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Enhancing governance through the application of the rule of law.

COMMENTS ON THE REVISED PROCEDURES FOR SHORTLISTING, INTERVIEWING AND RECOMMENDING CANDIDATES FOR JUDICIAL APPOINTMENT AND REGARDING BREACHES OF MEMBERS' DUTIES OF CONFIDENTIALITY, LAW AND ETHICAL STANDARDS ("THE REVISED PROCEDURES").

1. Introduction

1.1. The Institute for Governance and Law (IGL) is a non-profit, public benefit organisation that aims to improve governance through the application of the Rule of Law. The scope of the IGL's activities includes submissions to Parliament on a range of issues, including proposed legislation and regulations.

1.2. Reviewing the Revised Procedures for Shortlisting, Interviewing and Recommending Candidates for Judicial Appointment and Regarding Breaches of Members' Duties of Confidentiality, Law and Ethical Standards ("the Revised Procedures") falls within the scope of activities for the IGL. The IGL views the interviews, selection, and discipline of judges as critical aspects of the role of the judiciary in the application and defence of the Rule of Law.

1.3. Due consideration of the Revised Procedures is essential as it is the only framework governing the process for interviewing and proposing judicial officers for selection. The Judicial Service Commission (JSC), created by section 178(1) of the Constitution, identifies the members of the commission. The Constitution also provides, in 178(6), that the JSC may determine its own procedures, which must be supported by a majority of members and bear the hallmarks of the principle of legality.[1]

1.4. The Constitution provides broad guidance on the selection of judges in section 174, specifying that judges must be appropriately qualified, fit and proper, and

[1] See chapter 2, "The Principle of Legality," in Mathews, Anthony S. (1971). *Law, Order, and Liberty in South Africa*. Juta.

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South African citizens. It must also consider the need for the judiciary to represent broadly the demographics of South Africa.[2]

1.5. The JSC must be independent and maintain its integrity. It must act lawfully, rationally, in the public interest, and in good faith. It must not act with ulterior motives or in the interests of a political party.[3]

2. Commendable aspects of the JSC's Revised Procedures.

2.1. The Revised Procedures provide improved guidance for the JSC when considering candidates for appointment.

2.1.1. Paragraph 24 of the Revised Procedures provides for a secret ballot when voting on whether a candidate should be recommended for appointment. This should help to minimise interference from outside the JSC when making decisions on which candidates to recommend.

2.1.2. Paragraphs 21-23 improve transparency around deliberations. While the deliberations themselves are private to allow for open discussions, the chairperson must publish a summary of the reasons for the decisions to create a balance between privacy and the need for transparency. Publishing the summary in no way bars an interested party from being provided with the full minutes and/or transcript of deliberations.[4]

2.1.3. The previous voting process of the JSC arguably left vacancies pending for far too long. Subjecting every selection to a secret vote resulted in qualified candidates not being appointed while the position remained vacant. The proposed procedures in paragraphs 25-30 have created a voting procedure that aims to address the previous inadequacies. This should minimise vacancies in critical positions.

2.2. Paragraphs 38-41 show promise in providing a system for holding members of the JSC accountable. These paragraphs allow the JSC to refer Commissioners

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[2] Constitution s174(2)

[3] For the most coherent argument around independence of thought see Burke, Edmund (1774). "Speech to the Electors of Bristol."

[4] *Helen Suzman Foundation v Judicial Service Commission* 2018 (7) BCLR 763 (CC); *The Magistrates Commission and Others v Richard John Lawrence* (Case no 388/2020) [2021] ZASCA 165 (2 December 2021)

back to their member bodies for discipline or removal if they fail to uphold the legal, ethical, and professional standards of their member bodies.

3. While these Revised Procedures are welcomed and point to the right direction, the IGL has identified aspects that require further consideration and development.

4. **Structure of the interviews**.

4.1. The IGL notes the JSC's adoption of the criteria on 3 October 2022 for the Commission's interview procedures. These criteria focus on legal skills and the abilities of aspirant judges.

4.2. However, the questions put to candidates often fail to match the above-mentioned criteria.

4.3. The high number of party-political representatives creates the danger that Commissioners may lack either the legal or technical experience required to evaluate candidates. This requires a more active role by the Chairperson, usually the Chief Justice, to prevent arbitrary questions and to keep the interviews focused.

4.4. The IGL recommends that, in addition to the general criteria, the JSC publicises specific interview guidelines before each set of interviews. It is desirable that these guidelines identify the particular and technical requirements of the vacancies, a broad outline of issues that are considered relevant, and criteria for evaluating the candidates. This would standardise the interviews to ensure all candidates have the best opportunity for displaying their relevant competencies.

5. Transparency in Commissioner Selection for the JSC.

5.1. Section 178(1) of the Constitution sets out the composition of the JSC. While some Commissioners are appointed *ex officio*, there are also members appointed by bodies. These include the National Assembly, the National Council of Provinces, the advocates' profession, the attorneys' profession, a teacher of law designated by teachers of law at South African universities, and four persons designated by the President.

5.2. These appointments lack transparency.

5.3. Reasons for the selection of Commissioners should be published by the National Assembly, the National Council of Provinces, the teachers of law at South African universities, the advocates' profession, the attorneys' profession, and the Presidency.

5.4. In terms of the selection of members representing (?) or appointed by the National Council of Provinces, the present arrangement falls far short of democratic representation. To enhance democratic accountability, a Constitutional amendment would be needed. The IGL would favour this approach and urges the Department of Justice and the Constitutional Commission to move for a Constitutional amendment.

5.5. Highlighting transparency and accountability in the selection and appointment of Commissioners would be one of the important steps in ensuring that they select judges that have sound legal, technical, and ethical standing. As held in *Helen Suzman Foundation v Judicial Service Commission 2018 CC*, "Those that bear the responsibility of nominating, designating or electing individuals for membership of the JSC bear the responsibility to ensure that their designated representative on the JSC complies with that designating authority's legal, ethical and professional standards."[5] It is thus necessary to enhance the judiciary's legitimacy as a priority, more so within the context of assaults on its work which have occurred over the past two decades.

6. Problem of irrelevant agendas arising during interviews

6.1. Section 178(1) of the Constitution provides for most of the members of the JSC to be political appointments, where at least 15 of the 23 members are political appointments. This includes six (6) members of the National Assembly, four (4) members of the National Council of Provinces, four (4) persons chosen by the President, and one (1) cabinet member in the form of the Minister of Justice. In addition, when considering matters related to a specific division of the High Court, the Premier of the affected province would also be a Commissioner.

[5] Helen Suzman Foundation v Judicial Service Commission 2018 (7) BCLR 763 (CC) at [37]

6.2. This provides the potential, realised in past interviews, for political questions to dominate the process. This was nowhere more evidenced than in the interview of Judge David Unterhalter in April 2021.[6]

6.3. Several researchers have noted political influence during interviews to have the potential not only of politicising the proceedings but also of deterring potential candidates from taking part.[7] [8]

6.4. This preponderance of political appointments selecting judicial officers undermines the principle of the Separation of Powers.

7. Appropriate authority of the Chair needs to be established and respected

7.1. The Revised Procedures show promise with paragraphs 38-41 that require members to uphold the legal, ethical, and professional standards of their member bodies.

7.2. Despite the promise shown, these Revised Procedures are only as good as their enforcement. The harm done by disgruntled members of the JSC has in the past cast a pall over deliberations of the Commission.[9]

7.3. It may be desirable to have clearer guidelines and stronger tools available for use by the Chairperson.

8. Conclusion

8.1. These Revised Procedures offer a way forward for greater efficiency and a smoother running of the judicial selection process.

8.2. Given the preponderance of political appointees, the IGL urges that the Department of Justice and the Constitutional Commission revisit the issue, especially in relation to presidential appointees and the skewed selection as

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[6] Judges Matter (April 2021). "SA Constitutional Court JSC Interview of Judge D N Unterhalter – Judges Matter (April 2021)." available at *https://www.youtube.com/watch?v=Fdc3JrV9u8A&t=3s*

[7] Tilley, Alison, and Zikhona Ndlebe (2021). "Judical Appointments in South Africa." *Br. J. Am. Leg. Studies 10(3), DOI: 10.2478/bjals-2021-0013* at p. 468

[8] Gravett, W.H. (2017). "Towards an algorithmic model of judicial appointment: The necessity for radical revision of the Judicial Service Commission's interview procedures." *Journal of Contemporary Roman-Dutch Law, Vol. 80, p. 267-286* at pp. 268-269

[9] Mafolo Karabo(14 March 2022). "*Dali Mpofu out of the JSC after Advocates for Transformation identify his replacement*." Daliy Maverick accessible at https://www.dailymaverick.co.za/article/2022-03-14-dali-mpofu-out-of-the-jsc-after-advocates-for-transformation-begins-search-for-his-replacement/

regards the National Council of Provinces. In the case of the presidential appointees, the IGL would urge the President to limit his appointees to retired senior judges.

8.3. Furthermore, the IGL suggests that the JSC should take a proactive stance when it comes to filling vacancies in the courts, particularly in the Constitutional Court. There are already long delays, due to courts that are overburdened and under-capacitated.[10] In the long run, these delays cause irreparable harm to the judicial process. Proactive steps are urgently needed, and the JSC is an appropriate institution to assist in this regard.

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[10] Mabasa, Nkateko Joseph (19 May 2026). "Constitutional Court 'overburdened and undercapacitated', says Freedom Under Law." *Mail & Guardian* accessible at *https://mg.co.za/news/south-africa/2026-05-19-constitutional-court-overburdened-and-undercapacitated-says-freedom-under-law/*