



Submission to the
Parliamentary Portfolio Committee on Justice and Constitutional Development
on the
Judge's Remuneration & Conditions of Employment Amendment Bill [B12-2011]
by the Political Information and Monitoring Service (PIMS), Idasa
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Introduction

1. Idasa as an independent public interest organisation committed to promoting sustainable democracies in Africa in collaboration with global and local partners. Idasa's Political Information and Monitoring Service (PIMS) seeks to promote accountable democratic institutions, active citizens and social justice in South Africa. It does so through research and advocacy, based on the principles and practices of constitutional democratic governance and human rights.
2. PIMS recognises the judiciary as one of the three branches of the state established by the Constitution according to the principle of a separation of powers. However, the judiciary holds a unique position as guarantor of the rights and duties set out in the Constitution. As such, it is vital that judicial branch of government is strengthened, is independent, and operates according to the highest standards of integrity.
3. PIMS has noted President Jacob Zuma's announcement that he has extended the term of office of the current Chief Justice, Judge Sandile Ngcobo, in terms of the existing provisions of the Judges' Remuneration and Conditions of Employment Act, 2001, and that the Chief Justice has accepted the President's invitation to continue to serve in this capacity. PIMS also notes that the President apparently informed leaders of political parties and the Judicial Services Commission of his decision.
4. PIMS has also taken note of the current litigation in the Constitutional Court initiated by the Centre for Applied Legal Studies, the Council for the Advancement of the South African Constitution, Freedom Under Law and the Justice Alliance of South Africa, which seeks to challenge the executive's extension of the tenure of the Chief Justice. We have had the benefit of prior sight of some of the Heads of Argument in those matters, as well as of the draft submission to the Committee by the Democratic Governance and Rights Unit (DGRU). Nevertheless, while PIMS generally endorses several of the arguments set out therein, this submission adopts somewhat different reasoning in certain respects.

Objectives of this submission

5. This submission endeavours to assist Parliament to find a constitutionally sound and principled solution to the controversy that has resulted from the President's announcement that he has decided to extend the term of office of the current Chief Justice, based on what we understand to be unconstitutional provisions of the Judges' remuneration and Conditions of Employment Act, 2001 (the Judges' Act).

6. We agree with the view that sections 4(1) and (2), s 8 of the Judges' Act are unconstitutional, and submit that s 3(1)(b) is similarly constitutionally invalid. We believe that the Bill does not alleviate all of these concerns and may therefore also be vulnerable to constitutional challenge.

Current legislative regime

7. Section 176(1) of the Constitution provides that:
'A Constitutional Court judge holds office for a non-renewable term of 12 years, or until her or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.'
8. Section 177(1) of the Constitution provides that:
'A judge may be removed from office only if-
 - (a) the Judicial Services Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.'
9. Section 177(2) of the Constitution provides that:
'The President must remove a judge from office upon adoption of a resolution [by the National Assembly] calling for that judge to be removed.'
10. Section 3(1)(a) of the Judges Act provides that:
'A Constitutional Court judge who holds office in terms of section 176(1) of the Constitution-
 - (a) must, subject to the provisions of section 4(1) or (2), be discharged from active service as a Constitutional court judge, on the date on which he or she-
 - (i) attains the age of 70 years; or
 - (ii) has completed a 12-year term of office as a Constitutional Court judge, whichever occurs first'.
11. Section 3(1)(b) of the Judges Act provides that:
'A Constitutional Court judge who holds office in terms of section 176(1) of the Constitution-
...
 - (b) may at any time be discharged by the President from active service as a Constitutional Court judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties'.

12. Section 4(1) of the Judges' Act provides that:

'A Constitutional Court judge whose 12-year term of office as a Constitutional Court judge expires before he or she has completed 15 years' active service must, subject to subsection (2), continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service, whereupon he must or she must be discharged from active service as a Constitutional Court judge.'

13. Section 4(2) of the Judges' Act provides that:

'A Constitutional Court judge, who, on attaining the age of 70 years, has not yet completed 15 years' active service, must continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a Constitutional Court judge.'

14. Section 8(a) of the Judges' Act provides that:

'A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.'

Discussion of the current legislative regime

15. Section 176(1) of the Constitution has two dimensions. First, it establishes for Constitutional Court judges a non-renewable term of 12 years or an age limit of 70 years, whichever occurs first. Second, it provides for an exception to the non-renewable term of office of a Constitutional Court judge.

16. In view of these provisions, it is submitted that an extension of the term of office of a Constitutional Court judge whose term of office has come to an end is clearly an exception to the rule of a non-renewable term of judicial office set out in s 176(1).

17. The power to extend the term of a Constitutional Court judge as contained in s 176(1) of the Constitution affects the fundamental principle of judicial independence. This principle requires that judges enjoy security of tenure of office that cannot readily be changed by the executive or by the legislature. The power to

extend the term of office of a Constitutional Court judge was introduced by the Sixth Amendment to the Constitution,¹ and was evidently intended to afford Parliament the power to extend the term of office of a Constitutional Court judge as an exception to the rule. This ensured that the underlying principle of security of tenure remained essentially unchanged.

18. On the basis of this view, an extension of the term of office of a Constitutional Court judge cannot be granted as a matter of course, but must be fully justified by the executive and subjected to the normal rigorous legislative process of Parliament, including public participation, in order to be valid. Theoretically, two options appear to arise in this context. First, if Parliament agrees with the executive that it is necessary to extend the term of office of a particular judge, then it may pass a law extending the term of office of that particular judge or particular judges. The legislation extending the term of office of a particular judge or particular judges would lapse when the particular extended term of office has been served. Second, Parliament may accept in principle the necessity of providing for the possible future extension of the term of office of a judge, and may adopt a law setting out a procedure for doing so that accords with existing constitutional provisions and constraints.
19. In view of the language in s 176(1), which refers to individual Constitutional Court judges, in contrast to other Constitutional provisions referring to ‘judges’ and ‘other judges’, authorising Parliament to extend the term of office of a Constitutional Court judge arguably demonstrates that the envisaged legislation would operate with regard to a specific judge, such as a Chief Justice or a Deputy Chief Justice, or specific judges, such as all judges in that class or category, such as all Chief Justices or Deputy Chief Justices. This interpretation, in our view, accords with the general principle that one of the requirements for legal validity is that it is ordinarily of general application, whereas it is exceptional for a law to be amended with a single individual in mind.
20. Nevertheless, whichever Act of Parliament is envisaged in s 176(1) would constitute an exception to this fundamental principle requiring a law to be of general application, and both would require public debate and legislative decision. This is because the question of a judge’s continued fitness to serve applies to all judges whose term of office has ended. Consequently, their continued involvement in the judiciary through the extension of that term of office is a matter that must be justified by the executive, and then publicly debated and accepted by the legislature. There is nowhere evident any presumption of judicial fitness in favour of judges

¹ Constitution Sixth Amendment, 2001.

whose term of office has expired. Parliament may refuse to pass a law extending the term of office of a particular judge or a class of judges if there is insufficient justification on the facts and from the executive that such an extension is warranted.

The extension of the term of office of judges in terms of Sections 4(1) and 4(2) of the Judges' Act

21. In 2001, Parliament purported to pass a law to extend the term of office of Constitutional Court judges in terms of s 4(1) and 4(2) of the Judges' Act. These provisions extended the term of office of all judges of the Constitutional Court to 15 years or until the age of 75 (unless they have already served fifteen years active service, for example, partly by serving as a High Court judge, when their 12 years of service as a Constitutional Court judge expired, or they reach the age of 70). Thus, the term of office for all Constitutional Court judges may be extended to 15 years or the age limit of 75, whichever comes first. According to this amendment, judges of the Constitutional Court may no longer be discharged from office upon the completion of 12 years or reaching the age of 70 in terms of section 176(1). This supposed automatic and general extension of the term of office of Constitutional Court judges in terms of s 4(1) and 4(2) is, we believe, susceptible to constitutional challenge in that it has effectively amended the fixed term of office set out in s 176(1). We support the view that sections 4(1) and 4(2) of the Judges Act do not operate as an exception to the term of office set out in section 176(1) of the Constitution. Instead, they appear to purport to replace it, without any supporting Constitutional amendment. To this extent, we submit, these provisions are unlawful and unconstitutional.

22. The Judges' Act seeks to create two procedures for extending the term of office of Constitutional Court judges. The first is in s 4(1) and 4(2) of the Act, and purports to be binding on all present and future Constitutional Court judges. The second is in s 8(a) of the Judges' Act, which essentially regulates the further extension of the term of office of a Chief Justice alone; in this instance, at the request of the President. This latter has taken place in the present instance: The Chief Justice has completed his term of office by virtue of having completed 15 years of service as a judge, for part of which he served as Chief Justice. Section 8(a) of the Judges' Act provides for a further extension of the term of office of the Chief Justice, which arose when the President requested the Chief Justice to continue serving in that capacity, and the Chief Justice agreed to that request.

Extension of the term of office in terms of section 8(a) of the Judges' Act

23. Section s 8(a) of the Act achieves the extension of the term of office of the Chief Justice only², not of other judges, whether of the Constitutional Court or otherwise, and by means of an executive act: the President makes a request and, if the Chief Justice accepts, then the term of office of the Chief Justice is extended. However, s 176(1) does not provide for the separate regulation of the term of office of the Chief Justice when compared to other Constitutional Court judges. It is therefore submitted that s 8(a) of the Act is unlawful by reason that it is not in accordance with s 176(1) of the Constitution. To the extent that it allows the extension of the term of office of a specific judge, such an extension must be via an Act of Parliament. In order to extend the term of office of a Constitutional Court judge, an Act of Parliament must be passed in accordance with the standard procedure and the President must then assent to that Act. As argued above, this may be done in one of two ways.
24. Section 8(a) of the Judges Act provides for the procedure for the extension of the Chief Justice, viz. upon the request of the President, who can extend the term of office for an indefinite period, subject only to a retirement age, with no other circumscription upon the exercise of his or her apparently unfettered discretion.
25. We respectfully agree with the argument that to interpret the reference in s 176(1) to 'A Constitutional Court judge' as referring to all Constitutional Court judges, without more, is to disregard the necessity of taking account of the particular circumstances pertaining to each judge at the time when a term extension is under consideration. At the very least, the age limit reflected in the constitutional provision is there for a very practical reason, which should not be heedlessly disregarded.
26. As argued above, the second portion of s 176 (1), which provides that 'except where an Act of Parliament extends the term of office of a Constitutional Court judge', is central to the interpretation of s 176(1) and its relationship with the Judges Act. Only Parliament is empowered by s 176(1) to extend the 12 year term and/or the retirement age of 70; and only in respect of a Constitutional Court judge.
27. The law envisaged in section 176(1) is an exception to the rule. What Parliament has done in section 4(1) and 4(2) of the Judges' Act is to extend the 12 year term to 15 year term and extend the retirement age of 70 to 75 years in the case of all judges, regardless of the considerations applicable to a particular judge at the relevant time.

² This submission does not consider questions relating to the extension of tenure of the President of the Supreme Court of Appeal

In doing so, Parliament has not created an exception to the 12 year term or the retirement age of 70, but has purported to effectively replace them.

28. Section 8(a) is therefore *ultra vires* s 176(1) of the Constitution, and is unlawful and unconstitutional.

Implications of this argument for the present Bill

29. If, as we submit, this interpretation of s 176(1) is correct, then the implications are that Parliament is obliged to pass a law that operates as an exception to the constitutional rule of a fixed, non-renewable term of office, and that this law must, either expressly in its own terms, or implicitly via a procedure spelt out therein, extend or enable the extension of, respectively, the term of office of the present Chief Justice.

30. The question that then arises is whether the present Bill remedies these concerns.

31. Section 2 of the Bill proposes substituting Section 8(a) of the Judges' Act in the following terms:

'A Chief Justice of South Africa who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or 4(2) before he or she has completed seven years' active service as such Chief Justice must, subject to the provisions of paragraph (c), from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa to the date on which he or she completes a period of seven years' active service as such Chief Justice or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as Chief Justice of South Africa.'

32. It is submitted that the proposed changes in the Bill remain constitutionally vulnerable. The rule for the tenure of Constitutional Court judges remains that set out in s 176(1). However, an amendment to the fixed term of tenure set out in s 176(1) can be effected only by constitutional amendment, not by the existing Act and not by this Bill. Like the present Act, the proposed Bill would effectively amend the term of office prescribed by s 176(1) of the Constitution, in relation only to this and all future Chief Justice,³ without further constraint or consideration of the kinds of practical issues alluded to above.

³ and to this and all future President of the Supreme Court of Appeal

33. It is accepted that the exception envisaged in s 176(1) allows Parliament to extend tenure by adopting legislation to this effect, and the Bill does seek to provide for the increase in tenure of a Chief Justice who has not yet served seven years as Chief Justice, which would therefore be achieved through an Act of Parliament were the Bill to be passed. However, as discussed above, the Bill identifies only the office of Chief Justice for such extension, without setting out any constitutional, legal or factual basis for its failure to address the position of other Constitutional Court judges, including the Deputy Chief Justice.
34. The Bill fails to resolve the inadequacies of the existing Act, including that it fails to satisfy the requirement that legislation should be of general application and that it should provide for an acceptable (or any) procedure to take account of the very real practical considerations arising when considering a term extension beyond the age contained in the Constitution. The Bill, if passed, may, like the present Act, be susceptible to a constitutional challenge on the basis that it constitutes a further unlawful amendment of the terms of office set out in s 176(1).
35. In essence, then, it is submitted that s 176(1) envisages two requirements for amending the term of office of a Constitutional Court judge: (a) a constitutional amendment to the maximum term of office or the age of retirement from service; and (b) a law of general application to Constitutional Court judges that requires a case-by-case consideration of the continued fitness for service by any particular judge.
36. Thus, until the Constitution is amended through the prescribed procedure laid down in s 74(3) of the Constitution, and the term of office set out in s 176(1) is therein specifically amended, the current law and the proposed legislative changes are constitutionally problematic and will continue to expose the judiciary to constitutional challenges. Such a scenario is likely to erode public confidence in the independence of the judiciary and to weaken its capacity and effectiveness to perform its constitutional obligations to uphold the Constitution and the rule of law. Judicial independence cannot be protected if the term of office of the Chief Justice (and all Constitutional Court judges) is open to constitutional attack or uncertainty.

Section 8(c) of the Bill – Removal of a Chief Justice

37. Section 2 of the Bill proposes substituting the following provision for section 8(c) of the Act:
- ‘A Chief Justice of South Africa or a President of the Supreme Court of Appeal who continues to perform active service in terms of paragraph (a) or (b) may at any time-

- (i) Be discharged by the President from active service as Chief Justice of South Africa or President of the Supreme Court of Appeal if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties.⁴

38. We are respectfully of the view that this provision is unconstitutional.⁵ As observed earlier, judicial independence requires that judges have security of tenure of office, which cannot easily be changed by the executive or legislature. The language and tenor of both the Act and the Bill purport to grant to the President alone the power to discharge a Chief Justice, without input or oversight from any other body.

39. It is necessary in our view, to read the relevant provisions of the Act and the Bill as implicitly conditional upon adherence to the checks and balances set out in s 177. Such adherence is not apparent in the provisions of either the Act or the Bill. Any perception that these provisions grant the power of removal to the President alone risks creating an impression of a clear infringement of judicial independence.

40. By contrast, s 177 of the Constitution sets out a structured process that includes a number of safeguards, which aim to ensure that removal of a judge from office is both necessary and legitimate. We can identify no persuasive reason why this constitutionally-mandated procedure should not continue to apply during any extended term of office.

ENDS

⁴ Again, our comments will be focused on the Chief Justice, although they are applicable also to all other judges, as envisaged by the provisions of s 177 of the Constitution.

⁵ We understand that this view is shared by legal scholars. See, for example, the DGRU submission and <http://constitutionallyspeaking.co.za/what-now-for-the-chief-justice/>