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Commentary

THE SOUTH AFRICAN JUDICIAL APPOINTMENTS PROCESS[©]

BY PENELOPE E. ANDREWS*

In the past decade, the legal system in South Africa has moved from one premised on racism, sexism, and authoritarianism, to one that strives to provide human rights for all South Africans. The *Constitution of the Republic of South Africa 1996*,¹ a much heralded document, created the possibilities for this transition, by embracing the classic range of civil and political rights found in the International Bill of Human Rights,² as well as a panoply of socio-economic and cultural rights. In addition, the *Constitution* incorporates a host of bodies mandated to implement and enforce the rights embodied in the “Bill of Rights” of the *Constitution*.³ These bodies include, among others, the Public Protector, the Human Rights Commission, and the Commission for Gender Equality.⁴

The *Constitution* creates a constitutional court that sits at the apex of the court structure, and which is the final court of appeal on all matters constitutional.⁵ Beyond the establishment of the Constitutional Court, the *Constitution* provides the basis for a fundamental restructuring of the entire legal system. Its purpose is to render the

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¹ No. 108 of 1996 [*Constitution*].

² *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13. UN Doc. A/810 (1948) 71; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 933 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 368 (entered into force 3 January 1976, accession by Canada 19 August 1976) [*ICESCR*]; and *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

³ *Supra* note 1, c. 2.

⁴ *Ibid.*, c. 9, ss. 182, 184, 187.

⁵ *Ibid.*, s. 167(3).

system representative, accountable, and accessible, and to allow the system to provide justice to all South Africans irrespective of race, gender, and ethnicity. These values have an impact on all aspects of the legal system, but especially the court structure. And, at the core of the court structure lies the issue of the appointment of judges in this new constitutional and human rights universe.

Section 174(1) of the *Constitution* provides that “any appropriately qualified woman or man who is a fit and proper person” is eligible for an appointment as a judge.⁶ Yet section 174(2) states that the “need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered” in the appointment process.⁷ It is this apparent paradox that has preoccupied, and some would argue, haunted, the process of transforming the judiciary in South Africa in the past decade.

Consideration of racial and gender diversity, and to a lesser extent disability and sexual orientation diversity, has propelled the transformation of the judiciary in South Africa. This consideration is underpinned by both the stated and unstated assumption that a majority white judiciary cannot adequately and fairly serve and deliver justice to a majority black population. The very legitimacy of the judiciary, and indeed the project of constitutional democracy, is contingent on a bench that reflects the racial and gender diversity of the society. Moreover, with equality as the primary principle in the “Bill of Rights,” the judiciary has to accommodate this principle unequivocally in its appointments, processes, and jurisprudence.

Seeking to give effect to the transformative vision embodied in the *Constitution*, the past decade of constitutional democracy in South Africa has seen the racial and gender makeup of the judiciary almost completely altered. In 1994, South Africa’s judiciary was overwhelmingly white, male, drawn from the ranks of the middle and upper classes, and Afrikaans speaking. In 1994, there were two black judges and one female judge amongst the two hundred or so judges that made up the judiciary.⁸ By 2005, the number of black judges had increased

⁶ *Ibid.*, s. 174(1).

⁷ *Ibid.*, s. 174(2).

⁸ See “Great strides have been made in judicial transformation,” *Mail & Guardian* (27 January 2003), online: <http://www.mg.co.za/articledirect.aspx?articleid=14913&area=%2finsight%2finsight__comment_and_analysis%2f>.

exponentially, and so had the number of women appointed, although not to the same extent.⁹ The Constitutional Court is an interesting case in point. At the Constitutional Court's founding in 1994, it was composed of only three black and two female judges.¹⁰ Today, the Constitutional Court is made up of two white males and six black males, including the chief justice, and three females.¹¹ However, women make up less than 10 per cent of the overall South African judiciary.¹²

This project of constitutional transformation has not occurred without rancour, as the sometimes competing challenges of racial and gender transformation and representation, on the one hand, and integrity, competence, skill, and merit, on the other hand, are evaluated and balanced.

In addition, the Judicial Services Commission (JSC) has indicated that, in terms of its judicial appointments, the stated goals of diversity and representation are more than just the exercise of increasing the numbers of black individuals and women on the bench. The JSC has required that the values and visions of the appointed individuals must also comport with the explicit social justice commitments embodied in the *Constitution*; indeed, the candidates for an appointment to the judiciary have to demonstrate this commitment both in their personal statements and in their track records.¹³

The drafters of the first *Constitution*, in keeping with the newly adopted principles of transparency and accountability in South Africa's political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges

⁹ See "Judicial transformation in South Africa" *Africa Investor* (December 2004) 4, online: Omega Investment Research <http://www.omegainvest.co.za/Ai_December_2004.pdf>.

¹⁰ Since this was a new court, these black and female judges were the first to be appointed in the post-apartheid democracy. See Constitutional Court of South Africa, "Judges," online: <<http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm>>.

¹¹ See Constitutional Court of South Africa, "About the Court," online: <<http://www.constitutionalcourt.org.za/site/thecourt/history.htm>>.

¹² Marianne Merten, "Judging the judges" *Mail & Guardian* (10 April 2005), online: <http://www.mg.co.za/articlePage.aspx?articleid=201132&area=/insight/insight__national/>.

¹³ See Carmel Rickard, "The South African Judicial Services Commission" (Paper from the Conference on Judicial Reform: Function, Appointment and Structure, Centre for Public Law, University of Cambridge, 4 October 2003), online: University of Cambridge <http://www.law.cam.ac.uk/docs/view_doc_info.php?class=12&order=doc_title&dir=asc&doc=879&page=1&start=0> ["South African Judicial Services Commission"].

under the apartheid system had been at the discretion of the President on the recommendation of the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely.

The new system reflects a complete rejection of that which persisted under apartheid. The *Constitution* provides for the establishment of the JSC. In terms of section 178(1) of the *Constitution*, the membership of the JSC includes the chief justice, one judge president, the minister of justice, members of the legal profession and the legal academy, politicians, and laypersons.¹⁴

When a vacancy arises, the head of the relevant court will inform the JSC that there is a vacancy, will publish the vacancy, and then the JSC will call for nominations of suitable candidates. The nominations are all in writing and include the candidate's résumé, a completed application form, and the applicant's letter of consent to the nomination. The detailed application form is in the format of a questionnaire: it solicits information about the applicant's personal and professional life, including the applicant's contribution in the struggle against apartheid, commitment to the principles underlying the *Constitution*, financial interests, practice, and other relevant experience. The nomination also calls for the candidates to include a statement from their professional organization stating that they are a member in good standing.

The completed application form is then circulated among the members of the JSC and a sub-committee is appointed to meet to examine the applications. A short list of candidates is drawn up, which is then distributed to all the members of the JSC. Upon unanimous approval of the short list by the JSC, the names of the shortlisted candidates for interviews are published. These requirements apply to candidates seeking a first judicial appointment, as well as to sitting judges who seek promotion to the higher courts or transfer to other courts. This process ensures consistency by standardizing all information and allowing every candidate to respond to the same questions. The JSC rules also require that all shortlisted candidates undergo an interview;

¹⁴ *Constitution*, *supra* note 1, s. 178(1).

this applies even in those situations where there is a single candidate on the short list.¹⁵

Although the JSC has been praised for the transparency of its judicial appointment process, and particularly for giving the public an opportunity to participate in its judicial hearings, concern has been raised about the nature of the sifting process and the shortlisting of candidates by the sub-committee of the JSC. Since the names of those who are nominated, but not shortlisted, are not published, questions have been raised about how the choices are made and whether political and other inappropriate influences play a part in the decision. It has, for example, been suggested that this process may exclude people who hold unpopular political opinions, particularly those who may have been members of the former Nationalist Party or women who are of child-bearing age. Inappropriate influences may even include constitutionally impermissible factors such as a candidate's sexual preference.¹⁶ Despite these criticisms, the JSC has maintained this system of shortlisting candidates through the sub-committee process and not revealing the identities of those who are not shortlisted. The ostensible purpose behind such non-disclosure is to protect the privacy of the individual concerned.

To satisfy the commitment to transparency, the JSC invites comments on the shortlisted candidates before the interviews are conducted from the various associations of the legal profession, such as the Law Society, the Bar Council, the National Democratic Lawyers' Association, or the Black Lawyers' Association.

This facially democratic and transparent process has resulted in a bench today that is racially more diversified and accountable. But the process has fallen far short of the goals of gender diversity. In May 2006, Minister of Justice Brigitte Mabandla hosted a conference in Johannesburg to examine the question of female judicial appointments in the context of the overall transformation of the legal system.¹⁷

¹⁵ See Rickard, "South African Judicial Services Commission," *supra* note 13.

¹⁶ These attitudes were plainly apparent, to the dismay of the press and the public, during the JSC hearings in Cape Town in October 2005. See Carmel Rickard, "Judging Women Harshly" *Sunday Times* (23 October 2005), online: <<http://www.sundaytimes.co.za/Articles/TarkArticle.aspx?ID=1735237>>.

¹⁷ Ministry of Justice, "Opening address by Ms Bridgette, MP, Minister of Justice and Constitutional Development" (South African Women in Law Indaba in Boksburg, 5 May 2006),

Mabandla did so out of a growing concern that women have not been fully integrated into the legal profession, either in the legal academy, in law practice, or in the judiciary. This conference took place against the backdrop of a very contentious concept paper that focused on a comprehensive transformation of the legal system, which Mabandla had circulated a few months prior.¹⁸ In addition to the issue of racial and gender transformation, the concept paper also raised questions regarding separation of powers, rationalization of the courts, and judicial accountability.¹⁹

Although the JSC has succeeded, though not without some controversy, in appointing a significant number of black male judges, its appointment of female judges, both black and white, has been somewhat lacking. Several factors explain this omission; individually and in combination, they create a fairly formidable barrier to the appointment of female judges.

The first factor stems from the legacy of the apartheid system. Apartheid resulted in a huge and unequal distribution of resources between white and black South Africans, and its disproportionate impact on black women was particularly devastating. All research indicators point to the systemic disadvantage that apartheid imposed upon black women, which deprived them of access to resources, especially education.²⁰ As a consequence, only a minute number of black women has been able to enter into professions, particularly the legal profession.²¹ The past decade has seen the proliferation of black female students in law schools, and this may translate into a greater number of black female judicial appointments in the next few decades.

South African Government Information, online: South African Government Information <<http://www.info.gov.za/speeches/2006/06051709451002.htm>>.

¹⁸ The so-called Legal Services Charter is intended to transform the legal services sector. See Department of Justice and Constitutional Development, "Media breakfast to announce the members of the Steering Committee for the Legal Services Charter" *South African Government Information* (11 Aug 2006), online: South African Government Information <<http://www.info.gov.za/speeches/2006/06081413451001.htm>>.

¹⁹ At the time of writing this commentary, discussions around the concept paper were continuing and a few pieces of legislation were pending.

²⁰ See generally Christina Murray *et al.*, *Gender and the New South African Legal Order* (Cape Town: Juta, 1994).

²¹ See generally Centre of Concern, "Gender, Race, and the Legal Profession in South Africa," online: <<http://www.coc.org/index.fpl/1255.html?article=1947>>.

The second factor is the very nature of the profession. The legal profession in South Africa has always been dominated by white males, which has generated a markedly masculinist culture; therefore, the profession is not amenable to attracting a huge number of female practitioners. In a profession divided between advocates and attorneys, as is the case in South Africa, women have generally practised in larger numbers as attorneys. In South Africa's adversarial system, with only advocates traditionally having the right of appearance in the higher courts, the ranks of advocates have historically attracted individuals, overwhelmingly male, who are more predisposed to trial work. This is so for many reasons, including a greater sense of confidence that white males experience in a racially hierarchical society, more contacts with attorneys who may brief them, and the ability to work the long and erratic hours that trials sometimes require. This has resulted in fewer women practicing as advocates. Since the pool of judges has historically come from the ranks of advocates (although this is no longer the case), the result has been fewer women being available for an appointment to the bench.

The third factor lies in the attitudes of South African society overall, which is still steeped in deeply patriarchal and masculinist cultural attitudes. Despite a "Bill of Rights" that is unequivocally committed to the principle of equality, odious sexist attitudes pervade the society. Moreover, South African society evinces one of the highest statistics in the world regarding violence against women.

In a South African newspaper in October 2005, an alarming article by a prominent legal journalist, Carmel Rickard, outlined the shameful attitudes displayed by the members of the JSC in their questioning of female candidates.²² For example, one candidate for a vacancy on the Constitutional Court, who lived abroad, was asked whether getting a boyfriend in South Africa might "persuad[e] [her] to return even if she were not appointed to the court."²³ Another candidate for promotion to Deputy Judge President, who is openly gay, was asked whether her gay lifestyle might make her colleagues uncomfortable.²⁴

²² "Judging Women Harshly," *supra* note 16.

²³ *Ibid.*

²⁴ *Ibid.*

Notwithstanding the fact that the questions raised were inappropriate, and in one case unconstitutional, not one member of the JSC intervened to stop such a line of questioning.²⁵ The attitudes of the individuals who raised the questions in the JSC mirror those found in the wider society.

There is not much empirical literature examining the impact of the racial and gender transformation of South Africa's court system on the status of the judiciary or the way it is viewed amongst the general population. In addition, there is not much empirical literature on the impact of racial transformation on the members of the judiciary themselves. Although not widespread, press reports over the years have focused on racial conflict between judges.²⁶ For example, in the past few years, the Cape High Court has experienced significant racial strife after the Judge President (a black male) made claims about widespread racism amongst his white judicial peers.²⁷ Women judges have privately commented on the incidence of gender prejudice in the courts, with some noting that a few of their male colleagues appear hostile or indifferent to their presence.

Despite these problems, it appears that the JSC is committed to the project of judicial transformation and to ensuring that the judiciary reflects the racial and gender makeup of the country, while maintaining the integrity of the bench at the same time. This process, as indicated above, has been difficult and in some ways much slower than expected, particularly regarding the appointment of female judges. But on the other hand, considering the situation at the start of the process ten years ago, the achievements have not been insignificant.

²⁵ *Ibid.*

²⁶ See "Judge: Racism Peddled by Those Resisting Change" *Mail & Guardian* (23 October 2005), online: <http://www.mg.co.za/articlePage.aspx?articleid=254490&area=/breaking_news/breaking_news_national/>.

²⁷ *Ibid.* See also Fikile-Ntsikelelo Moya, "Judge's Archive Move Queried" *Mail & Guardian* (28 October 2005), online: <http://www.mg.co.za/articlePage.aspx?articleid=255043&area=/insight/insight_national/>.