



HELENSUZMAN
FOUNDATION

For attention: Adv P Gwebu

Email: pgwebu@parliament.gov.za

30 June 2021

Dear Adv P Gwebu

Submission in response to the call for comments on the Annual Review of the Constitution

We attach our written submission in response to the call for comments on the Annual Review of the Constitution.

We would like to confirm our interest in making oral representations to the Committee at a later convenient date.

Should you have any queries, it would be appreciated if you could contact Chelsea Ramsden (Email: chelsea@hsf.org.za).

Yours sincerely

Francis Antonie

Director



HELENSUZMAN FOUNDATION

Submission in response to the call for comments on the Annual Review of the Constitution

1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Joint Constitutional Review Committee on the annual review of the Constitution as required by section 45(1)(c) of the Constitution. The HSF sees this engagement as a way of fostering critical, yet constructive, dialogue between civil society and government.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability. The HSF’s interest in participating in these proceedings centres on our commitment to our constitutional obligations of the achievement of equality and the advancement of human rights and freedoms. Central to our work is the defence of the rule of law.

The importance of upholding the independence, credibility and integrity of the Judiciary cannot be overstated. Section 165 of the Constitution vests judicial authority in the courts and provides for the independence of the courts.¹ The Judiciary, and the courts, are the guardians of the Constitution and must uphold the rule of law.

The HSF would like to suggest amendments to sections of the Constitution concerning the administration of justice in order to enhance the independence of the Judiciary. This relates in particular to section 174 in relation to the appointment of judges and section 178 pertaining to the Judicial Service Commission (“JSC”). Both the appointment of judges and the

¹ Section 165(2) provides that “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

composition of the body that appoints them is of great constitutional importance as it impacts directly on the independence and integrity of the Judiciary.²

2. Section 174 – Appointment of Judicial Officers

The Judiciary is one of the three essential pillars of any democracy. It is tasked with upholding the Constitution and the Rule of Law. It does this through the decisions and judgments of the appointed judicial officers.³ It is therefore little surprise that the appointment of judges is so vitally important.⁴

Section 174 reveals two criteria for appointment as a judicial officer. First, the candidate must be appropriately qualified, and second, he or she must be a fit and proper person.⁵ In addition, this section requires that “[t]he need for the judiciary to broadly reflect the racial and gender composition of South Africa” be considered.⁶

The HSF proposes a minor amendment to this section. The HSF believes that the inclusion of a subsection indicating that the JSC must publish and make publicly available additional criteria considered when appointing a judicial officer. The purpose of not including additional concrete criteria within this section would be to leave open the possibility that the relevant criteria may change from time to time.

The HSF is aware that in 2010 the JSC made limited criteria available.⁷ The HSF submits, however, that this is insufficient to provide the necessary clarity on the criteria to be considered.⁸ The offered criteria are abstract and open to a variety of interpretations, only

² Office of Civil and Criminal Justice Reform, ‘Model law on Judicial Service Commissions’, available at https://thecommonwealth.org/sites/default/files/key_reform_pdfs/D16227_2_GPD_ROL_Model_Law_Judicial_Service_Commissions.pdf, at pg 1.

L Despouy, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’, *Human Rights Council* (24 March 2009), A/HRC/11/41, at para 28.

³ British Institute of International and Comparative Law, ‘Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges’, (February 2016), principle I.

⁴ Bingham Centre for the Rule of Law, ‘The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice’, (2015), at para 1.1.2; Democratic Governance and Rights Unit, ‘Judicial Selection in South Africa’ (2013), at pg 3.

⁵ Section 174(1). In addition, for the purposes of appointment to the Constitutional Court, this section mandates the candidate be a citizen of the Republic of South Africa.

⁶ Section 174(2).

⁷ Judicial Service Commission, ‘Summary of the Criteria Used by the Judicial Service Commission When Considering Candidates for Judicial Appointment’, (15 September 2010) available at <https://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments/>

⁸ This was also made clear in the National Planning Commission, ‘National Development Plan 2030: Our Future – Make it Work’, at 453.

adding to the uncertainty.⁹ The HSF recognises that any published criteria will necessarily have to contain some degree of flexibility but submits that in its current form, candidates, commissioners and the public are unable to determine the content of the criteria with any degree of certainty.¹⁰

The National Development Plan (“NDP”) indicated that the criteria contained in section 174 of the Constitution, on its own, as well as that published by the JSC is insufficient and acknowledged that there is no consensus regarding the exact criteria to be applied when appointing judicial officers.¹¹ The NDP called for the publication of clearer criteria.¹²

The HSF submits that it is important that the commissioners on the JSC, the candidates, as well as the public should be aware, prior to conducting the interviews, and even prior to the nominations as to exactly what criteria will be applied in the appointment process. This would align with international best practice¹³ and will ensure greater transparency and accountability.¹⁴ It will also lend a greater degree of credibility to the appointment procedure, as each candidate will know what is expected of them, whether they meet such criteria and how they will be judged.

3. Section 178 – Judicial Service Commission

Section 178 currently provides for the composition of the JSC.¹⁵ The current composition includes, at a minimum,¹⁶ 23 commissioners with at least eleven drawn from political ranks. The eleven commissioners include the Minister of Justice,¹⁷ six commissioners from the

⁹ C Oxtoby, ‘Managing a Fraught Transition: the Practice of the South African JSC’, in H Corder and J Van Zyl Smit eds, *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth*, (2017), pg 156; Compendium (n 4 above), at para 1.2.3; Judicial Selection (n 4 above), at pg 8-9.

¹⁰ *Securing Judicial Independence* (n 9 above), at pg 156.

¹¹ NDP (n 8 above). See also *Securing Judicial Independence* (n 9 above), at pg 453.

¹² NDP (n 8 above).

¹³ Model Law (n 2 above), section 9; Compendium (n 4 above) para 1.3.1.; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), principle IV(a); Human Rights Committee, ‘General Comment No.32’, CCPR/C/GC/32, (23 August 2007) available at <https://digitallibrary.un.org/record/606075?ln=en>, at para 19; The Southern Africa Chief Justices’ Forum, ‘Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers’ (30 October 2018), at principle (i) pg 4-5 and principle (vii) pg 7-9.

¹⁴ Compendium (n 4 above), at para 1.2.2; Judicial Selection (n 4 above), at pg 9; Cape Town Principles (n 3 above) at principle III.

¹⁵ Section 178(1)(a)-(k).

¹⁶ In terms of section 178(1)(k) the number will increase to 25 when “matters relate to a specific Division of the High Court of South Africa”.

¹⁷ Section 178(1)(c).

National Assembly,¹⁸ and four commissioners from the National Council of Provinces (the composition of these four commissioners will tend to be in favour of the dominant party).¹⁹ This number can be expanded to fifteen by section 178(1)(j) which allows the President, after consultation, to appoint a further four commissioners and there is no qualification from where these commissioners need to be chosen from.

Especially given South Africa's history, the HSF understands the need for a diverse spectrum of commissioners on the JSC.²⁰ However, the number of political representatives on the JSC creates the impression of potential political interference in the administration of justice and within the Judiciary. The process and procedure of appointment needs to ensure that there are proper safeguards in place to guard against, even the mere perception of, improper influence.²¹ The danger is that with a built-in political majority, the JSC will have the perception, if not the reality, of bias.

Concerns of over-representation of political representatives was raised during the certification process of the Constitution. The Constitutional Court, although acknowledging that the mere inclusion of political representatives on the JSC does not invalidate the section, found that it cannot make a decision on this matter as it was a political choice that it could not interfere with.²² This finding places the suggested amendment squarely within the competence of Parliament and this review procedure. The need to make the JSC membership smaller as well as provide for a more even dispersion of commissioners was called for by the NDP.²³

It is important to "safeguard against the unjustified dominance of the commission by the executive or by members of parliament or representatives of political parties".²⁴ The dominance of the JSC by political representatives holds the danger of perceptions of political influence and loss of independence and integrity.²⁵ It is for this reason that model clauses of

¹⁸ Section 178(1)(h).

¹⁹ Section 178(1)(i).

²⁰ Securing Judicial Independence (n 9 above), at pg 166.

²¹ Compendium (n 4 above), at para 1.3.4; Lilongwe Principles (n 13 above), principle (iii); Despouy (n 2 above), at para 28.

²² *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC), at paras 120-4.

²³ NDP (n 8 above), 453.

²⁴ Cape Town Principles (n 3 above), principle II.

²⁵ Despouy (n 2 above), at para 28; Compendium (n 4 above), at para 1.3.4.

what the composition of judicial service commissions should emulate does not include membership of the executive or parliament.²⁶

With this in mind, the HSF submits that the total exclusion of political representatives is not necessary nor is it desirable. However, we do contend that the number of commissioners should be adjusted to reflect a smaller JSC membership and with less political influence in order to better reflect best practice. Therefore, the HSF submits that following subsections of section 178 should be amended to read:

- Section 178(1)(h): Three persons identified by the National Assembly from among its members who are not also members of the national executive. Each of the three largest parties in the National Assembly is to designate a member;
- Section 178(1)(i): Three permanent delegates to the National Council of Provinces. Each of the three largest parties in the National Council of Provinces is to designate a member; and
- Section 178(1)(j): Two persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.

This amendment would best reflect best practice and a diverse appointment body, many with appropriate legal qualifications or experience,²⁷ whilst still including the input of political representatives.²⁸ Diversity, it should be noted, must extend also to political diversity.

4. Conclusion

The HSF welcomes the opportunity to engage with the Joint Constitutional Review Committee in this regard. The HSF suggested amendments are made with the idea of enhancing the credibility, integrity and independence of the Judiciary with a particular emphasis on the appointment of judges and less influence within the JSC of representatives of political parties and the Executive. As the only arm of government with “no constituency, no purse and sword, the judiciary”²⁹ is reliant on the public’s trust and confidence in the Judiciary to function properly and uphold the rule of law.³⁰ It is therefore essential that only suitably qualified and

²⁶ Model Law (n 2 above), section 3.

²⁷ Model Law (n 2 above), section 3(2)(3)(a) which requires commissioners to “be nominated by reference to their knowledge, expertise and independence”.

²⁸ Lilongwe Principles (n 13 above), principle (ii) pg 5-6; Despouy (n 2 above), at para 28.

²⁹ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC) at para 16.

³⁰ *Mamabolo* (n 29 above), at para 19.

independent judges who uphold the Constitution and emulate the values contained within be appointed as this will foster the public's trust in the Judiciary. The HSF believes that the amendments contained herein can assist in ensuring the appointment of such judicial officers and ensuring the independence of the Judiciary.