC) where it was held by Chaskalson P (who assumed that ‘*the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder*’) as follows (at paras 88 and 89): ‘*[P]ublic opinion may have some relevance to the enquiry, but, in itself is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.*’

¹¹¹ Supra n 110 at para 89.

¹¹² Section 165(2) of the Constitution.

¹¹³ Supra n 3 p 50.

‘[The virtue of impartiality], one of the most important of all the judicial virtues, is undoubtedly the most difficult to attain. I am not speaking about conscious partiality, favoritism or prejudgment, for no judge of moral integrity would be guilty of any such offence. No judge worthy of his office would knowingly permit any cloud of prejudice to darken his understanding or to influence his decision. ... It is precisely through ... blind faith in his impartiality that (a judge) lulls himself into a false sense of security. He has failed to take into account the limitations of human nature. He has overlooked the difficulty of bringing to consciousness hidden motives, ideas and prepossessions. The partiality, the prejudice, with which we are concerned is not an overt act, something tangible on which you can put your finger. ...’¹¹⁴

Shientag writes about what we can expect from an impartial judge:

‘The suppression of personal emotion, the willingness to suspend judgment until a comprehensive survey of the ground has been made, a hospitable receptivity to the viewpoints of others, a disposition, in the language of Justice Holmes, “to learn to transcend our own personal convictions,” a distrust of the spontaneous conclusions of so-called common sense or happy conjecture, unchecked and unverified by reflective thought and deliberation – all these play their part in enabling us to approximate impartiality with a high degree of probability. That is all we can expect, human nature being what it is; that is all that modern science expects. ...’¹¹⁵

Judicial integrity

‘Moral integrity we take for granted. It is more than a virtue: it is a necessity; it is elemental. All that the judge thinks and does is dependent upon it.’¹¹⁶

The standards of integrity that are required of judges are best articulated in the various documents setting out the ethical standards that govern the judicial system. Two important sources are the Bangalore Principles of Judicial Conduct and the South African Guideline for Judges.¹¹⁷ They include the following principles, amongst others: a judge should comply with the laws of the land applicable to both judicial

¹¹⁴ Supra n 3 p 49.

¹¹⁵ Supra n 3 pp 52-3.

¹¹⁶ Shientag, supra n 3 at 20.

¹¹⁷ Supra n 2.

office and extra-judicial conduct,¹¹⁸ a judge should recuse him or herself if there is a conflict of interests or a reasonable suspicion of bias based on objective facts,¹¹⁹ a judge should act in a manner that minimises the potential for conflicts of interest,¹²⁰ a judge should in respect of judicial activity refrain from conduct that may be interpreted as personal advancement¹²¹ and a judge must observe the limits on the holding of other office of profit and the receipt of gifts.¹²²

While these principles govern how judges should behave once in office, the underlying values can guide the selection process. For example, a candidate should display an acute understanding of the rules and principles designed to avoid conflicts of interest. Indeed, this is a prominent feature of the system for vetting candidates for federal judicial office in the USA.

The ABA's understanding of 'integrity' sheds some further light. It understands 'integrity' to refer to 'character, reputation, industry and diligence'. Character includes considerations such as whether a candidate is '*honest, truthful, trustworthy*' and whether they '*keep their word*'.¹²³

Judicial Temperament

*'There may be a place for arrogance. I'm not sure what that place would be, but I am sure that it is not on the bench. The courts do not belong to us. We are holding a public trust. The courts belong to the people. They need to be made to feel welcome, that this is a place for resolution of their disputes ... Our job is to administer the law fairly and impartially. It is not our place to assume a sense of power which we do not possess, a sense of superiority which we simply do not have. We are administering a public service.'*¹²⁴

¹¹⁸ Guide for Judges, n 2 item 3.

¹¹⁹ Guide for Judges, n 2 item 9.

¹²⁰ Guide for Judges, n 2 item 15.

¹²¹ Guide for Judges, n 2 item 18.

¹²² Guide for Judges, n 2 items 25 and 26.

¹²³ Kim Askew, Chairperson of the ABA Standing Committee on the Federal Judiciary, e-mail interview 23 April 2009.

¹²⁴ Judge Wright during his confirmation hearings before the Senate Judiciary Committee. www.gpoaccess.gov/congress/senate/judiciary/index.

Judicial temperament is a helpful, if somewhat elastic, term that refers to ‘the manner of thinking, behaving or reacting’¹²⁵ expected of a judge. It might embrace characteristics dealt with elsewhere in this report, such as fair-mindedness or independent-mindedness. Thus, the ABA, when evaluating ‘judicial temperament’, ‘considers the nominee’s compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.’¹²⁶ The term is used here in a narrower sense to cover the following characteristics: humility, open-mindedness, courtesy and patience, and decisiveness.

The quality of humility is highlighted in Judge Wright’s testimony to the Senate Judiciary Committee quoted above and derives from the fact that a judge, when adjudicating disputes is performing a public service. It is perhaps best understood by its antithesis, humourously described in American legal culture as ‘robitis’,¹²⁷ this being a propensity on the part of a nominee or judge to attach too much importance to the judicial robe and tending to think that she or he has been appointed as a personal accolade rather than to discharge a public service.

Humility is closely related to open-mindedness. Shientag describes these qualities well when he says: ‘*The ability to receive impressions, but to keep the mind open and flexible, and emancipated from over-certainty, is one of the great judicial virtues. The characteristic of open-mindedness is true intellectual humility, free from egoism and even self-conscious modesty. ... [T]he virtue consists not only in actually keeping the mind open and receptive, but in saying or doing nothing to suggest the contrary.*’¹²⁸ He concludes saying: “*The judge ought to be ‘wise enough to know that he is fallible and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors ...’*”¹²⁹

¹²⁵ The Free Dictionary: www.freeditonary.com

¹²⁶ See Backgrounder supra n 94.

¹²⁷ This term was first drawn to the author’s attention by Arnold Burns, (telephonic interview 20 April 2009) a former member of the ABA Standing Committee on the Federal Judiciary who served during the Clinton administration. The records of the Senate Judiciary Committee are replete with references to it as senators seek to establish whether nominees might, if appointed, be prone to the disease.

¹²⁸ Shientag supra n3 p 46.

¹²⁹ Shientag supra n 3 pp 47-8 quoting Bronson J in *Pierce v Delamater*, 1 N.Y. 17, 18 (1847).

Shientag describes ‘courtesy and patience’ as belonging in ‘the front rank’ of the cardinal judicial virtues: *“For a judge there is a great duty of patience and high obligation of courtesy.”*¹³⁰ The Bangalore Principles of Judicial Conduct 2002 treat courtesy and patience towards litigants, witnesses, lawyers and others with whom she or he deals with in an official capacity as integral to a judge’s competence and diligence.¹³¹ Similarly the South African Guide for Judges requires judges to *‘act courteously and respect the dignity of all who have business there.’*¹³²

Those duties also arise because a judge is adjudicating disputes as a public function. In each case, there will be a loser, and while the loser may prefer a different result, *‘[t]here is no reason ... why each should not leave the judgment seat convinced that the case has been fairly tried. The conduct of the Bench towards the bar, the litigants, and the witnesses is therefore a matter of great concern. They are entitled to be treated with courtesy, with patience and with consideration.’*¹³³

Underlying the duty of courtesy and patience owed to the bar is the litigant’s interest, or right, in being properly represented: *‘The demeanour of the Bench towards the bar, especially towards the Junior Bar ... is of much more concern to the public than may at first sight appear, or than is generally imagined. A client is entitled to the fullest exercise of the talents of the advocate he has chosen to represent him; but this he cannot have, if the latter is not allowed to feel perfectly at ease in the pursuit of his vocation, his mental powers unchecked by unseemly interruptions, captious, ill-natured remarks, or superciliousness of manner exhibited by the judge before whom he is arguing.’*¹³⁴

On the other hand, judges are also expected to be both thorough and decisive. In Shientag’s words: *‘There is nothing more distressing than the spectacle of a judge who is indecisive, particularly on matters which are mostly routine and which should*

¹³⁰ Shientag supra n 3 p 24.

¹³¹ Article 6.6.

¹³² Item 4.

¹³³ Shientag supra n 3 p 27.

¹³⁴ Shientag supra n 3 pp 27-28 quoting Serjeant Robinson, Bench and Bar (1891) 169.

*be disposed of almost instinctively as intellectual reflexes.*¹³⁵ Shientag contrasts two extremes: on the one, the mind that is ‘untroubled by any great legal learning’ or a judge who believes that ‘if he deliberates he is lost’¹³⁶ and on the other, a mind ‘tortured by the anxiety of making decisions’ or paralyzed by ‘extreme intellectual scrupulosity’, ‘tormented by doubt and painful indecision’. Between the two extremes, ‘the quick judge and the judge who sinks into a ... bog of indecision’, he describes the ‘*judicial mind that ... proceeds with all deliberate speed, a mind in which thought is excited, rather than confused, by the invitation of doubt, a mind which at times cannot avoid, indeed does not seek to shirk, what Shelley called ‘the agony and bloody sweat of intellectual travail.*’¹³⁷

Commitment to constitutional values

Because the Constitution is a transformative document and is underpinned by a set of moral values, we can legitimately expect that our judges will both be personally committed to those values,¹³⁸ and to the journey the Constitution contemplates from “*a past based on 'conflict, untold suffering and injustice' and a future which is stated to be founded on the recognition of human rights.*”¹³⁹

The values underlying the Constitution are expressed in section 1. It provides that South Africa is a democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Each value has far-reaching and multi-dimensional implications and, accordingly, many issues arise when we ask what commitment to the Constitution’s

¹³⁵ Shientag, supra n 3 pp 64-5. As pointed out by former Chief Justice Arthur Chaskalson (in discussion with the author) this is important for ensuring that litigants have speedy trials and do not encounter unnecessary delays and highlights the importance of appropriate training and / or experience.

¹³⁶ Shientag supra n 3 p 68.

¹³⁷ Shientag supra n 3 pp 69-70.

¹³⁸ A valid distinction can be drawn between a commitment to constitutional values and skill and expertise relevant to constitutional adjudication referred to above.

¹³⁹ Former Chief Justice Mohamed in *Shabalala v AG, Transvaal* 1996 (1) SA 741 at para 25.

values and its transformative project entails. The examples chosen here are mere illustrations. Other important examples would be commitment to the realization of social and economic rights, especially for poor people, and access to justice, but there are many.

Respect for diversity and pluralism

Various elementary consequences must flow from the fact that South Africa is a diverse and pluralist society,¹⁴⁰ that the Constitution ‘not only tolerates but celebrates the diversity of our nation’¹⁴¹ and that we are a society that seeks to eradicate racism and sexism.¹⁴²

Firstly, if judges are to dispense justice in a diverse and pluralist society, they need to have respect for difference. As Justice Sachs said in *National Coalition for Gay and Lesbian Equality v Minister of Justice and others*:¹⁴³ ‘It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled, ...’ He went on: ‘The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are.’¹⁴⁴

Secondly, there can be no place within the judiciary for discriminatory attitudes. South Africa’s commitment to the elimination of discrimination is fundamental,

¹⁴⁰ For the importance of diversity, see *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) at para 60. See too *Hassam v Jacobs NO*, supra at para 27.

¹⁴¹ *Hassam v Jacobs NO* supra n 59 at para 33 with reference to *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 65.

¹⁴² See section 1(b) of the Constitution.

¹⁴³ 1999(1) SA 6 (CC) at para 107.

¹⁴⁴ Id at para 134.

perhaps most markedly racialism and sexism.¹⁴⁵ Few, if any of us, can claim not to hold prejudices but we have embarked on a most important journey to move to a place where it is our common humanity that defines us and where each person is able to realise their full potential,¹⁴⁶ as individuals and as members of religious and cultural and other social groups. We should choose judges who are committed to that journey and not select those who are not.

Thirdly, and for some, controversially, the Constitution requires judges to display compassion and empathy for litigants. The constitutional value of dignity is central to the bill of rights: it concerns the essential worthiness of every human being and it is from our inherent dignity that our other rights derive.¹⁴⁷ Arguably, to appreciate the worth of every human being requires compassion and empathy.

Retired Justice Sandra Day O'Connor had the following to say of this attribute in Justice Marshall: *'His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.'*¹⁴⁸ It is perhaps those qualities that we should be seeking in our judges.

The controversy around a call for empathy and compassion in judicial officers was evidenced recently in the United States when President Obama announced the resignation of Justice Souter from the Supreme Court. He told America that in considering replacement nominees, he would *'seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives.'*¹⁴⁹ When he nominated

¹⁴⁵ The South African Guide for Judges deals with this (supra n 2, item 4) in context of judicial proceedings as follows: 'In conducting judicial proceedings judges should themselves avoid and where necessary disassociate themselves from comments or conduct by any person subject to their control which are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.'

¹⁴⁶ See the preamble to the Constitution.

¹⁴⁷ Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, supra at para 28.

¹⁴⁸ *The Majesty of the Law* (2004) Random House p 133.

¹⁴⁹ *New York Times*, May 2 2009.

Justice Sonia Sotomayor, he emphasized that he was not only looking for a rigorous intellect, mastery of the law and recognition of the judicial role, but for ‘*experience that can give a person a common touch, in the sense of compassion, an understanding of how the world works and how ordinary people live.*’¹⁵⁰ These remarks ultimately set the stage for a partisan battle as for some, including a vocal Republican voice, empathy and compassion have no place in judicial selection because it would sanction the impermissible introduction of emotion and personal or ‘non-legal’ considerations in judicial reasoning¹⁵¹ and result in judges ‘legislating personal views from the Bench.’¹⁵²

But while the role of compassion and empathy is probably limited because adjudication does require the application of law, it does not follow that it has no place. A judge who shows empathy and compassion towards litigants does not thereby renounce adherence to legal standards. More importantly, adjudication at times *requires* consideration of a vulnerable group or person’s position to apply a legal rule, notably in family law,¹⁵³ sentencing and in constitutional law. For example, the test for unfair discrimination expressly requires a judge to have regard to ‘*the situation of the complainants in society, their history and vulnerability, ... and whether it ameliorates or adds to group disadvantage in real life context.*’¹⁵⁴ Thus in *Hassam v Jacobs NO*, (which concerned the application of the Intestate Succession Act 81 of 1987 to spouses in polygynous marriages concluded under Muslim personal law) Nkabinde J rejected assumptions made in the 1983 Appellate Division case of *Ismail v Ismail*¹⁵⁵ where the remark was made that the non-recognition of polygamous unions will not cause hardship to members of Muslim communities except perhaps in

¹⁵⁰ www.youtube.com/watch?v=-Njr2GAFhck (sourced 17 July 2009)

¹⁵¹ Interview with Republican staffer, Senate Judiciary Committee, April 2009.

¹⁵² ‘Obama Hails Judge as Inspiring’ www.nytimes.com/2009/05/27/us/politics/27court.html.

¹⁵³ Former Australian Chief Justice Gleeson suggests that empathy may be an important consideration in certain areas of law, such as family law, but not others, for example, commercial law. (Interview with the author.) This is a contested view. For example, former Chief Justice Arthur Chaskalson (in discussion with author) adopts the view that it is more widely relevant including for example in the evaluation of fact and the development of the common law.

¹⁵⁴ *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at para 27 (per Moseneke J)

¹⁵⁵ 1983(1) SA 1006 (A)

isolated cases. In *Hassam*, Nkabinde J held¹⁵⁶: ‘*The assumption made in Ismail, with respect, displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another.*’ At least in cases where the experience of discrimination or vulnerability (whether in the constitutional context or not) is relevant, it would seem to be far better if a judge is open to understanding that experience than not.

But we must be cautious, as Justice Sotomayor’s confirmation battle in the Senate illustrates. As it transpired, the battle was fought over a now notorious remark that Justice Sotomayor made during an extra-judicial speech in 2001 (in context of anti-discrimination law) that she ‘*would hope that a wise Latina woman with the richness of her experience would, more often than not, reach a better conclusion than a white male who hasn’t lived that life.*’¹⁵⁷ Some, adversaries and supporters alike, thought those words were ill-chosen and, during her confirmation hearings, Justice Sotomayor sought to clarify them and accepted that ‘(i)t was bad because it left an impression that I believe that life experience commands a result in a case’.¹⁵⁸ Some would argue that life experience does play a role, even if circumscribed, in how some cases are decided.

But there is another reason for caution which is that we should not think that the qualities of compassion and empathy are the preserve of the vulnerable, the marginalised or previously disadvantaged. Indeed, Justice Sotomayor made the point in the text of her controversial speech, emphasising that it would be myopic ‘*to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group (and) (m)any are so capable. ... However, to understand takes time and effort, something that not all*

¹⁵⁶ At para 25

¹⁵⁷ The remarks have often been quoted in the US media out of context. For the full text of the speech, see ‘Media still can’t find context of Sotomayor’s “wise Latina” comment’ <http://mediamatters.org/research/200907130040>

¹⁵⁸ ‘Republicans Press Judge about Bias’ *New York Times* 15 July 2009

*people are willing to give. For others, their experiences limit their ability to understand the experience of others. Others simply do not care ...*¹⁵⁹

An appreciation of the judicial role and the extent and limits of deference owed by the judiciary

Much has been said by the Constitutional Court about the balance to be struck between the deference it owes to the other arms of government on the one hand, and the robust approach it must adopt to the protection of rights on the other.¹⁶⁰ There are many doctrines that courts invoke to preserve the separation of powers including the doctrine of *stare decisis*, the principle that a dispute will if possible be resolved on grounds other than constitutional grounds, the principle that courts will generally only resolve live disputes and not abstract questions of law,¹⁶¹ the rules of co-operative governance when intergovernmental disputes are in issue,¹⁶² and the doctrine of deference as applied in administrative law,¹⁶³ the assessment of reasonableness in social and economic rights cases¹⁶⁴ and when selecting an appropriate remedy in constitutional cases.¹⁶⁵

¹⁵⁹ See <http://mediamatters.org/research/200907130040> She also made the remark that ‘*Personal experience affects the facts that judges choose to see ...*’ which also formed the subject of interrogation during her confirmation hearings. She clarified the remarks by saying that she did not stand by the remark insofar as it can be understood to mean that she would “*ignore other facts or other experiences because (she hasn’t) had them.*” www.nypost.com/seven/07152009/news/nationalnews/soto_my_bad_wise_crack_179307.htm. (Sourced on 16 July 2009)

¹⁶⁰ See for example, *Bato Star v Minister of Environment Affairs* 2004(4) SA 490 (CC).

¹⁶¹ There is also a general principle that Courts should not be approached by the legislature to exercise advisory functions on the constitutionality of proposed legislation. In limited circumstances, and with the support of at least 30% of the National Assembly, parliament may approach the Court to make a declaration of unconstitutionality within 30 days of the President enacting legislation. (Section 79 of the Constitution.) Similar powers are vested in the provincial parliaments under Section 121.

¹⁶² Section 41(3) of the Constitution. Where there is an inter-governmental dispute, organs of state involved are obliged, under the Co-operative Government provisions of the Constitution to ‘*make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before approaching courts to resolve the dispute.*’ Legislation has now been enacted under Section 42(2) of the Constitution to enable inter-governmental disputes to be resolved without approaching courts.

¹⁶³ See *Bato Star*, supra.

¹⁶⁴ See *Government of the Republic of South Africa v Grootboom* 2000(11) BCLR 1169 (CC); *TAC v Minister of Health* supra.

¹⁶⁵ The Constitutional Court has thus held that, flowing from the principle of separation of powers, a court must keep in mind the deference it owes to the legislature in devising a remedy for a breach of the constitution in any particular case. That involves ‘*restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.*’ *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* supra at para 66. See generally, on remedies and the separation of powers: Michael Bishop ‘*Remedies’ Constitutional Law of South Africa* Juta Chapter 9, pp 9-73. See too the Second Ben Beinart Memorial Lecture delivered in Cape Town by former Chief Justice Arthur Chaskalson on 22 April 2004.

Promoting an active citizenry

Democracy is not only about the exercise of the vote, elementary as the right to vote might be: It also entails the active participation by citizens in decisions that affect them. This was the subject of *Doctors for Life International v Speaker of the National Assembly*¹⁶⁶ concerning public participation in the legislative process¹⁶⁷ and numerous cases concerning the right to be heard when administrative action is taken that adversely affects a person's rights or legitimate expectations.¹⁶⁸ In his recent book *Active Liberty: Interpreting our Democratic Constitution*, Justice Stephen Breyer advances the 'thesis that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts'¹⁶⁹ and to that end he analyses the US Supreme Court case law on issues such as speech, federalism, privacy, affirmative action and administrative law. He holds the view, which has resonance in the South African context, that the legitimacy of government action suggests 'several kinds of connection' between government and the people including that '*the people themselves should participate in government*'.¹⁷⁰ It is surely legitimate for selectors to consider whether a candidate for judicial office is committed to the type of democracy that active citizenry contemplates.

Commitment to the transformative goals of the Constitution¹⁷¹

South Africa did not become the society we seek when the Constitution was enacted: the Constitution merely created the framework within which the process of social change would take shape. While, at least as far as government is concerned, the

¹⁶⁶ 2006(6) SA 416 (CC)

¹⁶⁷ Section 59 of the Constitution obliges the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees. See section 72 for the equivalent provision in the National Council of Provinces.

¹⁶⁸ See sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000.

¹⁶⁹ (2005) Vintage Books p 5.

¹⁷⁰ *Id* at pp 15-16.

¹⁷¹ The Constitution's transformative object was most recently affirmed by Nkabinde J in the Constitutional Court decision in *Hassam v Jacobs NO and others* CCT 83/08 [2009] ZACC 19 at par 28 and n 35 delivered on 15 July 2009.

executive and legislative branches are the primary architects of social change, judges are entrusted to protect rights and they have the power to halt and guide government action. It would thus seem legitimate for selectors to enquire whether candidates for judicial selection are committed to the process of social change as the Constitution mandates. That may either entail assessing whether a judge might seek to exercise judicial power with a view to preserving the status quo (on the one hand) or by assuming the role of primary architect of social change (on the other). Either is arguably inimical to the values of the Constitution.

While assessing commitment to constitutional values and the Constitution's transformative project is a legitimate exercise for selectors, selectors must be cautious not to venture beyond assessing *values* to assessing *political* commitments. It might at times be a difficult line to draw, but it is an important one if we are to preserve the principle of judicial independence. As foreshadowed above, an understanding of theories of adjudication might helpfully inform selectors' approach.¹⁷²

A theory of adjudication

Two extreme theories of adjudication posit, at the one of the spectrum, that there is no role for reasoning according to moral and political preferences,¹⁷³ and at the other, that such reasoning has¹⁷⁴ and should have,¹⁷⁵ free reign.

Adherents to the latter view, proclaim, in varying ways, that '*legal rules are in their nature not capable of yielding uniquely correct answers in any of the cases that come before the courts ...*'¹⁷⁶ and adjudication is explained by 'non-legal' considerations such as psychology or personality, social determinants or judicial views on policy.¹⁷⁷

¹⁷² The description of legal theory and accounts of the nature of adjudication are drawn from Meyerson's helpful book *Understanding Jurisprudence* Routledge Cavendish 2007 chapters 3 and 4.

¹⁷³ Adherents to these claims are sometimes referred to as legal formalists or strict or formal positivists.

¹⁷⁴ The descriptive claim that judges do at times make decisions on 'non-legal reasons' was asserted most prominently by the US legal realists and is often accepted – as a descriptive claim – by mainstream legal theorists. See Meyerson n 172 p 94.

¹⁷⁵ The normative claim is asserted by some legal realists and critical legal scholars.

¹⁷⁶ Meyerson n 172 p 90.

¹⁷⁷ Meyerson n 172 p 94.

Law is somewhat cynically invoked in judicial reasoning to justify outcomes instinctively regarded by judges as correct.¹⁷⁸ As Meyerson explains, these theorists argue that given that this is so '*judges should openly make decisions politically, that is, with an eye to their policy implications and future social consequences.*'¹⁷⁹

It must probably be conceded that at least some adherents to these theories would accept that it is permissible for politicians to choose judges based on their expressed moral or political preferences because it is these that will be vindicated through the judge's decisions. It is thus not surprising that amongst those American commentators on the US federal judicial selection process who are most comfortable with its overtly politicised nature are those who claim that law is politics and who reject as 'fairy-tale', the notion that 'correct' answers to legal questions exist.¹⁸⁰

Between these two extremes, mainstream legal theorists assert that judging differs in its nature from legislating or developing and executing policy, the powers of which vest in Parliament and the Executive. Judges, they say, are not (usually) permitted to rely on their own moral or political preferences in reaching decisions. Put simply, a society committed to the rule of law expects that disputes will be resolved according to law. Those vested with judicial power are granted authority to apply the law in resolving disputes. While the application of law requires the application of legal standards that often have a moral or policy-driven content, these are sourced (at least usually) not in a judge's own sense of justice, but in the rules and principles that form the fabric of the law and in which lawyers are trained.¹⁸¹ In order to uphold the rule of law, or law's integrity, and to apply the law equally to all people, mainstream theorists would argue that judges must reason according to law, at least where this is possible.

¹⁷⁸ Meyerson n 172 p 95.

¹⁷⁹ Meyerson n 172 89.

¹⁸⁰ See Epstein and Segal *Advice and Consent: the Politics of Judicial Appointments* (2005) Oxford 2005 p 4.

¹⁸¹ Such a description is, of course, overly simplified and potentially misleading in various respects. See further below.

It must be stressed that the argument applies both to constitutional and non-constitutional cases,¹⁸² even though constitutional cases may often be politically more controversial, have political consequences or involve the application of rules about human rights that often have moral content and require weighing policy considerations.¹⁸³ Mainstream legal theorists thus appreciate that the law will not always provide mechanistic formulae for a judge to apply in deciding a case. Yet they would argue that the methods of reasoning about cases where answers are not mechanically yielded, remain constrained, at least for the most part, by legal doctrine.

The approach to adjudication under South African constitutional law is theoretically consistent with mainstream legal theory and is reflected in various ways in many judicial decisions.¹⁸⁴ Judges will resort in the first place to the relatively detailed text of the South African Constitution to resolve cases.¹⁸⁵ When interpreting the text, they are enjoined to articulate and apply what is described as an ‘*objective, normative value system*’,¹⁸⁶ and in testing the lawfulness of government actions, must do so based not only on evidence furnished by the parties to the litigation¹⁸⁷ but in light of now well-worn tests of proportionality, reasonableness and rationality.

Although mainstream theorists would agree that, at the least, *most* legal disputes can be resolved by the application of laws that yield a determinate outcome, some, such as

¹⁸² For example, underlying the law of contract is the policy laden rule that a court may decline to enforce a contract where it is contrary to public policy, which is now understood in light of the values of the Constitution. See *Sasfin v Beukes* 1998(1) SA 1 (A) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

¹⁸³ See Meyerson, n 172, 66-67 dealing with Hart’s views.

¹⁸⁴ See for example Mohamed CJ’s statement in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999(4) SA 1319 (A) at para 28 referring to ‘[a] case which involves difficult policy and political choices which should appropriately be left to the Legislature’. See too Chaskalson P’s statement in *Ferreira v Levin* 1996(1) SA 984 (CC) at para 182: ‘In a democratic society the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times the functions may overlap. But the terrains are in the main separate, and should be kept separate.’ These cases are referred to by Christie *The Law of Contract in South Africa* at 348, when dealing with the courts’ traditional approach of developing the common law incrementally leaving major changes to the legislature.

¹⁸⁵ The South African Constitution is far more detailed in its terms than the US Constitution. For example, the South African Constitution is explicit in its protection of the right of women to make decisions about reproduction. (See section 12(2)).

¹⁸⁶ *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC) at para 54; *Du Plessis v De Klerk* 1996(3) SA 850 (CC) at para 94.

¹⁸⁷ In cases of judicial review, most often that will mean that a case must be decided on the factual version advanced by the State, who is likely to be the respondent. As former Chief Justice Arthur Chaskalson recently pointed out, most cases are decided upon fact not law. See Franny Rabkin *Business Day* 4 January 2010.

Hart, claim that there are some cases where the law does not yield a determinate outcome and which a judge may permissibly decide according to his or her subjective view of the correct outcome.¹⁸⁸ Others, such as Dworkin, believe that the law can always provide a correct answer, sourced in rules and principles, without resorting to subjective preferences.¹⁸⁹

However, even if there is a correct answer to every case, it does not follow that there is only one reasonable answer.¹⁹⁰ In this vein, former Chief Justice Chaskalson has written:¹⁹¹ “...*though some legal philosophers believe that there is only one correct answer to a given problem, experience shows that this answer is not always obvious, and that judges, lawyers, academics and politicians often differ as to what that answer should be. ... There is no doubt in my mind that despite the constraints placed on choices by the forms of law, judges do on occasions make subjective moral choices in interpreting relevant facts and legal principles. These choices can have an influence on power relations within society and on societal norms.*”

It is thus clear that between the two extremes where law determines all and politics has free reign lie a range of more conventional positions which hold that law either always provides the correct answer (albeit premised on moral reasoning) or at least heavily constrains judges in how they will decide a case. If we accept the more conventional positions, how then should this inform how judicial selectors perform their functions?

Firstly, it would seem that judicial selectors must observe a principle that it is not permissible to assess whether a candidate’s subjective or personal moral or political value system would serve the political interests of the party or indeed the members of the other institutions represented on the JSC.¹⁹² Secondly, in assessing a candidate’s

¹⁸⁸ See Meyerson supra n 172 pp 63 – 67 for a helpful summary of Hart’s views.

¹⁸⁹ See Meyerson supra n 172 pp 75-87.

¹⁹⁰ The point was emphasised to the author by former Chief Justice Arthur Chaskalson: interview 18 September 2009.

¹⁹¹ Paper delivered at the World Justice Forum in Vienna in July 2008.

¹⁹² Thus while it would be legitimate for the representatives of the legal professions to serve the interests of justice broadly, it must not utilise its position to advance the interests, personal or political, of the professions’ members.

commitment to constitutional *values*, emphasis might be placed on two issues. Firstly, selectors might assess the candidate's appreciation of "*the constraints placed on (judges') choices by the forms of law*" within the separation of powers contemplated by the Constitution. Secondly, selectors must avoid utilizing an assessment of commitment to constitutional values to see how a judge might reason in a particular type of controversial case or imminent controversy. A now academic example would be a question asking what length of delay between prosecution and trial is unreasonable asked at the time when President Zuma was seeking a stay of prosecution of his corruption charges on the grounds of unreasonable delay. Rather, selectors should focus any enquiry about a candidate's understanding of constitutional values to abstract and generalized enquiries. Thirdly, selectors should focus on a candidate's track record to assess his or her commitments rather than to seek commitments from the interview or questionnaire process. For example, a candidate who has consistently provided pro bono services to the poor is demonstrably committed to access to justice at least in one important sense.¹⁹³

We now turn to the final section of this part of the paper, which deals with the important questions of non-discrimination, diversity and race and gender representivity.

¹⁹³ During the Kliptown interviews, JSC members noted this in respect of various candidates.

CHAPTER 6: NON-DISCRIMINATION, DIVERSITY AND THE REQUIREMENT OF REPRESENTIVITY

Considerations of race, and - though too often subordinated - gender, dominate public discourse about judicial selection and generate deep controversy. That is not surprising given that historically the bench was composed of white men¹⁹⁴ and given that section 174(2) of the Constitution requires those selecting judicial officers to consider *'the need for the judiciary to reflect broadly the racial and gender composition of South Africa'*.

Both as a matter of principle and constitutional interpretation, the debate about how the plurality of South Africa's population should be reflected in the composition of the judiciary and the judicial selection process requires careful analysis. The analysis should take account of three notionally distinct though overlapping constitutional objectives or requirements: non-discrimination, diversity and the requirement of race and gender representivity.

Non-discrimination

The requirement of non-discrimination in judicial selection is located in section 9 of the Constitution which prohibits unfair discrimination and which treats as presumptively unfair, discrimination on various listed grounds: these being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. At its heart is the recognition that South Africans have historically been arbitrarily or unfairly denied equal opportunities by virtue of belonging to various groups, often those referred to in the listed grounds. The threat of discrimination is of course one that society must constantly guard against.

The issue arose pertinently at Klibtown in context of the Judge Satchwell's candidacy, the merits of which had reportedly been 'questioned' by an attorney who contended

¹⁹⁴ Forsythe aptly commented in 1991, supra n 12 that *'[I]t is monstrous that, in a multi-racial country, the judiciary should continue to exist of only one race (continuing in a footnote) and indeed, very largely, of only one sex.'*

that god-fearing South Africans would not be able to identify with her because of her sexual orientation.¹⁹⁵ To its credit, the JSC, through Chief Justice Langa, made it clear during her interview that the JSC would not consider a comment of this sort to be relevant to the judicial selection process.

People from various groups might recount horrific stories of how their group membership has been held against them. For women, an astonishing reminder of the deeply sexist attitudes that recently prevailed is reflected in the statement in 1914 by Davis, who became a judge of appeal, who said that *'[w]e cannot but think the common law wise in excluding women from the profession of the law ... the law of nature destines and qualifies the female sex for the bearing and nurture of children of our race and for the custody of the world ... all lifelong callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature, and when voluntary treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. ... But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours.'*¹⁹⁶

Because the Constitution was adopted as the supreme law so as to 'heal the divisions of the past' and 'to free the potential of each person', and because South Africa is founded on the values of human dignity, the achievement of equality, non-racialism and non-sexism, the duty on the part of judicial selection officers strictly to observe the requirements of the unfair discrimination clause cannot be over-emphasised.

No comprehensive quantitative or qualitative research has been undertaken to assess whether the JSC and the President, in the exercise of their selection powers, have refrained from discriminatory practices. Anecdotal observations do, however, suggest

¹⁹⁵ Cape Times August 28 2009 sourced on www.iol.co.za. The attorney reportedly had written a complaint to this effect on behalf of his Society for the Protection of Our Constitution. His remarks were slammed by various human rights groups including Human Rights Commissioner Jody Kollapen who is reported to have questioned which constitution Omar's society was claiming to protect.

¹⁹⁶ R Davis 'Women as Advocates and Attorneys' (1914) 31 *SALJ* 383 at 384.

that such research may be warranted.¹⁹⁷ Anecdotal claims that there is no space for white men to be appointed to the judiciary have at times abounded, but that is a claim that has been assessed and does not appear to stand scrutiny.¹⁹⁸ As President of the Supreme Court of Appeal Judge Mpati has demonstrated, there have been a significant number of white male appointments to the bench since 1994.¹⁹⁹

Diversity

The objective of creating a *diverse* bench is distinct from the need to desist from any discriminatory practices. South Africa is a pluralist society made up of people who understand their humanity not only as human beings, but as members of religious, cultural or other social groups. Yet, save in respect of race and gender, there is no express constitutional provision referring to the need for a diverse bench.

It does not however follow that it is not a permissible objective for judicial selectors to pursue. On the contrary, it is arguably sanctioned by section 9 itself at least insofar as it is aimed at advancing persons disadvantaged by unfair discrimination.²⁰⁰ Moreover if we are clear about the purposes diversity can legitimately serve, it can validly play a role in the judicial selection process.

The danger lies in any attempt to make the judiciary broadly representative of the social or political interests represented by different social groups. Put differently, *‘the need for judges to be independent and impartial means that we should not talk about a representative judiciary in the same way as we might the legislature and executive. Judges are not there to represent the interests of any particular group but to ensure*

¹⁹⁷ See Ruth B Cowan ‘Women representation on the courts in the Republic of South Africa.’ *Race, Religion, Gender and Class*, U MD LJ [Vol. 6:291] at pp 308-9 and p 313 referring to transcripts of the JSC hearings and the media report of Carmel Rickard ‘Judging Women Harshly’ *Sunday Times* October 23 2005. See too P Andrews ‘The South African Judicial Selection Process’ *Osgoode Law Journal* Vol 44 No 545.

¹⁹⁸ How race should factor into decision-making raises different questions, dealt with below.

¹⁹⁹ *Supra* n 18 pp 19-20. At the time he delivered his paper, and leaving aside the Supreme Court of Appeal and Constitutional Court, 51 of 134 appointments had been white judges. Only 12.5% (25 of the total of 199) judges (including the Constitutional Court and Supreme Court of Appeal) were women (including black women.)

²⁰⁰ Section 9(2) provides: “To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

*that the law is applied fairly and equally to all.*²⁰¹ Similarly, we should not think that *'black men cannot try white men fairly and that white men cannot try black men fairly (because) (t)he essence of the judicial office is that judges are capable of freeing themselves from the prejudices derived from their race and class and background and then subjecting themselves to the law ...'*²⁰²

Though this seems clear at the level of principle, there are dangerous signs that some are thinking along these lines in the wake of two recent High Court judgments concerning the JSC investigation of Cape Judge President Hlophe JP for misconduct. Both decisions were split along racial lines. While we can take some comfort from the fact that in respect of the first case, which was subject to an appeal, the Supreme Court of Appeal judgment was both unanimous and represents the views of a multi-racial bench, we may have ventured dangerously close in public debate to manifesting tolerance of the assertion that we should be tried by judges of our own race.

The Sotomayor controversy sparked related concerns. While many Democrats and Republicans alike think it a good thing for more women to be appointed to the Supreme Court and that the appointment of a Hispanic judge may be long overdue, many were troubled by an interpretation of her *'wise Latina remark'* that a judge's experience may determine the outcome of a case. Notably, it was precisely that interpretation that Judge Sotomayor disavowed during the confirmation hearings.

While we should reject the idea that diversity means representivity and that justice can only properly be dispensed by 'one of your racial kind' there are two considerations which do justify the quest for diversity on the bench.

The first, which is the most compelling, is the need for legitimacy of the bench as a whole.²⁰³ Quite simply, in a country like South Africa, a bench that is not diverse will

²⁰¹ Malleon, supra n 17, p 216 referring to arguments put up by some judges and academics in the United Kingdom. The arguments are equally apposite in the South African context.

²⁰² Forsythe supra n 12 p 18 fn 71.

²⁰³ The helpful distinction between the need in South Africa for people to identify with the bench as a whole rather than a specific judge hearing a specific case was drawn by Tony Honore, e-mail communication with the author, 23 September 2009.

lack legitimacy. That is especially so given that the only reason the bench is not diverse is South Africa's history and given that under apartheid '*(j)ustice had a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them.*'²⁰⁴ Thus, as Malleson argues '*while the background of the judges should not affect their decision-making, the composition of the judiciary as a whole does affect public confidence in their work and so undermines its legitimacy. For this reason, if no other, diversity is needed.*'²⁰⁵

The second reason why the quest for diversity may be legitimate does concern the impact of experience on deliberation if not determine its outcome. While one's experience surely should not dictate the outcome of a case, a diversity of experience can legitimately enhance the deliberative process in an appropriate case.

Sir Sydney Kentridge's remarks about his experience as an acting judge on the South African Constitutional Court reflect this view. He commented: '*[W]hat I found overwhelming was the depth and variety of [the judges'] experiences of law and of life. This diversity illuminated our conferences especially when competing interests, individual, governmental and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no-one, black, white, male or female was representing any constituency.*'²⁰⁶

Justice Ruth Bader Ginsberg made a remark to similar effect when commenting on Sotomayor's '*wise Latina remark*' in an interview held before the confirmation hearings, with Emily Bazelon of the New York Times: '*... I thought it was ridiculous for them to make a big deal out of that. Think of how many times you've said something that you didn't get out quite right, and you would edit your statement if you could. I'm sure she meant no more than what I mean when I say: Yes, women bring a different life experience to the table. All of our differences make the conference better.*

²⁰⁴ Chief Justice Langa quoted in Mpati, supra n 18 p 23.

²⁰⁵ One need not agree with Malleson's first proposition to agree with the second. The need for diversity to ensure legitimacy is made by many others. See for example, Mpati, supra n 18 pp 22-23; Dumisa Ntsebeza, quoted in Mpati, supra n 18 p 23; Forsythe, supra n 12 p 18; Wesson / Du Plessis report supra n 13.

²⁰⁶ Supra n 17, p. 61.

That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me'.²⁰⁷

The potential for diversity to enhance deliberation is perhaps most real on a court such as the Constitutional Court, and though to a lesser extent, the Supreme Court of Appeal, because these courts sit as full benches. It is easy to understand how a diversity of experience might enhance deliberation in such circumstances. However, when one speaks of diversity in context of any specific High Court proceedings, the argument becomes more nuanced: a bench composed of a single judge or two or three judges cannot be truly 'diverse', and the need to distinguish a quest for diversity from a quest to seek judges who represent the interests of social groups is particularly stark. The best one might hope for is that if the South African bench is more diverse *at all levels*, that diversity of experience will ultimately reflect in the reasoning underlying our body of case law and thus inform the development of law over the longer term.

Thus, while seeking a diverse bench is a legitimate objective, it remains critical to bear in mind that its pursuit serves specific objectives.

Race and gender representivity

Race and gender representivity in the judiciary have a distinct and special place by virtue of the provisions of section 174(2) of the Constitution, which stands on a different footing to section 9. That provision requires, in mandatory terms, that those responsible for appointing judicial officers to consider '*the need for the judiciary to reflect broadly the racial and gender composition of South Africa*'. The Constitution thus ordains both that there is such a need and that whenever judicial appointments are made, that need must be considered by the JSC. In public discourse there are few who would dispute that a fundamental transformation of the judiciary on race and gender lines is not necessary but the meaning and implementation of the section has been highly contentious.

²⁰⁷ <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html>

Some argue that the section (and its reference to racial composition of the country) requires that each court must be *demographically* representative with reference to the racial classifications used under apartheid: Black, Indian, Coloured and White. Others say that it is wrong to perpetuate notions of identity that were arbitrarily imposed by the apartheid regime and that such interpretations will lead people to believe that they are entitled to be judged ‘by one of one’s own race’. Rather we must reject the labels we were given and resist demographic calculations: a *broadly* representative bench can still be achieved. While it is difficult to resist the conclusion that the section has been unhelpfully drafted, it is similarly difficult to see both as a matter of interpretation and given our colonial and apartheid history why we should not strive for a bench that is composed primarily of judges of African descent. That being said, we must strongly resist any interpretation that frustrates non-racialism and perpetuates apartheid’s offensive racial practices.

We should also be ever mindful that although South Africa’s *diversity* is not characterized crudely by race but by many social, cultural and religious communities as well as on class lines, section 174(2) refers to the need specifically for race and gender representivity. It may well be that the drafters of the Constitution were alive to the danger that if diversity in a broad sense were elevated to a constitutional requirement, it would be tantamount to saying that judges must be representative of social groups or interests in society, an approach that, as argued above, should be rejected. Judges, unlike politicians, are not appointed to represent social interests. If that is so, we must resist the idea that the *need* for race and gender representivity referred to in section 174(2) refers to any quest to enable us to be judged by ‘one of our own race’.

We should rather focus our minds on the historical wrongs that undermine the legitimacy of the bench that section 174(2) can address if cautiously applied. One is that in 1994, race and gender were the two fundamental distortions in group-based representivity in the judiciary, a direct result of our unjust colonial and apartheid history. Another is the damaging effect that racism and sexism in particular have had on individuals’ advancement in the legal profession and consequently judicial aspirations. A further dimension is that for many people in South Africa ‘race’

remains a proxy for 'class'. If we seek to remedy these wrongs, a quest for a broadly representative bench is in line with the Constitution's aspiration to create a just society that is based on non-racialism and non-sexism.²⁰⁸ While it must mean that the bench we seek must be made up primarily of judges of African descent, we needn't resort to the crude tactics of apartheid to get there.

We also need to take a view on how being black or female ought to influence the selection process in a specific case. The easy case arises where two candidates who are similarly well-qualified are being considered for appointment. Subject to any special needs of a court, the appointment of a candidate to enhance racial or gender representivity would seem appropriate. The difficult case arises where two qualified candidates are being considered but the candidate who will not enhance racial or gender representivity is appreciably better qualified in an important respect. In that case, the consideration of the need for racial and gender representivity on the bench requires careful evaluation and cannot be the only relevant consideration. Importantly, whether the better qualified candidate should be appointed may depend on what qualities separate the two candidates and whether the qualities that stand out in the better qualified candidate are qualities that are needed to ensure a bench that is best able to perform the adjudicative functions entrusted to the judiciary by the Constitution. That evaluation cannot focus myopically on the relative merits of two candidates:²⁰⁹ rather, selectors require an appreciation of the overall needs of the judiciary and the court in question at the relevant time.

If that evaluation is to be conducted honestly and constructively, there is a real need to remove racist and sexist discourse from our discussions and to focus squarely on the detailed criteria for judicial selection.²¹⁰ There is similarly a real need to be honest about mistakes we may have made in the past. The mistakes are many and will include engaging in discourse that assumes that more meritorious white candidates are being overlooked in favour of less meritorious black or female candidates. But they also include appointing judges for political favour or in circumstances where

²⁰⁸ Section 1 of the Constitution proclaims that South Africa is founded on, amongst others, the values of non-racialism and non-sexism.

²⁰⁹ It is in this context that we must be particularly astute to adopt an appropriate definition of merit.

²¹⁰ During the Kliptown hearings, Judge Theron was effectively asked to give herself a racial categorisation. See Eusebius McKaiser 'Tragicomedy revealed more about JSC than about judges' *Business Day* 22 September 2009

qualifications or fitness and propriety are in question. That much we know at least from our apartheid history.

In this regard, many express the view that being black, or being a woman, constitutes a valid *criterion* for judicial selection. This approach is misleading because the criteria for judicial selection are that a person be appropriately qualified and a fit and proper person. If a person is not appropriately qualified and is not a fit and proper person, it is irrelevant whether they are black or female. That person does not qualify for judicial office.

It is also misleading because it encourages the thinking that being black or female somehow enhances a candidate's fitness and propriety for office. Yet, in a society committed to non-racialism and non-sexism, we should be vigilant not to assume that any qualities relevant to judging flow from membership of a group. As argued above in context of the Sotomayor controversy, it may be that because a candidate is black or female, and has experienced discrimination, their capacity for empathy and compassion is enhanced, but that will depend on the person in question and does not flow automatically from their membership of a group. Similarly, a person's commitment to constitutional values or qualification to adjudicate questions of constitutional law does not flow from their race or gender, but from their humanity, what skills and experience they possess and how they have chosen to live their lives.

Finally, we ought not be too quick to assume that the legitimacy of the bench will be best enhanced if race and gender representivity is accelerated. We must obviously aim to meet the objective of racial and gender representivity with due expedition²¹¹ and treat it with priority, because the judiciary's legitimacy depends on it. But its legitimacy will ultimately depend on how well the judiciary is able to perform the functions the Constitution entrusts to it.

It is thus critical that the mechanisms that we use to assess the suitability of a judge for office are appropriately tailored to that end. That is the subject of the second part of this paper to which we now turn.

²¹¹ That requires far more than judicial selection aimed at meeting the objectives of section 174(2). Importantly, it requires the legal profession and the State to take measures to enable black and female candidates to qualify themselves for judicial office.

C. PROCESS AND SYSTEMS

CHAPTER 7: INTRODUCTION

In this section, we consider procedural and systemic features of the judicial selection process. Because there is no simple algorithm to test whether a judge is a suitable candidate for judicial office or more suitable than others, we need to ensure that our procedures for assessing whether candidates' possess relevant qualities are rigorous and promote fairness and equity. Six features of the selection process are considered and recommendations made with a view to enabling the JSC to perform its judicial selection functions optimally. These are:

- Peer review of candidates.
- The collation and circulation of background information about candidates.
- The involvement of governmental and non-governmental agencies and organisations, including the media.
- The 'rules of engagement' with candidates.
- Transparency and accountability.
- Resources.

These are not the only systemic features that warrant evaluation. There are many others, which require careful thought, such as how to ensure that good candidates from diverse backgrounds are nominated, and make themselves available for judicial office. The features identified are, nevertheless, important and their consideration can pave the way for a comprehensive discussion about others.

Any discussion is best conducted in light of an understanding of the existing systems and accordingly these are examined briefly by way of introduction.

The JSC is entitled to determine its own procedures,²¹² which are contained in a document entitled 'Procedures of the Judicial Service Commission'.²¹³ When a vacancy arises the JSC calls for nominations,²¹⁴ which must consist of a letter of nomination, the candidate's acceptance of the nomination, a questionnaire prepared by the Commission and completed by the candidate and any 'further pertinent information' the candidate or nominator wishes to provide. The JSC then prepares a short-list of candidates including those any member feels should be included or who has 'a real prospect of selection for appointment.'

Comment on nominations is sought from the organized legal profession and the Justice Ministry, and 'any other institution as the Commission may identify from time to time with an interest in the work of the Commission'.²¹⁵ Material received on short-listed candidates is distributed to the Commissioners who then conduct public interviews.

Deliberations take place in private and candidates are selected 'by consensus or majority vote if necessary'. In the case of Constitutional Court judges, recommendations are made to the President with reasons. The President has to choose from a list of three more than the number of vacancies. In most other cases,²¹⁶ the President is advised of the Commission's selection. The President must follow the Commission's advice.

Before turning to consider the procedural features identified above, it is worth highlighting that it is not only the JSC as a collective body which wields significant power in the judicial selection process. Before JSC representatives meet to shortlist,

²¹² Section 178(6) of the Constitution.

²¹³ The version referred to was furnished to the DGRU by the JSC on request. See A: Introduction, above.

²¹⁴ In the case of the Constitutional Court, vacancies are announced publicly. In the case of the High Court and Supreme Court of Appeal, vacancies are announced to the organised legal profession and the Department of Justice. JSC Commissioners are afforded the opportunity after the closing date for nominations to make additional nominations should they wish to.

²¹⁵ Comment is sought from 'institutions' as defined in the JSC's procedures. The institutions are 'the Association of Law Societies, the Black Lawyers Association, the Department of Justice, the General Council of the Bar, the National Association of Democratic Lawyers, the Society of Teachers of Law and such other institutions as the Commission may identify from time to time, with an interest in the work of the Commission. It is not known whether others have been formally identified.

²¹⁶ Different considerations may apply to some specialist courts or tribunals which are not examined here.

interview and deliberate about candidates, they will have embarked on a prior process to evaluate applications. While this paper focuses on the JSC's processes, it is worth bearing in mind that procedural integrity should be demanded also in the processes followed by the JSC representatives in respect of the constituencies or institutional interests that they represent.²¹⁷

²¹⁷ No methodological research has been conducted for purposes of this paper to ascertain what systems might be in place. The Cape Law Society has developed criteria and processes applicable to recommending attorneys as judges. See 'Criteria to be applied by the Society when Recommending the Appointment of Attorneys as Judges, whether for acting or permanent appointments.' www.capelawsoc.law.za (sourced on 23 January 2010). For a critique of the comment process followed by the advocates' profession, see S Cowen 'The advocates' profession and judicial selection' *Advocate* December 2009 34.

CHAPTER 8: PEER REVIEW

The JSC's existing systems are directed in the first place at gathering relevant information about candidates via the application form. But this information is supplemented with comment from bodies with an interest in judicial selection and knowledge about candidates' qualities. The adoption of a process designed to obtain input from those operating within the legal system has obvious merit, as long as it yields both a rigorous and fair evaluation of candidates.

In principle, the approach is not new. Under the pre-constitutional system of executive appointment, judicial selectors had a relatively free hand in appointing judges.²¹⁸ Debate about political appointments aside, there is little public understanding of how candidates were promoted or selected.²¹⁹ It is however widely understood that the views of at least some members of the bench and bar were, at least often, solicited.

The same might be said of the system that was, historically, at work in the United Kingdom, on which South Africa's system was modeled. Malleon writes that "(u)ntil relatively recently, the process for appointing judges could be described as operating much like a club, with members recommending their friends and colleagues for advancement."²²⁰ Despite improvements introduced in the 1980s, she argues that 'criticism remains of the lack of transparency in the consultation process (this being) the process whereby the opinions of judges and senior lawyers are sought on the suitability of applicants. ... (The) process is described by critics as a 'secret sounding system' by which those already on the bench can promote those they know, excluding other equally competent candidates outside the social and work networks of a 'golden

²¹⁸ The only formal restriction being that a Chief Justice or Judge of Appeal must have been a judge or former judge, a restriction that remains applicable to appointments to the Supreme Court of Appeal. Hahlo and Kahn *The South African Legal System and its Background* (1968) Juta 43-44 with reference to section 10(5) of the Supreme Court Act 59 of 1959 which provides as follows: No person other than a judge or former judge to the Supreme Court shall be appointed to act as the Chief Justice or as a judge of appeal.

²¹⁹ Seniority traditionally played an important role in the appointment of the Chief Justice. But see J Gauntlett SC 'Duty for duty's sake: MM Corbett remembered.' *Advocate* December 2007 3.

²²⁰ *The Legal System*, supra n 17, p. 214. Malleon explains that it was only in the 1980s and in response to a criticism of lack of transparency that changes 'designed to open up the process' were introduced including advertising vacancies, publication of policies and procedures, job descriptions and selection criteria. The UK system has recently changed substantially with its introduction of a Judicial Appointment Commission.

circle' of judges and barristers.'²²¹ Its defenders point out that lawyers and judges are particularly well placed to assess the suitability of candidates for judicial office and that the consultation process is objective and fair.²²²

In the USA, and ideological and partisan battles aside, it is also widely appreciated that lawyers and judges, indeed all those who interact with the legal and judicial system, are well placed to evaluate suitability for judicial office, at least in respect of certain criteria. At first blush, some might resist looking at the US system because of its crudely partisan approach. But politics is not its only feature: it is also designed to identify candidates of high calibre and integrity and root out those who lack these qualities. What stands out to a South African observer in this regard is the highly structured and relatively sophisticated nature of its peer review process.

Although the JSC systems are now designed to ensure more broad-based consultation than occurred under apartheid, and are more open and transparent, the process can still be criticized for failing to ensure a consistent, fair or sufficiently rigorous evaluation of candidates. The JSC itself has, over time, identified concerns about the usefulness of the comments at times received. At a meeting held in 2008, for example, the JSC resolved that 'a more intensive and healthy input was to be encouraged from the professional bodies'²²³ Concerns about the input of the advocates' profession can be distilled from annual reports submitted to the General Council of the Bar by former JSC member (and one of two representing the advocates' profession) Milton Seligson SC. One concern is the need for greater particularly in the profession's comments. In 2004, he reported that 'I would like to reiterate that where are criticisms of a candidate, specific facts should be given, if at all possible, rather than generalizations gleaned from unstated or anonymous sources. I believe that where feasible, the reports should be garnered from colleagues who either know, or have appeared with or against, the particular candidate, or from other sources who are in a position to

²²¹ Malleon, *The Legal System*, supra n 17, 214.

²²² Malleon, *The Legal System*, supra n 17, 214-5

²²³ To this end it was resolved that a report would be published containing the JSC's criteria in more detail which, it was hoped, 'would help to improve the understanding of the working of the Judicial Service Commission in the profession.'. See note 20 above.

comment fairly on the candidate's proficiency and suitability'.²²⁴ A second concern arising from the annual reports relates to the need to balance candour and effective review with fairness, a difficulty that arises when a colleague wants to preserve confidentiality in the comment process.²²⁵ A third concern relates to the need for the advocates' profession to comment on all candidates and not only those well known within the profession such as advocates and well known attorneys.²²⁶ On the plus side, Seligson consistently reported that the profession's input has been valuable to the JSC interview and deliberation process.

While it may be possible to retain and merely improve the current system of comment to respond to these important concerns, it is arguably more constructive if we were to re-evaluate our overall approach to peer review. There may be many motivations for doing so but at least two stand out. The first arises from the fact that the legal profession in South Africa is not united in two important senses. As a result of the split bar system, it is divided into attorneys and advocates, and the professions, as well as legal academics, organize separately. Even more problematic and as a result of our history, the professions remain divided racially. These features make it inherently difficult for any of the professional bodies to generate uniformly rigorous and fair comment in respect of all candidates. Even if the professions were united, or could unite for purposes of evaluating nominees, a process of merely seeking 'comment', from those who might have knowledge of a candidate is inherently subjective and susceptible to arbitrariness.

What is required is a more systematic process of peer review. The argument advanced here is that to remedy these deficiencies, we should remodel our peer review system drawing on certain features the US system, with suitable adaptation to the South African context.

²²⁴ 2004 December *Advocate* 8

²²⁵ The JSC will generally not accept anonymous complaints against candidates who dispute the correctness of the allegations against them. 2007 December *Advocate* 14 and 2008 December *Advocate* 15

²²⁶ 2005 December *Advocate* 4; December 2006 *Advocate* 8.

Before examining the features of the US peer review system, it is helpful to highlight the key benefits, risks and limitations of peer review as an evaluative method. Its key benefit, of course, is that candidates are evaluated by those in a position to assess suitability with reference both to accepted standards of professional and institutional practice and direct knowledge or experience of candidates' work. Thus lawyers are relatively well equipped by their experience to identify information relevant to criteria and the principles of fairness and confidentiality, relevant in this context, underscore professional ethics.²²⁷ Peer review, if properly conducted, is also beneficial because it enables a range of people to participate in the evaluation thereby enhancing its depth, rigour and its legitimacy. The key risk is that the process inevitably relies, at least in part, on subjective comment which, unless we are cautious, can lend itself to unfairness or discriminatory practices. The key limitation is that it is not only lawyers and judges who have relevant knowledge and experience of a candidates' work and thus peer review may be a necessary, but is ultimately an insufficient tool. However, as long as these considerations are kept in mind, a properly structured peer review system can serve valuable ends.

The American Bar Association is the key agency through which peer review is conducted in the US.²²⁸ Unlike in South Africa, the ABA – as the organized legal profession – does not have a formal constitutional role in judicial selection. Rather, the reliance placed by the President and the Senate Judiciary Committee on its views is an historical practice which commenced during the Eisenhower years and has continued to date, save for a brief interruption during the Bush administration.²²⁹ It should also be noted that the way in which the American legal profession is organized differs markedly from the South African legal profession, in part because America has a unified, and not a split Bar. Thus, the ABA represents all legal professionals including law teachers, whereas in South Africa different organizations represent

²²⁷ This point was made by Kim Askew, current Chairperson of the ABA's Standing Committee, referred to below. Telephonic interview, 23 April 2009. Former Committee member during the Clinton administration Arnold Burns highlighted the benefit of using lawyers trained in ascertaining and evaluating fact. Telephonic interview, April 2009.

²²⁸ Much of the background information about the ABA peer review process is sourced from its website and in particular a document posted there entitled Backgrounder, supra n 94. Where quotations are not specifically attributed, reference is made to this document.

²²⁹ The National Bar Association, which represents minority groups, is also consulted and interestingly, was consulted during the Bush administration notwithstanding his displeasure with the ABA.

different (though sometimes overlapping) components of the profession, including the General Council of the Bar (representing advocates), Advocates for Transformation, the Association of Law Societies (representing attorneys), the National Association of Democratic Lawyers and the Black Lawyers Association (representing practicing lawyers) and the Conference of Law Teachers (representing academic lawyers). One common feature is the existence in both countries of parallel organizations representing the interests of (previously) disadvantaged groups.²³⁰

The ABA evaluates three criteria: professional competence, integrity and judicial temperament. The ABA does not evaluate a candidates' ideology and political philosophy albeit that these considerations weigh heavily, many might think far too heavily, in the selection process.²³¹

The ABA conducts its evaluation process through a Committee, known as the ABA Standing Committee on the Federal Judiciary which is composed of fifteen senior members of the legal profession.²³² The ABA has adopted various mechanisms to ensure the Committee's political neutrality²³³ and Committee members expect to dedicate a large proportion of their time to its functions while serving on the committee:²³⁴ According to its website, approximately 1000 hours are spent per year

²³⁰ These terms are used with some discomfort because of histories of marginalization and discrimination must be understood contextually. Broadly speaking, in the US the most prominent organisation would be the National Bar Association but others exist such as the Association of Hispanic Lawyers. In South Africa, the most prominent organisations, which have formal recognition in the judicial selection process include the National Association of Democratic Lawyers, the Black Lawyers' Association and Advocates for Transformation.

²³¹ Although Republicans and Democrats alike place great store on the evaluation conducted by the ABA, both are cautious to conduct independent evaluations at the political stages. Republicans pay particularly close attention to the ABA's findings insofar as they reflect judicial temperament which some conservatives see as "code" for "not liberal". Interview with Republican staffer, Senate Judiciary Committee April 2009. For quotation and reference to recent research on the topic, see Marcia Coyle 'Study concludes a well-worn gripe may be right: ABA ratings are biased against conservative members' 18 March 2009 www.nlj.com. The ABA has resisted these claims.

²³² In the main, the representatives are drawn from and allocated to areas linked to the US Circuit Court jurisdictions. Two members are from the Ninth Circuit, one from each of the other Federal Judicial Circuits and one member at large. Members are appointed by the President of the ABA "based on their reputations for professional competence, integrity and devotion to public service."

²³³ Committee is not permitted to consider ABA policies in the performance of its functions and the Committee's work is kept apart from ABA activities. The ABA does not propose, recommend or endorse candidates for the Federal Judiciary and members on the committee may not seek or accept federal judicial appointment while on the committee and for a period thereafter, committee members must refrain from participating in political activity at federal level and may not make campaign contributions. No member of the committee may be an ABA officer for candidate for such office while serving on the Committee. The Standing committee does not report either to the ABA leadership.

²³⁴ Members are appointed for staggered three year terms.

by each member.²³⁵ Service on the committee is tantamount to the performance of public service.²³⁶

The standing committee evaluates candidates using two central methods. Firstly, scrutiny is given to information supplied in a candidates' response to a questionnaire used by the Senate Judiciary Committee.²³⁷ Secondly, numerous interviews are conducted "with a broad spectrum of lawyers, judges and others who are in a position to evaluate the potential nominee's professional qualifications to serve as a federal judge."²³⁸ Interviews are conducted both with the candidate and with "40 or more colleagues of the candidate": more complex investigations might result in over 100 interviews. The process will yield a detailed Informal Report which includes a recommended rating for the nominee. Formal Reports are prepared on request by the White House which will describe a prospective nominee as 'well qualified', "qualified" or "not qualified".

"Well qualified" designated that the nominee "is at the top of the legal profession in his or her community, has outstanding legal ability, breadth of experience and the highest reputation for integrity, and demonstrates the capacity for sound judicial temperament." "Qualified" designates that the nominee "satisfies the standards of integrity, professional competence and a judicial temperament and that the nominee, in the committee's view, is qualified to perform satisfactorily all the duties and responsibilities requires of a Federal Judge". "Not qualified" designates that "the Committee has determined that the nominee does not meet its standards with respect to its criteria". The rating is finalized by the Standing Committee by vote.

Confidentiality is a key ingredient of the ABA's methodology. Not only are its evaluation material and reports disclosed only to committee members, but interviewees are assured of confidentiality. The committee itself will not consider

²³⁵ Former committee member Arnold Burns described it as a 'labour of love'. Members speak with a minimum of 25 people in depth and would go to the habitat of the candidate.

²³⁶ Telephonic interview with Arnold Burns, member of the ABA Standing Committee on the Federal Judiciary under the Clinton administration, May 2009.

²³⁷ This is comparable to the JSC questionnaire in material respects but is more detailed in its approach.

²³⁸ Backgrounder, supra n 94.

comments from anonymous sources. Unless an interviewee waives confidentiality, the identity of those who provide information regarding professional qualifications of a nominee is maintained. The purpose of doing so is to enable the Committee to obtain candid assessments of a nominee's qualifications.

That objective is balanced with the need for fairness to a nominee. Thus, where adverse comments are made about a nominee, the evaluator will, without breaching confidentiality, disclose to the candidate "as much of the underlying basis and context of the adverse comments as reasonably possible". Where disclosure of the substance of the comment would compromise confidentiality and confidentiality has not been waived, that comment will not be reported or considered in the evaluation process.

In any evaluation process a range of interviews will be conducted. It will include referees identified in the nominee's questionnaire, judges before whom the nominee has appeared, lawyers who have appeared as co-counsel or opposing counsel with the nominee and, if a nominee is a judge, other judges who have served with the nominee. Interviews might be conducted with law school professors and deans, legal services and public interest lawyers, representatives of professional legal organizations and community leaders and others who have information concerning the nominee's professional qualification. Where appropriate, further investigations and follow up interviews will be conducted that might shed light on adverse comments and it is open to a nominee to refer the evaluator to other interviewees and documentation.

The report that is prepared is based on the outcome of interviews as well as an assessment of relevant materials that are provided when completing the questionnaire, which includes significant cases, articles and other relevant written material.

Although an individual committee member is responsible for each candidate, the report is checked by the Chairperson for thoroughness and consistency and other committee members will have an opportunity to comment. Where an evaluator has recommended a 'not qualified' rating, a second evaluator is appointed to conduct an independent review. The first report will not be distributed until the second evaluator has conducted his or her own report and the same procedure for an evaluation is

followed by both the evaluators. The Committee then reviews both reports simultaneously.

Importantly, committee members are not left to enquire at large according to their whims or personal preferences, but approach the review and interviews in a structured fashion. The approach is detailed in a manual which contains guidelines for evaluation. The ABA manual is confidential but according to Kim Askew, those seeking to prepare a manual might consider the following subject areas: an explanation of the overall process and purpose; the obligations of each member, an outline of each step of the evaluation process and other practical matters.²³⁹ The steps in the evaluation process would include how the evaluation is commenced, timelines, the steps to be followed, how to record interviews and report them, what should be covered in interviews with judges and lawyers, how to handle negative or adverse information, when to interview the candidate, how to report the information to the committee, guidelines to ensure that a diverse section of the legal community is contacted, what ratings mean and how to determine what rating applies, how ratings are reported, how much explanation to give of a rating and what procedures to follow if there is an adverse rating.

The need to ensure a diverse section of the legal community is contacted has particularly important dimensions in the South African context but it should not be thought that interviewing a diverse community in this context means only men and women or black and white lawyers. Diversity would also include people from large as well as small law firms, opposing as well as co-counsel, junior as well as senior lawyers, and so on. The same point was made by Helaine Greenfeld, a former advisor to the Justice Department, which conducts interviews with peers independently of the ABA:²⁴⁰ She emphasized that if considering a candidates' record as a prosecutor, one would interview not only others in the prosecution but defence attorneys; if considering a lawyer's record, one would speak to judges, co-counsel and opponents; if considering a judge's record, one would speak to colleagues, lawyers, clerks and appeal records. It may also be important to go beyond the legal fraternity: litigants,

²³⁹ Examples given were media liaison processes and reimbursement policies and processes.

²⁴⁰ Interview with the author, Washington DC, April 2009.

witnesses, secretaries and administrative staff are at times also sources of important information.²⁴¹ The purpose is to reflect as wide a range of views as possible and produce a fair evaluation. That is especially so when considering qualities such as fairness itself or impartiality and temperament.

The detailed approach to questioning is critical because it is not self-evident what questions need to be asked. While there are some questions that must apply to all candidates, each candidate comes with a different set of experiences, professional and personal, which will determine what line the evaluation process will take. And those conducting peer review need some guidelines to ensure depth of evaluation, consistency and to limit arbitrariness and discrimination. While the examples provided here have relevance to the peer review process they are also relevant to the duties of the JSC itself in its shortlisting, interview and deliberative processes.²⁴²

By way of example, it is often said that one measure of competence against which a sitting judge might be evaluated for elevation to higher office is his or her appeal record. The issue arose during the Kliptown hearings via a comment made by the Cape Bar about Judge Dennis Davis' appeal record and illustrates why a rigorous process of peer review is needed.

The following comment was made: *'Members have observed that Judge Davis has a relatively high rate of reversal on appeal. That observation appears to be correct. It should be noted, however, that in one of the cases where his judgment (delivered with Judge Van Heerden) was reversed on appeal, the judgment of the Supreme Court of Appeal was itself reversed on further appeal to the Constitutional Court ...'*. No inference is expressly drawn about Davis J's merits but the reasonable reader might assume that the innuendo is that 'he gets it wrong more than others do'.

For a comment of this nature to be of any assistance, which is doubtful, the quantitative analysis would have to be correct. The evaluative method used to

²⁴¹ This aspect was highlighted to me by Helaine Greenfeld of the Justice Ministry, interview, Washington DC, April 2009. Though not strictly peer review, it might arise in context of adverse comment relevant to peer review, for example, if a judge is accused of treating witnesses discourteously.

²⁴² It will be noted that the examples are drawn not only from the ABA peer review mechanism but from processes conducted by the Senate Judiciary Committee itself.

confirm whether the members' observations are correct is not disclosed. However, to the author's knowledge, statistics are not recorded which might permit analysis of whether any specific judge's reversal rate is within the average or usual range or even to enable comparison with other judges.²⁴³ But if a judge is fairly to be compared with other judges, one would need reliable figures. Not only would each judge's reversal rate have to be assessed, but one would need to work such a rate out carefully, having regard to appealability of decisions and reported and unreported judgment. One would also have to use an average annual *rate* rather than numerical figures because no two judges will have decided the same number of cases. Even if resources can be garnered to conduct a fair and accurate quantitative analysis, it is hard not to doubt the value of the exercise in its entirety when one considers that even where a candidate's reversal rate 'falls within an acceptable range', there might still be cause for concern in the substance of his or her appeal record.

Given these pitfalls, it would probably be more helpful if limited resources were garnered to conduct a qualitative evaluation of all candidates' judicial track record (where they have one) on identified criteria. The evaluation would then focus on the reasons why a judge seeking elevation to higher office, or an acting judge seeking a full-time appointment, has been overturned on appeal and whether there is any troubling pattern on the record. Such an analysis properly conducted might simply reveal that a judge is one who is willing to decide cases on hard issues or who has been allocated cases in unsettled or new areas of law. Or it might reveal worrying patterns such as whether a candidate shows disregard for precedent, is careless in judicial reasoning or disregards fundamental principles of law.

Where a concern is identified in an appeal record, a duty of fairness to the candidate arises. Put differently, if selectors intend to have regard to any concern in a candidate's appeal record, the candidate must be afforded an opportunity to deal with it.²⁴⁴

²⁴³ As highlighted to me by Helaine Greenfeld of the US Justice Ministry, it is to be expected that judges will get it wrong from time to time. That is the basis upon which litigants are afforded an opportunity to appeal. Interview, April 2009.

²⁴⁴ During the Kliptown hearings, Judge Davis was afforded an opportunity to deal with the comment made by the Cape Bar. In a similar vein, and although not directly concerning an appeal record, Minister Radebe afforded Judge Bertelsmann an opportunity to explain the rationale and approach behind a case, described by the Minister as 'creative' which dealt with the rights of child witnesses to intermediaries in criminal cases. The case was *S v Mokoena* 2008 (5) SA 578 (T) which held that a statute granting a discretion to judicial officers to provide child witnesses with an intermediary, rather

Although the JSC, via its questionnaire, asks candidates to disclose cases that have been overturned or confirmed on appeal, it is not known how the information furnished is evaluated. Some guidance might be gleaned from approaches followed in the US during the confirmation process conducted by the Senate Judiciary Committee,²⁴⁵ where it seems that a set of questions typically arises when appeal records are in question. Though each concern will raise its own set of questions, a helpful example is found in the written questions asked by a senator of a nominee to the Fifth Circuit,²⁴⁶ in respect of a decision that had been overturned on appeal:

‘Please explain the facts of the case and your decision?’

What precedent or persuasive authority did you rely upon in making your decision?

Did you cite that authority in your decision?

How do you reconcile your decision with [identified binding authority.]

Do you continue to believe that your ruling was correct?’

A candidate’s appeal record is only one index of merit, a relatively mechanical one at that and one that can be examined by peers with reference to a candidate’s record rather than comment by colleagues. A peer review process would also have to confront more textured and complex criteria such as fairness, integrity, independent mindedness and commitment to constitutional values which in their nature require both an examination of a candidate’s record and individual perspectives. And distinctive approaches would need to be developed to evaluate those with judicial track records and those without.

than requiring them to do so is unconstitutional. The approach followed in the case was not followed in a subsequent decision on the same issue by the Constitutional Court. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* 2009(4) SA 222 (CC) the Constitutional Court upheld the validity of the statutory provisions saying that the rights of children are protected if the discretion is properly applied by judicial officers.

²⁴⁵ It should be noted that the rigour with which some of the questions are pursued can be explained by the political context of the decisions and partisan perceptions of the candidate’s ideology. For example, the two main questions asked by Republican senators during the hearings of David Hamilton related to decisions that had been overturned on appeal and which related to matters ‘close to the hearts of Americans’. In one case, the candidate explained that at the time he took the decision he was bound by a higher court authority that was subsequently overturned. Senate Judiciary Committee hearing, April 2009, attended by the author.

²⁴⁶ In the US, members of the Senate Judiciary Committee are afforded an opportunity during the confirmation process to request written responses to questions in addition to queries raised at the hearings. Samples of questions of this sort can be accessed online at www.gpoaccess.gov/congress/senate/judiciary/index.

It is beyond the scope of this paper to offer any comprehensive guide to how each criterion ought to be evaluated but it is worth considering a few examples to provide an indication of the type of approach that might be developed. The critical quality of integrity is a helpful example because its assessment relies on an evaluation based on various features: individual perspectives, a candidate's record and a candidate's stated understanding of the ethical duties of judges.

Current Chairperson of the ABA's Standing Committee, Kim Askew provided some guidance of questions one might ask colleagues during a peer review process when assessing a candidate's integrity. These relate to an assessment of character and more particularly honesty, truthfulness and whether a candidate keeps his or her word. Questions might include: Do people in the community look up to them? Do they keep their commitments to opposing counsel and the Court? Can you accept their oral promise or commitment or do you have to record it and file it with the Court because you don't trust them? Are they truthful with the Court, in other words: Do they truthfully represent facts? Do they accurately state case holdings? Do they properly relay settlement information?

As does the JSC, the ABA also places reliance also on a candidate's disciplinary record. Candidates provide the ABA with a waiver to allow them to obtain confidential information. When complaints have been made which in their nature raise concerns about integrity, such as not being truthful with a client, failing to return telephone calls or improper use of client trust funds, detailed discussions ensue to determine the circumstances.

Integrity is a key concern not only in the ABA evaluation process but in the confirmation hearings, where candidates are routinely questioned about their appreciation of the ethical duties of a judge. A common question in confirmation hearings relate to the candidate's understanding of the rules relating to conflicts of interests, and questions are asked both in general terms, and in light of a candidate's own history of association.²⁴⁷

²⁴⁷ Again useful samples of questions can be accessed from the Senate Judiciary Committee's records online.

Askew also provides some guidance about assessing a candidate's temperament, a criterion which is probably best assessed through peer review as matters of temperament will rarely reflect on a candidate's written record. Questions asked by the ABA include the following: Does the candidate listen to others on a team, or opposing counsel? Is the candidate open-minded? Does the candidate demean subordinates?²⁴⁸ Will he or she listen to all the facts before arriving at a view or making a decision? Does the candidate treat other lawyers and litigants with respect and dignity? Is the candidate a person the interviewee can see properly handling the role of a judge and why? What comments would an interviewee make about the candidate's compassion, decisiveness, courtesy, patience and such like? Open ended questions are also asked so that interviewees can say what they wish to about judicial temperament, for example: Is there anything you wish to tell me about the temperament of Candidate X? Do you have any concerns about the temperament of Candidate Y?

When assessing a candidate's qualifications and experience, much valuable information will appear from the written record of a candidate, but to appreciate the quality of the lawyer, it is necessary to consider the work of the candidate in some depth. Put differently, it does not suffice merely to ensure that a candidate has an adequately broad range of experience, or sufficient litigation or adjudicative exposure. The ABA peer review process goes beyond this and entails both an evaluation of the written record of a candidate and an assessment by peers of their skills. In general terms, Askew explains, other lawyers are asked to assess levels of expertise, analytical skills, whether law is correctly applied to facts and ability to handle complex issues judges are required to handle. An assessment is made whether a candidate is able to learn quickly in a new environment or in respect of a new area of law, which can be assessed both from a written record and interviews with peers. These enquiries are relevant to all candidates but where judges seek elevation to higher office, further lines of enquiry are possible such as: Do they correctly apply the law to the facts? Can they properly try a case or handle arguments? Do they rule promptly? Do their opinions show an understanding of the law and what is their reversal record on appeal? Askew explains that when interviewees consistently

²⁴⁸ This example was provided by Arnold Burns, telephonic interview, April 2009.

provide a positive review, then the candidate's competence is reasonably clear. It is when negative feedback is given that careful scrutiny needs to be applied. She explains that the evidence is usually cumulative and patterns quickly emerge when one is conducting interviews with fifty to sixty people who have relevant knowledge. Presumably, the peer review process then facilitates a more meaningful evaluation of the written record itself.

What is intrinsically far more difficult is how to assess qualities such as independence and this is undoubtedly an issue that needs to be highlighted for public discussion. For present purposes, reference is made to some different approaches one might encounter. One example of a line of enquiry was furnished by a Republic staffer who routinely seeks to establish whether a candidate's record shows that he or she has been willing to pursue unpopular decisions. An illustration of this approach was in fact volunteered by Constitutional Court candidate and Judge of Appeal Azhar Cachalia during the Kliptown hearings. In answering a question about his general background, Cachalia JA provided two examples in his record where he had taken unpopular decisions within ANC structures, one in connection with decisions relating to possible disciplinary measures against Winnie Mandela and the other in connection with proposals that may have led to an indefinite period of detention without trial.

Evaluation of the independence of candidates who are already judges is in some senses easier than where a candidate has no such record as indications of a judge's independence of mind are revealed by their record. The evaluation is however inevitably contextual and requires consideration of the candidate's record of dissents or separate concurrences, whether decisions might be regarded as manifestly populist or politically expedient and whether a judge has a tendency to rule in a fashion that favours a particular sector such as business, the prosecution or the defence. Because of the contextual nature of the assessment, fairness would of course demand that a candidate be afforded a full opportunity to deal with any conclusions that might be drawn from their record.

Given the partisan nature of the US selection process, and the ABA's avoidance of ideological considerations, it is very difficult to draw much insight from the US system in its evaluation of 'political' independence of candidates. Indeed, there

appears to be a widespread acceptance in the US of the partisan nature of its selection process which is not altogether unsurprising given the express wording of the US Constitution. But what is not always appreciated is that this acceptance goes hand in hand with strong affirmation of powerful and countervailing checks and balances germane to the US judicial and democratic system. It also goes hand in hand with an acceptance that judges' security of tenure means that while a President will seek to nominate a candidate who shares his ideology, he cannot assume that a judge, once a nomination is confirmed by the Senate, will do his bidding. The point is made by retired Justice Sandra Day O'Connor with a quote from President Truman: "*(P)acking the Supreme Court simply can't be done ... I've tried it and it won't work ... Whenever you put a man on the Supreme Court, he ceases to be your friend.*"²⁴⁹ The provisions of the South African Constitution on judicial selection differ markedly to those of the US Constitution, not least because the power to select is not vested in the political organs but a multi-sectoral commission, but the tenure of the judges who wield the most significant political power, the Constitutional Court judges, is limited, albeit secure for the period in question. For these reasons at least, it is not only difficult but unwise to seek guidance from the US system on matters relating to 'political' independence.

If a peer review system is to be further developed in South Africa, thought needs to be given to who should conduct it and its relationship with the JSC. In view of the structural differences between the US and South African judicial selection process and legal professions, referred to above, the US system cannot merely be transplanted.

Two possible approaches present themselves. One option would be for the legal professions (advocates, attorneys and academics) to join forces to create an independent peer review committee to provide an evaluation of each candidate in light of a detailed set of relevant criteria. If this approach is followed, it would be critical that the peer review body be representative and enjoy broad legitimacy amongst the professions. A key question would be to determine what access the JSC itself would have to the detailed findings of the peer review process especially in light of the need

²⁴⁹ *The Majesty of the Law: Reflections of a Supreme Court Justice (2004)* Random House 22. A commonly cited example of a conservative 'mistake' was President Bush's nomination of Justice Souter who consistently voted with the Court's 'liberal wing'. See for example Epstein and Segal *Advice and Consent: the politics of Judicial Appointments* supra n 180 at 62.

to preserve confidentiality of interviewees. While the investigative process conducted by the ABA is extremely detailed and rigorous, the ABA reports are in summary form. Where a candidate has been evaluated adversely, however, the ABA will appear at the Senate Judiciary Committee hearing to deal with the specific concerns raised. In the South African context it may well be appropriate that more detailed findings are furnished to the JSC. Another option would be for the JSC itself to establish a sub-committee to conduct peer review via the professional representatives, and others where appropriate.

Which route is preferred would probably depend in the final result on who has the resources to establish an effective system, but in each case, the challenge would be to ensure rigour, candour, consistency, fairness and to devise appropriate measures to ensure that diverse interests are properly accounted for. While resources are critical, it should not be assumed that the time entailed in South Africa, with its relatively small judiciary, would match the daunting 1000 hours annual service performed in the US which vets candidates across fifty states. Resources would nevertheless have to be applied not only to the establishment of an appropriate peer review committee but to developing its systems, preparing handbooks and guidelines and collecting and managing candidates' information.

In conclusion, while we may have come some way from a system of 'secret soundings', a comparison with the US system reveals starkly that there is room for improvement especially if what we seek is a fair and rigorous evaluation system. It may be that there is room to develop the current system of comment to achieve the same objectives. But it is at least worth giving serious thought to whether a more structured peer review process is a better solution.

CHAPTER 9: COLLATION OF INFORMATION ABOUT CANDIDATES

Access to information about a candidate's record is a key feature of any selection process. Two questions are considered in this section: What information ought to be collated and who ought to have access to it?

The system in place focuses on the JSC questionnaire, which asks wide-ranging questions.²⁵⁰ There are separate forms for candidates who are already judges and those who are not. In each case, information is requested about tertiary academic qualifications, employment particulars since leaving school or university and membership of legal, political, community and any secret organisations. Similarly all candidates are asked to list any publications in the field of law, to identify those regarded as most significant and to explain why.²⁵¹ Candidates must indicate whether any writings have been cited in judicial decisions indicating whether the citation was with approval, and must identify who has reviewed the publications. All candidates are asked to state what they regard as their most significant contribution to the law and the pursuit of justice in South Africa.

The form for judges focuses its enquiry on the candidate's judicial experience. After requesting detail about the date of appointment to a court, the information sought relates to the candidate's decisions. Candidates must list up to ten cases in which he or she has written the judgment and which the candidate regards as 'the most significant'. Candidates must furnish an explanation why these are identified and whether any of the identified cases have been reported. Details of up to ten cases in which the candidate gave a judgment that was unsuccessfully appealed against or successfully appealed against are requested together with details of any outstanding reserved judgments.

The focus of enquiry for candidates who are not judges is prior legal experience. In general terms questions seek to extract details of the candidate's extent and range of

²⁵⁰ A copy can be sourced at <http://www.constitutionalcourt.org.za/site/Admin/judicial.htm>.

²⁵¹ Candidates are also asked to identify publications outside the field of law.

litigation experience. Candidates are asked to identify up to ten cases in which the candidate has appeared (or reported cases in which the candidate was an instructing attorney) and which he or she regards as most significant with an explanation why. Details of involvement in activities (aside from practice or academic employment) which have a bearing on legal experience²⁵² are requested, as are details of relevant quasi-judicial experience.²⁵³ Other questions request information about experience as a magistrate and acting judge, including whether decisions have been taken on appeal and whether any judgments remain outstanding.

The forms also differ for candidates who are and who are not judges regarding financial and proprietary matters. Judges are asked whether they hold or have ever held other office for profit and whether they have divested themselves of their assets. Candidates who are not judges must list all directorships held and other interests in businesses held in the past ten years and to indicate what steps would be taken in regard to private business interests and directorships if appointed to the bench.

Under the heading 'General', all candidates are asked to disclose circumstances, financial or otherwise, which may cause embarrassment in undertaking judicial office or seeking the relevant appointment and to disclose any other relevant matters that ought to be brought to the attention of the JSC. Candidates who are not judges must disclose any convictions of offences involving dishonesty, violence or other disreputable, dishonourable conduct and adverse findings of unprofessional or disgraceful conduct by any legal professional body.

A proper evaluation of the questionnaire is beyond the scope of this paper, although on the face of it, the questionnaires seek a wide range of relevant information.²⁵⁴ Nevertheless, three key concerns can be highlighted.

²⁵² Examples referred to in the form include whether a candidate has acted as an adviser to a community law centre or advice office, organised or addressed legal conferences or acted as a commissioner in the small claims court.

²⁵³ Examples include acting as a chairperson or member of a commission of enquiry or any type of disciplinary board.

²⁵⁴ The process followed and reasoning adopted by the JSC in developing its questionnaires is not known, although some of the reasoning is self-evident and it is likely that regard was had to other systems. It may be an interesting exercise to compare the questionnaires with questionnaires used in a range of other systems.

The first relates to the provision by candidates of source documentation. As in South Africa, the questionnaire used by the ABA and the Senate Judiciary Committee in the US seek information about the range of relevant experience, publications and judgments. However candidates are not only required to furnish relevant detail but to provide selectors with *copies* of judgments, publications and other relevant material. The distinction is critical. From a practical perspective, it is relatively easy for a candidate to keep or obtain and supply a record of his or own work. For the task to be undertaken by selectors, on the other hand, requires extensive resources, both in time and money. But it is also important because selectors (and for that matter, those conducting peer review or merely commenting on a nomination) must, if they are to do their job properly, have regard to the work actually done by a candidate. If they do not, it is difficult to see how one can independently evaluate suitability for office with reference to relevant criteria, for example analytical abilities, knowledge of legal principles and commitment to constitutional values.

This shortcoming was apparent during the Kliptown process and, in the final result, was remedied, albeit only imperfectly, by independent research volunteered by a working group comprised of civil society organisations that have an interest in the judiciary by virtue of the work that they do. The working group was convened by the Democratic Governance and Rights Unit and included the Centre for Applied Legal Studies, the Women's Legal Centre, the Treatment Action Campaign, the Open Democracy Advice Centre, the Legal Resources Centre, the Freedom of Expression Institute, Idasa and the South African Institute for Advanced Constitutional Law. What was produced was a document entitled 'A Study of the Judicial Records of Nominees for the Constitutional Court 2009' comprising a statistical analysis of nominees from the Supreme Court of Appeal²⁵⁵ and High Courts²⁵⁶ and extracts from a selection of leading judgments penned by the candidate dealing with constitutional matters. No information was provided for advocates and academics.²⁵⁷ Advocates

²⁵⁵ The analysis provided the following information: the number of cases hearing by the Judge of Appeal, the number of leading judgments written by the Judge of Appeal, the number of cases where at least one separate judgment concurred with a leading judgment written by the Judge of Appeal, the number of cases where at least one judgment dissented from a leading judgment written by a Judge of Appeal, the number of separate but concurring judgments written by the Judge of Appeal and the number of dissenting judgments written by the Judge of Appeal.

²⁵⁶ The information available was more limited and did not include a section detailing separate and / or dissenting judgments.

²⁵⁷ No practising attorneys were shortlisted. It is not known whether any applied for the positions.

were not evaluated because no comprehensive way could be found in the time available to determine what cases had been argued nor to evaluate their role or obtain heads of argument. Time constraints also precluded even a cursory review of academic literature. While the research did not purport to be comprehensive, any observer of the Kliptown process would have noticed that selectors made constructive and critical use of the material. The challenge is thus to ensure that comprehensive material in respect of each candidate is available for scrutiny. The obvious solution is to require candidates to make the documentation available themselves.

The second concern relates to the nature of the documentation that ought to be provided by candidates, which inevitably begs the question whether the questionnaire is sufficiently comprehensive. At the very least it would seem that copies of written judgments²⁵⁸ and publications (both legal and non-legal)²⁵⁹ ought to be provided. But this is insufficient because much of a candidate's record is contained in other material, such as heads of argument, reports of enquiries, findings of disciplinary or administrative tribunals or arbitration awards. In the US, candidates also supply copies of news articles and speeches. Subject to any privilege that may attach to aspects of candidates' records, a more rather than less comprehensive approach ought to be followed. That is especially so if we are to expand the pool of candidates for judicial selection in light of unequal historical access to professional opportunities.

A third and related point is that reliance should not only be placed on source material provided by the candidate, especially if leeway is to be given to candidates to decide which cases are the most significant.²⁶⁰ Rather, systems should be in place to supplement the documentation supplied by candidates. In the US, the record is frequently supplemented as a result of the active participation in judicial selection not only by divergent political interests but by a range of government and non-governmental agencies. To this end, Democratic Party staffers of the Senate Judiciary Committee reported that within minutes of any announcement of a Presidential

²⁵⁸ There is no reason in principle why candidates should only furnish reported judgments. The decision to report a case is made by publishers albeit with regard to factors such as whether the case decides novel questions. However, much might be gleaned from unreported decisions too, both positive and negative.

²⁵⁹ Non-legal publications may well be relevant to selection criteria such as commitment to constitutional values.

²⁶⁰ That is the approach in the existing JSC questionnaires which require candidates to identify up to ten relevant decisions or cases.

announcement interest groups (be it local police, non profit organisations or political party structures) will make contact with Senators or the Committee staff sometimes drawing attention to other relevant documentation.²⁶¹ While caution needs to be exercised in respect of ‘external’ comments,²⁶² a range of interest groups can clearly serve a positive role. Reliance is also placed on internet sources. Both general and specific internet searches are conducted including google searches.²⁶³

In conclusion, the following recommendations are made in respect of collation of documentation:

- Candidates should be required to furnish copies of relevant documentation to the JSC;
- The documentation to be provided should extend beyond reported judgments and publications to include unreported judgments, other findings made in an adjudicative capacity (administrative, quasi-judicial or disciplinary), heads of argument, news articles, speeches and reports of any enquiries;
- Documentation provided by candidates should be independently supplemented by evaluators for example by conducting internet searches and enabling interest groups to participate.

²⁶¹Interview with Democratic Party staffers, Senate Judiciary Committee, Washington DC, April 2009.

²⁶² Anonymous information ought usually to be disregarded but if considered at all, needs to be treated with extreme caution. In all cases, caution must be exercised to identify the nature and legitimacy of the underlying interest being asserted.

²⁶³ Helaine Greenfeld pointed to a US website where lawyers offer comment about the quality of judges, which provides interesting clues about what lines of enquiries ought to be followed. For example comment might be made about the judge’s temperament or delays or whether a judge is perceived to be fair.

CHAPTER 10: THE INVOLVEMENT OF GOVERNMENTAL AND NON-GOVERNMENT AGENCIES

The current selection process contemplates the participation of legal professional organisations via the nomination and notice and comment process. Where notice and comment is, at least formally, limited to institutions identified in terms of the JSC's procedures, nominations to the Constitutional Court are invited from the general public. In this section, it is argued that while the participation of legal professional organisations is a valuable part of the process, it is insufficient. Further efforts could be directed to facilitate the involvement of a much broader range of government and non-governmental agencies in the selection process, which in turn can enhance the judicial selection process.²⁶⁴ In principle, this approach is sanctioned by the JSC's existing procedures, which enable the JSC to invite comment from organisations identified as having an interest in the selection process.

The question is: Who has an interest in judicial selection? Arguably, the answer is that everyone does because we all rely on the judiciary to protect our rights. While it may be impracticable to facilitate the general public's involvement in the selection process, in principle, the JSC should seek to engage as wide a range of interest groups as possible. In reality, it will be those who play an active role in the administration of justice or who seek to protect rights through civic activity that are best placed to participate. And the ability of interest groups to participate, in turn, will depend on who has the resources and organizational capacity to do so. Consequently, the challenge is not only to devise methods that encourage relevant agencies and civic organisations to participate, but to guard against the exertion of undue influence of more organized or resourced groupings.

A notable feature of the US judicial selection process is the active role played by a wide range of agencies and civic organisations. There are many such organizations but for purposes of this research, enquiries were made about the role played by two:

²⁶⁴ Separate consideration needs to be given to participation in the nominations process.

the National Women's Legal Centre²⁶⁵ and the Leadership Conference on Civil Rights.²⁶⁶

The National Women's Legal Centre²⁶⁷ is based in Washington DC and has been operating since 1972. It '*uses the law in all its forms*' in its lobbying strategies. Amongst a range of priority areas it focuses on 'Judges and the Courts'. On its website, it notes that '*core legal rights that women have won over the last 35 years ... have been jeopardized by the appointment of Federal Judges who do not support the fundamental rights and principles that are critical to women.*' It focuses attention during nominations processes on ensuring that candidates have demonstrated commitment to fundamental rights of women.

The Leadership Conference on Civil Rights²⁶⁸ describes itself as 'the nation's oldest and largest civil rights coalition, consisting of nearly 200 national organizations, representing persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups.' It was founded in 1950 and has participated in lobbying efforts since 1957 in respect of major civil rights laws and securing an independent federal judiciary. As an organization it has, with other civil rights advocates, 'monitored the integrity of the processes for nominating and confirming judicial ... appointments – insisting that such processes be fair, open and balanced.' It asserts that 'anyone committed to social justice and equal rights must concern themselves with the caliber of those officials nominated or appointed by the President to protect our civil rights and with protecting the independent judiciary.'

US law requires non profit organisations that raise funds such as the NWLC and the Leadership Conference to be independent of political parties and thus participation in the selection process is, in principle, non-partisan. However, given that US society is

²⁶⁵ An interview was conducted with staff member in Washington DC in April 2009.

²⁶⁶ An interview was conducted with President and CEO Wade Henderson in April 2009 in Washington DC. Wade Henderson has participated in the Federal Judicial selection process for many years and regularly gives testimony before the Senate Judiciary Committee, including recently in Justice Sotomayor's confirmation hearings.

²⁶⁷ The information in this paragraph is sourced from www.nwlc.org, including a document entitled Women's Rights at Stake found on that site: www.nwlc.org/pdf/womensrightsatstake12-22-04.pdf.

²⁶⁸ The information in this paragraph is sourced from www.civilrights.org/judiciary.

is starkly divided on partisan lines on social issues, it appears inevitable that in respect of some issues, such as abortion and equal opportunity, the interests of organisations will correspond more closely with the interests of one political party than another. Accordingly, arguably the challenge that organisations such as these face is simultaneously to provide selectors with information relevant to a candidate's expertise and commitment to constitutional values and to frame their participation in a manner that permits of independent evaluation of relevant issues. As to the former, public interest organisations are particularly well placed to gather information that reveals how a candidate has approached important issues such as gender equality or equal opportunity not least because they may have litigated or lobbied in the fields and may have had direct experience of candidates' work and its consequences for people on the ground. As to the latter, what is important is that the participation of organisations is directed to enabling a critical assessment by selectors of the candidates' work. For example, a gender organization concerned that appropriate sentences are imposed for rape convictions might highlight a decision where relevant factors were not considered or others given undue weight.²⁶⁹ Similarly, organisations will be well placed to highlight statements made publicly by candidates that might reveal a lack of commitment to constitutional values such as remarks that might be understood as discriminatory.²⁷⁰

The ability of public interest organisations and other agencies, including governmental agencies concerned with the administration of justice, to participate effectively and usefully in judicial selection will depend on various factors, some of which lie beyond the control of the JSC itself. Most critically, effective participation requires that resources are dedicated to the task both in terms of personnel and money, and US based organisations are typically far better resourced than South African organisations. Yet a relative lack of access to resources ought not to deter us as it would be better if organisations are encouraged to play some role in judicial selection than no role at all, and with time, we might find that role can be enhanced.

²⁶⁹ Wade Henderson highlighted the distinction between promoting partisan interests and enabling a proper enquiry about a candidate's approach to reasoning. There are many possible examples especially where what is in issue is the exercise of a judicial discretion with an impact on a litigants' rights.

²⁷⁰ Both Wade Henderson and the NWLC staffer interviewed highlighted the important role that public interest organisations can play in this regard as many will have monitored public statements of this sort in the course of their work.

There are at least two factors that do lie within the control of the JSC. Firstly, the JSC should ensure that applications (save for confidential information) and underlying source documentation are easily and widely available, preferably through the internet. Secondly, the JSC might evaluate its procedures and create mechanisms that facilitate broader participation in its processes at the very least by identifying a broader range of organisations that can participate in the notice and comment procedure.

In concluding this section, it should be emphasized that it is not only public interest organisations that can play a useful role. Many government agencies which are not directly represented on the JSC might have useful contributions to make, for example the National Prosecuting Authority, the South African Police Force and Chapter Nine institutions.

CHAPTER 12: RULES OF ENGAGEMENT

The term 'rules of engagement' is used here to describe the manner in which the JSC engages with candidates during the selection process. A candidate's engagement with the JSC will commence when an application is lodged and end when a decision, adverse or favourable is communicated. Focus is placed here on the JSC's engagement during the interview process as it is that process which has, to date, been susceptible to most public scrutiny. More particularly, the comment is based on observations made by the author during the Kliptown hearings.

The argument advanced is that the rules of engagement ought to be informed by a set of principles, including relevance, consistency, fairness and respect for candidates' dignity. The latter consideration arises acutely in dealing with questions of race and gender representivity. While responsibility for determining the rules of engagement rests with the JSC collectively, it is its Chairperson, the Chief Justice who bears primary responsibility for their implementation not least to prevent partisan or sectoral interests from influencing the JSC process unduly.

Relevance

What constitutes a relevant question must be determined in the first place by the relevant criteria. The central thesis of this paper is that these criteria need to be more fully debated. Once better clarity is obtained, the task of assessing whether a line of questioning is relevant will be easier. Relevance is also determined by asking whether there are lines of questioning that are not permissible, such as questioning designed to elicit how a candidate would decide a particular case or whether a candidate would advance party political interests.

While selectors ought to have free reign to enquire into often open-textured criteria, it is also important that controls are in place to stop irrelevant questioning. An interesting dilemma that arose during the Kliptown hearings related to a line of questions asked by Marumo Moerane which sought to establish whether the candidate had reconsidered his or her candidature and whether he or she had been encouraged to

'stay in the race' by 'a certain retired judge'. The questions were apparently provoked by a newspaper report that suggested that four candidates had been encouraged to 'stay in the race' by retired Constitutional Court Justice Kriegler. Several candidates had withdrawn their applications apparently in the wake of controversy surrounding the integrity of the JSC's enquiry into a complaint of gross misconduct relating to Western Cape Judge President John Hlophe and a counter complaint lodged by Judge President Hlophe against the judges of the Constitutional Court. Justice Kriegler, through an organization called Freedom Under Law had instituted review proceedings against the JSC's decision not to conduct a full enquiry into the complaint against the Judge President. The relevance of the questioning is not readily apparent. It is arguably relevant whether a Constitutional Court candidate demonstrates respect for the institutions of democracy, including the JSC, a theme which arose in the answers provided by some of the candidates to the questions. However, it is difficult to see how the questions that were asked could helpfully facilitate that enquiry. Not only did the candidates stay in the race which evidences a trust of process but it is difficult to see how JSC members can infer disrespect in this context impartially when it is their own decision that is the subject of the controversial review proceedings.

It may be that the questions were justified but they are highly controversial and if they were not, they undermine the legitimacy of the JSC process.²⁷¹ Whatever the merits, political or legal, of the review, the JSC is a party and thus should decline to enter the fray on the issue via an unrelated judicial selection process. What is the duty of the JSC Chairperson in such circumstances? Arguably, the JSC member ought to have been requested to indicate the relevance of the questioning before being permitted to continue. Unless a satisfactory answer is provided, the questions should not have been permitted.

²⁷¹ See Eusebius McKaiser 'Tragicomedy revealed more about JSC than about judges' Business Day 22 September 2009 where it is suggested that the questions were an 'attempt to smoke out anyone who might have spoken to Judge Johann Kriegler, or to taint them by association.'

Consistency

Because candidates all have different backgrounds, qualities and experiences, it cannot be expected that each candidate will be subjected to the same set of questions. Rather, each interview will be dictated by the information that arises from the candidate's application and record.

Nevertheless, to ensure that each candidate is evaluated fairly and that candidates can rationally be evaluated against each other, a degree of consistency is warranted.

Several examples illustrate the point. The questionnaire (and common sense) suggests that regard is to be had to a candidate's appeal records. If that is so, then each candidate should be questioned in respect of concerns that have been identified. It is neither fair nor helpful if most candidates are spared the enquiry. The Constitution requires the JSC to have regard to the need for race and gender representivity. Where certain candidates' appointment might frustrate that objective, it is both fair and helpful for the candidates each to be afforded an opportunity to highlight what stands out in their application that ought to weigh in the deliberative process. A candidate's appreciation of the boundaries of judicial power in the separation of powers is arguably a relevant consideration. If this is so, each candidate should be asked to indicate their views on what those boundaries are. Similarly, because each candidate must demonstrate a proper appreciation of ethical principles applicable to judicial office, it is appropriate that each candidate must demonstrate an appreciation, for example, of judge's duties where conflicts of interest arise.²⁷²

Fairness

Fairness to candidates is elementary. At the very least it requires that a candidate is afforded an opportunity to deal with any adverse comment. It follows that a candidate must have access to comments made in respect of his or her candidature and an opportunity to deal with them, a duty which would arise both during a peer review

²⁷² A Republican staffer of the Senate Judiciary Committee (interview, Washington DC, April 2009) indicated that questions are always asked of candidates relating to their appreciation of the rules about conflicts of interests. That this is so appears from a reading of the transcripts of the Senate Judiciary Committee hearings.

process and in respect of comment furnished directly to the JSC. If the Kliptown hearings serve as any indication of the JSC's approach, it would seem that this principle is observed. Many candidates were afforded an opportunity to deal with adverse comments raised in respect of their candidacy. Preferably candidates ought to be given reasonable notice of the comments that have been made, an issue that arose in context of Judge President Hlophe's candidacy when he indicated that he had not received a relevant document in advance of the interview.²⁷³

Respect for candidate's dignity

Concerns about candidate's dignity may arise in many circumstances, but they arise acutely when questions of discrimination, diversity and race and gender representivity are in issue. The distinction drawn in Part One of this paper between these three issues is again of assistance.

It is of course critical that the JSC itself is not guilty of lines of questioning that evidence underlying discriminatory attitudes. Although cases of discriminatory questioning will often be obvious, this is not necessarily so. An interesting parallel might be drawn between the confirmation hearings of Justice Sotomayor in the US and the Kliptown interview of Judge Satchwell, both of whom were questioned about their 'aggressive' demeanor in court.²⁷⁴ In the case of Justice Sotomayor, anonymous comments were made by lawyers in New York who called her 'aggressive' and a 'terror on the bench.'²⁷⁵ In respect of Judge Satchwell, it was reportedly claimed by an attorney (who also took issue with the candidate's sexual orientation) that Judge Satchwell 'is known to become very emotional in court proceedings' and had on one occasion 'began shouting at a counsel and eventually

²⁷³ It is not clear whether the JSC had forwarded the comment to the candidate in advance although it seemed as though this was the general practice of the JSC. The candidate had been on leave prior to the interview process.

²⁷⁴ A proper assessment of whether there is any truth in the comments would require a more thorough evaluation than lies within the scope of this paper, but *prima facie*, it would seem at the very least that the comments themselves warrant scrutiny.

²⁷⁵ See for example 'Sotomayor answers her Senate critics in hearing' *Los Angeles Times* 15 July 2009. The judge reportedly 'explained that she liked to ask questions as way to help lawyers and herself. "It's to give them an opportunity to explain their positions ... and to persuade me that they're right."'

slammed her hands on her desk in fury and stormed out of court.²⁷⁶ While demeanor in court may be an important indicator of judicial temperament, we need to be cautious not to infuse our assessment of temperament with discriminatory assumptions. The cases in point may illustrate a tendency, sometimes remarked upon in the US selection debates, only to interrogate the ‘aggression’ of female judges. The underlying attitude is that it is acceptable for male judges to be tough in their questioning and firm in running their courtrooms, but toughness and firmness on the part of female judges is characterized as aggression.

The legitimate desire to promote diversity on the bench also requires thoughtful engagement both because it is not self-evident how diversity will or should factor in any specific selection process and because diversity relates to many things such as religious and cultural background, class background, or urban and rural experiences.²⁷⁷ What is important is how we ask the questions and how we encourage candidates to reveal something of the forces that have made them who they are.

The more difficult question relates to race and gender representivity as the Kliptown, and indeed other JSC hearings, revealed. Two points can be made.

Firstly, there is an apparent trend on the part of the JSC to ask candidates to indicate how they interpret section 174(2) of the Constitution. While that may be a difficult question, and might reveal something of the candidate’s views on affirmative action, it is arguably not one that candidates should be asked to answer. The JSC must develop and disclose its own understanding of its constitutional obligations. If they interpret the obligations incorrectly, they can be held accountable. If selectors want to assess whether candidates reason about affirmative action within the boundaries contemplated by the Constitution, they should do so as part of an appropriately bounded enquiry into a candidate’s commitment to constitutional values.

²⁷⁶ Karyn Maughan ‘Lesbian judge lashed’ 28 August 2009 www.iol.co.za, where it is reported that Judge Satchwell denied the allegations: ‘I have never shouted at counsel, slammed my hands on the desk or stormed out of court.’

²⁷⁷ The rural experience of Supreme Court of Appeal Judge Maya featured during her interview at Kliptown arising from a film ‘Courting Justice’ which had featured her attendance of customary law dispute resolution proceedings near her rural home.

A second issue that arose pertinently during the Kliptown hearings relates to the racial classification of a candidate. The argument advanced here is that if we are to achieve the non-racial society contemplated by the Constitution, racial classification should be abandoned. At the very least, candidates should not be asked to classify themselves racially. The objective of seeking a bench largely comprised of judges of African descent can be achieved without doing so.

The real challenge that faces the JSC is how it must factor race and gender representivity into judicial selection. Where two candidates are of comparable merit and the appointment of one will enhance representivity where the appointment of the other will not, it would be legitimate for the JSC to appoint the former. The difficulty arises where the candidate who does not enhance representivity (who in today's context is likely to be white or male) is a better candidate. If the selection process is to be fair and rigorous, the JSC needs to empower itself to evaluate candidates against each other in a meaningful and respectful way. To enable that enquiry it might be useful to ask all candidates whether they would highlight any quality or experience that they have that would be of particular use to the bench or that might distinguish them from other candidates.

What needs to be studiously avoided are questions that suggest that it is only legitimate for candidates to make themselves available for selection if they will enhance race or gender representivity. That compromises not only the dignity of all who participate in the selection process but it will deter people from making themselves available for office. As Chief Justice Pius Langa emphasized during the Kliptown hearings, candidates must feel free to come before the JSC. They may not be appointed in the final result, but our selectors will be best placed to make good decisions if there is a wide pool of candidates.

CHAPTER 12: TRANSPARENCY

The JSC's decision post 1994 to hold interviews of candidates for judicial selection in public has been widely and rightly acclaimed. Although some might be deterred from making themselves available for office because their candidature is subject to public scrutiny, the gains of this transparency are palpable. Most pertinently the public can know what it is that selectors interrogate in candidates' records and assess whether the JSC is performing its functions appropriately. It thus serves an important role in enhancing the JSC's accountability.

In the first part of this paper it was argued that there is a need for greater accountability and transparency in respect of the general criteria used by selectors. It was argued that openness about the general criteria used for judicial selection serves many interests. It enables a principled debate about the adequacy of the criteria used, it enables those who nominate candidates or comment on nominees to do so optimally, it enables those who may wish to make themselves available for judicial office to assess their own candidacy, and it enables the media to perform their responsibility to inform the public and generate informed public debate on these matters. Perhaps most critically, however, decision making is always enhanced when those who take decisions are clear about the criteria that are to be used. Because it is the independence and quality of our legal system that is at stake, accountability is thus serving particularly important ends.

It is notable that the JSC, in its response to the request made by the Democratic Governance and Rights Unit for documentation reflecting the criteria used in judicial selection did not make reference to the qualities that they seek in judges. At the very least it is desirable that the JSC takes measures to cure this. It seems that not only is clarity required about what these criteria are or should be, but these need to be made publicly known.

The point is not novel as a Department of Justice report on the activities of the JSC for the year ended 30 June 1999 reveals.²⁷⁸ At that time Chief Justice Mohamed

²⁷⁸ Sourced from www.doj.gov.za

chaired the JSC and under his leadership, the Commission “devoted an entire session to a discussion of the formulation of criteria and guidelines for appointment to and the transformation of the higher judiciary.” Pertinently, Professor Milton (then a member of the JSC) was asked to “record the substance of that discussion so that the views and approach of the JSC become a matter of public record.” It was also resolved that the paper should be published in law journals as it was hoped that this would help to improve the understanding of the working of the Judicial Service Commission in the profession.

Enquiries conducted by the author in October 2009 have confirmed that the paper was indeed prepared but that it was not published as contemplated. It does appear to have been provided to some members of the public at the time. When a request was made of the JSC to provide the document in October 2009, the author was advised by JSC staff members, that it could not be located.

Whatever the contents of the document,²⁷⁹ the JSC’s decision to place on the public record ‘*the views and approach of the Judicial Service Commission*’, is clearly a good one. The JSC should surely do so on a consistent basis.

While there can be little, if any, dispute that transparency relating to the general criteria for judicial selection is a good thing, it is not the only means of enhancing transparency, and thus accountability. Three other methods require consideration: facilitating public access to the record of JSC applications and interviews, the provision of reasons for decisions and the holding of deliberations in public.

Public access to the record of JSC applications and interviews

Public access to the record of JSC applications is, as argued above, critical to enable effective participation by interested parties in the judicial selection process. But it also serves the interests of transparency because it enables *ex post facto* evaluation of the process. Similarly, while enabling public access to the interviews is important, it is arguably not enough because few people are able to attend the hearings. While the media play an important role in engendering an understanding of what transpires, it is

²⁷⁹ Some indication of its contents can be gleaned from the Department of Justice Report albeit in somewhat general terms.

inevitably limited. This is because the media will tend to focus on more controversial or high profile selection processes,²⁸⁰ because the media tends not to engage in in-depth analysis of the events or candidates' records²⁸¹ and because the media is not always best placed to comment on the significance of what transpires.²⁸²

The JSC does record interviews, but the public do not have ready access to the transcripts.²⁸³ Again this might be compared with the US confirmation hearings which are available in audio form on-line shortly after the event and official written transcripts are thereafter published. During the Kliptown hearings, the easiest access to the audio recordings was through radio stations, which applied successfully at the commencement of the hearings for permission to record and broadcast what transpired.²⁸⁴ But few people knew about this option and access was informal.

The desirability of making transcripts available should not be underestimated. Judicial selection is a controversial, difficult and important process and it is crucial that we debate the issues based on fact not speculation about how the JSC is in fact performing its tasks. The challenge the JSC faces is to garner sufficient resources to make its records widely accessible.

Reasons for decisions

The Kliptown hearings took place over a period of three long days, in which numerous issues concerning judicial philosophy, candidate's qualifications and experience and their character and integrity were canvassed. Those observing the process were taken by surprise when approximately an hour after the last interview was completed the JSC announced its shortlist of seven. In such circumstances, one could only speculate about the extent to which the JSC deliberated, the role the interviews played, and the basis upon which it took its decisions.

²⁸⁰ The relatively wide coverage given to the Kliptown hearings can be explained in part by the controversy surrounding the candidature of Western Cape Judge President John Hlophe.

²⁸¹ A comparison with media reportage in the US is interesting. While it is high profile nominations that receive most coverage, there is widespread reporting and analysis of the records and background of candidates.

²⁸² This can be remedied if the media dedicate more resources to training journalists and allocating judicial selection to appropriately experienced reporters.

²⁸³ Requests can be made from the JSC but the process is both costly and time-consuming.

²⁸⁴ To date there has been no live television coverage of the interviews.

It is however by no means clear whether the JSC ought to give reasons for its decisions. It cannot be contended that it is legally obliged to do so under applicable legislation. Decisions “relating to any aspect regarding the appointment of a judicial officer by the Judicial Service Commission” are specifically excluded from the definition of “administrative action” in the Promotion of Administrative Justice Act 3 of 2000²⁸⁵ and it is in respect of administrative action that decision makers are obliged by law to provide reasons.²⁸⁶

There are compelling reasons why it might be inappropriate for reasons to be given in respect of individual decisions. As Kentridge argues,²⁸⁷ the decision not to select a judge can be based on private or embarrassing matters for example an assessment of competence, health problems or financial reasons. If these matters were canvassed publicly it may well deter candidates from making themselves available either at all or after an unsuccessful application.

That being said, it does not follow that the JSC should never provide reasons of a more general sort. Indeed, these might enhance public understanding of the JSC’s evaluation of the needs of the judiciary and need not compromise candidate’s privacy or undermine future selection processes. For example, there is no reason why the JSC should not indicate how it has assessed the needs of a particular court with regard to race and gender composition. Other examples arose from the Kliptown hearings when certain JSC members indicated their views on the relevance of prior judicial experience to appointment to the Constitutional Court or concerns about the consequences of an appointment to the bench on which the candidate was serving.²⁸⁸ If factors of this nature weigh heavily in a particular process, it may well be a good thing if they were disclosed and it is difficult to see what harm would ensue. Because so many divergent bodies are represented on the JSC, it might be that such

²⁸⁵ See section 1 (gg) of PAJA.

²⁸⁶ See section 5 of PAJA.

²⁸⁷ *Supra* n 17.

²⁸⁸ The discourse about this issue was humorous. Concerns were expressed in relation to Supreme Court of Appeal judges about ‘stealing from Lex to pay Pius.’ The concern was raised in respect of various candidates especially those who held the position of Judge President of a High Court division or specialist court. As Judge Theron stated in her interview, this is a ‘hazard of our times.’

transparency is best achieved not only by disclosure by the JSC collectively but also by individual representatives (whose views may or may not have prevailed).

Open deliberations

To date the JSC has resisted opening its deliberations to the public presumably in the interests of enhancing a candid and meaningful deliberative process. Although decisions can be taken by majority vote, the JSC's procedures contemplate that decisions should preferably be taken by consensus. To achieve this, and to ensure that a rigorous evaluation takes place, members must be permitted to ventilate their concerns about candidates openly and without censure. If deliberations were open to the public and the media, JSC members might either self-censor (in their own interests or those of a particular candidate) or use the opportunity less to deliberate meaningfully than to score political points.

These are compelling objections but they presuppose that the JSC's deliberations are the locus of decision-making. If the Kliptown hearings are any measure, it is difficult to see how, in the space of an hour, any meaningful discussion could have taken place about the relative strengths and merits of the candidates in light of suitable criteria. It is also difficult to see how race and gender representivity or diversity more broadly could have been given the proper consideration they deserve. It is not unreasonable to speculate that the interview process played only a limited role and that JSC members had caucused heavily before the deliberative process took place or that the decisions were taken simply by vote.

While caucusing will inevitably play a role, it needs to be emphasized that the Constitution specifically contemplates that the JSC collectively takes decisions about judicial selection based on criteria relating to qualification and fitness and propriety in light of the need for race and gender representivity. These are matters that inherently can only be assessed based on the record before the JSC including the application form and the interview process. It follows that the deliberations play a crucial role in ensuring that the JSC makes the best decisions it can. If we are to sacrifice transparency of the deliberative process in the interests of a proper deliberative process, then it is legitimate for us to insist that rigorous deliberation takes place.

CHAPTER 13: RESOURCES AND CONCLUSION

Many of the proposals made in this paper presuppose that adequate resources are available to those who participate in the judicial selection process. Resources are required at various stages: to enable non-governmental and governmental agencies to comment on candidates; to enable a proper peer review to take place, to enable transparency in the process and wide access to candidate's applications and records and to enable proper research to be conducted by the JSC itself and its members in respect of any application. Various types of resources are required including personnel, internet resources, and money. In each respect, we face serious challenges.

The JSC itself only recently secured independent premises, which are housed close to the Constitutional Court, which is probably appropriate given that the JSC is chaired by the Chief Justice. However although it is a distinct constitutional body it does not appear to be adequately resourced as such. For example, the JSC does not employ dedicated researchers. Nor does it have its own website. Rather it posts advertisements and its questionnaires on the Constitutional Court website presumably because it still lacks the infrastructure to operate an independent site.

If there is merit in the proposals that have been made in this paper, the only way they might be realized is if adequate resources are available to the JSC and other institutions or organisations that play a role in the selection process. Precisely what resources are required can only be ascertained after we decide what work needs to be done.

While the challenges are many, it is hardly surprising that fifteen years into democracy we still face many challenges to build the institutions the Constitution creates to foster the society that we seek. What is important is that we meet those challenges through a process of dialogue and engagement. It is to that end that the recommendations in this paper are directed.