

VIEWPOINT

The Constitution and the Public Service Commission

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Public Service Commission

196. (1) There is a single Public Service commission for the Republic to promote the values and principles of public administration in the public service.
- (2) The Commission is independent and must be impartial and regulated by national legislation.
- (3) Each of the provinces may nominate a person to be appointed to the Commission.
- (4) Members of the Commission nominated by provinces may exercise the powers and perform the functions of the Commission in their provinces, as prescribed by national legislation.
- (5) The Commission is accountable to the National Assembly.
(Constitution of the Republic of South Africa, 1996)

INTRODUCTION

The first Public Service Commission (PSC) in South Africa came into existence in 1912 in terms of the *Public Service and Pensions Act, 1912* (Act 29 of 1912). Since then, the PSC has been regulated through the years by various acts of Parliament. Even the name of the PSC was changed for a period (1984–1994) to demonstrate the broadening of the sphere of jurisdiction and functions of the Commission. The Interim Constitution of the Republic of South Africa (Act 200 of 1993) brings a significant change in the constitutional position of the PSC. For the first time in the South African history of the PSC, provision has been made in the Constitution for the PSC. Its future position in the new Constitution was even secured by Constitutional Principle XXIX, one of the 34 principles contained in the Interim Constitution. As a result of that, Section 196 of the 1996 Constitution of the Republic of South Africa, which was adopted by the Constitutional Assembly on 8 May 1996, provides for the independence and impartiality of the Public Service Commission.

The discourse in this viewpoint tries to find answers to a few key questions about the Constitutional position of the PSC.

- What are the functions and powers of a public service commission intended to be?
- What is the impact of the constitutional provisions of the 1996 Constitution on the functions and powers of the South African PSC?

FUNCTION AND POWERS

The functions and powers of the South African PSC can be traced back to the origins of the British Civil Service Commission (United Kingdom 1855), whose primary function was to prevent favouritism (nepotism) in the appointment of public servants. As a colonial power, the United Kingdom influenced the government systems of numerous states, for example India, Nigeria, Zambia, Zimbabwe and even Namibia.

An analysis of public service commissions in these states shows that the appointment and disciplining of personnel may be viewed as the primary functions of PSCs. Regarding the appointment of personnel, these commissions try to prevent political favouritism and to apply the merit principle to new entrants in the public service. Regarding disciplining of personnel, the public service commissions take care that departments treat their personnel fairly and justly.

In most of these states public service commissions have executive powers regarding their primary functions. With the exception of the United Kingdom, which does not have a fully written constitution, the constitutions of all the above states spell out the composition, powers and functions of the public service commissions.

An analysis of the South African PSC from 1912 till 1994 shows that it has had powers in more functional areas than public service commissions in the United Kingdom, India, Nigeria, Zambia, Zimbabwe and Namibia. The provisions in chapter 13 of the Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) confirm its wide-ranging powers and functions. According to the Interim Constitution, the PSC shall be competent to make recommendations, give directions and conduct enquiries with regard to the organisation and administration of departments, conditions of service, personnel practices, promotion of efficiency and effectiveness of the public service, and a code of conduct.

The provisions regarding the PSC in the 1996 Constitution look quite different. The reason for the existence of the PSC, according to the new Constitution, is to promote the values and principles of public administration in the public service. The powers and functions of the PSC are no longer prescribed constitutionally, but are left to national legislation. The 1996 Constitution is different from the constitutions of other modern states like India, Zambia, Zimbabwe, Nigeria and Namibia, which spelled out the major powers and functions of their public service

commissions. Constitutionally, the South African PSC has far fewer powers and functions than the public service commissions of these states, and indeed fewer powers and functions than provided for by the Interim Constitution.

INDEPENDENCE AND IMPARTIALITY

According to Constitutional Principle XXIX included in the Interim Constitution the 1996 Constitution shall provide for the independence and impartiality of the PSC. Section 196 of the new Constitution indeed states that the Commission is independent and must be impartial. What is the meaning of independent and impartial? One could argue that it means that the PSC must be able to execute its powers and functions in an unbiased way without fear of endangering its position as a result of decisions with which the government of the day may not agree.

What is the substance of its independence and impartiality? Usually it is determined by the procedure of appointment of members of the PSC, the length of their terms of service, the dismissal procedure, the system of accountability, and the determination of the mandate (powers and functions) of the Commission. If these five criteria are used to evaluate section 196 of the new Constitution, it seems that the impartiality and independence of the PSC can be doubted.

Appointment of members: it is not clear, with the exception of the provinces, who will nominate the members of the Commission. Provision will probably be made in separate national legislation.

Term of service: the term of service of a member of the PSC as well as the *procedure of dismissal* is not mentioned in the Constitution. It will probably be spelled out by national legislation.

Accountability: the Constitution makes it clear that the PSC is accountable to the National Assembly, and for that matter the PSC is independent from the Executive.

Mandate: the securing of the mandate of the PSC can be regarded as the substance of its independence and impartiality. Its powers and functions are not prescribed by the Constitution. The only indication of its mandate is the reference to public service in sub-section 196(1) where the aim of the PSC is stated to be the promotion of the values and principles of public administration in the public service. The specific reference to the public service implies a limitation to its jurisdiction.

Although the Constitution states that the Commission is independent and impartial, the substance of its independence and impartiality are not constitutionally determined, but depend on provisions in national legislation for the appointment of members, term of service, powers and functions.

CONCLUSIONS

The constitutional provision for a PSC brings South Africa in line with a recent

tendency in modern democracies to make constitutional provision for public service commissions. It does not, however, prescribe the powers and functions of the PSC in the same detail than other modern constitutions do. In fact, it does not secure the traditional powers and functions of the South African PSC, or the powers and functions which were prescribed by the Interim Constitution.

Section 196 of the new Constitution may seemingly be in line with Constitutional Principle XXIX, but it does not really secure the impartiality and independence of the PSC.

REFERENCES

India 1949. *The Constitution of India*.

Namibia 1990. *Constitution of the Republic of Namibia*.

Nigeria 1978. *The Constitution of the Federal Republic of Nigeria*, 1978 (Decree 25 of 1978).

South Africa 1912. *Public Service and Pensions Act*, 1912 (Act 29 of 1912).

South Africa 1996. *Constitution of the Republic of South Africa*, 8 May 1996. Constitutional Assembly Database Project on www.constitution.org.za/drafts/2bill656.htm.

United Kingdom 1855. *The Order in Council of 21 May 1855*.

Zambia 1973. *Constitution of Zambia Act*, 1973 (Act 27 of 1973).