



Securing
Judicial
Independence

THE ROLE OF COMMISSIONS IN SELECTING
JUDGES IN THE COMMONWEALTH

EDITORS

HUGH CORDER & JAN VAN ZYL SMIT

SECURING
JUDICIAL
INDEPENDENCE

Securing Judicial Independence

THE ROLE OF COMMISSIONS IN SELECTING JUDGES
IN THE COMMONWEALTH

Securing Judicial Independence

THE ROLE OF COMMISSIONS IN SELECTING JUDGES
IN THE COMMONWEALTH

Editors

HUGH CORDER
JAN VAN ZYL SMIT

2017



Siber Ink

First published 2017

by



Siber Ink CC
PO Box 30702
Tokai 7966
Cape Town
SOUTH AFRICA

www.siberink.co.za © Siber Ink CC

ISBN 978-1-928309-15-4 (print format)
ISBN 978-1-928309-16-1 (pdf format)

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/4.0/> or send a letter to Creative Commons, PO Box 1866, Mountain View, CA 94042, USA.



Typesetting and cover by G J du Toit
Printed and bound by Tandym Print, Cape Town

Contents

Introduction	vii
HUGH CORDER AND JAN VAN ZYL SMIT	
CHAPTERS	
1. Dirty Laundry: Judicial Appointments in Canada	1
RICHARD DEVLIN	
2. All Change? Judicial Appointments in England and Wales since the Constitutional Reform Act 2005	39
JAN VAN ZYL SMIT	
3. Constitutional Reforms and Judicial Appointments in Kenya.	85
YASH GHAI, JILL COTTRELL GHAI, LINETTE DU TOIT AND MAXWEL MIYAWA	
4. Judicial Appointments in Malaysia	114
KEVIN YL TAN	
5. The Role of Special Judicial Bodies in Judicial Appointments in Nigeria . . .	137
AMEZE GUOBADIA	
6. Managing a Fraught Transition: the Practice of the South African JSC	152
CHRIS OXTOBY	
APPENDICES	
1. Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth.	177
2. Project Participants	181

Introduction

HUGH CORDER AND JAN VAN ZYL SMIT

Judicial authority within constitutional democracies, together with the duty of judges to review all aspects of the exercise of public power, has grown appreciably over the past decades. This trend has led to increasing scrutiny being applied to the methods by which superior court judges are appointed,¹ as the present volume seeks to do with regard to the jurisdictions that are examined here. The focus on judges of the higher courts does not in any way seek to diminish the vital role played by judicial officers in the lower courts of all these countries. It is rather a function of the daunting enormity of the scope of any research project that endeavours to capture the courts in their fullness. In addition, in any legal system which employs the doctrine of precedent, the superior courts (to which almost all politically sensitive disputes will find their way for judgment) are bound to be disproportionately influential in determining the scope of legal rights and obligations, thus fundamentally affecting socio-economic relationships.

Within the sphere of appointments, there are debates about how the selection process can be made more transparent and better able to identify talent in a diverse pool of candidates, and how the appointment system can generally be designed to function in a way that strengthens the independence of the judiciary, public confidence in the administration of justice and the rule of law. The challenge of meeting these expectations increasingly falls to independent judicial appointment bodies, such as South Africa's Judicial Service Commission (JSC) established in 1994, and there is therefore considerable international interest in the policy and practice of such institutions.

After a promising start, the South African JSC ran into substantial criticism from about 2009 onwards, coinciding with the accession to power of President Jacob Zuma, and several changes to the personnel of the Commission, in consequence. More tellingly, the JSC was subjected to several applications for the judicial review of its actions, mainly relying on the ground of irrationality, which succeeded. While most of the criticism focussed on its failure to hold judges accountable for alleged misconduct, the JSC has also on frequent occasions been taken to task for its failure to appoint apparently suitable candidates for judicial office. In particular, concerns have been raised about whether candidates are receiving fair and equal procedural treatment, about the relevance and appropriateness of some lines of questioning in public interviews, and about respect for judicial independence as a cornerstone of the rule of law.²

¹ See the various contributions in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto University Press 2006).

² The first systematic treatment of the judicial branch of government in the democratic era in South Africa appeared in 2014, a few months after the origins of the research project whose

So it was that a research project was devised in early 2014 by Professor Hugh Corder of the University of Cape Town and Professor Sir Jeffrey Jowell QC, the founding Director of the Bingham Centre for the Rule of Law in London, to respond to the following question: *What can South Africa's Judicial Service Commission learn from the experience of jurisdictions elsewhere in the Commonwealth, and what can the JSC teach such foreign jurisdictions?* With the ready and generous financial assistance of the Claude Leon Foundation and its Chair, Bill Frankel, the project was initiated in the second half of 2014, and most of the work was done within the following 18 months.

The project aimed to identify lessons that could be learned from recent experience in the Commonwealth because, like South Africa, many Commonwealth states have moved from the traditional method of appointment of judges by the Executive to the use of judicial appointment/service commissions,³ and have grappled with the challenge of how to make this new approach work. At Commonwealth level, the adoption of judicial service commissions has been recommended under the Latimer House Guidelines since 1998.⁴

There is no doubt that, in principle, this development has the potential to strengthen the rule of law and the legitimacy of the courts by improving the transparency and perceived independence of appointments. Much depends, however, on how the JSC is structured and how it operates in practice. In each case, the model was adopted with local variations, including the membership of the commission and the objectives of the pursuit of diversity or the redress of past discrimination in a particular national context. Public debates and scholarship have accordingly tended to be concerned with issues such as whether party political representatives should serve on the commission and how judicial “merit” can be defined in a way that goes beyond narrow, traditional understandings. These are important matters that form part of the background to this project. There is a danger, however, that the debates about politicisation and merit lose their connection with the larger picture in which the appointment of judges is a crucial determinant of the rule

findings are reflected in this book. See Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014). In particular, chapters 5, 6 and 7 provide a detailed account of the events referred to in this Introduction.

³ Research conducted by Dr Jan van Zyl Smit of the Bingham Centre found that in 2015, 81% of Commonwealth jurisdictions had a JSC or similar body with some responsibility for the selection of superior court judges. See *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (British Institute of International and Comparative Law 2015).

⁴ The Latimer House Guidelines, a set of norms on the institutional realisation of good governance, human rights and the rule of law, were developed by the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association. The Guidelines were annexed to the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (also known as the Latimer House Principles) adopted at the 2003 Commonwealth Heads of Government Meeting in Abuja. Para II.1 of the Guidelines states that “[w]here no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission”.

of law, and with the more practical aspects of the appointments process that are necessary to realise that goal.

The project therefore focussed on how the *processes* of judicial appointment can be designed and conducted in practice. Questions that are considered include the criteria for appointment to judicial office (and the underlying concept of what makes a “good judge”), how JSC procedures should be structured to ensure that candidates are properly and fairly evaluated in respect of these criteria, and how the JSCs and their members should respond to, and interact with, candidates with an unusual range of backgrounds and profiles. Some jurisdictions have introduced the use of recruitment exercises and pre-interview testing of personal character and problem-solving ability, which are widely used in other areas of employment. In the context of the judiciary, including the promotion of judges to appellate courts, a candidate’s track record of independent judging, or previous litigation or activism in political or constitutional matters, will also be a matter for some attention. The South African JSC has increasingly begun to be criticised for its assessment of candidates in this particular respect.

While not all of these innovations are suited to every jurisdiction, the aim of this project has been to identify good practice, with a view to articulating practical guidelines as to how judicial appointment processes can be carried out in a manner that strengthens the independence and quality of the judiciary as well as public confidence in the institution. The “Cape Town Principles” contained in Appendix 1 are an attempt to set out such guidelines. The Cape Town Principles are not a comprehensive blueprint for the appointment of judges, nor are they addressed to one jurisdiction specifically. Instead, the Principles draw on the combined experience and deliberation of the participants in this project, who are engaged with judicial appointment issues in a number of different Commonwealth jurisdictions, as the chapters of this book attest. Appendix 2 contains a full list of project participants, including both chapter authors and others who were involved in the initial period of wider research and in the discussions that led to the Cape Town Principles.

HOW THE PROJECT UNFOLDED

The University of Cape Town’s Department of Public Law, through Professor Hugh Corder as the project director, assumed the role of formal co-ordination of the research, in close collaboration with the Bingham Centre for the Rule of Law in London, for the following reasons.

Within South Africa, the University of Cape Town (UCT) plays a leading role in the study of the South African judiciary and judicial appointments in particular, both leading up to the establishment of the JSC in 1994, and since. Those whose work centres on the judicial branch of government include Hugh Corder (who has researched and written on the judicial branch of government since 1979) and Christopher Oxtoby, senior researcher at the Democratic Governance and Rights Unit (DGRU), which has for several years run a judicial governance programme

which includes extensive monitoring of the judicial appointments process. In particular, the DGRU has, at every round of judicial appointments since September 2009, researched the careers of each candidate shortlisted for interview by the South African JSC, and compiled a report, copies of which have been supplied to each member of the JSC well before the interview process begins. Oxtoby has been at the forefront of this socially-responsive research from the outset. This has enabled the members of the JSC to approach the interviews with some more nuanced measure of the views and competence of the candidates before them, a contribution to its work that has been acknowledged positively by many JSC members.

The DGRU also convened a meeting (in August 2013) which brought together most of the major interest groups in the appointments process, to foster better understanding of what is expected, and plans more such interventions in the future. Since the start of this project, the DGRU has substantially expanded its work in judicial education throughout Africa, in the form of the courses run by the Judicial Institute for Africa (JIFA), and in other related initiatives. The DGRU has also engaged with JSCs in other African countries to share its experience of the South African judicial appointments process and provide technical assistance.

The Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law, was founded in 2010. It is dedicated to the study and promotion of the rule of law worldwide. Professor Sir Jeffrey Jowell QC, Founding Director of the Centre until 2015, has provided advice on judicial appointments in respect of a number of national constitutions over several decades, both in his personal capacity as a distinguished academic lawyer and barrister, and as the United Kingdom's inaugural representative on the Venice Commission, which was established to advise on constitutional reform in the former communist states of Eastern Europe. As Director of the Bingham Centre, Sir Jeffrey was responsible for a number of initiatives relating to the judiciary and judicial independence, including the facilitation of a dialogue between the Palestinian Authority and the Chief Justice of Palestine on their respective roles in the administration of justice. Dr Jan van Zyl Smit, a research fellow of the Centre since 2013, has conducted research on judicial appointments, tenure and removal on behalf of the Commonwealth Secretariat, and has worked as a consultant on judicial vetting processes in the context of constitutional reforms in Kenya and Tunisia.

The first phase of the project saw a period of relatively intense research into judicial selection practices in South Africa and a sample Commonwealth jurisdictions. This took place at UCT where Gregory Solik, an LL.M graduate of UCT and advocate of the Cape Bar, undertook the work of compiling an accurate and authoritative database of case studies which could inform subsequent deliberations about best practice. The case studies set out the essential features of the appointment process in each country, including the membership of the JSC or equivalent body, and of the practical manner in which it goes about recruitment and selection of judges. The countries chosen for inclusion in this database were the ten largest Commonwealth states (by population) which have a JSC or comparable body with

a role in the selection of judges: Canada, Ghana, Kenya, Malaysia, Pakistan, Nigeria, South Africa, Tanzania, Uganda and the United Kingdom. At the same time, the project co-ordinators at UCT and the Bingham Centre made contact with legal academics in some of these countries and invited them to write papers responding to a detailed set of questions about the judicial appointment process.

The second phase of the project brought together in a two-day workshop in Cape Town in April 2015, a small number of legal and policy experts who between them had written and circulated papers on six jurisdictions: Canada, England and Wales, Kenya, Malaysia, Nigeria and South Africa. The participants also had knowledge of the appointment systems in neighbouring Commonwealth states, and informal contributions were received from yet more jurisdictions, so that in the end the research net was cast more widely. The workshop considered in some depth the lessons to be learned from the database compiled during the first phase and the papers presented. Through critical discussion, the workshop participants sought to identify common problems and themes among the various methods for judicial appointment, and proposed and debated a set of practical guidelines which the UCT and Bingham Centre team sought to capture in draft. This draft provided the basis for the Cape Town Principles which appear in this book.

After the conclusion of the workshop, the third phase of work focussed initially on the refinement of the draft Cape Town Principles, by seeking critical commentary from a number of groups concerned with judicial appointments. Thus the Commonwealth Secretariat, the Commonwealth Magistrates' and Judges' Association, JSC/JACs in several Commonwealth jurisdictions, and individuals with expertise in this area were requested to engage critically with the proposals. Meetings were held with some of these bodies in London in May 2015, and the Principles were circulated in increasingly-refined draft form to all those who had been integrally involved with the research. At the same time, the participants who had prepared papers for the workshop were asked to revise them for publication in this volume, and to incorporate if they wished any subsequent developments in their jurisdiction.

For the preparation and publication of this book, many thanks are due. Simon Sephton of Siber Ink took on the project not long after the Cape Town workshop in 2015 and his patient support over the ensuing two years was crucial to its completion. Calli Solik applied her expert copy-editing to the final manuscript under considerable time pressure and Gawie du Toit transformed the product by type-setting it for printing and free online access in PDF format.⁵

⁵The PDF is to be made available from the websites of both UCT's Democratic Governance and Rights Unit <<http://www.dgru.uct.ac.za>> and the Bingham Centre for the Rule of Law <<https://binghamcentre.biiicl.org>>.

OVERVIEW OF THE CHAPTERS

The following is a sketch of each chapter, compiled to draw attention to aspects of each system which distinguish it from others. They are considered in alphabetical order, in which they appear also as chapters in this book.

The chapter on **Canada** by Richard Devlin was written before the government of Prime Minister Trudeau began its current process of review and reform. The focus of the work is on diagnosing the problems which are widely recognised to be affecting the system of appointing judges, and considering solutions that would strengthen the judiciary. Whatever the merits of the judges as individuals, it is argued that, if the process itself could be improved, public confidence in the judiciary as a whole would be enhanced. While there are advisory committees that play a role at entry level into the judiciary, higher level appointments are made almost exclusively by the Executive, and most promotions and appellate appointments follow that route. This is characterised by ad hoc procedures for consultations and sometimes public “confirmation hearings” at Supreme Court level, which can be so deficient in rational and fair process that it leads to a failed appointment: the immediate past Prime Minister misapplied the eligibility requirements so that the Supreme Court had to unseat his nominee as unqualified. Nor is the entry level (through the federal courts and the superior courts in the provinces) exactly what it seems. The size and shape of the committees is in the gift of the Executive, with no underpinning statutory framework, and they have been reshaped time and again. In addition, the result is not a dedicated selection of those who will fill existing vacancies, but rather an assessment of whether candidates are fit for office or not. This is really more of a filter to create a pool for the Executive to dip into to make appointments at their discretion. On the positive side, the existing system provides some valuable guidance to appointments committees—for example, on conflicts of interest, process for interviewing, and so on, but its impact is lessened by affording a low level of transparency. Diversity is a problem both in the membership of the committees and among the candidates selected, although this is changing slowly. At provincial court level, there has been room for valuable experimentation with different provinces taking different approaches. Ontario’s Judicial Appointments Advisory Committee is rightly renowned for its progressive composition (it has a lay majority) and the detailed criteria set out according to which candidates will be assessed for appointment.

The new framework for judicial appointments in **England and Wales** is not quite as flexible as that of Canada, though much of the detail is contained in regulations and there are other means of input from the Executive, including the specification of job requirements. As Jan van Zyl Smit traces in his chapter, the power to appoint was still largely with the Executive until 2006 (through the office of the Lord Chancellor), though the procedure had shifted from the “tap on the shoulder” to allowing applications for judicial vacancies, and, in the final years of the system, scrutiny by an independent oversight body. The requirements of the

doctrine of the separation of powers (which the office of the Lord Chancellor straddled), the elevated “political” role of the courts consequent on the adoption of the Human Rights Act of 1998, and the need for a clear process to attract more diverse candidates gave the impetus for change. Notwithstanding the improved process, it has proved difficult to make progress on achieving greater demographic diversity at the highest level. Broader initiatives beyond the application process, including the possibility of job-sharing right up to the UK Supreme Court, seem appropriate steps towards securing greater diversity. The application process itself has been revised several times, as lessons have been learnt from the first years of the Judicial Appointments Commission (JAC). Structured questions for referees to elicit evidence of candidates’ experience and competence have been devised and are used, creating a more even-handed framework for consistent evaluation of candidates for judicial office. Although the process is confidential, so as not to scare off applicants, there is now recourse to an Ombudsman, for those who wish to review the fairness of the process followed. In addition, extensive annual reports are published by the JAC, in the interest of accountability.

Kenya has had a JSC for longer than any other jurisdiction included in this study, indeed since independence from Britain in 1963. However, the system had to be overhauled completely as part of the process of negotiating and adopting the 2010 Constitution. In their chapter, Yash Ghai, Jill Ghai, Linette du Toit and Maxwell Miyawa examine these developments. Some of the problems with the old JSC were that it was small and all members were chosen either directly by the President or indirectly via the Chief Justice, who was himself the President’s choice. Appointments were made in an opaque rather than transparent manner, with no clear basis on which people were offered judgeships. The judiciary was further weakened by being underfunded, and developed a reputation for political partisanship and corruption, so much so that a vetting process had to be incorporated in the 2010 Constitution to determine which of the serving judges and magistrates were fit to remain in office. The new JSC under the 2010 Constitution is much more inclusive, with a balance between judicial members (now elected by their peers), representatives of the legal profession, and lay persons. There must be a minimum level of representation of women and there is a broader requirement for the JSC to be diverse in its membership. The Judicial Service Act 2011 fleshes out the constitutional framework. A detailed set of criteria for judicial office, and required procedures for application and selection are provided in this legislation. Significantly, this includes the requirement that interviews must be conducted in public, a provision borrowed from South Africa. These hearings have attracted significant media attention, even in the form of live television broadcasts. The selection decision must take into account the diverse representation of Kenya’s many ethnic groups and there is a constitutional requirement that women and men should each account for at least one third of the judiciary, although the courts have held that this is not an immediate obligation but an objective to be progressively worked towards. The JSC also has wider responsibilities for discipline and for

managing the affairs of the judiciary. Sadly, there has been significant Executive resistance to the work of the JSC but in a way this confirms the value of the JSC as an actor for judicial independence: it is no pushover.

The chapter on **Malaysia** by Kevin Tan Yew Lee also highlights serious concerns about the influence of the Executive. It took a scandal about the corrupt “brokering” of judicial appointments in the first decade of the 2000s to discredit the existing Executive-based appointment system and provide momentum for legislation establishing a JAC. Even then, the old constitutional framework was not altered, so the current hybrid structure leaves the role of the JAC somewhat unclear. The Prime Minister can appoint candidates not considered by the JAC. Moreover, the structure of the JAC does not give a great deal of protection for the independence of members. Four of the nine are lay members, but they are chosen by the Prime Minister, serve for only two years and can be removed at will. Finally, the JAC does not have its own secretariat (administrative services are provided by the Department of the Prime Minister). Subject to these provisos, the JAC conducts a selection process that is an improvement on the opaque appointment system that existed before. There is a well-articulated set of criteria, which the JAC has elaborated upon, a process of screening and interviews, and an annual report on its activities is published.

Among the group of jurisdictions considered in this study, **Nigeria**, the subject of a chapter by Ameze Guobadia, has by far the most complex system of appointing judges, and gives “special judicial bodies” the greatest influence. For its federal courts, selections are made by a Federal JSC, which recommends a shortlist to the National Judicial Council (NJC), and the NJC then puts forward a single name to the President for appointment. Similar processes are in place at state level, where each state’s JSC shortlists for the central NJC, which then recommends appointees to the Governor of the state. This process, which has been in place since 1999, is the result of the pendulum swinging back towards judicial involvement, to protect the independence of the judiciary, the result of clamour from the Bar and others. This occurred after the first independence-era JSCs had been abolished and for a time the Executive had made appointments itself. Tensions remain, however. For instance, is the provision of a single name really viable? The crisis concerning the appointment of the Chief Judge of Rivers State raises this question. The Governor’s interpretation of the law, that he could send the name back to the JSC/NJC, could be justified in context. The possibility of such referral produces arguably a better balance between the Executive and the judiciary, though there should be some limit of the number of times the Executive can reject names in respect of a particular vacancy (the South African Constitution allows this once only). Tensions also exist within the judiciary. Does the Chief Justice—chair of both the FJSC and the NJC—have too much power? On paper, the Chief Justice’s ability to appoint the majority of NJC members is a clear concern, but few Chief Justices have been in office for long enough to cause serious concern on this count. More troubling, perhaps, is the Chief Justice’s key role in shortlisting applicants for judicial office,

being responsible for drawing up a provisional shortlist. The criteria for shortlisting and their application are still evolving. At the moment, crude measures such as number of judgments written and seniority are relied on. This needs to be replaced by a system which uses more qualitative assessments.

The chapter on **South Africa** by Chris Oxtoby considers how the post-apartheid framework has fared in addressing the major challenges facing it: the need for urgent demographic transformation but also the securing of an independent judiciary which will safeguard the constitutional separation of powers and resist executive and legislative pressures. The Constitution has taken the power to appoint judges from the Executive and given it to a large and inclusive JSC, operating in the glare of public transparency at the interview stage of the selection process. Once the JSC has shortlisted candidates from among those who have applied or been nominated for a judicial vacancy it must interview the entire shortlist in public. Demographic transformation is being achieved, but the manner in which it is being striven after raises many questions. A central thread which runs through the chapter is the need to establish a firm and clear set of criteria for judicial appointment. At odds with a system that is otherwise admirably transparent, the JSC had to be compelled to release its criteria, and when these were released (only in 2011), they turned out to be vague. This lack of clarity landed the JSC in trouble when it proved itself unable, in the judgment of the reviewing court, to justify its decisions to pass over highly qualified applicants, leaving positions vacant. Lack of clarity in the criteria may be a contributing factor to the problematic questioning of some candidates, with Commissioners at times expressing views on the separation of powers that seem hostile to the concept of an independent judiciary. There has also been an unevenness of treatment between candidates at the interview stage, with some being questioned relatively gently in short interviews while others have faced hostile questioning and much longer interviews. Among the white judges appointed, some seem to have been chosen on the basis of their deferential view of the separation of powers and this seems also to have resulted in the refusal to appoint some very distinguished (white) candidates. Another factor contributing to controversy about the JSC is the presence in its ranks of party political representatives, and the increasing politicisation of their roles. Realistically, however, given the current balance of power in Parliament, the composition of the JSC will be difficult to change. The fall-out from Commissioners' hostility and the uneven treatment of candidates is that fewer suitable candidates are applying or being nominated for judicial office. For example, Constitutional Court seats have remained vacant for longer than desirable because the JSC has not received a sufficient number of appropriate applications to constitute a shortlist of the number of vacancies plus three which (for such positions) it has to forward to the President. At the time of writing, however, tensions seemed to have eased a little.

THE CAPE TOWN PRINCIPLES

The Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges are reproduced in Appendix 1. The Principles aim to provide practical guidance to constitution-makers, legislators and existing JSCs and JACs, by identifying ways in which processes for the selection and appointment of judges can strengthen the independence of the judiciary and the rule of law, while preserving sufficient adaptability to suit national legal systems. As recounted earlier in this Introduction, the Principles reflect the outcome of discussions among the chapter authors and other participants in this project, all of whom are listed in Appendix 2, as well as a consultation held in London with representatives of the Commonwealth Secretariat, the Commonwealth Magistrates' and Judges' Association and senior staff members working for the England and Wales Judicial Appointments Commission. Those who attended this consultation provided valuable input but should not be held responsible for the content of the Principles.

Two distinguished project participants have explained the challenges which the Cape Town Principles seek to address. In the words of Justice Kate O'Regan, who served for a 15-year term on the Constitutional Court of South Africa from 1994:

Appointing independent, competent and trusted judges is central to ensuring the rule of law in a democracy. The last few decades have seen the establishment of judicial appointment committees in many Commonwealth countries that have diminished the power of the Executive over the appointment of judges. The Cape Town Principles provide welcome guidance on the processes and principles that should inform the work of these committees, which should in turn contribute to the enhancement of the rule of law and independence of the judiciary across the Commonwealth.

Professor Sir Jeffrey Jowell QC, Founding Director of the Bingham Centre for the Rule of Law, has observed:

These principles provide a sorely needed guide to the role of judicial appointment commissions, their composition, and their proper procedures—all in the interest of a judiciary that is legitimate, competent and wholly independent.

The Principles are intended to supplement the various norms on judicial appointments that exist internationally,⁶ including in the Commonwealth.⁷ Whereas most of these norms focus on the constitutional framework for judicial appointments

⁶ A brief list would include, at global level, the UN Basic Principles on the Independence of the Judiciary (1985), and the Bangalore Principles of Judicial Conduct (2002). At regional level, judicial appointments are addressed in declarations such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2005), the Campeche Declaration of Minimum Principles on Judiciaries and Judges' Independence in Latin America (2008), the Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region (1998) and numerous European instruments (many of which are summarised in the Venice Commission report *Judicial Appointments*, CDL-AD(2007)028).

⁷ The leading statements of principle are still the Latimer House Guidelines and Principles (n 4). Several of the Commonwealth bodies which were involved in developing the Latimer House Guidelines subsequently collaborated to produce Action Plans for their implementation in Nairobi (2005) and Edinburgh (2008), as well as a report, *Judicial Appointments Commissions: A Model Clause for Constitutions* (2003).

and on specific safeguards for judicial independence, the Cape Town Principles attempt to deal in a more comprehensive fashion with the practicalities of judicial selection and appointment. The 17 Principles are divided into five parts:

- **Part I (General)** identifies values that are relevant to the design and operation of judicial appointment systems, including the rule of law, judicial independence, equality and access to justice. Any system should aim to attract the best candidates from all backgrounds and to enhance public confidence in the judiciary.
- **Part II (Establishment of an independent commission with responsibility for selecting judges)** deals with the membership, structure and functions of a commission, highlighting the importance of independence both on the part of individual members and the institution as a whole. In order to be effective, commissions require the support of a dedicated and appropriately resourced secretariat.
- **Part III (Criteria and process of selection)** outlines the elements of an open and evidence-based approach to judicial selection. Selection criteria and information about the selection process should be published, and judicial vacancies widely advertised with open calls for applications. Valuable evidence concerning the suitability of candidates may be obtained from a variety of sources including self-assessment, references from third parties, and interviews (which some countries may choose to hold in public to enhance the legitimacy of the process).
- **Part IV (Appointment)** considers situations in which a commission recommends candidates for formal appointment by another authority, often the head of state. Where the appointing authority is given discretion this should not be exercised arbitrarily or used to bypass the selection process conducted by the commission.
- **Part V (Accountability)** suggests ways in which a commission may be required to account for its work, including by providing feedback to unsuccessful applicants, publishing an annual report, and through its decisions being subject to challenge before a dedicated ombudsman body or in judicial review proceedings.

The Principles were first published in February 2016. Since they first appeared, the Principles have been translated into Spanish, Portuguese, Bulgarian and Burmese at the request of various organisations.⁸ It is hoped that they will continue to inform debate about judicial appointments in years to come.

In many constitutional systems throughout the world, the past three years (in which this project has endured) have witnessed a substantial elevation of the prominence of the judicial branch of government. This trend which we noted at the outset has been enhanced by increasing levels of misuse of political power and challenges to the constitutionality of the exercise of public power. Perhaps the most striking example of such judicial intervention is to be seen in the decision of the

⁸Translations of the Cape Town Principles are available on a webpage maintained by the Bingham Centre for the Rule of Law: <https://binghamcentre.biicl.org/projects/capetownprinciples>.

Kenyan Supreme Court in annulling the presidential elections in September 2017, and ordering a repeat of that process. We hope that the work in this volume will assist all those concerned with constitutional governance in the Commonwealth to review and improve the process for appointing judges, where necessary.

Dirty Laundry: Judicial Appointments in Canada

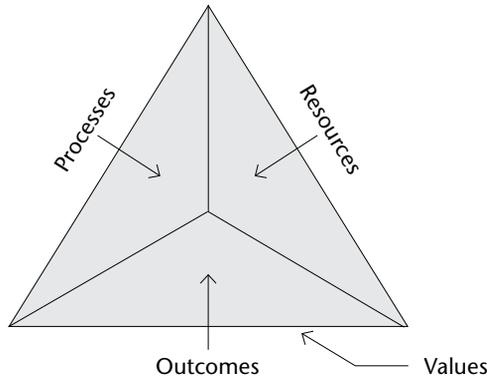
RICHARD DEVLIN¹

INTRODUCTION

The issue of the appointment of judges is not a freestanding problem. Rather, as Adam Dodek and I have argued, it is part of a larger public policy puzzle, the challenge of designing an appropriate regulatory regime for judges.²

Any description, analysis, assessment or critique of judicial appointments processes necessarily requires the development and deployment of some conceptual framework. Sometimes such a framework is implicit or taken for granted. However, in our opinion, it is better if we can make that framework—that paradigm—explicit because we can then more clearly understand the nature of the evaluative process in which we are engaged.

In response to this challenge of articulating a conceptual framework for regulating judges, Dodek and I have developed a heuristic which we characterise as a regulatory pyramid. That pyramid is composed of a floor and three walls. The floor we characterise as a cluster of values that lay the foundation for an understanding/evaluation of a judicial regime. The three walls are processes, resources and outcomes. The pyramid looks like this:



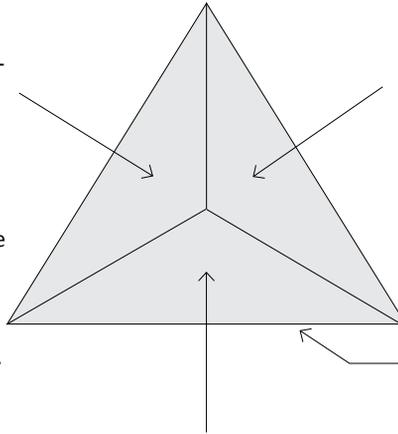
¹ Schulich School of Law, Dalhousie University. Thanks to Jessica Habet, Molly Ross and Lindsey Wareham for their support in developing this chapter and to the participants at the Judicial Appointments Workshop, University of Cape Town, 21–23 April 2015. The research was supported in part by the Schulich Academic Excellence Fund. The chapter is current to 18 August 2015, and concludes with a Postscript written in September 2016 to reflect changes introduced by the Liberal Party government of Prime Minister Justin Trudeau.

² Richard Devlin and Adam Dodek, “Regulating Judges: Challenges, Controversies and Choices” in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016).

The key point is that all four elements are interdependent and closely connected. Based upon this schema, we then argue that there are a number of discrete subcomponents that constitute each of the four elements. They are the bricks and mortar that constitute the pyramid. We suggest that the following are worthy of consideration (although we recognise that these are contestable and perhaps either over-inclusive or under-inclusive):

Processes

- Institutional relations
- Recruitment and appointment processes
- Continuing education and training
- Appellate mechanisms
- Ethical assistance programs and networks
- Complaints and discipline processes
- Relations and engagement with the public
- Relations with media
- Judicial immunity/liability
- Evaluation of judges



Resources

- Court budgets
- Numbers of judges, part time and full time, per capita
- Salaries and pensions of judges
- Physical Infrastructure
- Support staff

Values

- Independence
- Impartiality
- Accountability
- Representativeness
- Transparency
- Efficiency

Outcome

- Public confidence in the judiciary

For the purposes of this chapter it is important to emphasise that while our regulatory pyramid locates recruitment and judicial appointments in the wall of “processes”, the challenge of judicial appointments necessarily requires a consideration of the values at stake, the resources implicated, and the outcomes desired.

In the following overview, assessment and critique of judicial appointments in Canada, the analysis will explicitly:

- (i) ask whether we are adequately fulfilling the values of independence, impartiality, accountability, transparency, representativeness and efficiency;³
- (ii) consider the resource issues involved; and
- (iii) interrogate whether the current regime contributes to public confidence in the Canadian judiciary.

My conclusion will be that while there have been some modest experiments to improve the judicial appointments process(es) in Canada over the last few decades,

³ Many of these values are also to be found in a variety of international documents which address judicial appointments processes. See for example: Commonwealth Lawyers Association, Commonwealth Legal Education Association and Commonwealth Magistrates’ and Judges’ Association, *Judicial Appointments Commissions: A Model Clause for Constitutions* (2013); OSCE and Max Planck Minerva Research Group, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010); European Network of Councils for the Judiciary, *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* (May 2012); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003); European Commission For Democracy Through Law (Venice Commission), *Report on Judicial Appointments*, CDL-AD (2007) 028 (2007).

the current mechanisms are significantly flawed. The consequence is that this failure indicates that Canada still has a long way to go in designing and delivering a defensible regime for the appointment of judges.

The chapter has three main sections which correspond to the three distinct regimes that exist for the appointment of Canadian judges: Supreme Court of Canada appointments; Superior Court (section 96) appointments; and Provincial Court (section 92) appointments. The differences between these regimes are significant and illustrate the competing visions and values at stake in the design of a judicial appointments process and therefore the inevitably normative and political character of such an enterprise.⁴

I THE SUPREME COURT OF CANADA

The constitutional and historical backdrop

The Supreme Court of Canada is Canada's apex court. However, the constitutional foundations of the Supreme Court of Canada are decidedly flimsy. In the "old constitution", historically called the British North America Act 1867 (now the Constitution Act 1867), section 101 gave the Parliament of Canada the power to "provide for the constitution, maintenance and organisation of a general Court of Appeal for Canada".

In the "new constitution", the Constitution Act 1982, the amending formula makes two references to the Supreme Court of Canada. First, section 41(d) provides that an amendment to "the composition of the Supreme Court of Canada" requires the unanimous consent of all the provinces and the two houses of Parliament. Second, under section 42(1)(d), other amendments to the Supreme Court of Canada are subject to what is called the "General Procedure for Amending the Constitution of Canada" which is found in section 38(1). This is called the "seven-fifty procedure", since it permits amendments supported by resolutions of both the Senate and House of Commons and resolutions of the legislative assemblies of at least two-thirds of the provinces (seven out of the total of 10) provided that those provinces have, in the aggregate, according to the latest census, at least 50% of the population of all the provinces.

It is also important to note that there is nothing in the Canadian Charter of Rights and Freedoms, passed in 1982 as part of the "new constitution", which specifically refers to the Supreme Court of Canada.

Pursuant to section 101 of the Constitution Act 1867, the federal Parliament in 1875 passed the Supreme Court Act.⁵ In terms of the specifics of the appointments process the Act is spartan. Section 4(2) provides that the "judges will be appointed by the Governor in Council by letters patent under the Great Seal" and because the Governor General acts on advice, this means that decisions on appointment are made by the federal Cabinet, or in reality, the Prime Minister.

⁴ Richard Devlin, A Wayne MacKay and Natasha Kim, "Reducing the Democratic Deficit: Towards a 'Triple P' Judiciary" (2000) 38 Alberta L Rev 734.

⁵ Supreme Court Act 1875.

The only qualifications are spelt out in section 5: a candidate must be a person who “is or has been a judge of a superior court of a province or a barrister of at least 10 years standing at the bar of a province”. No consultation with provincial Attorneys General or ratification by the Senate or House of Commons is necessary.

From the beginning however, there has always been a concern with representativeness. Because Canada is a federation, and because Quebec follows the civil law tradition, particular statutory rules and conventions have emerged. The original Supreme Court Act of 1875 stated that at least two of the six judges had to come from Quebec. The composition of the Court was increased to seven judges in 1927 and in 1949, two more were added. Since the number has increased to a total of nine justices, it has been a statutory requirement under section 6 of the Supreme Court Act that three judges come from Quebec. Generally, the pattern (and now possibly a constitutional convention) has been that three judges should also come from Ontario, two from the Western provinces and one from the Atlantic provinces. But these are not statutory requirements. The usual pattern is also that the Chief Justice alternates between those whose first language is French and those whose first language is English.

For the first century of its existence the Supreme Court struggled to gain legitimacy. There were multiple reasons for this⁶ but some of its troubles were connected to concerns about the composition of the Court, and the fact that justices were selected exclusively at the discretion of the Prime Minister and Cabinet. Generally speaking these concerns fell into four broad categories. First, there were questions raised about the competence and quality of various members of the Court over the years.⁷ Second, there were concerns about how independent and impartial the Court could be when there were disputes between the federal government and the provincial governments. Allegations were sometimes made that only those who were of a federalist disposition would be appointed to the Court.⁸ This was a particular concern for Quebec.⁹ This led to calls for greater provincial participation in the appointments process.¹⁰ Third, and closely connected to the first two points, critics have argued that from its inception the Supreme Court appointments process has been tainted by concerns about political patronage. For example, Martin Friedland reports that “prior to 1949 over fifty per cent of the

⁶James G Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Osgoode Society for Canadian Legal History 1985); Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (McGill-Queen’s University Press 1992).

⁷Snell and Vaughan (n 6).

⁸Erin Crandall, “Intergovernmental Relations and the Supreme Court of Canada: The Changing Place of the Provinces in Judicial Selection Reform” in Nadia Verrelli (ed), *The Democratic Dilemma: Reforming Canada’s Supreme Court* (McGill-Queen’s University Press 2013) 71.

⁹Eugénie Brouillet and Yves Tanguay, “The Legitimacy of Constitutional Arbitration in a Multinational Federative System: The Case of the Supreme Court of Canada” in Nadia Verrelli (ed), *The Democratic Dilemma: Reforming Canada’s Supreme Court* (McGill-Queen’s University Press 2013) 125.

¹⁰Nadia Verrelli, “Introduction” in Nadia Verrelli (ed), *The Democratic Dilemma: Reforming Canada’s Supreme Court* (McGill-Queen’s University Press 2013) 1.

Supreme Court of Canada judges had at some point in their career been elected politicians”.¹¹ Fourth, some have objected that candidates have not been either jurisprudentially bijural nor functionally bilingual.¹² This is not the place to assess the accuracy of these historic criticisms. My point is to help set the stage for current discussions about Supreme Court appointments, by illustrating that the values of independence, impartiality, representativeness, accountability, transparency and effectiveness have been constitutive of the debate.

The current context

In the last three decades of the twentieth century, Canada found itself embroiled in a number of “mega-constitutional debates” about the nature of the federation. These debates, compounded by the enhanced authority allocated to the courts as a result of the adoption of the Canadian Charter of Rights and Freedoms in 1982, intensified concerns about how judges were selected to be members of the Supreme Court.

However, prior to the early 2000s the process for selecting Supreme Court justices was shrouded in secrecy. There was an understanding that there were confidential consultations with leaders in the legal profession about a possible candidate—“secret soundings” in the language of the day—followed by a “tap on the shoulder”. But beyond that little was known. Increasingly concerns were raised about the lack of transparency, although it was always politely emphasised that the problem was not the quality or reputation of any particular justice because they were all “impeccable”,¹³ but with “the process”.

Then, in March 2004, the Liberal Minister of Justice Irwin Cotler (who had himself been a law professor) appeared before the parliamentary Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness and for the first time in Canadian history “in the interests of both transparency and accountability”¹⁴ revealed, at least in part, how the sausage was made. It was a three-stage process, consisting of: (i) initial consultations by the Minister of Justice about potential candidates, with a number of key stakeholders (including the Chief Justice of Canada, the Chief Justice of the relevant province, the Attorney General from the relevant province, a senior member of the Canadian Bar Association, and a senior member of the relevant law society); (ii) an assessment of the candidates by the Minister of Justice, “with the predominant consideration being merit” and with

¹¹ Martin Friedland, “Appointment, Discipline and Removal of Judges in Canada” in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 52.

¹² Sébastien Grammond and Mark Power, “Should Supreme Court Judges be Required to be Bilingual?” in Nadia Verrelli (ed), *The Democratic Dilemma: Reforming Canada’s Supreme Court* (McGill-Queen’s University Press 2013) 49; Peter H Russell and Jacob S Zeigel, “Federal Appointments: An Appraisal of the Federal Government’s Appointments and the New Judicial Advisory Committees” (1991) 41 U Toronto LJ 4.

¹³ Irwin Cotler, “The Supreme Court of Canada Appointment Process: Chronology, Context and Reform” in Shetreet and Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff 2012) 284; Adam Dodek, “Reforming the Supreme Court Appointment Process, 2004–2014: A Ten Year Democratic Audit” (2014) 67 SCLR (2d) 111, 146.

¹⁴ Cotler (n 13) 283, 288.

a particular focus on “professional capacity, personal characteristics, and diversity”;¹⁵ and (iii) a decision and recommendation by the Prime Minister to Cabinet.

In May 2004, the Standing Committee issued a report called *Improving the Supreme Court of Canada Appointments Process*. The original aspiration for the Committee was to create a permanent process that would “ensure greater transparency and openness as well as enhanced Parliamentary and public involvement”.¹⁶ However, the idea of a permanent process was derailed when two judges unexpectedly announced that they were planning to resign. As a result the majority of the Committee proposed an “Interim Reform Process” which the Liberal government of the day followed. Since 2004 there have been nine successful judicial appointments to the Supreme Court of Canada and one failed appointment. To be blunt, it has been a series of ad hoc, seat-of-the-pants processes that does little to inspire public confidence.

In a 2014 paper, Adam Dodek traced and assessed eight of these processes on the basis of three criteria: transparency, accountability and public knowledge about the Supreme Court and its judges.¹⁷ He argued that Canada has failed on the first two grounds but has been very successful on the third.¹⁸ There is no point in repeating

¹⁵ Minister Cotler specified (ibid 283–284) what he meant by these three qualities:

“Professional capacity encompasses not only the highest level of proficiency in the law, but also the following considerations:

- Superior intellectual ability and analytical and written skills;
- Proven ability to listen and to maintain an open mind while hearing all sides of the argument;
- Decisiveness and soundness of judgment;
- Capacity to manage and share consistently heavy workload in a collaborative context;
- Capacity to manage stress and the pressures of the isolation of the judicial role;
- Strong cooperative interpersonal skills;
- Awareness of social context;
- Bilingual capacity;
- Specific expertise required for the Supreme Court (expertise can be identified by the Court itself or by others).

“Under the rubric of personal qualities, the following factors are considered:

- Impeccable personal and professional ethics: honesty, integrity and forthrightness;
- Respect and regard for others: patience, courtesy, tact, humility, impartiality and tolerance;
- Personal sense of responsibility, common sense, punctuality and reliability.

“The diversity criterion concerns the extent to which the court’s composition adequately reflects the diversity of Canadian society. As well, in reviewing the candidates, the Minister could also consider—where appropriate—jurisprudential profiles prepared by the Department of Justice. These are intended to provide information about the volume of cases written, areas of expertise, the outcomes of appealed cases, and the degree to which judgments have been followed in lower courts.”

¹⁶ Ibid 283, 292.

¹⁷ Dodek (n 13).

¹⁸ Ibid. See also Michael Plaxton, “The Neutrality Thesis and the Rothstein Hearing” (2007) 58 U New Brunswick LJ 92; Carissima Mathen, “Choices and Controversy: Judicial Appointments in Canada” (2007) 58 U New Brunswick LJ 52; John D Whyte, “The Supreme Court From the Outside” (2006) 13 Policy Dialogue (Saskatchewan Institute of Public Policy) 14. But see contra Peter Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2000) 44 Osgoode Hall LJ 527; Peter Hogg, “Appointment of Thomas A. Cromwell to the Supreme Court of Canada” in Nadia Verreli (ed), *The Democratic Dilemma: Reforming Canada’s Supreme Court* (McGill-Queen’s University Press 2013) 13.

his analysis here, but it is important to emphasise his key argument and to pick up the story from where he leaves off because there have been troubling developments.

Dodek argues that although successive recent Canadian governments have emphasised the importance of accountability and transparency, this has not led them to establish judicial appointments committees. Rather, at best, they have put their energy into improving parliamentary participation via consultations with a “Parliamentary Advisory Committee”, followed by a public hearing.¹⁹ Dodek has summarised the various processes in Table 1.²⁰

Table 1

Judge (Year)	Advisory Committee	Public Hearing	Others
Abella & Charron (2004)	No	Yes. Minister of Justice appeared before Ad Hoc Committee.	
Rothstein (2006)	Yes. 4 MPs, 1 provincial rep, 1 retired judge, 1 Law Society rep, 2 public.	Yes. Nominee appeared before ad hoc committee of parliamentarians & judicial and law society representatives.	
Cromwell (2008)	No.	No.	Prime Minister had intended to proceed with both advisory committee and public hearing.
Karakatsanis & Moldaver (2011)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal).	Yes. Nominees appeared before ad hoc committee of MPs.	
Wagner (2012)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal).	Yes. Nominee appeared before ad hoc committee of MPs.	
Nadon (2013)	Yes. 5 MPs (3 Conservative, 1 NDP, 1 Liberal).	Yes. Nominee appeared before ad hoc committee of MPs.	

¹⁹To be accurate, and fair, Minister Cotler did propose a permanent process that would have an ad hoc advisory committee for each vacancy that would provide a shortlist of three candidates to the Minister of Justice. The aspiration was that the Prime Minister would select a candidate from this list, subject to an “exceptional circumstances” proviso (Cotler (n 13) 295–300). However, since the Liberal Party has not formed a government since 2006, this option has disappeared.

²⁰Dodek (n 13) 130.

However, the Nadon nomination generated a retreat by the government from using either a Parliamentary Advisory Committee or public hearings.

On 30 September 2013, Prime Minister Stephen Harper nominated Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to be a puisne justice of the Supreme Court of Canada.²¹ Nadon's nomination was to fill one of the three seats statutorily reserved for Quebec on the Supreme Court.²² Nadon had been a member of the *Barreau du Québec* for more than ten years previously, but at the time of his appointment to the Supreme Court, he was no longer a member. Justice Nadon appeared before a committee of MPs on 2 October 2013 and was formally appointed to the Supreme Court of Canada the next day. On 7 October 2013, the same day Justice Nadon was sworn in, a Toronto lawyer, Rocco Galati, filed an application with the Federal Court of Canada to challenge the appointment. The Quebec government also announced it would contest the appointment. Due to the surrounding controversy the Supreme Court stated that Justice Nadon would not hear cases until the legal challenge to his appointment was settled.²³ On 22 October the Governor-in-Council sent a reference to the Supreme Court raising two issues: (i) the legality of Nadon's appointment in accordance with the Supreme Court Act; and (ii) the constitutionality of legislation to change the composition requirement of the Supreme Court so that a person might currently be or could previously have been a barrister or advocate of at least ten years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada.²⁴

On 21 March 2014, the Supreme Court of Canada held 6–1 that Justice Nadon's appointment was contrary to the Quebec-specific provisions in the Supreme Court Act and that changes to the composition of the Supreme Court required unanimous constitutional amendment. The Court held that a Federal Court of Appeal judge is not eligible for appointment under section 6 as a person who may be appointed "from among the advocates of that Province" because the language of the section requires that the appointee be a current member of the bar with at least ten years standing.²⁵ Justice Nadon's appointment was declared void *ab initio*,²⁶ and the government's legislative amendments to the composition of the Supreme Court were declared *ultra vires*.²⁷ In dissent, Justice Moldaver said that sections 5 and 6 should be read together and that eligible Quebec appointees included former members of the Quebec bar, the same as for appointees from other provinces under section 5.²⁸

²¹ Prime Minister of Canada, Stephen Harper, Press Release, "Prime Minister Announces Nominee for the Supreme Court of Canada" (30 September 2013).

²² Supreme Court Act 1985, s 6.

²³ Supreme Court of Canada, News Release, (8 October 2013) <<http://scc-csc.lexum.com/scc-csc/news/en/item/4401/index.do>>; Sean Fine, "Justice Nadon steps aside while legal challenge heard" *The Globe and Mail* (Toronto, 9 October 2013).

²⁴ Dodek (n 13) 146.

²⁵ *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433, para 4.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

However, the controversy did not end at this point. Instead two new developments emerged. First, in April 2014, six weeks after the Supreme Court brought down its decision in the *Supreme Court Act Reference*, the Prime Minister, supported by the Minister of Justice, launched an attack on the Chief Justice of Canada, Beverley McLachlin.

The facts remain somewhat murky but the essence of the Prime Minister's complaint was that the Chief Justice had crossed the line and "acted inappropriately" by seeking to speak to both the Minister of Justice and the Prime Minister during the process in 2013 that had led to the nomination of Justice Nadon. Apparently, the Prime Minister had given the Supreme Court Advisory Committee a list of six potential candidates in the summer of 2013, and that Committee was instructed to pare it down to a final list of three, from which the Prime Minister would make his choice. As part of its consultations the Advisory Committee, in July 2013, shared the list with the Chief Justice of Canada. When she saw the list, the Chief Justice sought to speak to both the Minister of Justice and the Prime Minister to express reservations, although it is not clear what those reservations were. They refused to speak with her.

That seemed to be the end of it. The Prime Minister, as we have seen, nominated Justice Nadon; that was challenged, and the Supreme Court upheld the challenge. It was only after the government had lost its case that it publicly criticised the Chief Justice for her allegedly inappropriate intervention. Such an attack by a Prime Minister and the Minister of Justice was unprecedented in Canadian history and was condemned by the political opposition, legal associations and by the International Commission of Jurists.²⁹

The second development was that, having lost the Nadon appointment, in June 2014 the federal government decided to change the rules again. Instead of reviving the Advisory Committee and holding Parliamentary hearings which, since 2004, appeared to have become the "new normal", the Prime Minister simply announced the appointment of Justice Clément Gascon.³⁰ This constituted a retreat to the ancien regime of secrecy and unfettered discretion. Moreover, the explanation given by the government is noteworthy: the government no longer had confidence in the parliamentary process because a national newspaper had managed to obtain the confidential long list that the Prime Minister provided to the Advisory Committee as part of the Nadon nomination.³¹

This retreat was confirmed in November 2014 when the Prime Minister announced yet another appointment to the Court, Ms Suzanne Côté, a lawyer who was being elevated directly from practice. This particular appointment raised concerns among a number of commentators. First, it highlighted the merit question. While it is not unprecedented for a practitioner to be directly appointed to

²⁹ Mark Kennedy, "International Panel Slams Stephen Harper for treatment of Supreme Court Justice" *Ottawa Citizen* (Ottawa, 25 July 2014).

³⁰ Sean Fine, "Unvetted Quebec judge Clément Gascon takes Supreme Court seat" *The Globe and Mail* (Toronto, 14 October 2014).

³¹ *Ibid.*

the Supreme Court of Canada, it has been rare. What, precisely, were Ms Côté's qualifications that made her superior to all the other judges and lawyers in Quebec? Second, several years previously, Ms Côté had been involved in litigation with Revenue Quebec over claimed "professional clothing and personal care" expenses totalling more than Can\$200,000 over a three-year period. The dispute had been resolved in 2012 by an out of court settlement. The matter only became public after her appointment.³² Third, others raised questions about Ms Côté's hyper adversarial tactics as independent counsel to an Inquiry Committee which was addressing complaints against Associate Chief Justice Lori Douglas.³³ In other words, the cumulative concern arising from all three issues is that there was no transparency or accountability in the process. On the other hand, Ms Côté's appointment did assuage the worry that the Prime Minister might reduce the number of women on the Supreme Court, thereby suggesting an ongoing commitment to gender representativeness on the Court.³⁴

In June 2015, the Prime Minister made yet one more appointment to the Supreme Court of Canada just a few months prior to calling an election. This time the appointee was Russell Brown. Brown, just turning 50, had been a practitioner, an Associate Professor of Law and Associate Dean, a trial judge for just over a year and a Court of Appeal judge for 15 months. Once again, there was controversy over this appointment.

Some commentators praised the diversity of Brown's experience, his intellectual abilities, industry, integrity, and open-mindedness.³⁵ However, others raised concerns. First, once again there was no transparency in the process. The Prime Minister simply announced the appointment noting "[h]is appointment is the result of broad consultations with prominent members of the legal community".³⁶ The Minister of Justice stated that he "was impressed by some of Justice Brown's judgments" but when pressed responded "Oh, I am not going to say which ones."³⁷

Secondly, there was disappointment that Justice Brown was another appointment from Alberta, when it had been argued that it was Saskatchewan's turn to have a representative on the Supreme Court. Critics pointed out that there were

³² Allan Woods, "Suzanne Côté waged \$200,000 Tax Battle over Clothes with Quebec Tax Agency" *Toronto Star* (Toronto, 17 December 2014).

³³ Susan Drummond, "I Can Never Be a Judge" *Winnipeg Free Press* (Winnipeg, 8 December 2014).

³⁴ Of course this does not resolve concerns that there has never been an Aboriginal, visible minority, or openly LGBT person appointed to the Court.

³⁵ See for example J Brown, "Brown brings 'open mind' to top court bench" *Canadian Lawyer* (Canada, 28 July 2015); T Pedwell, "Russell Brown brings 'wide experience' to SCC, says Chief Justice" *Canadian Press* (Canada, 28 July 2015); J Markusoff, "How Conservative is new Supreme Court judge Russell Brown?" *McLeans Magazine* (Canada, 28 July 2015).

³⁶ "Justice Russell Brown of Alberta named to Supreme Court" *CBC News* (Canada, 27 July 2015); "Editorial: Harper abandons openness with latest nomination to Supreme Court" *Toronto Star* (Toronto, 28 July 2015).

³⁷ Sean Fine, "MacKay declines to explain Court pick" *The Globe and Mail* (Toronto, 30 July 2015).

several excellent Saskatchewan candidates and that there had not been a judge from that province on the Supreme Court since 1973.³⁸

Third, although Justice Brown had some judicial experience (unlike Justice Côté) having served as a trial and court of appeal judge for two and a half years, there were questions as to whether his “swift”, indeed “meteoric”, rise was because of his connections to the governing Conservative party.³⁹

Furthermore, several commentators identified his explicitly right-wing ideology: he had served on the advisory board of a conservative legal think tank, the Justice Centre for Constitutional Freedoms;⁴⁰ as a law professor he had been a frequent blogger who advanced libertarian and conservative arguments, in the process trashing Liberal politicians, the Canadian Bar Association, the Canadian Anglican Church, and critiquing the Chief Justice of Canada as having an “anti-Conservative bias”;⁴¹ and he had been an advocate in favour of including private property rights in the Charter of Rights and Freedoms.⁴²

In summary, as of the summer of 2015, the appointment process for Canadian Supreme Court judges had reverted to a regime of minimal transparency and unfettered Prime Ministerial discretion. In particular, the manner in which Justice Brown was appointed brings to the fore the concern that political orientation is a major determinant in the process. In view of the candidate’s pronounced views on controversial political questions, which aligned closely with those of the government of the day, the values of transparency and accountability might have been better served if he had undergone scrutiny in a more public fashion and/or been examined by a cross-party group of parliamentarians. The failure to do so risks casting doubt on the independence and impartiality of members of Canada’s apex court. These worries are intensified when, in the following section, I review the process for the appointment of Superior Court judges.

³⁸J Simpson, “It is Saskatchewan’s turn to send a judge to the top court” *The Globe and Mail* (Toronto, 26 June 2015); “Justice Russell Brown of Alberta named to Supreme Court” *CBC News* (Canada, 27 July 2015); Sean Fine “Appointment of Russ Brown extends Harper’s influence on Supreme Court” *The Globe and Mail* (Toronto, 27 July 2015); Fine, “MacKay declines to explain court pick” (n 37); John Whyte, “Russell Brown doesn’t belong on the Supreme Court” *Toronto Star* (18 August 2015).

³⁹Fine, “Appointment of Russ Brown extends Harper’s influence” (n 38); Sean Fine, “Law School blog sheds light on Supreme Court’s newest judge” *The Globe and Mail* (Toronto, 31 July 2015); Pedwell (n 35); Sean Fine, “Politics supplanting merit in flawed process, observers say” *The Globe and Mail* (Toronto, 27 July 2015).

⁴⁰J Brown, “Brown brings ‘open mind’ to top court bench” *Canadian Lawyer* (Canada, 28 July 2015); Fine, “Appointment of Russ Brown extends Harper’s influence” (n 38); Whyte, “Russell Brown doesn’t belong on the Supreme Court” (n 38).

⁴¹Fine, “Law School blog sheds light on Supreme Court’s newest judge” (n 39); Fine, “MacKay declines to explain court pick” (n 37); Whyte, “Russell Brown doesn’t belong on the Supreme Court” (n 38). But see Glenn Kauth, “McLachlin has ‘no concerns’ about new judge’s political writings” *Canadian Lawyer* (Canada, 13 August 2015).

⁴²Pedwell (n 35); Markusoff (n 35).

II FEDERAL/SUPERIOR/SECTION 96 COURT APPOINTMENTS

The constitutional and historical backdrop

Section 96 of the Constitution Act 1867 empowers the federal government, by way of the Governor General, to appoint judges of the Superior Courts in each of the Canadian provinces.⁴³ The federal government is also responsible for their salaries and pensions. There is nothing in the Constitution Act 1982 that specifically addresses Superior Court appointments.

There are approximately 1100 Superior Court judges in Canada.⁴⁴ They include trial level judges and appellate level judges. They function as higher level trial courts, and often serve as the first court of appeal from “provincial/inferior/section 92” courts. A federal judgeship is seen to be a highly desirable appointment generating a salary of approximately Can\$300,000 and a gold-plated pension plan.

The initial decision to vest authority for the appointment of superior level provincial judges in the hands of the federal government was controversial for two reasons. First, it raised questions as to the independence of such judges if there was a dispute between the federal and provincial governments as to the scope of their respective constitutional authority/responsibility. Secondly, and perhaps more mundanely, it generated concerns about patronage. FL Morton argues that:

[I]n 1867, vesting the power to appoint the provincial Superior Court judges with the new federal government was intended to insure the independence of these courts from local politics or prejudice. It was also a legacy of British imperial rule and (some of) the Canadian founders’ desire to subordinate provincial governments to Ottawa.⁴⁵

Friedland, however, “speculate[s]... that the main reason that the federal government was given the appointing power was that ‘the key players in Confederation who were moving on to the federal stage wanted to keep patronage over appointments in their own hands’”.⁴⁶

Over the decades, the second concern has proven to be the most pervasive. A study by RCB Risk reviewed all federal appointments from 1945–1965 and determined that “all but a few of the judges ... were affiliated with the party in power at the time they were appointed, and most were actively engaged in politics”.⁴⁷ In the early 1970s, the Liberal government of the time tried to improve the process by creating the position of a Special Advisor on Appointments.⁴⁸ In the 1980s, following the publication by the Canadian Bar Association of its 1985 report on

⁴³ Constitution Act 1867 (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, App II, No 5, s 96.

⁴⁴ As of 7 May 2015 there were 864 “judges in office”, 273 supernumeraries, and 37 vacancies.

See Office of the Commissioner for Federal Judicial Affairs Canada, “Number of Federally Appointed Judges as of May 7, 2015” (7 May 2015) <<http://www.fja.gc.ca/appointments-nominations/judges-juges-eng.html>>.

⁴⁵ FL Morton, “Judicial Appointments in Post-Charter Canada: A System in Transition” in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006) 57.

⁴⁶ Cited in Friedland (n 11) 49 quoting his own earlier work.

⁴⁷ *Ibid* 52.

⁴⁸ *Ibid*.

judicial appointments,⁴⁹ the Conservative government established the office of the Commissioner for Federal Judicial Affairs under the Judges Act.⁵⁰ Formal applications were now required and were screened by five-person advisory committees that had been established in every province and territory. The committee had representation from “the bench, the bar and general public”.⁵¹ Candidates would be ranked as either “qualified” or “not qualified”. However, as Friedland has laconically suggested, “The result was that the process normally gave the government a reasonably large pool of candidates from which to select judges.”⁵²

In the early 1990s there were several other changes. First, the committees were increased in size from five to seven members, with the Minister of Justice appointing three representatives, instead of just one. On the one hand this was justified as enabling the minister to appoint representatives reflecting the diversity of Canadian society; but on the other it enhanced the influence of the Minister on the composition of the committee.⁵³ Second, candidates were split into three categories, “highly recommended”, “recommended” and “unable to recommend”, with the hope that this would create a smaller, more finely-tuned pool of qualified candidates. Despite these modifications subsequent empirical studies found that there had been very little change in the process. Political considerations still had a dominant effect.⁵⁴

In 2006 the Conservative government added new reforms. First, it increased the number of members of the committee from seven to eight, the new representative being from “law enforcement”, and at the same time the judicial representative was restricted to voting only in the case of a tie.⁵⁵ Second, it reverted to a system of only two possible categories “recommended” or “not recommended”. These reforms led the Canadian Judicial Council to take the unprecedented step of publicly questioning the independence of the advisory committees.⁵⁶

The current situation

The current appointment process is filtered through the Office of the Commissioner for Federal Judicial Affairs (OCFJA), whose “Mission” is “[t]o promote the independence of the federal judiciary in order to maintain the confidence of Canadians in our judicial system”⁵⁷ and whose “Vision” is “[t]o be recognized for our contribution

⁴⁹ Canadian Bar Association Committee on the Appointment of Judges in Canada, “McKelvey Report”, approved by CBA Resolution 86-08-M (1985).

⁵⁰ Judges Act 1985, s 77.

⁵¹ Friedland (n 11) 53.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Russell and Zeigel (n 12); Morton (n 45) 57; Lori Hausegger and others, “Exploring the Links Between Party and Appointment: Canadian Federal Judicial Appointments 1989–2003” (2010) 43 *Can J Pol Stud* 633.

⁵⁵ Friedland (n 11) 55.

⁵⁶ Canadian Judicial Council, News Release, “Judicial Appointments: Perspective from the Canadian Judicial Council” (20 February 2007).

⁵⁷ OCFJA, “Strategic Plan” (as updated to 22 April 2014) <<http://www.fja-cmf.gc.ca/fja-cmf/plan-eng.html>>.

in preserving Canada’s reputation as a leader in the field of judicial independence”.⁵⁸ The articulated values of the OCFJA are “Excellence, Integrity, Respect and Communication”.⁵⁹ The website for the Office identifies “administration of the judicial appointments process” as one of its core responsibilities. More specifically, it identifies two of the main responsibilities of the Commissioner as to ensure that “the system treats all candidates for judicial office fairly and equally” and that “all assessments are completed expeditiously, thoroughly and fairly”.⁶⁰

The Commissioner is assisted by an Executive Director, Judicial Appointments. Together, the Commissioner, the Executive Director and the remaining OCFJA staff provide important logistical support as well as guidance to the JACs in each province.

Candidates for judicial office can either apply or be nominated. If nominated, they are contacted by the Commissioner to “ascertain whether they wish to be considered for a judicial appointment”.⁶¹ Candidates must submit a personal history form; a law society authorisation to release form; and a background check form.

The personal history form is quite detailed and asks: in which province the candidate would like to sit; where they would reside; whether they are willing to travel; language competency; education; professional and employment history; qualifications for judicial appointments (specifying “the personal qualities, professional skills and abilities, and life experiences that you feel equip you for the role of judge”); a personal and other matters section; a list of at least six references; and an additional list of “professional colleagues who are familiar with your work”.⁶² Of significant interest is the following section:

Optional

Given the goal of ensuring the development and maintenance of a judiciary that is representative of the diversity of Canadian society, you may, if you choose, provide information about yourself that you feel would assist in this objective.

*There is no obligation to do so.*⁶³

Applicants are also urged to think carefully about the “Ethical, Change of Lifestyle and Other Considerations” for themselves and their family members before applying.⁶⁴

The Commissioner’s Office reviews all applications to ensure they are complete and that the minimal requirements for application have been fulfilled. If so, applications are forwarded to the next stage of the process—consideration by the

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ OCFJA, “Process for an Application for Appointment” (as updated to 22 April 2014) <<http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>>.

⁶¹ Ibid.

⁶² OCFJA, “Federal Judicial Appointments Personal History Form” (as updated to 30 April 2013) <<http://www.fja-cmf.gc.ca/appointments-nominations/forms-formulaires/ph-fc/index-eng.html>>.

⁶³ Ibid (emphasis in original).

⁶⁴ OCFJA “Considerations Which Apply to an Application for Appointment” (as updated to 1 April 2015) <<http://www.fja-cmf.gc.ca/appointments-nominations/considerations-eng.html>>.

Judicial Advisory Committees (JACs). The website states that “independent judicial advisory committees constitute the heart of the appointments process”.⁶⁵

Currently there are 17 JACs in Canada: one for most of the provinces and territories; two each for Ontario and Quebec; and one for the Tax Court of Canada.⁶⁶ Each Committee is composed of eight representatives, nominated as shown in Table 2.

Table 2

Nominator	Representatives nominated
Chief Justice	1
Law Society	1
CBA	1
Prov / Terr Government	1
Law Enforcement	1
Minister of Justice	3

It is important to clarify that, with the exception of the final nominator, “Each nominator is asked by the federal Minister of Justice to submit a list of names from whom an appointment to the relevant committee can be made.”⁶⁷ It is the Minister (with the assistance of the Commissioner) who actually selects the Committee members. The OCFJA’s Guidelines for Advisory Committee members, available on the OCFJA’s website, state that “When appointing Committee members, the Minister of Justice attempts to reflect factors appropriate to each jurisdiction including geography, language, multiculturalism and gender.”⁶⁸ Members of the Committee are appointed for a three-year term, and may be reappointed for one additional term. The Chair of the Committee is the judicial appointee. Committee members are bound by a Code of Ethics which includes provisions on confidentiality, conflicts of interest, and a one-year cooling-off period between Committee membership and application for a judicial position.⁶⁹ Given historic concerns about patronage, the Code of Ethics also contains a neutrality provision:

A member of the Committee must show discretion and neutrality in all aspects of Committee work. Questions must be directed only to the candidate’s fitness for the bench. No questions concerning a candidate’s political views or political affiliation are to be raised. If a candidate has mentioned active participation in a political party as part

⁶⁵ OCFJA, “Process for an Application for Appointment” (n 60).

⁶⁶ The JAC for the Tax Court is slightly different: it consists of one nominee of the Chief Justice of the Tax Court of Canada and four nominees of the federal Minister of Justice.

⁶⁷ OCFJA, “Process for an Application for Appointment” (n 60).

⁶⁸ OCFJA, Guidelines for Advisory Committee members (2006) <<http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html>>.

⁶⁹ OCFJA, Code of Ethics (2006) <<http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/ethics-ethiques-eng.html>>.

of his or her social involvement, no inference, favourable or unfavourable, is to be drawn other than the candidate's capacity for social involvement.⁷⁰

Subsequent to appointment, but prior to the commencement of committee processes, all members of the Committee meet with the Executive Director of Judicial Appointments "for an information session during which the policies and procedures of the ... appointments process are reviewed".⁷¹ The goal is to "ensure the application of consistent standards from one committee to the next, as well as between all Committees throughout Canada".⁷²

After the applications are received, members of the Committee then conduct telephone consultations with "both references and other names provided by the candidate, and other persons selected or identified by the Committee".⁷³ The Guidelines state that "Committees are encouraged to routinely consult a large number of other sources inside and outside the legal community who possess information that relates to the candidate's suitability for the bench."⁷⁴ The Chair of the committee assigns individual members responsibility for various consultations. A draft script is provided to committee members to help structure the consultations, and again there is an admonition that "questions are to be directed only to the candidate's fitness for the Bench and no questions are to be asked concerning the candidate's political views or political affiliation".⁷⁵ Members complete a "consultation form ... which ... is designed to help record the results of their telephone interviews ... on the merits of a given candidate".⁷⁶ This form is not publicly available, but the Guidelines state:

Assessment criteria for each candidate are grouped under headings in the form. Space for check marks or rating, as well as space for general written comments, to accommodate a variety of individual assessment styles, is provided on the form.⁷⁷

The Guidelines also state that "the scope and type of consultations must be sufficiently broad to ensure a good reading of the candidate's personal, as well as professional qualities".⁷⁸ Committee members are prohibited from having any communications with the candidates, except via the Executive Director, Judicial Appointments.⁷⁹

On completion of the consultations, the Chair of the Committee arranges for an assessment meeting. Other than in exceptional circumstances, all Committee

⁷⁰ OCFJA, Code of Ethics (2006) (n 69).

⁷¹ OCFJA, Guidelines for Advisory Committee members (n 68), see under "Information Concerning the Process".

⁷² *Ibid.*

⁷³ *Ibid.*, see under "Consultation Form".

⁷⁴ *Ibid.*, see under "References".

⁷⁵ *Ibid.*, see under "Consultations".

⁷⁶ *Ibid.*, see under "Consultation Form".

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, see under "Communication with Candidates".

members are required to attend in person.⁸⁰ The Commissioner or the Executive Director also attends *ex officio*.⁸¹

The Committee reviews the application form, the results of the consultations, the law society clearance, the background check form, and the personal history form. With regard to the last of these, the Guidelines state “particular attention must be paid to the ‘Personal and Other Matters’ section ... [and if any matter] raises concern [it] should be investigated fully as part of the Committee’s assessment”.⁸² Emphasis is also given to the candidate’s “health” and other possible “impediments to appointments” for example “criminal or other offences, breaches of professional conduct, questionable financial dealings, failure to meet a family support obligation, wrongdoing ...”.⁸³

No interviews are required. This is justified on the basis that there are “a large number of applications in many provinces and the limited time and resources generally available to Committees”.⁸⁴ However, if there is a “division within the Committee or another issue preventing the completion of an assessment” then the Committee is “encouraged” to hold an interview.⁸⁵ There are no public hearings.

Committees are required to assess candidates “on the basis of two categories”: “recommended” or “unable to recommend”.⁸⁶ The articulated “primary qualifications” in the Guidelines are “professional competence and overall merit”.⁸⁷ There are specific references in the information available to prospective candidates to “professional competence and experience, personal characteristics, and potential impediments to appointment”.⁸⁸ Furthermore, “Committees are encouraged to respect diversity and give due consideration to all legal experience, including that outside a mainstream legal practice.”⁸⁹ In public statements, spokespersons for the Minister frequently state that judicial appointments “are based on the principles of merit and legal excellence”.⁹⁰ The Guidelines also deal with the manner in which Committees are to decide if their members are not in agreement:

Committee decisions are normally arrived at through a consensus of the Committee members present, without recourse to a recorded vote. Where consensus is not possible the Chair must request that a decision be made by majority vote of the members present.

⁸⁰ *Ibid*, see under “Conference Calls”.

⁸¹ *Ibid*, see under “Commissioner for Federal Judicial Affairs and Executive Director, Judicial Appointments”.

⁸² *Ibid*, see under “Personal History Form”.

⁸³ *Ibid*, see under “Impediments to Appointment”.

⁸⁴ *Ibid*, see under “Interviews”.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*, see under “Assessments”.

⁸⁷ *Ibid*.

⁸⁸ OCFJA, “Process for an Application for Appointment” (n 60), see under “Assessments and Confidentiality”.

⁸⁹ *Ibid*.

⁹⁰ Sean Fine, “MacKay’s judicial appointments favour prosecutors over defence”, *The Globe and Mail* (Toronto, 29 December 2014).

Where a vote is required, the chair will refrain from voting, unless it is necessary to break an otherwise tied vote.⁹¹

After the assessment has been made, the Commissioner or Executive Director Judicial Appointments drafts and certifies a report to the Minister which includes a “short synopsis” of the Committee’s decision.⁹² The report is forwarded to the Minister by the Commissioner. Assessments remain valid for two years.⁹³

The candidate is notified of the date of their assessment. However, the candidate is not provided with the results of the assessment or the report.⁹⁴ Candidates are entitled to reapply after two years by submitting a new personal history form three months prior to the expiry date.⁹⁵

The report of the Judicial Advisory Committee to the Minister of Justice is only advisory in nature. It does not bind the Minister. Indeed the Guidelines anticipate the possibility of both re-assessment and additional consultations by the Minister:

The Minister may request that a Committee provide additional information concerning a candidate The Minister can also request that a committee re-assess a candidate at any time when information received from other sources is at variance with the assessment made by the Committee.⁹⁶

It is the Minister of Justice who formally announces the judicial appointment, and confers the title “Honourable” on the appointee.⁹⁷

The foregoing overview applies to lawyers who are seeking judicial appointment. There is also a parallel, but slightly modified, process for “Section 92/ Inferior/Provincial” court judges who apply for appointment as a “Section 96/ Superior/Federal” court judge. The core differences are that: these judges are not “assessed” but rather are subject to a “commentary” from the Judicial Appointments Committee; they submit a different personal history form; and their names are “automatically placed on the list of those available for appointment for a period of five years”.⁹⁸ However, the decision whether to “elevate” such judges is purely at the discretion of the Minister of Justice.

Assessment

There is little doubt that the federal judicial appointments process is an attempt to respond to the values of independence, impartiality, accountability, transparency, representativeness and efficiency. However, in spite of these attempts to calibrate the multiple values, the federal judicial appointments process is open to

⁹¹ OCFJA, Guidelines for Advisory Committee members (n 68), see under “Votes”.

⁹² Ibid, see under “Report to Minister of Justice”.

⁹³ Ibid, see under “Assessments”.

⁹⁴ Ibid, see under “Report to Minister of Justice”.

⁹⁵ OCFJA, “Process for an Application for Appointment” (n 60), see under “Duration of Assessments”.

⁹⁶ OCFJA, Guidelines for Advisory Committee members (n 68), see under “Reassessments”. There is also a possibility that the Committee may re-assess but only “exceptionally”.

⁹⁷ OCFJA, “Process for an Application for Appointment” (n 60), see under “Appointments”.

⁹⁸ OCFJA, Guidelines for Advisory Committee members (n 68), see under “Provincial/Territorial Court Judges”.

criticism, and in fact has been criticised on numerous grounds, both procedurally and substantively.

First, and most generally, the process lacks any constitutional or statutory foundation.⁹⁹ It is entirely the creation of the Executive (i.e. the Minister of Justice) as filtered through the Office of the Commissioner of Judicial Affairs. This means that everything about the process is entirely at the discretion of the Minister of Justice.

Second, and more concretely, the composition of each JAC is highly dependent upon the Minister. For example, its numbers can expand or contract depending on the will of the Minister.¹⁰⁰ More problematically still, the members of the committee are ultimately chosen by the Minister. Not only does the Minister of Justice directly appoint three members (see Table 2 above), but the remaining five members representing five specified constituencies are selected by the Minister from lists provided by those constituencies. There is also the issue whether a committee with only eight representatives is sufficient to capture the diversity of perspectives that constitute the reality of Canadian society more generally. More specifically, a review of the current composition of the committees indicates that there is significant under-representation in terms of gender.

*Table 3*¹⁰¹

Nominator	Male	Female
Chief Justice	10 (62.5%)	6 (37.5%)
Law Society	9 (60%)	6 (40%)
CBA	10 (67%)	5 (33%)
Prov / Terr Government	12 (75%)	4 (25%)
Law Enforcement	12 (100%)	— (0%)
Minister of Justice	32 (80%)	8 (20%)
Total	85 (75%)	29 (25%)

What is particularly revealing about this is that the disparities seem to depend on the nominator. Some nominators appear to be seeking significant (but not equal) female representation—the judiciary and the law societies—but others do not appear to be doing so to the same degree, if at all—especially the Minister and the law enforcement community, the latter having no female representatives. However, it is not clear to what extent the gender disparities reflect the composition of the shortlists provided by the nominators, and to what extent they may be attributable to particular choices made by the Minister. In any event, as already mentioned, the

⁹⁹ It is true that the Office of the Commissioner for Judicial Affairs is established by way of section 73 of the Judges Act, but the processes are not.

¹⁰⁰ For example, as discussed in text to n 55, in 2006 the Minister simply announced an increase in the size of each JAC by one person, by adding a “law enforcement” representative.

¹⁰¹ This table was compiled by reviewing the membership of each of the Committees as identified on the website of the OCFJA <<http://www.fja-cmf.gc.ca>>.

Minister retains overall responsibility for having determined who the nominators should be.

Third, ministerial discretion also infects the decision-making processes of the Committee. Formerly, the Committee could place candidates in one of three categories—“recommended”, “highly recommended” or “not recommended”—the idea being to narrow the pool. However, in 2006 this was changed to just two categories—“approved” or “not approved”. This was widely criticised for enhancing the Minister’s discretion and diluting the effectiveness and utility of the Committee. The latitude which the Minister has enjoyed in recent years is confirmed by the following table:

Table 4
Statistics for Federal Appointments Committees 2004–2015¹⁰²

Year	Applications Received	Recommended	Highly Recommended	Applications from judges	Appointed
2004/5	562	170	62	54	38
2005/6	481	151	76	16	8
2006/7	550	146	—	21	75
2007/8	552	228	—	23	63
2008/9	460	171	—	14	68
2009/10	441	152	—	19	74
2010/11	428	154	—	10	46
2011/12	515	221	—	22	43
2012/13	495	132	—	21	52
2013/14	527	300	—	29	66
2014/15	Not yet available online				
TOTAL	5011	1825		229	533

Broadly speaking, this means that there is a 1 in 3 chance of being recommended if you are a lawyer, and then another 1 in 3 chance of being appointed if you are either a recommended lawyer or a judge. However, this is complicated by the fact that the Commissioner does not publish statistics on what percentage of appointees are lawyers or provincial court judges seeking elevation. The main point, however, is that the Minister has a proportionately large pool of approved candidates over which he can exercise his discretion. Furthermore, it seems clear that although the Committee itself might be diligent in its consultations, that is not determinative because after receiving the list of approved candidates the Minister can pursue additional consultations, and make a decision on that basis.

¹⁰²OCFJA, “Report of Activity of the Judicial Advisory Committees across Canada”, reports for the period 2004–2014 (as updated to 30 October 2014) <<http://www.fja.gc.ca/appointments-nominations/committees-comites/reports-rapports/index-eng.html>>.

Fourth, unlike the process for the appointment of Supreme Court judges, where commentators went out of their way to emphasise that their concerns were with the “process” not individual judges, the same has not been true of federal appointments. The objections to the “outcomes” have been both structural and individual, and primarily deal with the values of independence, impartiality and representativeness.

For example, when the government announced the addition of a law enforcement representative to each Committee, the Prime Minister made a direct connection to a particular ideology: “We want to make sure we’re bringing forward the laws to make sure we crack down on crime, that we make sure our streets and communities are safer ... We want to make sure our selection of judges is in correspondence with those objectives.”¹⁰³

As another example, surveys of the appointees have pointed out that there have been a disproportionate number of Crown counsel appointed and a significant under-representation of defence counsel. Again, the concern has been that Crown counsel are seen to be tough on crime, while defence counsel are perceived otherwise.¹⁰⁴ In a twist, when the Minister did appoint a defence counsel, one commentator pointed out that this lawyer had a reputation for “whacking” female complainants in sexual assault cases and, as recently as 2013, had sought to present to the jury Botticelli’s “Calumny of Appelles” which portrays women as Slander, Ignorance and Suspicion.¹⁰⁵

These concerns about ideology were intensified when, in late 2014, the Government announced the appointment of two legal academics, one (Bradley Miller) to the Ontario Superior Court and one (Grant Huscroft) to the Court of Appeal of Ontario. Huscroft, a constitutional law professor at Western University, was the first academic appointed directly to the Ontario Court of Appeal by this government since it came into power in 2006.¹⁰⁶ Some praised the appointments because they added academic heft to the professional diversity of the bench.¹⁰⁷ However, many critics objected that both appointees had espoused strongly conservative positions when they were academics—Huscroft was an originalist who opposed so-called “judicial activism”, and Miller had been harshly critical of the gay rights decisions of the courts. Huscroft had also co-edited a book with the former Chief of Staff to the Prime Minister.¹⁰⁸ In June 2015, after only six months

¹⁰³Prime Minister Stephen Harper, House of Commons Debates, No 110 (14 February 2007) 1420, as quoted in Mathen (n 18) 61; Sean Fine, “Stephen Harper’s courts: How the judiciary has been remade” *The Globe and Mail* (Toronto, 8 August 2015).

¹⁰⁴Fine, “MacKay’s judicial appointments favour prosecutors over defence” (n 90); Fine, “Stephen Harper’s courts: How the judiciary has been remade” (n 103).

¹⁰⁵Sean Fine, “MacKay’s New Judge is Defence Lawyer who Tried to Show ‘Offensive’ Painting to Jury”, *The Globe and Mail* (Toronto, 11 February 2015).

¹⁰⁶Sean Fine, “Tories appoint two conservative law professors as judges”, *The Globe and Mail* (Toronto, 17 December 2014).

¹⁰⁷Ibid.

¹⁰⁸Ibid; Sean Fine, “Same-Sex Marriage harms free speech, New Ontario Judge wrote in 2012”, *The Globe and Mail* (Toronto, 18 December 2014).

on the Superior Court, Miller was elevated to join Huscroft on the Court of Appeal, seemingly without having produced one written ruling.¹⁰⁹

There have been particularly vociferous concerns about the diversity of the appointees. Despite statements endorsing a diverse bench, the statistics do not support this. In a 2012 survey of 100 recently appointed federal judges, *The Globe and Mail* (Toronto) found that 98% were white.¹¹⁰ This led a variety of organisations (including the Indigenous Bar Association, the Canadian Association of Black Lawyers and the Federation of Asian Canadian Lawyers) to call for more diversity in the appointments.¹¹¹ The problem is exacerbated by the fact that the government does not collect statistics on the racial background of the judiciary. Professor Rosemary Cairns-Way conducted a review of all judicial appointments between April 2012 and May 2014. Of a total of 107, 43 were women, a total of 40%. These numbers are verifiable because the government does publish statistics on gender. Of the 1137 federally appointed judges in office as of 7 May 2015 (864 sitting/273 supernumerary) 392 are women (34%).¹¹² With a 40% appointment rate Cairns-Way points out that gender parity will not be achieved until the mid-2030s.

She also estimated that one judge from a visible minority was appointed among the 107 and perhaps two Métis, which she says is an appointment rate of 1.04% for Aboriginal judges, and 0.5% for visible minority judges. She emphasised that these statistics do not reflect the national statistics for either Aboriginal people or visible minorities. Professor Cairns-Way also reconfirmed the disproportionate number of Crown prosecutors and that “an astonishing 48% of the 107 appointees (52) were described as either civil litigators or corporate/commercial lawyers”; she entitled her paper “Deliberate Disregard: Judicial Appointments under the Harper Government”.¹¹³

Things seemed to hit a new nadir, when the Minister appointed not only his best man to Supreme Court of Nova Scotia, but also the best man’s spouse to the same court.¹¹⁴

However, in June 2015 there was a significant shift on the issue of diversity. The Minister of Justice announced an exceptionally large cohort of 43 new judicial appointments, and highlighted the fact that 22 of these appointees were women.¹¹⁵

¹⁰⁹Yamri Tadesse, “Controversial Judicial Appointment in Ontario” *Canadian Lawyer* (Canada, 24 June 2015); Sean Fine, “Ottawa Picks Gay Marriage Critic to sit on Ontario’s Highest Court”, *The Globe and Mail* (Toronto, 24 June 2015).

¹¹⁰Kirk Makin, “Of 100 New Federally Appointed Judges, 98 White”, *The Globe and Mail* (Toronto, 17 April 2012).

¹¹¹Mallory Hendry, “Bar Groups Call Out Appalling Lack of Diversity of New Judges”, *Canadian Lawyer Magazine* (Canada, 18 December 2014).

¹¹²OCFJA, “Number of Federally Appointed Judges as of May 7, 2015” (7 May 2015) <<http://www.fja.gc.ca/appointments-nominations/judges-juges-eng.html>>.

¹¹³(2014) 67 SCLR 43.

¹¹⁴Sean Fine, “MacKay’s Judicial Appointments Favour Prosecutors over Defence”, *The Globe and Mail* (Toronto, 29 December 2014). See also “Peter MacKay’s Friends, Colleagues make up 6 of 9 Judge appointees” *CBC News* (Canada, April 2015).

¹¹⁵Quoted in Sean Fine, “More than Half of the New Appointed Judges are Women” *The Globe and Mail* (Toronto, 7 July 2015).

Indeed, in making these announcements the Minister added a new line in its press releases:

Through these appointments, the government of Canada has demonstrated an awareness of the need to bring greater gender balance to the bench, to help ensure that the judiciary is more representative of Canadian society.¹¹⁶

While some praised this development as “fantastic” because the government was “listening”,¹¹⁷ others were more critical, noting that the government was down in the polls and facing an imminent election, that the Minister of Justice had indicated that he would not run for re-election, and these judicial appointments were part of a larger group of “patronage appointments” made by the government that month.¹¹⁸

Fifth, the Office of the Commissioner for Federal Judicial Affairs is open to criticism for lack of transparency, even though it lists “communication” as one of its core values.¹¹⁹ Although it publishes a performance audit, the Office does not publish an annual report. Its website has some statistics available, for example on the number of women judges in Canada and the ratio of approved to appointed judges, but there is nothing systematic. It does make public its Guidelines describing the process, but when compared to some of the provincial JAACs to be discussed in Part III of this chapter, it provides very little information about the outcomes. When I sought an interview to clarify some points, the Executive Director, Judicial Appointments, was too busy and while she did provide an e-mail response to seven particular questions, it either referred me back to the website or avoided answering the question.¹²⁰

Sixth, judicial promotion is a particular problem in Canada as there is no express process to deal with it. Section 92 judges get “promoted” to become section 96 judges; section 96 judges get promoted to appellate level courts; some appeal court judges get promoted to the Supreme Court of Canada or perhaps the Federal Court of Appeal; and some judges get promoted to the position of Associate Chief Justice or Chief Justice of the court on which they serve.

Friedland has highlighted the existence of “a blatant conflict of interest for every judge who is interested in moving to a higher court or becoming a chief justice”.¹²¹ He explains:

If the power of selection is solely in the hands of the executive there is a danger that the judges will try to seem attractive to the government and thus be considered for the position.¹²²

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Glen McGregor, “Tories Unleash 98 patronage appointments” *Ottawa Citizen* (8 July 2015); “Conservatives made more than 70 patronage appointments over two days in June” *Postmedia News* (7 July 2015).

¹¹⁹ OCFJA, “Strategic Plan” (n 57).

¹²⁰ E-mails on file with the author. To be clear this is not a criticism of the individual person, rather it is a manifestation of a wider concern that under the current government the vast majority of civil servants have been instructed to be unforthcoming.

¹²¹ Friedland (n 11) 51.

¹²² Ibid.

As we have seen, these concerns are not academic; each year a significant number of inferior court judges do seek elevation to the superior courts. This clearly raises concerns about independence and impartiality especially when so much discretion remains with the Minister.¹²³ Many judges are concerned about the fairness of the process and as part of its “Judicial Ethics” programmes the National Judicial Institute has held sessions on the “ethics of pursuing a promotion”.¹²⁴

In summation, when assessed by the criteria of independence, impartiality, transparency, accountability and representativeness, it seems that the appointment process for Superior Court judges in Canada is deeply problematic. Moreover, one might even question if it is efficient: given that so much discretion remains in the hands of the Minister of Justice one might ask whether the Judicial Advisory Committees really are “the heart of the appointments process” in a sufficient sense that would justify expenditure from the public purse. The problems are structural. It is not just that a particular government seems to be packing the courts; previous governments of a different political stripe have done the same.¹²⁵ The current system actively facilitates such behaviour and ultimately endangers public confidence in the judiciary.

III PROVINCIAL/INFERIOR/SECTION 92 APPOINTMENTS

Historical and Constitutional Backdrop

Section 92 of the Constitution Act 1867 provides that:

In each Province the legislature may exclusively make laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated ...

14 The Administration of Justice in the Province, including the constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil matters in these Courts.

These are often characterised as inferior courts as they deal with “lesser” criminal and civil matters as well as family law, mental health etc. For many Canadians these are the real face of the judiciary. There are approximately 1,000 provincial court judges in Canada. These are also highly coveted appointments for many lawyers, paying well over Can\$200,000 per year, but not quite as desirable as a section 96 / Superior Court appointment.

The leading Canadian scholar on section 92 Appointments is a political scientist, Peter McCormick. In 1986 he published “Judicial Councils for Provincial Judges in Canada”¹²⁶ and in 2010 he produced a report for the Commission of Inquiry into the Appointment Process for Judges in Quebec entitled *Selecting Trial*

¹²³Fine, “Stephen Harper’s courts: How the judiciary has been remade” (n 103).

¹²⁴See for example “Ethics in Judging: In the Courtroom, In the Community, Throughout Your Career” *Session: Applying for Administrative Positions* Ottawa, Ontario (21 August 2010) (on file with author).

¹²⁵Fine, “Stephen Harper’s courts: How the judiciary has been remade” (n 103).

¹²⁶Peter McCormick, “Judicial Councils for Provincial Judges in Canada” (1986) 6 Windsor YB Access To Justice 160.

Court Judges: A Comparison of Contemporary Practices.¹²⁷ This section draws on this latter report, but updates it to Spring 2015. It also draws on an essay I co-authored in 2000.¹²⁸

Prior to the 1970s, appointments to provincial courts can be characterised in much the same way as appointments to the federal courts. McCormick suggests there were concerns about “patronage”, “ideology” and “cronyism”, although he notes that at the time that was just how things were done.¹²⁹ However, from the 1970s onwards there was a series of reforms to provincial appointments processes across Canada that attempted to emphasise the “merit principle”. Nevertheless, because Canada has ten provinces and three territories, there has been a variety of different appointment regimes put in place.¹³⁰ Indeed, the central proposition of McCormick’s 2010 report is the *diversity* of the appointments processes in Canada for provincial court judges. As a consequence, while the rest of this section will describe some patterns, the overview is not comprehensive.

The current situation

Broadly speaking, there are two different processes that can trigger an application for a judicial appointment to a provincial court. McCormick characterises these as “anticipatory” or “reactive”.¹³¹ In the first (adopted by six provinces) a candidate puts their name forward in anticipation that a position might become available in the foreseeable future. In the second (used in four provinces) a particular position is advertised and candidates apply for it. In either case, candidates must complete a “Judicial Candidate Information Form” which McCormick describes as a “bare bones ... fairly standard application form”.¹³² Applicants must also consent to a police background check and a consent to disclosure of any pertinent information by the relevant law society. Ontario (which is Canada’s largest province by population) has one of the more extensive application forms.¹³³ In addition to some basic personal information, it requests information on

- language fluency;
- preferred area of judicial assignment;
- professional and employment experience, both pre-law and legal, emphasizing “the experience you gained”;
- community and civic activities;
- membership in professional associations;

¹²⁷ <http://www.cepnj.gouv.qc.ca/etudes-des-experts.html?eID=tx_rtfiles_download&tx_rtfiles_pi1%5Buid%5D=78> (1 September 2010).

¹²⁸ Devlin, MacKay and Kim (n 4).

¹²⁹ McCormick, “Selecting Trial Court Judges” (n 128) 15–16.

¹³⁰ *Ibid.* The report only discusses provincial processes, but not territorial processes. Due to space constraints, I will do the same.

¹³¹ *Ibid.* 34.

¹³² *Ibid.* 33.

¹³³ Ontario Courts of Justice, Judicial Appointments Advisory Committee, “Application Form” <<http://www.ontariocourts.ca/ocj/jaac/application/>>.

- publications;
- personal suitability—including physical, emotional, psychological barriers; civil claims or serious financial difficulties; criminal convictions; other matters;
- education;
- reasons for interest in a judicial position;
- aspects of education, experience and character that would assist in discharging responsibilities of a judge;
- participation in continuing education;
- names of four referees.

The second stage is a check to ensure that the core eligibility requirements have been fulfilled (usually 10 years of legal practice) and that there are no issues with the candidate's professional history.

The third stage is review of the application by the Judicial Appointments Advisory Committee (JAAC). (Later I will review the significant differences in the composition and status of these JAACs.) This involves the JAAC contacting referees as well as undertaking "discreet inquiries", "secret soundings" or other forms of consultation with various people or groups who may have information about the candidate. McCormick reports that

[T]here is some controversy about this part of the process, on the grounds that it advantages certain types of candidates and that it creates a possibility that a candidate's application may be discredited without any right of reply; the major effect may be to compromise the chances of a more diverse judiciary by handicapping precisely the non-traditional applicants that most governments now wish to encourage.¹³⁴

While I agree with the first part of this analysis, I am not quite as confident that there is much empirical evidence to support the proposition that most provincial governments do in fact want to appoint "non-traditional candidates".

The fourth stage is a winnowing of the list of applications, usually by the Committee as a whole, but sometimes through the tabulation of forms submitted by Committee members individually.

The fifth stage is a 30–60 minute private interview with candidates who have made it through the winnowing process. It is not clear what percentage of applicants make it to the interview stage. McCormick suggests that in the provinces which do report statistics only about 50% of applicants make it to the interview stage while in Ontario it is a "much higher percentage".¹³⁵

The sixth stage is a deliberation by the Committee as to whether to approve a candidate or not. The categories vary from province to province: some use "recommend" "not recommend" and "not recommend at this time". Others use "well qualified", "qualified" and "other". Because the list of names is given to the provincial Minister this means that, just like the federal process, the JAAC's decisions are only advisory in relation to the provincial Minister, who maintains significant discretion. One committee that more closely approximates a nominating committee

¹³⁴ McCormick, "Selecting Trial Court Judges" (n 128) 35.

¹³⁵ *Ibid.*

is Ontario, where the Committee recommends at least two names, and in fact ranks all the names that it submits. But as McCormick notes “the Minister can—and during the Harris years several times did—refuse the pair of names and ask for others, or ask for additional names on the list”.¹³⁶

Assessment

The key point to note about the provincial JAACs in Canada is their variety. This manifests on numerous levels. First, they go by a variety of names. Second, and much more significantly, some committees (four) are just the Judicial Council of a particular province (which also fulfills other functions). However, others are specifically tailored appointment committees. Furthermore, within this second category, there is a further distinction between those which are standing committees (four in number, all of which deal with anticipatory applications) and those which are ad hoc committees (three, all of which deal with reactive applications).¹³⁷

Third, the size and composition of the committees also vary widely across the country. An updated version of McCormick’s Tables 5 and 8 (reproduced as Tables 5 and 6 in this chapter) illustrates this:

Table 5
Membership on Appointments Advisory Bodies¹³⁸

Province	Judges	Lawyers	Other	Total
British Columbia	3	3	3	9
Alberta (1)	3	1	2	6
Alberta (2)	1	6	4	11
Saskatchewan	5	1	2	8
Manitoba	2	2	3	7
Ontario	3*	3	7	13
Quebec	1	1	1	3
New Brunswick	3	4	2	9
Nova Scotia	2	2	4	8
P.E.I.	1	2	2	5
Newfoundland	2	1	2	5
Composite Total	26	26	32	84

* Ontario has one member appointed by the Ontario Judicial Council, with no requirement that this person be a judge, although it is a judge at the moment.

¹³⁶Ibid 36. Mike Harris was the Premier of Ontario from 1995 to 2003.

¹³⁷Ibid 21–23.

¹³⁸The reason why Alberta has two entries is because “uniquely [it] uses both a Judicial Council for screening and an Advisory Committee for interviews and recommendations” (ibid 21).

Table 6
 Sizes of councils/committees, by type

	Judicial Councils	Ad hoc committees	Standing committees
13 members			Ontario
11 members			Alberta
9 members	British Columbia		New Brunswick
8 members	Saskatchewan		Nova Scotia
7 members		Manitoba	
6 members	Alberta		
5 members	Newfoundland	PEI	
3 members		Quebec	

Not only is there great variation in the size of these bodies—from three to 13 members—there are also significant differences in the proportionate numbers of the “represented constituencies” of judges, lawyers and “others”. Mostly judges and lawyers dominate, but this is not the case for Ontario or Nova Scotia. McCormick’s Table 6, reproduced as Table 7 below, demonstrates some differences corresponding to the divisions between Judicial Councils, ad hoc committees and standing committees.

Table 7
 Composition of Councils, Ad Hoc & Standing Committees

	Judges	Lawyers	Public	Total	N	Average
Judicial Councils	13 (46%)	6 (21%)	9 (32%)	28	4	7
Ad Hoc Committees	4 (27%)	5 (33%)	6 (40%)	15	3	5
Standing committees	9 (22%)	15 (37%)	17 (41%)	41	4	10.3
All involved bodies	26 (31%)	26 (31%)	32 (38%)	84	11	7.6

It should also be emphasised that in contradistinction to the federal process, the judicial and lawyer representatives are not selected by the Minister. McCormick has categorised these as either “ex officio” or “outside appointment”. However, the public representatives are selected by the Minister of Justice because they are Order-in-Council appointments. An updated version of McCormick’s Table 9 (reproduced as Table 8 below) indicates that this group is the largest group of representatives.

Table 8

Composition of councils/committees, by type of appointment

Province	Ex officio Members	Outside Appointment	Order in Council	Total
British Columbia	4	1 (lawyer elected from law society)	4	9
Alberta (Council)	4	0	2	6
Alberta (Committee)*	0	2 (CBA of prov and prov law soc)	9	11
Saskatchewan	4	2	2	8
Manitoba	1	3	3	7
Ontario	0	6	7 (all lay people)	13
Quebec	0	2	1	3
New Brunswick	0	7	2	9
Nova Scotia	0	4	4	8
P.E.I.	1	2	2	5
Newfoundland	2	1	2	5
TOTAL	16	30	38	84

* McCormick said there were 2 *ex officio* members representing the legal profession, but I consider these outside appointments as it was not specified that either member had to hold a particular office, for example, President of the provincial Law Society.

In the context of Ontario, Ian Greene states that “the appointments of the lay members of the committee ... are approved by all the party leaders in the legislature, and this process encourages the selection of lay members who are competent, have integrity, and who will act in a non-partisan fashion”.¹³⁹ He does note, however, that this is more of a convention than a requirement and that some Ministers of Justice might be tempted to forgo such collaboration.¹⁴⁰

Beyond representativeness in terms of the judiciary, lawyers and others, there is also the question of representativeness in terms of gender, race etc. No province keeps statistics on the racial composition of their JAAC. In terms of gender, we were able to access the names of the Committee members in eight of the provinces.¹⁴¹

¹³⁹ “Democracy, Judicial Independence and Judicial Selection for Federally Appointed Judges” (2008) 88 U New Brunswick LJ 105, 108.

¹⁴⁰ Ibid 109.

¹⁴¹ The names and presumed gender of all contemporary provincial JAAC members are on file with the author.

Table 9
Gender Representation on JAAC's

Total Number	Male	Female
66	37	26

The reason for the discrepancy is that there are some vacancies on several JAACs. However, this approximate ratio of 59%:41% is significantly more inclusive than the federal committees. McCormick notes that the Ontario Committee, which is the largest, seeks to be as broadly representative of the Ontario population as possible. This leads him to observe:

Diversity in the outcome (a broadly representative judiciary) is perhaps a more important consideration; but diversity in the process (a broadly representative committee) is important as well, not least for the fact that it is an implicit invitation to a wider and more representative set of candidates.¹⁴²

There is also the important question of the criteria that are utilised to assess the candidates. Once again there are significant differences across the country in terms of the availability, transparency, extensiveness and content of the criteria.¹⁴³ In some provinces the criteria seem to be non-existent or cryptic, in others they are detailed and extensive.¹⁴⁴ It is widely agreed by most commentators that one of the best sets of criteria is to be found in Ontario. The Ontario JAAC's Criteria for Evaluating Candidates are to be found on its website as part of the application form:¹⁴⁵

Professional excellence

- A high level of professional achievement in the area(s) of legal work in which the candidate has been engaged. Experience in the field of law relevant to the jurisdiction of the Ontario Court of Justice on which the applicant wishes to serve is highly desirable but not essential.
- Involvement in professional activities that keeps one up to date with changes in the law and in the administration of justice.
- A demonstrated commitment to continuing legal education.
- An interest in or some aptitude for the administrative aspects of a judge's role.
- Good writing and communications skills.

Community awareness

- A commitment to public service.
- Awareness of and an interest in knowing about the social problems that give rise to cases coming before the courts.
- Sensitivity to changes in social values relating to criminal and family matters.
- Interest in methods of dispute resolution alternatives to formal adjudication and interest in community resources available for participating in the disposition of cases.

¹⁴² McCormick, "Selecting Trial Court Judges" (n 128) 43.

¹⁴³ Ibid 36–37; Devlin, MacKay and Kim (n 4).

¹⁴⁴ Devlin, MacKay and Kim (n 4).

¹⁴⁵ Ontario Courts of Justice, Judicial Appointments Advisory Committee, "Application Form" <<http://www.ontariocourts.ca/ocj/jaac/application/>>, 4.

Personal characteristics

- An ability to listen.
- Respect for the essential dignity of all persons regardless of their circumstances.
- Politeness and consideration for others.
- Moral courage and high ethics.
- An ability to make decisions on a timely basis.
- Patience.
- Punctuality and good regular work habits.
- A reputation for integrity and fairness.
- Compassion and empathy.
- An absence of pomposity and authoritarian tendencies.

Demographic

- The Judiciary of the Ontario Court of Justice should be reasonably representative of the population it serves. The Committee is sensitive to the issue of under-representation in the judicial complement of women, visible, cultural, and racial minorities and persons with a disability. This requires overcoming. However, professional excellence is still the paramount criterion in assessing judicial candidates. However, it must be emphasised that such transparency is the exception rather than the rule.

A major question is, of course, what difference do JAACs make? Do they constrain the discretion of the Executive? Do they ensure that only the most meritorious get appointed? Do they fulfill the aspiration for enhanced diversity? As indicated previously, all the provincial JAACs in Canada are, literally, advisory—they propose a list of names or create a pool from which the provincial Minister of Justice makes a selection.

There is no centralised data bank on this for the Canadian provinces. McCormick reports that: “The size of the pool varies, as does its ratio to the number of appointments to be made in any given period, but it is usually fairly large—for the provinces where I could find a number, it was in the dozens.”¹⁴⁶ Ontario, again, seems to be the exception—it presents a “ranked short list” to the Minister.¹⁴⁷ More specifically, McCormick reports that in British Columbia for the 10 year period 1999–2008, there were 668 applications, and 157 were approved. This results in a 23.5% approval rating. In Ontario over the nine-year period 1999–2007, there were 1149 applications, and 478 were recommended. This is a 41% approval rating.¹⁴⁸ It is difficult (in fact, impossible) to find statistics for other provinces.

I have updated McCormick’s numbers from Ontario and British Columbia and have obtained the results shown in Table 10 on page 50.

When one compares these numbers, the most distinctive point is the statistics from British Columbia for the last couple of years, which suggest that in fact its JAAC seems to have begun to operate *de facto* as a nominating committee, and not just an advisory committee. What remains unexplained is why there has been such a decrease in applications compared with earlier years.

¹⁴⁶ McCormick, “Selecting Trial Court Judges” (n 128) 55.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* 60–61.

Table 10
Application/Approval/Appointment Ratios

Year	Applications	Approval	Appointments	% of Approvals Appointed	Appointment to Application Ratio
Ontario					
2012	116	35	10	28.6	1:11.6
2011	83	33	12	36.3	1:7.1
2010	52	11	3	27.2	1:17.3
2009	103	61	19	31.1	1:5.4
2008	123	57	12	21	1:10.3
2008–2012	477	197	56	28.4	1:8.5
1999–2012	1626	675	175	25.9	1:9.2
1999–2007	1149	278	119	25	1:10
British Columbia					
2013	46	11	10	90.9	1:4.6
2012	46	12	11	92	1:4.2
2011	52	12	6	50	1:8.6
2010	48	17	4	23.5	1:12
2009	86	7	8	100	1:10.75
2009-2013	278	59	39	66	1:7
2004-2013	574	116	73	62.9	1:7.9
1999-2013	946	216	99	45.8	1:9.5
1999-2008	668	157	60	38	1:11

Several provinces have made diversity a component of the judicial appointments process. Nova Scotia, Alberta and Ontario all state:

The provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the under-representation of women, cultural and visible and racial minorities and persons with disabilities.¹⁴⁹

¹⁴⁹ Nova Scotia Department of Justice Judicial Appointments, “Provincial Judicial Appointments: Guidelines to Ensure Appointments Based on Merit”, <https://novascotia.ca/just/Court_Services/_docs/Guidelines%20Provincial%20Judicial%20Appts%202009%20%2003%2017>.

However, most provinces do not publish statistics on the identity of their judges. So it is impossible to assess whether this is rhetoric or reality. One of the exceptions is Ontario. Its annual reports track appointments since 1989 and specifically monitor both “legal background” and “appointments from representative groups”. The most recently available annual report (surprisingly 2012) includes the following:

Table 11
Ontario Appointments 2012

Timing of the Appointments			
Reporting Period	1 Jan 12 –31 Dec 12	Overall Total of Appointments	
Total Appointments	10	322	
Legal Background			
	1 Jan 12 –31 Dec 12	Total No.	Per cent (N=322)
Private Practice	9	220	68.3%
Provincial Crown	1	67	20.8%
Federal Prosecutor	0	11	3.4%
Government	0	24	7.5%
Appointments from Representative Groups			
	1 Jan 12 –31 Dec 12	Total No.	Per cent (N=322)
Women	4	117	36.3%
Francophone	2	23	7.1%
First Nations	1	6	1.9%
Visible Minority	0	23	7.1%
Persons with Disabilities	0	0	0%

Ian Greene claims that “the Ontario provincial judiciary is now amongst the most diverse in the country in terms of gender and minority group inclusion”.¹⁵⁰ However, these statistics are now significantly dated and no one has conducted a recent survey of the Ontario courts.

Finally, when we did attempt to compile some statistics across the country on the basis of gender, we were only able to tabulate the following, somewhat unhelpful, results.¹⁵¹ The indicated year is the one for which statistics were available. For most of these we relied simply on the first names of judges as listed on the websites of the relevant courts.¹⁵²

pdf>, 2; Ontario Courts of Justice, Judicial Appointments Advisory Committee, “Application Form” <<http://www.ontariocourts.ca/ocj/jaac/application/>>, 4. According to McCormick (ibid 37-39) Alberta’s set of criteria for judicial appointment is “extremely hard to track down”, but it does include a similar diversity statement.

¹⁵⁰Greene (n 141) 158.

¹⁵¹We, includes myself and my Research Assistant, Lindsey Wareham.

¹⁵²The British Columbia statistics were provided by the Chief Judge, because the relevant website only provides the first initial of the first name of the judges.

Table 12

Province	Total	Male	Female	% female
Newfoundland (2014)	29	18	11	38%
PEI (2014)	3	2	1	33%
New Brunswick (2004)	34	23	w	32%
Nova Scotia (2014)	36	27	9	25%
Quebec (2015)	287	168	119	41%
Ontario (2015)	287 (not including per diem, which is 344)	189 (239 including per diem)	98 (105 including per diem)	34%
Manitoba (2014)	48	27	21	43%
Saskatchewan	32	23	9	28%
Alberta (2012)	172	136	36	20%
British Columbia (2015)	144	93	51	35%*
Totals	1072	706	366	33%

* The Chief Judge of British Columbia provided a more nuanced statistic of 123.8 FTEs (full time equivalents) of which 78.15 (64%) were male and 45.65 (37%) were female. Similar modifications might also apply to the other provinces.

Three observations are pertinent. First, once again there is significant disparity: some provinces have edged into the 40%+ range, others are in the 20% range, while most are in the 30% range. Second, Ontario which, as I have noted, is often said to be one of the better processes, only has a 34% female representation. Third, overall a national average of approximately 33% is very close to the federal statistic of 34%.

In summation, when we assess the provincial appointment process on the basis of the values of independence, impartiality, accountability, representativeness, transparency and efficiency the picture is less than edifying. First, the system is a checkerboard, with very different regimes operating in different provinces. Such variation is not necessarily a problem, because it might allow for experimentation and innovation. However, while it appears that some provinces are making headway, progress in many provinces seems to be slow. Second, transparency is a significant issue in most provinces. Despite the existence of JAACs it is not clear how well they contribute to the values of independence, impartiality, accountability, and efficiency. Thirdly, while some provinces seem to be pursuing enhanced representativeness, it is not obvious that these outcomes are being achieved in many provinces.

CONCLUSION

The foregoing overview and analysis of the three different regimes for the appointment of Canadian judges make it clear that when judged against several of the standards identified in our regulatory pyramid—*independence, accountability, transparency, representativeness and efficiency*—there is genuine cause for concern, and clearly significant room for improvement. Independence is called into question by the highly politicised appointments processes; accountability is located exclusively in executive processes; transparency is negligible; representativeness is very much a work in progress; and efficiency remains questionable. But this analysis only takes us so far because the next, and obvious, question is whether these flawed processes generate flawed outcomes, i.e. a flawed judiciary?

This is an extremely difficult question to answer for at least two reasons. First, Canadian judges are not subject to any systems of objective evaluation although there are, of course, informal systems in place (for example under the auspices of Chief Justices as they manage their courts, or the Minister of Justice when considering elevation or promotions). Indeed, any attempts to discuss evaluation mechanisms have been foreclosed on the basis that they would be a threat to judicial independence.¹⁵³ However, in the absence of evaluative criteria and assessment mechanisms it is impossible to know whether the Canadian appointments processes are generating the most meritorious candidates.

Second, and perhaps more challenging, there is no consensus on what makes for a “good judge”. As a gross generalisation there are two schools of thought. For some the good judge is simply one who is faithful to precedent, the rule of law and formalistic analyses. For others the good judge is one who, while faithful to the rule of law, seeks to maintain coherence between the legal system and dynamic social relations, and embraces contextual and purposive analyses. Any assessment of a particular judge will, to a significant degree, depend upon which of these two conceptions is assumed, deployed or invoked.

In light of these two problems in *substantively* assessing whether Canada’s approximately 2000 judges are in fact “good judges”, perhaps we are driven back to the *processes* point: have we put in place the most normatively defensible appointments regime? Unfortunately, the answer in Canada is not yet. My hope is that Canada can learn from the systems in place in the other jurisdictions discussed in this volume.

POSTSCRIPT

In the fall of 2015, the Conservative government of Stephen Harper lost the general election to the Liberals under the leadership of Justin Trudeau. In the course of the election campaign, the Liberal Party made many high profile promises, but judicial appointments was not a particular priority. However, the issue came to

¹⁵³Troy Riddell and others, “Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy” (2012) 50 Osgoode Hall LJ 403.

the fore quite quickly. There have been significant developments both with regard to the Supreme Court of Canada appointments and section 96 appointments. The following is, necessarily, a very general overview.

Prime Minister Trudeau set the tone for judicial appointments in two distinct ways. First, he appointed as his Minister of Justice a relatively young Aboriginal woman, Jody Wilson-Raybould. Second, in his mandate letter¹⁵⁴ to Wilson-Raybould the Prime Minister stipulated “You are expected to do your part to fulfill our government’s commitment to transparent, merit-based appointments to help ensure gender parity and that indigenous Canadians and minority groups are better reflected in positions of leadership.”¹⁵⁵ In particular, the mandate letter instructed her to “ensure that the process of appointing Supreme Court justices is transparent, inclusive and accountable”.¹⁵⁶

Initially, it was assumed that there would be significant time to develop a revised Supreme Court of Canada appointments process as the next retirement was not expected until 2017, when the Chief Justice was scheduled to retire. However, in the spring of 2016, Justice Thomas Cromwell (who was only 64) announced that he would be retiring as of 1 September 2016. This forced the government to move quickly. After some hasty consultations, on 2 August 2016, the Prime Minister announced a new process that would be “open, transparent and set a higher standard for accountability”.¹⁵⁷ The new process would have several key features:¹⁵⁸

First, applications were open to any qualified Canadian lawyer or judge.

Second, a comprehensive application form, including specific assessment criteria, would be completed by all candidates.

Third, applications would be reviewed by a seven-member Advisory Board, comprised of eminent judges, lawyers and citizens representing the diversity of Canada.

Fourth, the Advisory Board would provide a short list of three to five candidates for consideration by the Prime Minister.

Fifth, the Prime Minister would select a nominee from the short list.

Sixth, after the Prime Minister made the selection, the Minister of Justice and the Chair of the Advisory Board would appear before Parliament to discuss the selection process.

Seventh, a number of Members of Parliament and Senators—from all parties—would also have an opportunity to take part in a Q & A session with the Prime Minister’s nominee, before he or she was appointed to the Supreme Court of Canada.

¹⁵⁴For the first time in Canadian history the Liberal government made the mandate letters to all Ministers public.

¹⁵⁵Cristin Schmitz, “Changes urged for ‘outdated’ selection process” *Lawyers Weekly* (Canada, 26 February 2016) 11.

¹⁵⁶Ibid.

¹⁵⁷Justin Trudeau, “Opinion: Why Canada has a new way to choose Supreme Court judges” *The Globe and Mail* (Toronto, 2 June 2016).

¹⁵⁸See OCFJA, “SCC Appointments: Frequently Asked Questions”, < <http://www.fja-cmf.gc.ca/scc-csc/questions-eng.html>>.

It is not possible to provide an assessment of the strengths and/or weaknesses of this particular process in this postscript. However, two key issues immediately garnered attention. First, the Prime Minister also announced that all candidates must be “functionally bilingual”.¹⁵⁹ This has generated criticism because many of the perceived potential candidates are unilingual. Second, as noted in Part I of this chapter, traditionally one member of the Supreme Court would come from Atlantic Canada. Justice Cromwell held that seat. However, the government announced that in the interests of increased diversity, the next nominee would “not necessarily” come from Atlantic Canada. Some have suggested that this decision was driven by a desire to create space for the appointment of an Aboriginal person to the Court, and have praised the move. However, this has caused great concerns for some Atlantic Canadians, and at least one organisation, the Atlantic Provinces Trial Lawyers Association, has launched a suit claiming that there is “constitutional convention” requiring that the nominee be from Atlantic Canada.¹⁶⁰ As of late September 2016, the Advisory Committee seems to have compiled and submitted its shortlist to the Prime Minister, and the law suit is making its way through the courts. This could mean that it will be the Supreme Court of Canada that will decide whether there is a constitutional convention, and this raises the spectre of another “Nadon moment”.

As for appointments to section 96 courts, the Trudeau government, and Minister Wilson-Raybould, had three options: they could continue with the same process as the Conservatives; they could take some significant period of time to revamp the process; or they could have an ad hoc process. For the first seven months of their mandate the government made no appointments. This led several senior judges to protest that there were almost 50 vacancies nationwide and that this was resulting in unnecessary delays in the courts.¹⁶¹ In response, in June 2016, the Government succumbed to the pressure and appointed 15 new judges. It is not clear what criteria the Minister used to select the appointees. There is no indication that the JAACs were involved. There was no announcement that the appointees had all be on the “recommended” lists, and that the selections had come from that pool. However, what was apparent was that only three of the 15 were “white males”, while one was “aboriginal”, another “Asian Canadian” and a third “a prominent member of the LGBT community”.¹⁶² Several of the other appointees are recognised as being progressives. This has led at least one former advisor to Prime Minister Harper to complain that “The Liberals are back to doing what they have always done, which is to appoint people who are obviously left-wing.”¹⁶³ Since June 2016, there have been no additional section 96 appointments. However, officials from the Ministry of

¹⁵⁹Trudeau (n 159).

¹⁶⁰Sean Fine, “Lawyers call on PM to pick Atlantic judge” *The Globe and Mail* (Toronto, 20 September 2016) A7.

¹⁶¹Sean Fine, “Government appointments signal intent to diversify the judiciary” *The Globe and Mail* (Toronto, 21 June 2016) 1.

¹⁶²Ibid.

¹⁶³Ibid.

Justice have been engaged in widespread consultations and there is an expectation that a new process will be announced before the end of 2016, if not sooner.

In short, change is certainly afoot, but whether Canada will develop judicial appointments systems that are sufficiently responsive to the regulatory virtues of independence, impartiality, accountability, representativeness, transparency and efficiency is still an open question.

All Change? Judicial Appointments in England and Wales since the Constitutional Reform Act 2005

JAN VAN ZYL SMIT¹

INTRODUCTION

Like a railway network being converted from steam to electric trains, the machinery of judicial appointments in England and Wales has been dramatically modernised in recent years. The scale of the reforms is especially striking in a country without a codified constitution, where constitutional change tends to be slow and incremental. The aptly named Constitutional Reform Act 2005 established the framework for the new system of appointments, creating a Judicial Appointments Commission (JAC) and redefining the role of other actors in the selection and appointment of judges. In its first decade of operations the JAC has used the framework of the Act to develop a modern process that features open calls for applications, detailed criteria, interviews and an evidence-based approach to selection decisions. Yet despite these changes, the judicial appointment system continues to be vigorously debated. Its effectiveness as a vehicle for improving the diversity of the bench has given rise to particular concern, in view of the still disproportionately male and almost entirely white demographics of the higher courts.

This chapter sets out to do three things. First, it provides a brief history of the modernising reforms and attempts to trace some of the ideas and institutional politics that produced the present appointment system. Secondly, it examines in some detail how judges of the High Court and above are currently selected. This account includes an overview of the institutional structure of the JAC, and an analysis of the distinct selection processes that are used for appointments to the High Court and to appellate and leadership posts respectively. Thirdly, and in the light of this account, the chapter considers the current state of the debate about judicial diversity and its implications for the future of the judicial appointment system established under the Constitutional Reform Act 2005.

The judicial posts considered in this chapter are only a small fraction of the total. Unlike most of the commissions discussed in this volume, the JAC has a

¹ Associate Senior Research Fellow in the Bingham Centre for the Rule of Law, British Institute of International and Comparative Law. The author is grateful to Hugh Corder, Dame Hazel Genn, Sir Jeffrey Jowell and senior staff of the Judicial Appointments Commission for England and Wales for their comments on earlier drafts, and to Juliet Wells and Nancy Williams for research assistance. He remains solely responsible for any errors.

selection remit which extends beyond the higher judiciary. While the maximum number of “puisne” or ordinary judges of the High Court is only 108,² the JAC also has responsibility for several thousand other appointments in the lower courts and in tribunals with jurisdiction over matters such as employment, welfare and immigration. The structure and processes of the JAC have undoubtedly been influenced by this heavy workload in ways that this chapter can only briefly touch upon.

It is worth emphasising at the outset that the JAC does not have responsibility for selection to the highest judicial offices. The Constitutional Reform Act makes provision for *ad hoc* committees to select the Lord Chief of Justice of England and Wales, holders of other judicial leadership positions, and the ordinary judges of the Court of Appeal (up to a maximum number of 39³). Similar provision is made for an *ad hoc* selection commission when there are vacancies to be filled in the UK Supreme Court. The establishment of the Supreme Court was another important change brought about by the Constitutional Reform Act 2005, although the Court only came into being in 2009. It replaced the Judicial Committee of the House of Lords, ending the anachronistic arrangement under which the judges exercising the highest appellate jurisdiction in the land did so in the name of the upper house of Parliament, of which they were also life-time members with full rights to speak and vote. Like its predecessor, the Supreme Court hears appeals not only from England and Wales but also from the distinct legal systems of Scotland and Northern Ireland. Indeed, the diversity of the Court’s jurisdiction has been recognised as a relevant factor in the selection of its 12 Justices.

I FROM “TAP ON THE SHOULDER” TO THE CONSTITUTIONAL REFORM ACT

Judicial appointments at the turn of the 21st century

The judicial appointment process in England and Wales is the product of a long constitutional history, and by the year 2000 some of its principal elements were looking distinctly antiquated. The legal power to appoint judges vested in the Queen, as it still does today, although by convention the power was exercised only on ministerial advice. A more problematic legacy was that the minister responsible for selecting judges was the Lord Chancellor.⁴

The ancient office of Lord Chancellor had been central to the rule of medieval monarchs and still carried significant responsibilities in all three branches of

²Senior Courts Act 1981, s 4.

³Senior Courts Act 1981, s 2.

⁴Shimon Shetreet and Sophie Turenne, *Judges On Trial* (2nd edn, Cambridge University Press 2013) 103-108; Graham Gee, Robert Hazell, Kate Malleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press 2015) 160-163; Diana Woodhouse, *The Office of Lord Chancellor* (Hart 2001). The Prime Minister was responsible for advising the Queen on appointments above those of puisne judges of the High Court. However, the Lord Chancellor would brief the Prime Minister on suitable candidates and there is no evidence of a modern Prime Minister advising the appointment of a judge not approved by the Lord Chancellor (Woodhouse 133-134).

government. The Lord Chancellor was the head of the judiciary in England and Wales and was entitled to sit as the presiding judge in the Judicial Committee of the House of Lords, which some Lord Chancellors did more frequently than others.⁵ The Lord Chancellor was also a member of cabinet, serving like other ministers at the pleasure of the Prime Minister. This meant that despite ranking first among judges, the Lord Chancellor did not hold that position with the security of tenure enjoyed by other judicial leaders such as the heads of court divisions. On top of this, the Lord Chancellor was expected both to preside and to present government business in parliamentary sittings of the House of Lords.⁶ It was clearly desirable that the Lord Chancellor should have a deep knowledge of the law and the political conventions of the unwritten constitution, not only to perform the functions already mentioned but also in order to provide an authoritative voice on legal and constitutional matters in cabinet. Twentieth-century Prime Ministers would invariably appoint either someone who already held a judicial post in the higher courts, or a senior barrister who could command the respect of both practising lawyers and the judiciary.⁷

By the late 1990s it was obvious that various aspects of the office of Lord Chancellor needed to be reformed. For a start, it had become increasingly difficult to reconcile the Lord Chancellor's ability to sit as a judge with the right in Article 6 of the European Convention on Human Rights to have civil rights and obligations determined by an "independent and impartial" tribunal.⁸ Lord Irvine of Lairg, the first Lord Chancellor to serve under Prime Minister Tony Blair, was one of the principal architects of the Human Rights Act 1998, which expanded and enhanced the effect given to the European Convention in domestic law. Somewhat surprisingly, however, Lord Irvine could not resist sitting as a judge from time to time, even in appeals involving public bodies and dealing with the rights of the individual against the state.⁹

The judicial appointment functions of the Lord Chancellor were also widely seen to be in need of reform. The traditional selection process was often described as a "tap on the shoulder" system because the initiative lay entirely with the Lord Chancellor, who could in principle offer a judgeship to individuals who were not even aware that they were under consideration.¹⁰ Although the Lord Chancellor was supported by an experienced team of civil servants, the process was fundamentally opaque and would-be judges did not have access to an approved job description or set of detailed criteria against which to measure themselves, let alone the ability to make a formal application for judicial appointment. Instead, the Lord

⁵ Woodhouse (n 4) 103-126.

⁶ Woodhouse (n 4) 68-70, 100-102.

⁷ Gee and others (n 4) 33-34.

⁸ The potential problem became more apparent following the decision of the European Court of Human Rights in *McGonnell v UK* (2000) 30 EHRR 289, which dealt with the combination of legislative and judicial functions exercised by the Bailiff of Guernsey, one of the Channel Islands.

⁹ Woodhouse (n 4) 123-131. See also Lord Windlesham "The Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 1", [2005] Public Law 806, 808.

¹⁰ Gee and others (n 4) 161.

Chancellor and his civil servants would take so-called “secret soundings” from senior judges and barristers to ascertain their views about potential candidates. In practice, the Lord Chancellor seems to have attached great weight especially to the opinions of the senior judiciary.¹¹ Appointments were made almost exclusively from the ranks of full-time barristers based on their professional performance and reputation and apparently without regard for their political views, at least from the mid-twentieth century onwards.¹²

Despite the absence of any obvious partisan politics, this method of selecting judges increasingly came to be criticised. In addition to highlighting the concentration of power in the hands of the Lord Chancellor and the extreme lack of transparency, critics argued that, consciously or unconsciously, the judiciary was replicating itself as senior judges would advise the Lord Chancellor to select those who had impressed them in court, almost invariably barristers who had followed similar career paths to their own and shared their social background.¹³ The fact that women and racial or ethnic minorities were grossly underrepresented also slowly came to be recognised as a problem.¹⁴ The lack of diversity was particularly pronounced in the higher courts. In 1995, there were seven female High Court judges (approximately 7% of the total) and one female member of the Court of Appeal (3%).¹⁵ There were no women in the judicial House of Lords. In racial terms, all the judges in these courts were white.

Under the Lord Chancellorship of Lord Mackay of Clashfern, who served in the Conservative cabinets of Margaret Thatcher and John Major, efforts to reform the system in the early 1990s resulted in a number of changes which mainly affected appointments to the lower courts.¹⁶ Job descriptions and selection criteria began to be published and vacancies advertised with open calls for applications. After Lord Irvine became Lord Chancellor in 1997, some of these innovations were extended to the High Court.¹⁷ For the first time, positions were advertised and applications received, although unlike in the lower courts there was no policy of interviewing shortlisted candidates. At least those who aspired to be appointed to the High Court no longer had to wait for the “tap on the shoulder”, although the practice continued in parallel with applications.

At the start of his term in office, Lord Irvine had expressed interest in the possibility of establishing a commission to select judges.¹⁸ This was hardly a revolutionary idea. From the 1950s onwards, British government lawyers had promoted

¹¹ Shetreet and Turenne (n 4) 103; Gee and others (n 4) 161.

¹² Shetreet and Turenne (n 4) 107; Gee and others (n 4) 161.

¹³ Shetreet and Turenne (n 4) 107.

¹⁴ *Ibid* 107-108; Gee and others (n 4) 161-162.

¹⁵ JUSTICE, *Increasing Judicial Diversity* (April 2017) 15.

¹⁶ House of Commons Library, “The Constitutional Reform Bill [HL]: a Supreme Court for the United Kingdom and judicial appointments Bill No 18 of 2004-05”, Research Paper 05/06 (13 January 2005) 47-48; Shetreet and Turenne (n 4) 106-107.

¹⁷ Shetreet and Turenne (n 4) 107.

¹⁸ This resulted in comparative research on the subject: Cheryl Thomas and Kate Malleon, “Judicial appointments commissions: the European and North American experience and

the inclusion of judicial service commissions in many of the constitutions under which former colonies gained their independence.¹⁹ Moreover, a judicial appointments commission, though not explicitly promised in the 1997 Labour manifesto, would have been consistent with its themes of modernising the democratic system, improving human rights protection and reducing secrecy in government and the centralisation of power.²⁰ However, Lord Irvine appeared to shelve this idea and instead sought to make the existing process of judicial selection more transparent and accountable.²¹ Under his leadership, the Lord Chancellor's Department produced annual reports on judicial appointment which were tabled in Parliament. The Department also provided feedback to individuals whose applications had been unsuccessful. Perhaps the most important measure was the establishment of an independent oversight body, the Commission for Judicial Appointments, in 2002.²² The Commission had no direct involvement in selecting judges, but was tasked with carrying out an annual audit of the selection processes conducted by the Lord Chancellor's Department, receiving complaints from candidates dissatisfied with the process and making recommendations for the improvement of any aspect of the judicial appointment system.

A narrow escape for the Lord Chancellor

Lord Irvine's modified system of judicial selection with independent oversight had not been operating for long when it was overtaken by events. In June 2003, the government unexpectedly announced that Lord Irvine had resigned as Lord Chancellor and that the position would be abolished.²³ The Lord Chancellor's functions were to be redistributed to other ministers and public bodies, one of which was to be a judicial appointments commission. The Prime Minister's office

the possible implications for the United Kingdom", Lord Chancellor's Department Research Programme paper no 6/97 (1997).

¹⁹ See Jan van Zyl Smit, "Opening up' Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection" in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017) 64-66.

²⁰ Labour Party, *New Labour because Britain deserves better* (1997).

²¹ In 1999, Lord Irvine commissioned an inquiry into the judicial selection process which specifically excluded the issue of establishing a new selection body. The inquiry was carried out by Sir Leonard Peach, a respected figure in the worlds of business and public administration. His *Report on Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (1999), although praising some aspects of the existing system, also made a number of recommendations for improving the selection process. Many of his suggestions foreshadowed changes later implemented under the Constitutional Reform Act, for instance introducing aptitude tests as a filter for the applications process, requiring referees and senior judicial consultees to follow a more structured approach to the evaluation of candidates, offering mentorship and work-shadowing opportunities to lawyers from underrepresented backgrounds and strengthening judicial training.

²² The establishment of the Commission for Judicial Appointments was one of the leading recommendations of the Peach report (n 21). The annual reports of the Commission are available in archived form at <<https://www.webarchive.org.uk/wayback/archive/20070220120000/http://www.cja.gov.uk/index.html>>.

²³ Gee and others (n 4) 37-38. It later transpired that Lord Irvine, who was a close friend of Tony Blair and had been his pupilmaster at the Bar, was forced to resign.

initially presented its plans as no more than a cabinet reshuffle and adjustment of ministerial portfolios, but it soon became clear that primary legislation would be needed to effect the complex changes which the government desired to make. The fact that this was not immediately understood seems to have been due to an unwillingness on the part of the Prime Minister and his inner circle to consult the senior judiciary, with whom the government found itself at odds about a range of issues, especially their plans for overhauling the management of the criminal justice system.²⁴

The resulting Constitutional Reform Bill had a long and stormy passage through Parliament and eventually became law only in March 2005.²⁵ In the end the office of Lord Chancellor was retained, albeit in much diminished form. Predictably, the Act abolished the Lord Chancellor's rights to sit as a judge and to serve as head of the judiciary. The new head would be the Lord Chief Justice of England and Wales, whose leadership responsibilities had previously been confined to the criminal courts. The Lord Chancellor would also cease to preside over debates in the House of Lords. In many ways, the Lord Chancellor became a cabinet minister like any other, with his or her influence coming not mainly from the Lord Chancellorship as such but rather from other portfolios held concurrently. Since 2007, the Lord Chancellor has also been Secretary of State for Justice, with responsibility for the conduct and management of the court system, prisons and probation.

To address concerns about the loss of the old Lord Chancellor who provided a judicial voice at the cabinet table, the 2005 Act imposed a duty to "uphold the continued independence of the judiciary", which applies to the Lord Chancellor and also more broadly to other ministers or persons with responsibility for the judiciary or the administration of justice.²⁶ In addition, the Act made reference to the "existing constitutional principle of the rule of law" and declared that it would not affect the Lord Chancellor's "existing constitutional role" in relation to that principle.²⁷ However, the government managed to defeat attempts to include in the Act a requirement that the Lord Chancellor should have a legal background.²⁸ Since 2012 four non-lawyers have held the post in succession. All of these incumbents have also been members of the House of Commons rather than the House of Lords.²⁹ This has enabled the appointment of ambitious figures in the governing party who may be looking to move on to higher ministerial office or even the Prime Ministership, a trajectory which is generally considered impossible for an unelected peer. This chapter will continue to refer to the Lord Chancellor in discussing the current judicial appointment system, but it is better to think of this as a limited set of additional roles performed by the Secretary of State for Justice who may, as in

²⁴ *Ibid.*

²⁵ See Windlesham, "Part 1" (n 9) and "The Constitutional Reform Act 2005: the politics of constitutional reform: Part 2" [2006] Public Law 35.

²⁶ Constitutional Reform Act 2005, s 3(1).

²⁷ Constitutional Reform Act 2005, s 1.

²⁸ Windlesham, "Part 2" (n 25) 55.

²⁹ Despite the retention of the title the position is no longer accompanied by a peerage.

any other country, be more or less committed to the rule of law depending on his or her individual politics and convictions.

The new appointment system takes shape: government proposals

Within weeks of the June 2003 announcement that it would seek to abolish the office of Lord Chancellor, the government outlined its plans for a judicial appointments commission in a consultation paper, *Constitutional Reform: A New Way of Appointing Judges*.³⁰ Other parts of the UK had already taken the plunge: Scotland had established a Judicial Appointments Board in 2002 and the framework for a Northern Ireland Judicial Appointments Commission had been enacted.

The consultation paper articulated an ambitious set of goals for the new body:

A Commission will provide a guarantee of judicial independence, will make the system for appointing judges more open and transparent, and will work to make our judiciary more reflective of the society it serves.³¹

While soliciting views from the public, the government also put forward fairly detailed proposals and an argument outlining how the commission it planned to establish would be able to meet these goals. Although its idealism is striking, the argument is also rather dogmatic in places as well as being vague on how some of the goals could be effectively pursued in conjunction with others.

The goal of guaranteeing judicial independence received a fuller treatment in the consultation paper than the other objectives. The main argument was that an independent judiciary had to be selected by a body which was itself independent from government and above party politics. To achieve this, the government proposed a 15-member commission—five judges, five lawyers and five lay persons—all chosen through mechanisms that insulated them from partisan influence.³² Members would have security of tenure for the duration of their appointment, and the commission would employ its own staff who would not be under ministerial authority.³³ Justifying the introduction of this new model, the consultation paper argued that the existing judicial appointment system amounted to a “breach of the separation of powers”, and that any new mechanism should not be placed in the hands of political appointees.³⁴ This was arguably an exaggeration as the involvement of other branches of state in judicial appointments is not uncommon in constitutional democracies and is often seen as part of the checks and balances that are inherent in all but the purest and most impractical conceptions of the separation of powers. The paper also argued, more persuasively, that an independent commission would help to prevent an erosion of public confidence in the independence of the judiciary and in the administration of justice more broadly. The appointment of judges by a member of the Executive represented a “potential

³⁰ Department for Constitutional Affairs, “Constitutional reform: a new way of appointing judges” (July 2003).

³¹ *Ibid*, para 21.

³² *Ibid*, para 120-121.

³³ *Ibid*, para 115-135, 77-83.

³⁴ *Ibid*, para 23.

source of patronage”, even if that power had not been abused in modern times.³⁵ Given the frequency with which government decisions were being challenged by way of judicial review under the Human Rights Act, it was becoming more plausible to think that ministers might abuse their power to appoint judges who were sympathetic to the government.³⁶

The goal of establishing a more open and transparent judicial selection process was also presented as a means of enhancing public confidence in the judiciary. However, the consultation paper did not advance any specific proposals for improving on the reforms begun in the late 1990s which saw vacancies openly advertised, with published information about the selection criteria and application process. Instead, it indicated that the new commission would be given an opportunity to introduce greater transparency as part of a wider overhaul of the selection process. The members of the commission would “bring a wide range of experience, professional background and fresh ideas to the process, to help ensure that judicial appointments are underpinned by best practice in recruitment”.³⁷

The difficult challenge of improving judicial diversity was also largely left to be tackled by the new commission. The paper identified the lack of judicial diversity as another factor tending to undermine public confidence in the courts.³⁸ It suggested that some potential candidates were probably being deterred by a perception that the Lord Chancellor’s Department, and the senior judges consulted by it, were biased in favour of appointing mainly white men from a narrow range of social and professional backgrounds.³⁹ An independent commission might prove better able to attract applications from women and ethnic minority lawyers. However, it would be up to the commission to come up with new ideas for how to do so. At the same time, the paper signalled that the commission would not have a completely free hand, as overall appointments policy should remain a matter for the government.⁴⁰ It was vital that the commission should select only on merit and should maintain the confidence of the legal profession.⁴¹ This approach seems to have been almost calculated to store up tension for the future.

Judicial responses, the Concordat and the Constitutional Reform Act 2005

The senior judiciary took full advantage of the opportunity to respond to the government’s consultation paper, having previously been excluded from the preparations for abolishing the Lord Chancellorship. The Lord Chief Justice, Lord Woolf of Barnes, was given a mandate by the Judges’ Council to negotiate a new framework covering many aspects of the appointment, discipline, training and leadership of the judiciary and the funding and management of the court system. After months of

³⁵ Ibid, para 22.

³⁶ Ibid, para 19.

³⁷ Ibid, para 25.

³⁸ Ibid, para 25.

³⁹ Ibid, para 24.

⁴⁰ Ibid, para 90-92.

⁴¹ Ibid, para 27-28.

negotiations, this resulted in an agreement, informally known as the “Concordat”, to which the government publicly committed itself in January 2004.⁴²

The influence of the senior judiciary on the subsequent development of the judicial appointments system is best illustrated by two observations. The first is the comprehensiveness of the Concordat, and the fact that its detailed provisions were almost all included in the Constitutional Reform Bill and passed through Parliament largely unamended. In the area of judicial appointments, the Concordat altered or elaborated upon the model set out in the government consultation paper in a number of important ways. It increased the judicial membership as a proportion of the JAC, and provided that selection for judicial posts above the level of puisne judge of the High Court would be undertaken by *ad hoc* committees with an effective judicial majority.⁴³ It declared that primary legislation would lay down that “the sole criterion for making judicial appointments is merit”.⁴⁴ The practice of consultations with senior members of the judiciary was preserved by specifying that the JAC would have to consult the Lord Chief Justice on all appointments to the High Court, and a judge with relevant seniority or experience would serve on the JAC’s selection panel for any such appointments.⁴⁵ Finally, the circumstances in which a minister could decline to accept the candidate selected for a vacancy were explicitly and narrowly defined.⁴⁶

The second observation is that opportunities for the judiciary to continue influencing the shape of the judicial selection process were written into the Constitutional Reform Act, and have since been expanded. In keeping with the argument advanced in the consultation paper that ministers should retain general control over appointments policy, the 2005 Act gave the Lord Chancellor a discretion to issue guidance to selection bodies on matters of selection procedure, including the assessment of candidates.⁴⁷ However, such guidance may only be issued with the consent of the Lord Chief Justice, and will only come into force if each House of Parliament has passed a resolution approving the agreed guidance in draft.⁴⁸

In 2013, the Act was amended to add many more shared discretions of the same type. The amendments attempted to reduce the complexity of the Act and make it more flexible by replacing some of its more detailed provisions with powers allowing the Lord Chancellor to make regulations with the consent of the Lord Chief Justice. Baroness Prashar, the first chair of the JAC, had articulated a widely held concern about complexity and rigidity when she described the Constitutional

⁴² Gee and others (n 4) 38, 179-180. The Concordat (“The Lord Chancellor’s Judiciary-Related Functions: Proposals”) was published in full as an appendix to the First Report of the House of Lords Select Committee on the Constitutional Reform Bill 2004, HL Paper No 125-1 (24 June 2004).

⁴³ Concordat (n 42) para 121, 122, 131-138.

⁴⁴ *Ibid* para 128.

⁴⁵ *Ibid* para 119.

⁴⁶ *Ibid* para 119, 121, 126.

⁴⁷ Constitutional Reform Act 2005, s 65.

⁴⁸ Constitutional Reform Act 2005, s 66.

Reform Act as “an interesting mixture of high principles and low level bureaucracy”.⁴⁹ The powers to make regulations cover some fairly important subjects, including the membership of the JAC and the options open to the Lord Chancellor when presented with the JAC’s selected candidate for a judicial vacancy. The Act does impose constraints on the exercise of these powers. For instance, it stipulates that the JAC membership should include judges, legal practitioners and lay persons,⁵⁰ and that the selection mechanism must ensure that a stage is reached in the interaction between the Commission and the Lord Chancellor where the latter has to accept one of the Commission’s selected candidates.⁵¹ It is intriguing that the Lord Chief Justice is given a veto over such matters, with all the bargaining power that provides. Of course, Parliamentary sovereignty means that primary legislation could still be used to overcome any judicial objections by amending the Act, whereas in other jurisdictions the equivalent provisions would be constitutionally entrenched. However, the veto does suggest a high level of respect for the constitutional wisdom of the judiciary and their ability to shape the protection of judicial independence. This is somewhat at odds with the picture painted by the government’s 2003 consultation paper of an institution at risk of losing public confidence. Moreover, as the following sections of this paper will consider, judges now play an important part in the JAC and in the *ad hoc* selection bodies that are formed when appellate or leadership posts need to be filled.

II THE JUDICIAL APPOINTMENTS COMMISSION

Appointment and tenure of Commissioners

The 15 members or “Commissioners” of the JAC are drawn from three categories: six lay members (one of whom chairs the Commission), seven judicial members (the most senior of whom serves as Vice-Chairman), and two lawyers.⁵² It is immediately apparent that no single category holds an outright majority of seats. In that respect, the JAC is not dissimilar from the judicial selection bodies that had already been established in the other parts of the United Kingdom: the Judicial Appointments Board of Scotland consists of six lay members, four judicial members and two lawyers;⁵³ and the Northern Ireland Judicial Appointments Commission of five lay members; six judicial members and two lawyers.⁵⁴ In each case, at least half the membership belongs to the judiciary or the legal profession, a formula which enjoys some support internationally, including in the Commonwealth, as safeguarding the independence of a judicial appointments body against interference

⁴⁹ “Translating Aspirations into Reality: Establishing the Judicial Appointments Commission” in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Judicial Appointments Commission, 2010) 45.

⁵⁰ Constitutional Reform Act 2005, Schedule 12, para 3B.

⁵¹ Constitutional Reform Act 2005, s 94C.

⁵² Judicial Appointments Commission Regulations 2013, reg 4.

⁵³ Judiciary and Courts (Scotland) Act 2008, s 9 and Schedule 1.

⁵⁴ Justice (Northern Ireland) Act 2002, s 3.

by the Executive.⁵⁵ Of course, the independence of such bodies also depends on other factors, including how the members who make up each category are chosen and how the work of the commission is resourced and conducted.

Turning to the first of the three categories within the JAC membership, a lay member is defined as someone who has never held judicial office, practised or been employed as a lawyer.⁵⁶ To fill a vacancy in the position of lay Commissioner, the Lord Chancellor must convene a selection panel, by following a series of steps that are clearly designed to dilute the risk of government influence.⁵⁷ The selection panel has three members if the vacancy to be filled is that of the JAC Chairman, and the JAC Chairman serves as a fourth member in the case of any other vacancy. The chair of the selection panel is chosen by the Lord Chancellor with the agreement of the Lord Chief Justice, and must not be someone whose present or past involvement in politics, the civil service, adjudication or legal work would make them an inappropriate person for the role (a list of specific exclusions based on current work also applies). The Lord Chief Justice or their nominee serves as the second member of the selection panel, and together with the panel chair must agree on a third member who satisfies the same requirements as the panel chair. The selection panel, in turn, has regard to a very similar list of considerations, including past and present political activity and involvement in adjudication or civil service work, when it performs its task of selecting a lay Chairman for the JAC or filling any lay vacancy. The object seems to be to ensure that lay Commissioners will not be committed to a partisan political agenda, or have personal loyalties to the civil service, judicial institutions or the practising legal profession. Selection panels are masters of their own procedure, and in practice they have advertised lay vacancies so that any member of the public who satisfies the eligibility criteria may apply.

The seven judicial members of the JAC are chosen by two main selection methods. The three most senior judicial members—a Court of Appeal judge; a High Court judge; and a senior tribunal judge—are chosen by judicial associations.⁵⁸ The remaining four—a circuit judge; a district judge, a master or a registrar; a more junior tribunal judge; and a non-legally qualified judicial member (for example a lay magistrate)—are recommended to the Lord Chancellor by a selection panel composed along the same lines as the panels that select lay members of the JAC.⁵⁹ The range of different judicial officers represented on the JAC is clearly

⁵⁵ See Van Zyl Smit (n 19) 75-77.

⁵⁶ Judicial Appointment Commission Regulations 2013, reg 8.

⁵⁷ Judicial Appointment Commission Regulations 2013, regs 9 and 13. It appears from reg 9, however, that the Lord Chancellor could refuse to appoint a person selected by a panel to serve on the Commission, and convene a new panel to carry out a fresh selection process. Formally, the Queen appoints members of the JAC, acting on the advice of the Lord Chancellor.

⁵⁸ Judicial Appointment Commission Regulations 2013, regs 10, 11. The former two are chosen by the Judges' Council and the latter by the Tribunal Judges' Council.

⁵⁹ The Senior President of Tribunals has a role in determining the membership of the selection panel when there is a JAC vacancy for a junior tribunal judge or a non-legally qualified judicial member.

designed to equip it for the wide range of judicial posts for which it has selection responsibilities.

The two Commissioners who are lawyers must be drawn from two of the three different branches of the legal profession: barristers, solicitors and legal executives. A selection panel is formed to make recommendations to the Lord Chancellor, with the same composition as the panels which choose lay Commissioners. Vacancies are similarly advertised and applications received. Before confirming its selection, the panel is obliged to consult the association representing the candidate's branch of the profession.⁶⁰

It will be clear from this overview that a substantial majority of JAC members, including the Chairman, are selected through an open application process rather than being nominated by a particular institution or professional body. This should make it less likely that Commissioners will act as delegates whose task is to lobby for the interests of the category from which they are drawn. Individuals vying for appointment to the JAC need to convince the selection panel that they will make a valuable contribution to the work of the Commission as a whole.

Commissioners are appointed to the JAC to serve for a period specified at the time of appointment, which may not be more than five years. Appointments are renewable, with the proviso that no Commissioner may serve on the JAC for more than 10 years in total.⁶¹ Decisions on the length of appointment and renewal are left to the discretion of the Lord Chancellor. The reason why a standard period of appointment was not laid down in the first place seems to have been understandable concern about avoiding the disruption that might be caused by a simultaneous exit of the first cohort of Commissioners.⁶² However, things turned out somewhat differently in practice. A difficult relationship developed between the first set of Commissioners appointed in 2006 and the Ministry of Justice. In 2010, when several Commissioners reached the end of their term, they were granted only a single year's extension, which ensured that a majority of Commission seats became vacant in 2011.⁶³ The episode raises a question about whether a Lord Chancellor could abuse their control over the length of Commissioners' tenure to weaken the independence of the Commission. The risk is tempered by the fact that the Lord Chancellor only has limited influence over the selection of new Commissioners.

While they are in office, the tenure of Commissioners is secure, except if a Commissioner ceases to satisfy the eligibility conditions under which he or she was appointed (for example a judicial member who retires from the bench).⁶⁴ A Commissioner may only be removed from office by the Lord Chancellor on speci-

⁶⁰Judicial Appointment Commission Regulations 2013, reg 15(2). This could be the General Council of the Bar, the Law Society or the Chartered Institute of Legal Executives.

⁶¹Constitutional Reform Act 2005, Schedule 12 para 12; Judicial Appointment Commission Regulations 2013, reg 15(2).

⁶²Department for Constitutional Affairs (n 30) para 134.

⁶³Gee and others (n 4) 170.

⁶⁴Judicial Appointment Commission Regulations 2013, reg 18. In such cases the Lord Chancellor may allow the Commissioner to remain in office for a transitional period.

fied grounds: dereliction of duty over a period of six months or more; having been convicted of a criminal offence; and being otherwise incapable or unfit for office.⁶⁵

Institutional independence and accountability

The JAC is established by the Constitutional Reform Act 2005 as a body corporate which is separate from the Crown, with its own legal personality and the ability to hold assets.⁶⁶ In the technical parlance of government, the Commission is classified as an “executive non-departmental public body”, “sponsored” by the Ministry of Justice.⁶⁷ This arrangement is supposed to enable the Commission to operate at arm’s length from the government of the day, at least insofar as individual selection decisions are concerned, while being funded from the budget of the Ministry.

As promised in the government’s 2003 consultation paper, the JAC was given the ability to recruit and manage its own staff. The Chief Executive of the Commission is a partial exception, as this appointment was made subject to the consent of the Lord Chancellor.⁶⁸ The Chief Executive is also the Commission’s Accounting Officer with duties to report on the JAC’s use of public money.⁶⁹ Like Commissioners, members of staff may not be concurrently employed in the civil service. This helps to avoid a situation in which Commission staff might be answerable to civil service managers and ultimately to a minister. The Commission also contracts with external members of selection panels, who are not employees but may be paid a fee, unless they are judges, for participating in the shortlisting and interviewing of candidates.

Despite individual Commissioners, staff and selection panel members not being answerable to ministers or civil servants, there is still a set of mutual obligations between the JAC and the Ministry of Justice as its sponsor. These are set out in a Framework Document agreed between the Lord Chancellor and the Chairman of the JAC, and subject to periodic review.⁷⁰ The current agreement stipulates that the Lord Chancellor is responsible for “approving the JAC’s strategic objectives and targets, and the policy and performance framework within which it shall operate”.⁷¹ The practical effect of the current arrangement is that the JAC Chairman, Commissioners and senior staff have to work closely with colleagues in the Ministry, meeting frequently and not just annually when the JAC business plan and budget are submitted for approval. The Framework Document refers to a “no surprises” policy which requires the JAC to keep the Ministry informed of issues of risk as

⁶⁵ Constitutional Reform Act 2005, Schedule 12, para 15. The JAC has adopted a Code of Conduct (not published, but made available to the present author) which includes procedures for the investigation, hearing and determination of matters that may warrant a Commissioner’s removal.

⁶⁶ Constitutional Reform Act 2005, s 61 and Schedule 12, para 18.

⁶⁷ *Framework Document: Ministry of Justice and the Judicial Appointments Commission* (October 2012) para 2.1.

⁶⁸ Constitutional Reform Act 2005, Schedule 12, para 22.

⁶⁹ *Framework Document* (n 67) para 5.1.

⁷⁰ *Ibid* para 1.2.

⁷¹ *Ibid* para 3.3

they arise.⁷² As far as funding is concerned, the Commission is dependent on the Ministry of Justice's assessment "in the light of competing priorities".⁷³ Against the background of the Coalition government's policies of public-sector financial austerity, the JAC was persuaded to reduce its spending by about a third between 2010 and 2014.⁷⁴

Officially, the Lord Chancellor remains accountable to Parliament for judicial appointments and may be held to account through mechanisms such as parliamentary questions and committee hearings. The arrangements just described help to ensure that the Lord Chancellor is sufficiently informed about the JAC's work. Wider public accountability is also provided through the publication of JAC documents. The Constitutional Reform Act requires the JAC to provide the Lord Chancellor with an annual report on its activities, which the Lord Chancellor must publish by tabling it in Parliament.⁷⁵ However, the volume of information that is made public is much greater than this statutory minimum. The JAC website hosts many documents which the Commission produces as part of its reporting obligations to the Ministry of Justice, including business plans, minutes of Commission meetings (excluding selection deliberations), and statistical bulletins.⁷⁶ The JAC's diversity statistics are particularly detailed as they cover certain demographic characteristics of the eligible pool for each judicial post as well as providing a breakdown of applicants, shortlisted candidates and appointees.

By publishing so much information about its work, the JAC has effectively stepped forward to share the spotlight of accountability for judicial appointments with the Lord Chancellor. This is probably appropriate in view of the Commission's central role in the judicial selection process, which is discussed in the next part of this chapter. Parliamentary select committees occasionally scrutinise the JAC directly by inviting the Chairman and other members to appear before them.⁷⁷ Such hearings have focused only on broad questions of process and method, however, as parliamentarians have refrained from asking questions about individual selection decisions. Both the Lord Chancellor and the JAC are prevented by their duty of confidentiality from revealing information about individual applications for judicial office.⁷⁸ Scrutiny of selection decisions may be undertaken in certain circumstances by the Judicial Appointments and Conduct Ombudsman, an independent body which has inherited some of the functions of the former Commission for Judicial Appointments, including the responsibility for investigating complaints from unsuccessful applicants.⁷⁹

⁷² Ibid para 4.26.

⁷³ Ibid para 4.5.

⁷⁴ Ministry of Justice, *Triennial Review: Judicial Appointments Commission* (January 2015) 26.

⁷⁵ Constitutional Reform Act 2005, Schedule 12 para 32.

⁷⁶ <https://jac.judiciary.gov.uk>.

⁷⁷ Gee and others (n 4) 188-189.

⁷⁸ See text to n 99 below.

⁷⁹ The Ombudsman is discussed further in text to nn 129-133 below.

III THE HIGH COURT SELECTION PROCESS

Selection exercises and the fine-tuning of criteria

Instead of dealing with vacancies only as and when they arise, the JAC generally selects new judges for each court in batches at regular intervals. Such recruitment may be done in anticipation of vacancies that are expected to arise, for example when particular judges reach the prescribed retirement age of 70. In the case of the High Court, there is usually one such “selection exercise” per year. The anticipated dates for selection exercises are set out in a calendar agreed by the JAC, the Lord Chancellor and the Lord Chief Justice. The selection calendar is published on the JAC website along with a wealth of information on the selection process.⁸⁰ In addition to enabling the JAC to achieve greater efficiency through forward planning, this consolidated approach may help to attract more applications for judicial posts. Advance notice of the selection timetable gives prospective candidates time to make up their minds and to prepare for the application process, and the availability of multiple posts may reduce fears about being out-competed for a single vacancy and having to apply repeatedly.

The selection criteria for High Court posts may vary slightly from one exercise to the next. By statute, the minimum eligibility requirements are “good character”, admission as a barrister or a solicitor, and seven years’ post-admission legal experience which may have been gained in non-practising roles including as a legal academic or an in-house lawyer.⁸¹ Beyond this, the Constitutional Reform Act requires candidates to be chosen “solely on merit”.⁸² The Act was amended in 2013 to allow the JAC to take into account the contribution a candidate would make to the diversity of the court in situations of “equal merit”.⁸³ To flesh out the JAC’s understanding of merit, the information pack that is for each selection exercise also sets out a list of “competencies” on which candidates will be assessed. Each selection exercise is also subject to additional selection criteria agreed between the JAC and the Lord Chancellor.

The Lord Chancellor’s bargaining position with regard to additional criteria is strengthened by his statutory power to issue binding guidance on selection procedures. As discussed above, this power is subject to the consent of the Lord Chief Justice and guidance must be approved in draft by both Houses of Parliament.⁸⁴ In practice, however, the Lord Chancellor consults the Lord Chief Justice and then simply asks the JAC to incorporate certain additional criteria in its selection exercises.⁸⁵ Some of these criteria have been uncontroversial. For example, candidates are usually required to hold UK, Irish or Commonwealth nationality, be in suffi-

⁸⁰ <<https://jac.judiciary.gov.uk>>.

⁸¹ See Constitutional Reform Act 2005, s 63(3) and Senior Courts Act 1981 s 10(3). Two years’ service as a Circuit judge provides an alternative basis of eligibility.

⁸² Constitutional Reform Act 2005, s 63(2).

⁸³ Constitutional Reform Act 2005, s 63(4). The application of this provision is discussed in text to nn 113-115 below.

⁸⁴ Text to n 48.

⁸⁵ Gee and others (n 4) 181.

ciently good health to perform the duties of judicial office (subject to reasonable adjustment in the case of disability), and to offer a specified length service of service prior to retirement (in the 2017 High Court selection exercise the period specified was five years⁸⁶).

A long-running controversy has surrounded the consistent request of each Lord Chancellor, backed by the Lord Chief Justice, that candidates should have some form of prior judicial experience, either as a salaried judge in a lower court or tribunal, or through having sat for a specified number of days in the fee-paid role of Deputy High Court Judge. The JAC was determined, particularly in its early years, to resist the Lord Chancellor's requests on the ground that the pool of candidates who met these conditions consisted overwhelmingly of white male barristers, which was detrimental to judicial diversity.⁸⁷ This difference of views repeatedly led to "fractious negotiations" and even "trench warfare" between the JAC and civil servants, before the Commission would eventually give way (mindful no doubt of the Lord Chancellor's power to issue binding guidance).⁸⁸

The period of confrontation about selection pools and judicial diversity has led to some changes to the selection process. One change was the transfer of responsibility for the selection of Deputy High Court Judges from the Lord Chief Justice to the JAC in 2013, enabling the JAC to grapple directly with the diversity challenge in this pool of candidates.⁸⁹ Another, more recent change has been the introduction of a twin-track selection exercise for the High Court in 2017. One track was reserved for candidates who had sat as Deputy High Court judges for at least 30 days in the previous two years, but the other was open to all candidates without any express stipulation as to prior judicial experience.⁹⁰

The use of additional criteria is not the only aspect of the selection criteria that raises complex issues. The JAC's list of competencies is just as important, if not more so, as it attempts to provide a reasonably comprehensive set of standards to be applied to the assessment of candidates. When the JAC came to prepare for its first High Court selection exercise in 2006, it decided that the existing set of competencies which the Lord Chancellor's Department had been using was too lengthy and complex.⁹¹ Since then, the Commission has formulated and revised its own version several times. The present list dates from 2015, and is based on a competency framework developed by the judiciary for performance appraisal of judges in more junior posts, and the provision of judicial training.⁹² There are five core competencies that apply to selection for all judicial roles: "Exercising Judgement",

⁸⁶ <https://jac.judiciary.gov.uk/sites/default/files/sync/selection-exercises-2016/041_-_eligibility.pdf>.

⁸⁷ Gee and others (n 4) 170-172.

⁸⁸ Ibid 171-172.

⁸⁹ Constitutional Reform Act 2005, s 87(1A).

⁹⁰ <<https://jac.judiciary.gov.uk/041a-high-court-judge-2017-track-1-information-page>>.
ibid.

⁹¹ Judicial Appointments Commission, *Annual Report 2006-2007*, 21-22.

⁹² <https://jac.judiciary.gov.uk/sites/default/files/sync/selection-exercises-2016/041_high_court_competency_framework.pdf>.

“Possessing and Building Knowledge”, “Assimilating and Clarifying Information”, “Working and Communicating with Others” and “Managing Work Efficiently”.⁹³ A sixth, “Leadership” applies to the High Court and certain other posts. The specification of the competencies varies according to the judicial post in question, with each competency being defined by a statement and a set of bullet points. The full set of High Court competencies is reproduced in the appendix to this chapter.

In light of the challenge of improving judicial diversity, considerable effort has been made to avoid requiring, or presupposing, experience which could only have been gained as a Deputy High Court judge or as a barrister. At one time, the JAC assessed applicants for the High Court on their “advocacy” but this was later changed to “communication skills”.⁹⁴ The present competency area of “Working and Communicating with Others” does not specifically mention courtroom advocacy. Although one of the bullet points under this heading refers to listening to evidence from parties and progressing a case efficiently, the introductory note to the competency framework explains that applicants “do not need to address every bullet point ... but you should seek to demonstrate the competency area as a whole”. In a sense, the JAC’s competency document tries to strike a difficult balance as it is based on the judiciary’s formulation of qualities demonstrated by a High Court judge who is working effectively. One aspect of the High Court role that comes through very clearly is the premium placed on intellectual abilities, legal skills and versatility. The bullet points contain a number of references to complexity. Candidates are expected to demonstrate “professional expertise to deal with the most complex work”, and “a high ability to acquire knowledge, especially of unfamiliar or highly complex subject matter”. Furthermore, under “Exercising Judgement” there is a reference to “willingness to challenge established norms and practices, and develop the law”, which reflects the expectation that High Court judges will produce reportable judgments that are essential to the functioning of a common law jurisdiction.

In the twin-track High Court selection exercise of 2017, the JAC has provided additional guidance on “transferable skills and experience” which candidates who have not served as Deputy High Court Judge might wish to include in their applications.⁹⁵ Complexity, for instance, may be established through appearances in high-profile cases, public inquiries or commercial transactions, and outstanding ability through writing law books or serving on disciplinary panels. Some of these activities seem to have been included with legal academics, solicitors or in-house lawyers in mind. It is made very clear that the list is non-exhaustive.

⁹³ Ibid.

⁹⁴ Shetreet and Turenne (n 4) 118.

⁹⁵ <https://jac.judiciary.gov.uk/sites/default/files/sync/selection-exercises-2016/041_transferrable_skills_table.pdf>.

Applications

The process of applying for appointment to the High Court has much in common with the application process for other judicial posts administered by the JAC. Applicants complete an extensive online application form, and provide details of two persons who have agreed to provide references (or “independent assessments” as they have been recently renamed). However, although applicants for some other posts will take an online test, those seeking High Court appointments do not. The JAC encountered a mixed reception which it first introduced testing into some of its selection exercises for the lower courts, and the Commission has not seen fit to extend it to the High Court where the numbers of posts and applicants are relatively small.⁹⁶

The overall purpose of the application form and independent assessments is to elicit evidence which is relevant to the eligibility requirements and wider selection criteria. In relation to the “good character” requirement, applicants are required to disclose past criminal convictions and cautions, even if these would be regarded for other purposes as spent, and other matters including past or present insolvency, tax investigations or professional disciplinary issues.⁹⁷ Applicants must consent to checks being carried out with the relevant agencies, and to notify the Commission of any incidents that occur during the application process. The JAC does not carry out full checks on all applicants immediately as it is considered more efficient to do so only for applicants who are shortlisted for interview.

The core of the application form consists of the applicant’s self-assessment against the High Court competencies. Applicants are required to provide concrete examples of how they have demonstrated the competencies. The JAC’s guidance urges applicants not simply to list cases or incidents but rather to spell out how they assessed a difficult situation and what action they took.⁹⁸ The guidance also suggests that answers could be structured according to the SOAR model—Situation, Objective, Action, Results—and even offers advice on how many words to allocate to each of these four elements within the overall word limit. Various “prompts” are provided in relation to the six competencies. For instance under “Working and Communicating with Others”, applicants are encouraged to think about “a time when you needed to significantly alter your usual style or method of communication to overcome some cultural, technological or logistical barrier”, and under “Exercising Judgement”, to explore “a situation where you needed to make a decision that you knew would have far-reaching consequences”. In similar vein, the guidance for “independent assessments” instructs assessors not simply to give their opinion of the applicant’s suitability for appointment, but to provide evidence within the framework of the High Court competencies. The SOAR model

⁹⁶ Shetreet and Turenne (n 4) 110-113.

⁹⁷ <<https://jac.judiciary.gov.uk/good-character>>.

⁹⁸ <<https://jac.judiciary.gov.uk/how-apply>>.

is again suggested as a possible format for assessors to explain how the applicant dealt with a difficult problem or situation.

The Commission is required to treat any information that it receives from, or about, an applicant in the course of the selection process as confidential.⁹⁹ Information may be disclosed as necessary to actors who have a recognised role within the appointment system, for instance the Lord Chancellor and certain judges whom the Commission has a statutory duty to consult. Confidentiality is thought to be an important factor in attracting applicants. Research suggests that some lawyers consider it essential that even the fact that they have applied should remain secret, both for reasons of ensuring continuity of work flow during the application period and avoiding embarrassment and damage to professional reputation in the event of a rejection.¹⁰⁰

Selection panels and shortlisting

As has already been mentioned, the JAC usually delegates the shortlisting and interviewing phase of each selection exercise to a selection panel. This procedure is not prescribed by statute, but enabled by the authority which Constitutional Reform Act grants the Commission to determine its own selection process and broad powers of delegation.¹⁰¹

The practice of the JAC has been to form High Court selection panels with at least four members: a lay Commissioner as panel chair; a judicial Commissioner, another judicial member and another lay member, who will usually be someone with a recruitment background.¹⁰² The JAC policy is that a selection panel must contain both men and women and, where possible, a member of an ethnic minority.¹⁰³ This reflects an understanding that recruitment bodies which are themselves lacking in diversity can discourage applications from underrepresented groups, or lead to inadequate awareness or understanding of the life experiences of candidates from those groups, and in some cases decision-making that is affected by conscious or unconscious bias.

Once applications have closed in a High Court selection exercise, the panel will receive the forms completed by the applicants and also the independent assessments (references). This information is used to carry out a sift and determine which candidates to summon for interview. Sifting reportedly involves selection panels reviewing the materials and assigning an A, B, C or D score in respect of each of the competencies.¹⁰⁴ However, the panel may give additional weight to exceptional

⁹⁹ Constitutional Reform Act 2005, s 139.

¹⁰⁰ Hazel Genn, "The attractiveness of senior judicial appointment to highly qualified practitioners", Report to the Judicial Executive Board (2008).

¹⁰¹ Constitutional Reform Act 2005, s 88.

¹⁰² Judicial Appointments Commission, *Annual Report 2013-2014*, 74.

¹⁰³ *Ibid.*

¹⁰⁴ See Sir Geoffrey Bindman QC and Karon Monaghan QC, *Judicial Diversity—Accelerating Change* (2014) <<http://ukscblog.com/wp-content/uploads/2014/11/Judicial-Diversity-Accelerating-Change.pdf>> 16.

strength in a particular competency when an applicant's scores are aggregated. The aggregate scores are used to form a shortlist of candidates who are invited to an interview with the selection panel.

Interviews, statutory consultation and selection by the JAC

When the JAC and its selection panels seek further information about shortlisted candidates they have access to information from both traditional and relatively novel sources, but the task of reconciling evidence gleaned from these sources is not without its difficulties and tensions.

The novel source of information is interviews. Interviewing applicants for High Court posts is something which the JAC introduced into the judicial selection process, as the Lord Chancellor's Department never made interviews part of its standard practice at High Court level.¹⁰⁵ Interviews are significant because they introduce a new source of information and an opportunity for applicants to respond to views which the selection panel may have formed on the basis of the applicant's paper application and references.

At the same time, the Act retained the practice of consulting senior judges which had been such a crucial source of information under the "tap on the shoulder" system. Indeed, what was previously an informal practice was now cast in statutory form, with a combination of specified and discretionary consultees being listed for each level of judicial post. In the case of High Court appointments, the JAC is required to consult the Lord Chief Justice, and may with the agreement of the Lord Chief Justice, consult another person who has held office as a High Court judge or has other relevant experience.¹⁰⁶ For the 2017 High Court selection exercise, the JAC indicated that it would consult the Lord Chief Justice and the heads of the various High Court divisions.

Interviews, like the rest of the selection process, are confidential, so there is relatively little information available about them. The 2017 High Court selection exercise states that "The interview will consist of the panel seeking evidence from you against the competencies for the post".¹⁰⁷ The published information also refers to "situational questioning", which involves candidates being asked what they would do if they were the judge. Candidates are given background material before the day of the interview. On the day, they are then given details of one or more scenarios to which the material is to be applied, and some further time to prepare.¹⁰⁸ This seems to be a sensible approach for assessing those aspects of the competencies that involve preparation, including the assimilation and analysis of information under time pressure.

After the interview, the selection panel prepares a report in which it assesses the applicants on the basis of their interviews and the written material received,

¹⁰⁵ Judicial Appointments Commission, *Annual Report 2006/2007*, 19.

¹⁰⁶ Constitutional Reform Act 2005, s 88; Judicial Appointments Regulations 2013, reg 30.

¹⁰⁷ <<https://jac.judiciary.gov.uk/041a-high-court-judge-2017-track-1-information-page>>.

¹⁰⁸ *Ibid.*

ranking them insofar as possible. The panel forwards this report to the JAC together with all the supporting materials. The Commission sits regularly as a Selection and Character Committee to consider selection panel reports. As such, the Commission must satisfy itself that any candidates who are in contention for selection meets the statutory “good character” requirement following a review of their criminal record status, disciplinary history and related matters. Apart from this, deliberations focus on the merit of the candidates as defined by the competency framework. The discussions are normally confined to the evidence gathered by the selection panel. Commissioners who have information about a candidate that does not appear on the papers are prohibited by the JAC Conflict of Interest Rules from raising such matters orally in selection meetings, albeit that the JAC Chairman has the discretion to admit such information if it is provided to him in advance.¹⁰⁹ Commissioners are also required to notify the Chairman of any possible conflict of interest as soon as they receive the papers for a selection round, and the presumption is that the Commissioner will take no part in discussions if they have a conflict.¹¹⁰

The Constitutional Reform Act requires the JAC to recommend to the Lord Chancellor one candidate per vacancy or anticipated vacancy in the High Court.¹¹¹ The requirement to select this candidate “solely on merit”¹¹² now has a proviso, inserted in 2013, which authorises (but does not oblige) the Commission to make its choice between two candidates found “of equal merit” in a way that would increase judicial diversity in the court where the vacancy has arisen.¹¹³ The current policy of the JAC is to apply this provision only in relation to diversity of gender and racial or ethnic origin, and not other protected characteristics such as sexual orientation or religion.¹¹⁴ The annual reports of the JAC indicate that the provision was applied 14 times in 2015/2016, but it is not known whether any of these uses was in relation to a High Court appointment.¹¹⁵

The Lord Chancellor’s limited role in candidate selection

Under the Constitutional Reform Act, the Lord Chancellor has to decide whether to accept a candidate selected by the JAC and advise the Queen to appoint the candidate to the High Court bench.¹¹⁶ The JAC is required to provide the Lord Chancellor with a detailed report to accompany the notification of selection.¹¹⁷ The report must include any recommendations received from statutory consultees and provide a statement of reasons in the event that such a recommendation was

¹⁰⁹Judicial Appointments Commission, Conflict of Interest Rules for Selection Decisions, rule 13.

¹¹⁰Conflict of Interest Rules for Selection Decisions, rule 2.

¹¹¹Constitutional Reform Act 2005, s 88(4).

¹¹²Constitutional Reform Act 2005, s 63(2).

¹¹³Constitutional Reform Act 2005, s 63(4).

¹¹⁴Judicial Appointments Commission, Equal Merit Provision policy, http://jac.judiciary.gov.uk/static/documents/EMP_policy.pdf, para 6.

¹¹⁵Judicial Appointments Commission, *Annual Report 2015-2016*, 5.

¹¹⁶Judicial Appointment Regulations 2013, reg 32.

¹¹⁷Judicial Appointment Regulations 2013, reg 31.

not followed. In addition, the Lord Chancellor may ask to see any further information pertaining to the application.

The reason why the JAC has to provide such extensive information is that the Lord Chancellor has to decide between acceptance and two other options, which are to reject the selection or require its reconsideration.¹¹⁸ The Lord Chancellor may exercise each option once in relation to any particular vacancy, and must provide the Commission with written reasons for doing so.¹¹⁹ The grounds for rejection or requiring reconsideration are limited. Rejection is permissible only if the Lord Chancellor considers that the selected candidate “is not suitable for the office concerned”, and the Commission is then obliged to select a different candidate.¹²⁰ The Lord Chancellor may require reconsideration if “there is not enough evidence” that the selected candidate is suitable, or if there *is* evidence that the selected candidate “is not the best candidate on merit”.¹²¹ Following a request to reconsider its selection, the Commission may select either the same candidate or a different candidate. In a situation where both options have been exercised, the Lord Chancellor is bound to accept a candidate selected by the Commission in any one of its three recommendations, except the candidate whose selection the Lord Chancellor rejected.¹²²

Although the use of the powers to reject or require reconsideration is not publicly announced, scholars who have conducted interviews with those inside the process report that there have only been only a handful of instances across all the different courts for which the JAC has selection responsibility, amounting to less than 0.1% of the appointments made since the current system was established.¹²³ None of these concerned a selection for the High Court.¹²⁴ However, the same study noted that there was evidence from government sources that the Lord Chancellor would be “unlikely to accept recommendations from the JAC that are at odds with the view expressed by a senior judicial consultee”.¹²⁵ Indeed, the authors conclude that those judges enjoy a “*de facto* veto”.¹²⁶ It is certainly possible to see that in this situation the Lord Chancellor would find it relatively easy to provide the JAC with reasons for not accepting its selection by referring to the criticism made in writing by a judge during statutory consultation. In other situations, however, the Lord Chancellor will probably find it more difficult to justify not accepting a selection, unless it is obvious from the materials on file from the selection exercise that the JAC has erred in its assessment, perhaps by overlooking a significant piece of evidence that affects a candidate’s suitability.

¹¹⁸Judicial Appointment Regulations 2013, reg 32.

¹¹⁹Judicial Appointment Regulations 2013, reg 33.

¹²⁰Judicial Appointment Regulations 2013, reg 33.

¹²¹Judicial Appointment Regulations 2013, reg 33.

¹²²Judicial Appointment Regulations 2013, reg 32.

¹²³Shetreet and Turenne (n 3) 114.

¹²⁴Graham Gee, “Rethinking the Lord Chancellor’s role in judicial appointments”, forthcoming in (2017) 20 *Legal Ethics*.

¹²⁵Gee and others (n 4) 175.

¹²⁶*Ibid.*

Feedback, complaints and judicial review

The JAC offers feedback to candidates who are unsuccessful at various stages of the selection process. Given the relatively small size of High Court selection exercises, individual feedback is provided both to applicants who are not shortlisted and to shortlisted candidates whose interview does not lead to an offer of judicial appointment.¹²⁷

The Commission regularly surveys applicants, both after shortlisting and after the interview stage. Survey responses have led to the JAC modifying its practices and procedures, notably by providing candidates with more detailed guidance on completing the self-assessment portion of the application form and taking steps to improve the quality of post-interview feedback.¹²⁸

Procedures are established for applicants who wish to complain about how the application process was conducted.¹²⁹ Complaints about actions of the JAC are generally required to be made to the Commission itself, where they are examined by a Complaints Manager who has no involvement in the selection process.¹³⁰ If a complainant is dissatisfied with the JAC's decision on their complaint, they may approach the Judicial Appointments and Conduct Ombudsman. The office of Ombudsman was established by the Constitutional Reform Act, and represents a continuation of the pioneering idea of an external adjudicator that was first embodied in the Commission for Judicial Appointments during the period 2002-2006.¹³¹ The Ombudsman has the power to recommend an award of damages for maladministration but not for failure to be appointed to judicial office, and may make recommendations to the Lord Chancellor regarding other actions to be taken, including process improvements. However, unlike its predecessor, the Ombudsman is not charged with undertaking regular audits or providing oversight of the appointment process as a whole as a whole.¹³² The Ombudsman's most recent annual report states that no judicial appointment complaint was upheld during the period under review, although it does include an appendix setting out in detail why a complaint about the content of qualifying tests for the lower courts was rejected.¹³³

¹²⁷ <<https://jac.judiciary.gov.uk/041a-high-court-judge-2017-track-1-information-page>>.

¹²⁸ *Triennial Review* (n 74) 31.

¹²⁹ Constitutional Reform Act 2005, ss 99-105.

¹³⁰ <<https://jac.judiciary.gov.uk/making-complaint>>

¹³¹ See text to n 22.

¹³² The Lord Chancellor may require the Ombudsman to investigate any aspect of the appointment process, even in the absence of a complaint, but there is no record of such investigation in recent years. Constitutional Reform Act 2005, s 104.

¹³³ Judicial Appointments and Conduct Ombudsman, *Annual Report 2016-17*. As the title suggests, the Judicial Appointments and Conduct Ombudsman also has a second area of responsibility in which it deals with concerns raised about the work of the Judicial Conduct Investigation Office and other bodies which receive or investigate complaints of judicial misconduct. Judicial conduct matters generally form a much larger part of the Ombudsman's workload than complaints about judicial appointments.

Decisions of the JAC and the Ombudsman are in principle subject to judicial review. However, very few cases are known to have been brought, and there is no evidence of any successful review of an appointment decision. In one known case, the High Court dismissed an application to review the JAC's good character guidance and its application to traffic offences.¹³⁴

IV APPELLATE AND LEADERSHIP APPOINTMENTS

Ad hoc selection committees in England and Wales

In the Concordat, the government accepted that the Judicial Appointments Commission would not be given selection responsibility for positions above the level of puisne judge of the High Court.¹³⁵ Instead, *ad hoc* selection committees would be formed when there was a vacancy to be filled in the Court of Appeal, or in one of the leadership positions such as Lord Chief Justice or head of division. Each selection committee would be fully autonomous in its decision-making, although it would be deemed to be a committee of the JAC and would receive administrative support from the Commission.

The agreed arrangements were duly enacted in the Constitutional Reform Act 2005, although they were subsequently modified when the Act was amended in 2013.¹³⁶ Initially, the Act stipulated that each committee would have four members and would include at least two senior judges, one of whom would have a casting vote in the event of disagreement. In 2013, the committee size was increased to five. Either two or three members will be judges, with the balance of the committee consisting of lay members of the JAC. The precise composition depends on the vacancy to be filled and committee members are chosen by the Lord Chief Justice and the JAC Chairman. The 2013 reforms also placed an obligation on those responsible for choosing committee members to consider the desirability that the committee should be diverse in terms of both gender and race. In 2017, selection committees sat to fill vacancies on the Court of Appeal and to identify a new Lord Chief Justice to succeed Lord Thomas of Cwmgiedd, who was approaching the mandatory retirement age. Each committee included both female and ethnic minority members, and only two judges rather than three.

Ad hoc selection committees have the right to determine their own selection processes.¹³⁷ Like the JAC, they apply the minimum statutory criteria of eligibility (which are almost identical to the criteria for eligibility to the High Court), and such further selection criteria as they may adopt to give effect to their duty of merit selection.¹³⁸ The Lord Chancellor also has the power, with the consent of the Lord

¹³⁴ *R (Graham Stuart Jones) v Judicial Appointments Commission* [2014] EWHC 1680 (Admin).

¹³⁵ Concordat (n 42) para 121-126.

¹³⁶ The current provisions are found in the Constitutional Reform Act 2005, ss 67-70 and 76-79 and in the Judicial Appointment Regulations 2013.

¹³⁷ Constitutional Reform Act 2005 ss 70, 79.

¹³⁸ Just as it is for the High Court (see text to n 81) admission as a barrister or solicitor followed by seven years' legal experience (broadly defined) is sufficient: Senior Courts Act 1981, s 10(3).

Chief Justice, to issue guidance on matters of selection procedure, which may take the form of additional criteria of the kind discussed above in relation to High Court appointments.¹³⁹

In the early years, selection processes were characterised by “exceptional levels of informality”, according to a leading study: for example, it was not considered necessary to hold interviews for appointments to the Court of Appeal.¹⁴⁰ Recent selection processes have been more structured and have largely followed the pattern of JAC High Court selection exercises in seeking to elicit evidence, including via interviews, in relation to selection criteria and the job description for the post in question. In 2017, Court of Appeal applicants were required to submit an application letter in which they explained how they met these standards for appellate judicial work, and to nominate two independent assessors (referees).¹⁴¹ In substance, the approach remains fairly narrowly focused on candidates in the traditional mould. Applicants were asked to provide links to two judgments they had authored, which obviously presupposes that applicants will have at least fee-paid judicial experience. The information pack did indicate that exceptional candidates without judicial experience were also free to apply, but there was nothing like the strenuous effort made to attract such candidates seen in the 2017 High Court selection exercise. Perhaps future selection committees will move towards the latter approach, but on the other hand it could be argued at least some experience of judging is almost essential before taking on a heavy workload of appeals against decisions in the High Court or below. Applicants for the position of Lord Chief Justice in 2017 were required to provide a third piece of writing which was not a court judgment, and a 2000-word paper setting out their plans as Lord Chief Justice.¹⁴² In addition, applicants were asked to identify “the most senior civil servant with whom you have had significant recent contact” so that the committee could consult that person. Those additional requirements are understandable in view of the leadership responsibilities attaching to the post of Lord Chief Justice and in particular the need to interact with other branches of government.

Consultation with senior judges is an important feature of the selection process, perhaps even more than in relation to High Court appointments. The 2017 selection committee for the Court of Appeal indicated that it would consult with a wide range of senior judicial office holders, including all sitting members of the UK Supreme Court and the Court of Appeal, and all Heads of Division. Outside the judiciary, selection committees are required to consult the Lord Chancellor, and for the appointment of the Lord Chief Justice also the First Minister for Wales.¹⁴³ In practice, the Lord Chancellor is often consulted at multiple points during the process. At the outset, a selection committee will discuss its proposed selection

¹³⁹Constitutional Reform Act 2005, ss 65-66, 70(2), 79(2).

¹⁴⁰Gee and others (n 4) 184.

¹⁴¹<<https://jac.judiciary.gov.uk/vacancies/COA17>>.

¹⁴²<<https://jac.judiciary.gov.uk/vacancies/LCJ2017>>.

¹⁴³Judicial Appointments Regulations 2013, reg 6.

criteria with the Lord Chancellor. The terms of such discussions are inevitably influenced by the Lord Chancellor's power to impose additional criteria. In 2017, the selection committee for the position of Lord Chief Justice announced that candidates would be "expected to be able to serve for at least 4 years", which in view of the judicial retirement age of 70 reportedly effectively excluded candidates aged 66 or older.¹⁴⁴ The then Lord Chancellor, Liz Truss, had insisted on a period of four years despite the protestations of leading judges. One of the judges affected was the presumed front-runner, Sir Brian Leveson, a Court of Appeal judge aged 67 who is best known to the wider public for leading an inquiry into press conduct and infringements of privacy. According to *The Guardian*, there was "speculation that ministers might be anxious about Leveson, with his experience of confronting the media, taking the top position—an outcome said to be likely to provoke tabloid animosity".¹⁴⁵ However, there is no evidence that this was the Lord Chancellor's intention. It is not uncommon for selection exercises to stipulate that candidates should be in a position to offer a reasonable period of service,¹⁴⁶ and the selection guidance in this case referred to the need for a new Lord Chief Justice to serve for long enough to "deliver significant Court reforms and to steer the judiciary through our exit from the EU".¹⁴⁷

Politicians have been less successful in getting their way at the final stage of the selection process. The Lord Chancellor has the same powers as in High Court appointments to accept a committee's selection, reject it, or require its reconsideration. To date, there has only been one instance in which a Lord Chancellor has declined to accept a selected candidate.¹⁴⁸ In 2010, a selection committee for the position of President of the Family Division recommended the appointment of Sir Nicholas Wall, a judge who had publicly criticised government plans for reforming the family justice system and its funding. The Lord Chancellor, Jack Straw, initially asked the committee to reconsider its selection. When the committee reselected Wall, he gave in and the appointment was made. It is difficult to form an opinion about the rights and wrongs of this incident since the memoranda exchanged between the committee and the Lord Chancellor remain confidential. A leading commentator has suggested that Jack Straw may have had legitimate grounds for preferring another candidate who was better suited to the administrative responsibilities of President of the Family Division and more willing to co-operate with the implementation of reforms.¹⁴⁹ However, senior judges had publicly expressed their support of Wall, and Straw may have considered that it would be politically

¹⁴⁴ <<https://jac.judiciary.gov.uk/vacancies/LCJ2017>>.

¹⁴⁵ Owen Bowcott, "New lord chief justice must be 65 or younger to navigate Brexit" (24 February 2017).

¹⁴⁶ See text to n 86 in relation to the period of service required in the case of new High Court judges.

¹⁴⁷ *Ibid.*

¹⁴⁸ Gee and others (n 4) 186; Graham Gee, "Rethinking the Lord Chancellor's role in judicial appointments" (2017) 20 *Legal Ethics* 4, 12-14.

¹⁴⁹ *Ibid.* 12.

damaging to be seen to riding roughshod over strongly expressed views of the judiciary.¹⁵⁰ Moreover, the committee had effectively painted the Lord Chancellor into a corner by reselecting Wall, for if Straw rejected this recommendation he would have exhausted his powers and would have been obliged to accept the next candidate put forward by the committee.

The tussle that preceded the appointment of Sir Nicholas Wall illustrates just how limited the Lord Chancellor's powers of non-acceptance are, both in law and in practice. The legal formula, as in the case of High Court appointments, is that the Lord Chancellor may only reject a committee's selection if he is of the opinion that the selected candidate "is not suitable for the office".¹⁵¹ It would be a bold move for a Lord Chancellor to take this view of a candidate selected by a body made up of distinguished judges and experienced lay Commissioners. Indeed, for the Lord Chancellor to reject a sitting judge who has been selected for promotion to the Court of Appeal as "not suitable" for the office might be tantamount to a breach of respect for judicial independence because of what such a rejection would imply about the track record of the judge concerned. A possible exception would be if the Lord Chancellor's reservations were shared by senior judicial consultees (as discussed above in relation to High Court appointments¹⁵²), but even then a refusal to accept a selected candidate might infringe the principle of individual judicial independence if it was based on the judge's record of rulings and decisions. The case of Sir Nicholas Wall was slightly different because the Lord Chancellor's reservations centred on the approach which Wall was likely to take to his managerial and administrative responsibilities as President of the Family Division.¹⁵³ Moreover, it is understood that there was another applicant with more relevant experience of these matters and who had not taken such a hostile stance towards the government's proposals for reforming the family courts.¹⁵⁴ If these were indeed the circumstances, it is understandable why Jack Straw considered that the conditions for requiring reconsideration—either "not enough evidence that the person is suitable for the office" or "evidence that the person is not the best candidate on merit"—had been met.¹⁵⁵ These grounds are clearly broader than the grounds for rejection. However, since a resolute selection committee may respond to a request for reconsideration by reselecting the same candidate, as occurred in this case, there are also limits to what the Lord Chancellor can expect to achieve by exercising this power.

Appointments to the UK Supreme Court

Justices of the UK Supreme Court are appointed by *ad hoc* selection commissions, which have much in common with the *ad hoc* selection committees just discussed.

¹⁵⁰ Ibid 13-14.

¹⁵¹ Judicial Appointment Regulations 2013, regs 9(1), 15(1), 27(1).

¹⁵² See text to n 125.

¹⁵³ Gee (n 148) 13-14.

¹⁵⁴ Ibid 13.

¹⁵⁵ Judicial Appointment Regulations 2013, reg 27(2).

The membership of the commission is governed by provisions of the Constitutional Reform Act 2005 as amended in 2013, and by regulations made under the Act.¹⁵⁶ Each commission consists of five members. Two seats are reserved for judges, one of whom will normally be the President of the Supreme Court, who chairs the selection commission. However, the President may not sit on a commission to choose the next President. The remaining three seats are filled by one member from each of the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. The chair of the selection commission receives nominations from these three bodies, and has to ensure that at least two of the three individuals chosen to serve are lay persons. A requirement to consider the need for gender and ethnic diversity also applies.

The Constitutional Reform Act provides that Supreme Court Justices are to be selected “on merit”,¹⁵⁷ which is slightly different from the “solely on merit” basis for judicial selection in England and Wales. The distinction leaves room for a further objective which reflects the multi-jurisdictional nature of the UK Supreme Court. The Act stipulates that selection commissions “must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom”.¹⁵⁸ It is interesting to note that this somewhat vague statutory requirement has been applied so as to mirror a more precise convention that had been followed with regard to the Judicial Committee of the House of Lords. The longstanding convention was that among the Law Lords there would always be at least two judges appointed from the Scottish courts and a practice also developed of appointing at least one judge from the courts of Northern Ireland.¹⁵⁹ The last Law Lords automatically became members of the Supreme Court, and when the Court lost a Scottish Justice in 2011 and 2013 they were each replaced by another judge from the Scottish court system. One wonders whether it was considered insufficient to have only one Scottish Justice, which would arguably have satisfied the statutory requirement, although there is no way of knowing whether the selection commission on either occasion would not have made the same decision regardless of the jurisdictional origin of the candidates.¹⁶⁰

¹⁵⁶ Constitutional Reform Act 2005, s 25-27B and Schedule 8 and Supreme Court (Judicial Appointments) Regulations 2013.

¹⁵⁷ Constitutional Reform Act 2005, s 27. In 2013, an “equal merit” proviso was introduced to enable the promotion of judicial diversity. For barristers and solicitors from England and Wales to be eligible for appointment to the Supreme Court, the period of post-admission legal experience, broadly defined, is 15 years. Alternatively, two years’ service in the High Court or Court of Appeal provides an alternative basis for eligibility.

¹⁵⁸ Constitutional Reform Act 2005, s 27(8).

¹⁵⁹ First Report of the House of Lords Select Committee on the Constitutional Reform Bill 2004, HL Paper No 125-I (24 June 2004) para 166.

¹⁶⁰ When the Supreme Court lost its first Scottish Justice, Lord Rodger, who died in office in 2011, the vacancy announcement quoted s 27(8) of the Constitutional Reform Act 2005 but also stated that ‘By convention there have for some years always been two Scottish Law Lords; and subsequently Justices of the Supreme Court.’ See <https://www.supremecourt.uk/docs/justices_adv_2011_07.pdf>.

Selection commissions determine their own procedure, within the framework of the Constitutional Reform Act. A commission is required to have regard to any guidance issued by the Lord Chancellor “as to matters to be taken into account” in the selection.¹⁶¹ Like the *ad hoc* selection committees in England and Wales, the Supreme Court commissions have developed a structured and evidence-based process very similar to that of the JAC. Applicants in the 2017 selection exercise were asked to submit a statement outlining how they meet the selection criteria, together with evidence of their suitability in the form of three judgments accompanied by a brief explanation of why they have chosen them. Applicants who were not serving judges could submit three other pieces of written work such as articles or legal opinion. Famously, Lord Sumption was elevated directly from the Bar to the Supreme Court in 2011, the first such appointment at the highest judicial level since the 1940s. However, he did have prior judicial experience as a Deputy High Court judge and as a part-time appeal judge in the Channel Islands. The 2017 selectors seem to have attempted to go further, as the published information pack strongly encouraged candidates from other professional backgrounds, such as legal academics, to apply.¹⁶² It highlighted the benefits of gaining experience of the application process for those who might be willing to apply again for further vacancies expected in 2018.¹⁶³ The Court had previously offered a judge-shadowing programme for prospective applicants.¹⁶⁴ In the end, all the appointments in this selection exercise were made from the Court of Appeal. Nevertheless, the selectors’ approach contrasts with the more conservative approach of Court of Appeal selection committee discussed above. It is not really surprising that selectors for the highest court do not insist on judicial experience as strongly as those for an intermediate appellate court. The Supreme Court hears fewer cases than the Court of Appeal but has a particular responsibility for deciding whether to develop the law and if so in what direction. Legal academics may have more to offer in that setting than they would as judges of the Court of Appeal, though it is probably unwise to generalise.

After applications have been received, selection commissions obtain further information about candidates in the usual ways. They request references from each applicant’s two referees, hold interviews, and carrying out consultations as required under the Constitutional Reform Act. All Justices of the Supreme Court must be consulted, as well as judges holding certain leadership positions in England and Wales, Scotland and Northern Ireland.¹⁶⁵ In the political realm, the selection commission

¹⁶¹ Constitutional Reform Act 2005, s 27(9).

¹⁶² <<https://www.supremecourt.uk/docs/judicial-vacancies-2017-information-pack.pdf>>.

¹⁶³ *Ibid.*

¹⁶⁴ This was announced by the President of the Court, Lord Neuberger, in his Bar Council Law Reform Lecture, ‘The Role of the Supreme Court Seven Years On—Lessons Learnt’ (21 November 2016) <<https://www.supremecourt.uk/docs/speech-161121.pdf>>, para 55. See also <<https://www.supremecourt.uk/news/visits-for-potential-candidates-for-forthcoming-judicial-vacancies.html>>.

¹⁶⁵ Supreme Court (Judicial Appointments) Regulations 2013, reg 18(1).

is required to consult the Lord Chancellor, the First Minister in Scotland, the First Minister for Wales and the Northern Ireland Judicial Appointments Commission.¹⁶⁶ It has been suggested that the consultations with senior judges can have significant impact on selection decisions. In a possible illustration of this, Lord Sumption's successful application to join the Supreme Court came at the second attempt, and his first application in 2009 is reported to have been scuppered by objections from some judicial consultees.¹⁶⁷

When a selection commission makes its recommendation for appointment to the Supreme Court, the Lord Chancellor has powers to accept, reject or require reconsideration.¹⁶⁸ Leading commentators argue that it is difficult to imagine that the Lord Chancellor would do anything other than accept a commission's recommendation, given the likely stature of the selected candidate.¹⁶⁹ However, there may be scenarios in which a Lord Chancellor could resist such a course. In this context, it is significant that the Lord Chancellor may require reconsideration if there is not enough evidence that appointing the recommended candidate would result in the Supreme Court Justices possessing sufficient knowledge, between them, of the law of all the constituent parts of the UK.¹⁷⁰ A selection commission might decide to apply the old convention that there should be at least two Scottish judges on the bench at all times and on this basis select a Scottish candidate in order to maintain that number. Such a choice might clash with the views of the judicial consultees if they considered a non-Scottish applicant to be the strongest candidate. In the inverse of this scenario, a commission might select an English judge in the face of objections from the Scottish First Minister who believed that the old convention should be followed and a second Scottish judge appointed. In either case, the Lord Chancellor could invoke the dissenting view of one or other subset of the consultees as a reason for requiring the commission to reconsider its recommendation. Should the commission select the same candidate again, the Lord Chancellor must accept that selection unless the candidate is not "suitable" for appointment, which is admittedly a narrow ground, particularly since a Lord Chancellor who invokes that ground is required to provide the commission with reasons for doing so. So a resolute commission is likely to get its way in the end.

Do the ad hoc selection mechanisms provide appropriate accountability?

As discussed earlier in this chapter, various measures are in place to enable the JAC to be held accountable for its High Court selection work, including the publication of an annual report and statistical bulletins, a financial and business planning relationship between the commission and the Ministry of Justice, and occasional

¹⁶⁶ It was probably too difficult to identify a single minister to be consulted in Northern Ireland, in view of the history of sectarian conflict and more recently power-sharing arrangements which have inevitably complicated Executive decision-making.

¹⁶⁷ Gee and others (n 4) 218.

¹⁶⁸ Supreme Court (Judicial Appointments) Regulations 2013, reg 18(1).

¹⁶⁹ Gee and others (n 4) 220.

¹⁷⁰ Supreme Court (Judicial Appointments) Regulations 2013, reg 21(2)(c).

appearances by the JAC Chairman and other senior figures before parliamentary committees.¹⁷¹ Most of these measures are difficult to apply to the *ad hoc* bodies.¹⁷² Firstly, because they are not permanent and their membership changes from year to year, it is not reasonable to expect a selection committee or commission to answer for the actions of its predecessors or to produce a continuous series of reports. Moreover, parliamentary committees may have difficulty in holding to account the senior judges who seem to have such a significant role in the *ad hoc* bodies.¹⁷³ Yet the need for accountability is arguably greater than at High Court level, since appellate courts determine cases of great public interest and have responsibility for developing the law, while the choice of Lord Chief Justice and other judicial leaders has implications for court management and the administration of justice more broadly.

Commentators from civil society and academia have suggested two main ways of making the appellate and leadership selection process more accountable. One is to replace the *ad hoc* bodies with a permanent institution, a “senior judiciary JAC”.¹⁷⁴ The other is to give politicians a greater role in the selection process. The two ideas have sometimes been combined, for example in a proposal that one third of the membership of the “senior judiciary JAC” should be parliamentarians, representing the three largest parties in Westminster.¹⁷⁵ Alternatively, parliamentarians could be included as members of the existing *ad hoc* bodies, as the incoming President of the Supreme Court recently suggested.¹⁷⁶ The role of the Lord Chancellor could also be

¹⁷¹Text to nn 67-75.

¹⁷²One area in which the *ad hoc* bodies come close is in their accountability to individual applicants. Like the JAC, they provide feedback to unsuccessful candidates. The actions of *ad hoc* selection committees for the Court of Appeal and judicial leadership posts in England and Wales may also in principle be challenged before the Judicial Appointments and Conduct Ombudsman, though the Ombudsman does not have jurisdiction over UK Supreme Court appointments.

¹⁷³Although judges do appear before parliamentary committees from time to time, concerns about judicial independence may constrain how they are questioned or how they choose to respond

¹⁷⁴Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards an independent, accountable and diverse senior judiciary* (Centre Forum 2012) 65. A similar idea is proposed by JUSTICE (n 15) 30-32. The alternative of simply expanding the functions of the existing JAC to make it responsible for the Court of Appeal and leadership positions in England and Wales is advocated by Graham Gee and Erika Rackley, “Challenging the JAC” (UK Constitutional Law Association blog, 27 September 2017) <<https://ukconstitutionallaw.org/2017/09/27/graham-gee-and-erika-rackley-challenging-the-jac/>>. Gee and Rackley exclude the UK Supreme Court from their proposal, presumably because of the clear necessity representatives of Scotland and Northern Ireland should participate in Supreme Court selection decisions. One of the challenges of designing a body to select both for the UK Supreme Court and the England and Wales appointments not currently entrusted to the JAC is how to achieve appropriate balance between the various jurisdictions.

¹⁷⁵Paterson and Paterson (n 174) 66.

¹⁷⁶In her public lecture, “Judges, Power and Accountability: Constitutional Implications of Judicial Selection” to Constitutional Law Summer School, Belfast (11 August 2017) <<https://www.supremecourt.uk/docs/speech-170811.pdf>>, Baroness Hale called for the selection committees for the Supreme Court and judicial leadership positions to include one senior government politician and one senior politician from the official opposition.

expanded by requiring the selection bodies to present that minister with a shortlist of approved candidates from which to choose, instead of just a single candidate.¹⁷⁷

Proponents of these changes point to several possible benefits. Entrusting selection responsibilities to permanent bodies, they argue, would enable more than just the production of annual reports and statistics. It would also equip the selection body to take a longer-term view of the challenges facing it, and to develop more effective strategies to tackle persistent problems such as a lack of judicial diversity, for example through engaging in succession planning which is a common feature of recruitment practice in other sectors.¹⁷⁸ It is worth recalling that one of the reasons the government gave in 2003 in the consultation paper on transferring the judicial selection functions of Lord Chancellor's Department to an independent commission was that, over time, the members of such a commission would be able to come to grips with the main judicial selection challenges.¹⁷⁹ A permanent body seems better suited to that task than the present *ad hoc* committee system.

The benefits of a greater involvement of politicians are more contentious. Some argue that politicians may be more responsive to the need for a diverse judiciary than the senior judges whose influence has been so significant in the *ad hoc* bodies.¹⁸⁰ Part of the argument is that, unlike judges, politicians are democratically accountable and there is now considerable public interest in judicial diversity.¹⁸¹ However, any additional involvement of politicians in the selection process is still likely to be seen as undermining the government's commitment in 2003 to eliminate the potential for government patronage in the judicial appointment system. A general reluctance to do so was evident in 2012-2013, the last time Parliament revisited and amended the judicial appointment framework.¹⁸² A modest proposal by the government which would have seen the Lord Chancellor given a seat on some *ad hoc* committees was rejected.¹⁸³ There was also some discussion of another limited form of exposure to the political process, in the form of requiring judges-elect to appear before a parliamentary committee prior to being formally appointed. The House of Lords Constitution Committee dismissed this idea as a "beauty parade".¹⁸⁴

Despite the lack of support in official circles, the case for more contact between politicians and judges or judicial candidates continues to be made. Professor Graham Gee argues that, paradoxically, the independence of the judiciary may be undermined if politicians are almost entirely excluded from the appointments

¹⁷⁷ Gee (n 124) 14-19.

¹⁷⁸ JUSTICE (n 15) 30-32.

¹⁷⁹ See text to nn 37-41 above.

¹⁸⁰ JUSTICE (n 15) 30-32; Gee (n 124) 15-16.

¹⁸¹ See text to nn 192-199 below.

¹⁸² Erin Delaney, "Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom" (2016) 14 *International Journal of Constitutional Law* 1.

¹⁸³ Gee and others (n 4) 187.

¹⁸⁴ House of Lords Select Committee on the Constitution, *Judicial Appointments* Twenty-Fifth Report of Session 2010-12 HL, (HL Paper 272, 2012) 61-62.

process.¹⁸⁵ He warns that a lack of familiarity between judges and politicians may make the latter less willing to accept court decisions which frustrate their policy objectives, and more likely to engage in intemperate criticism of the judiciary, which, in turn, may damage the public trust which an independent judiciary requires in order to uphold the rule of law. This concern is one of the arguments underpinning his proposal to give the Lord Chancellor a more meaningful role by enabling selection from a shortlist, and he notes that the potential for patronage is limited if that shortlist has been drawn up by an independent commission.¹⁸⁶ There is not enough space in the present chapter to engage fully with this argument, which would require the difficult exercise of comparing different kinds of risks: on the one hand, the risks that may follow from politicians' detachment from the judiciary, and on the other hand, the risks associated with their excessively robust engagement. In UK debates, the latter scenario is often associated with acrimonious judicial confirmation proceedings that have taken place in the US Senate. Professor Alan Paterson and Chris Paterson decry the 'reductive tendency to look only as far as the Senate confirmation hearing in the USA'.¹⁸⁷ They point out that each system has its own dynamics and that, crucially, the Senate is confronted with a nominee who is the personal choice of the President, exercising an almost untrammelled discretion which no-one in the UK is proposing should be given to politicians.¹⁸⁸ However, it is also worth noting that UK judges, operating under parliamentary sovereignty, wield far less power than their American counterparts although developments ranging from the influence of European human rights law to common law constitutionalism may be eroding the difference. Somehow, despite these developments, UK judges have until now largely avoided being identified with one or other political party as occurs all too often in American politics. Keeping politicians out of the judicial appointment process completely appears to be a necessary strategy in the effort to maintain that desirable state of affairs, although it is unclear how long it can last.

V JUDICIAL DIVERSITY: DEBATES AND STRATEGIES

To what extent has the judiciary become more diverse?

The leading criticism of the judicial appointment system remains that it has not yet produced a sufficiently diverse judiciary. Much of this criticism, and most of the statistical monitoring, has focused on the underrepresentation of women and members of racial or ethnic minorities. This chapter will also focus on these dimensions of diversity rather than others such as sexual orientation, religious belief or socio-economic background. As discussed in the first part of this chapter, in the early 2000s the government had argued that establishing an independent JAC would help to attract more female and minority applicants than had hitherto

¹⁸⁵ Gee (n 124) 16-18.

¹⁸⁶ *Ibid* 18.

¹⁸⁷ Paterson and Paterson (n 174) 6.

¹⁸⁸ *Ibid* 53-55.

benefited from the tap on the shoulder system or the very recent introduction of an application procedure.

Today, a decade after the JAC's first full year of operation in 2007, the picture is one of relatively slow progress, with white men still constituting a very large majority of the higher judiciary. Table 1 illustrates the growth in the number of female judges relative to the final years of the tap on the shoulder system. The Court of Appeal and the Supreme Court are included in this table since the diversity of the higher courts is commonly discussed together:

Table 1
Female judges in the higher courts (April 2017)¹⁸⁹

	1995	2007	2017
Supreme Court / House of Lords	0	1 (8%)	1 (8%)
Court of Appeal	1 (3%)	3 (8%)	9 (24%)
High Court	7 (7%)	10 (9%)	21 (22%)

The table indicates that progress towards gender balance in the High Court and the Court of Appeal has accelerated somewhat since the Constitutional Reform Act 2005 came into operation. However, in the Supreme Court it remained stalled for a very long time. Baroness Brenda Hale of Richmond, a former legal academic who later became a judge of the High Court and then the Court of Appeal, had been elevated to the House of Lords in 2004. She was accordingly transferred to the Supreme Court in 2009. Thereafter, no woman was appointed to the Supreme Court until Lady Justice Jill Black in July 2017. This important landmark coincided with the announcement that Baroness Hale had been appointed as the next President of the Supreme Court in October 2017 to succeed Lord Neuberger of Abbotsbury.

The figures for Black Asian and Minority Ethnic (BAME) judges remain starkly low in all of the above courts. The first BAME judge appointed to the High Court was Dame Linda Dobbs in 2004. There are currently two BAME judges in the High Court.¹⁹⁰ The first ever appellate judge not from a white background will be Sir Rabinder Singh, a High Court judge whose promotion to the Court of Appeal was announced in July 2017. In England and Wales, 14% of the population is estimated to have a racial or ethnic background within the broad BAME category.¹⁹¹

Debates about judicial diversity

As discussed above, widespread disquiet about the lack of judicial diversity predates the Constitutional Reform Act 2005 and was one of the main reasons why the government sought to abolish the Lord Chancellor's tap on the shoulder system.

¹⁸⁹ Figures extracted from Table 1 in JUSTICE, *Increasing Judicial Diversity* (April 2017) 15.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* 7.

Since then, judicial diversity has remained a live issue, not only within the legal community but also in mainstream politics.

Having secured the passage of the Constitutional Reform Act, the Labour Party did not rest on its laurels. In a 2008 White Paper, the government raised the possibility of giving the Lord Chancellor a power to set diversity targets for judicial appointments.¹⁹² Although this idea was not implemented, the government later established an independent Advisory Panel on Judicial Diversity, which published its report shortly before Labour left office following the May 2010 general election.¹⁹³ Since then, the party has taken further action, notably commissioning a review of judicial diversity issues by Sir Geoffrey Bindman QC and Karon Monaghan QC in 2014.¹⁹⁴ The Bindman-Monaghan report recommended the introduction of quotas to promote judicial diversity, a policy which Labour included in its 2015 election manifesto. The Conservatives, while not historically known for their advocacy of judicial diversity measures, were the lead partners in the 2010-2015 coalition with the Liberal Democrats which saw a significant package of diversity-oriented amendments made to the Constitutional Reform Act in 2013.¹⁹⁵ More recently, Liz Truss, a minister in Theresa May's Conservative government and the first woman to hold the post of Lord Chancellor, used her brief tenure in office to speak out on the issue.¹⁹⁶ These interventions by leading politicians suggest a broad consensus that more needs to be done to promote judicial diversity. Further evidence that it is seen as a pressing issue may be found in the work of backbench parliamentary committees¹⁹⁷ and civil society organisations, including most recently the report of a Working Party on Judicial Diversity convened by JUSTICE, a cross-party legal organisation, which was published in April 2017.¹⁹⁸ The academic literature on judicial diversity is extensive.¹⁹⁹

Amid the intensity of the debate and campaigning for reform, there is still considerable disagreement not only about what the most effective strategies for promoting judicial diversity are, but also about the underlying reasons for pursuing them. It is impossible within the confines of this chapter to attempt more than a basic summary of the debates. Nonetheless, the question of underlying justifications for pursuing judicial diversity is an appropriate starting point. The recent JUSTICE report helpfully identifies the three leading justifications for judicial

¹⁹² *The Governance of Britain—Constitutional Renewal* (Cm 7342-I, March 2008) para 125-129.

¹⁹³ Report of the Advisory Panel on Judicial Diversity 2010 <www.judiciary.gov.uk/publications/advisory-panel-recommendations/>.

¹⁹⁴ *Judicial Diversity—Accelerating Change* (November 2014) <<http://uksblog.com/wp-content/uploads/2014/11/Judicial-Diversity-Accelerating-Change.pdf>>.

¹⁹⁵ The amendments followed a Ministry of Justice consultation report, *Appointments and Diversity* CP 19/2011 (11 May 2012).

¹⁹⁶ "Women in the Legal Industry", Speech to the Spark21 Conference (November 2016) <<https://www.gov.uk/government/speeches/women-in-the-legal-industry>>.

¹⁹⁷ See House of Lords Select Committee on the Constitution, *Judicial Appointments* Twenty-Fifth Report of Session 2010-12 HL, (HL Paper 272, 2012).

¹⁹⁸ *Increasing Judicial Diversity* (April 2017).

¹⁹⁹ See, for example, Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017).

diversity as being based on “fairness”, and the “quality” and “legitimacy” of the judiciary as a whole.²⁰⁰ This is a useful framework for analysis because it follows a similar pattern to other leading contributions to the debate. JUSTICE’s threefold argument for judicial diversity is broadly in line with the analysis put forward in the 2010 Advisory Panel report and the 2014 Bindman-Monaghan report. A contrasting set of views was given by Lord Sumption in a 2012 lecture entitled “Home Truths about Judicial Diversity”.²⁰¹ Lord Sumption’s lecture is an important contribution to the debate, not only because of his ascent from the Bar to the Supreme Court bench in 2011, but more pertinently because he served as an inaugural member of the JAC between 2006 and 2010. Lord Sumption agreed that the Constitutional Reform Act 2005 and the development of an evidence-based judicial selection process have significantly improved the fairness of the system and should lead to a more diverse judiciary in the longer term.²⁰² At the same time, Lord Sumption strongly resisted arguments for further changes to the appointment system that invoked the justifications of improving the quality or legitimacy of the bench. This clash of ideas will be examined below in the context of the various reforms that have been proposed.

Broadening judicial diversity strategies beyond the appointment system

Over the past decade, arguably a more significant development than the still controversial debate about justifications has been the practical realisation that, in order to be effective, any diversity strategy needs to have a broader focus than just the judicial selection process. It is now generally accepted by reformers and sceptics alike that the selection process is “no more than part of the problem”, as Lord Sumption acknowledged.²⁰³ It should perhaps have been obvious from the start that, contrary to what the government’s 2003 consultation paper appeared to suggest, the establishment of the JAC would not prove to be a panacea for the lack of judicial diversity. However, expectations had been raised, and this meant that initially the JAC itself received a great deal of criticism for the failure to make rapid strides towards a diverse judiciary at the outset.²⁰⁴ Professors Kate Malleson and Lizzie Barmes have memorably described a good deal of the early criticism of the JAC as “soft target radicalism” for failing to engage more fully with practices and attitudes in other parts of the legal community that were holding back progress towards judicial diversity.²⁰⁵

²⁰⁰JUSTICE (n 198) 5.

²⁰¹Bar Council Law Reform Lecture, 15 November 2012, <<https://www.supremecourt.uk/docs/speech-121115-lord-sumption.pdf>>.

²⁰²Ibid, 5-6.

²⁰³Sumption (n 201) 1.

²⁰⁴See, for example, Marcel Berlins, ‘Judicial Diversity Goes Into Reverse’ *The Guardian* (London, 19 May 2008).

²⁰⁵“The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity” (2011) 74 *Modern Law Review* 245.

The report of the Advisory Panel on Judicial Diversity in 2010 played an important part in broadening the scope of concrete measures to advance judicial diversity.²⁰⁶ The Advisory Panel based its analysis on the concept of a “legal and judicial career”. This involved taking a much longer view than just the selection process itself, and paying attention for example to the early moments in which someone sees the possibility of becoming a lawyer and later a judge, or later times when the understanding a person has formed about the culture and working conditions of judicial life begins to shape his or her decision whether apply for judicial office.²⁰⁷ If the dynamics that work against diversity at these various stages could be tackled, an increased awareness of the existence and viability of this career path would encourage more women and minorities to embark on it.

Some of the Advisory Panel’s total of 53 recommendations were implemented when the Constitutional Reform Act was amended in 2013, resulting in changes such as the introduction of the “equal merit” provision and the transfer of selection responsibilities for the stepping-stone post of Deputy High Court Judge from the Lord Chief Justice to the JAC. Most of these legislative changes have already been discussed.²⁰⁸ The Advisory Panel’s recommendations also called for changes in policy and practice. A Judicial Diversity Task Force was established to bring together all the institutions and organisations that had been identified as able to influence judicial diversity, ranging from the Ministry of Justice and the JAC to the legal professional bodies, with a view to co-ordinating their work towards fulfilling the Advisory Panel’s recommendations. The Task Force met regularly until 2014, publishing annual reports which provided the public with some transparency over the extent of progress.²⁰⁹ Since then, meetings have continued under the auspices of the Judicial Diversity Forum. The various organisations and institutions now publish their own diversity plans and reports. In the case of the Ministry of Justice and the judiciary, this work responds to obligations imposed by a 2013 amendment to the Act, which imposed an explicit duty on both the Lord Chancellor and the Lord Chief Justice to “take such steps as that office-holder considers appropriate for the purpose of encouraging judicial diversity”.²¹⁰ Previously, it was only the JAC that was obliged to “have regard to the need to encourage diversity in the range of persons available for selection for appointments”.²¹¹

Since this chapter focuses on judicial appointments there is only scope for a brief review of initiatives outside the immediate context of judicial selection. Thus, it is not possible to describe all the outreach programmes that are now aimed at school pupils, students and lawyers with a view to encouraging members of under-represented groups to consider a judicial career. In brief, notwithstanding these efforts, the structure and career trajectories of the legal profession continue to give

²⁰⁶ See n 193.

²⁰⁷ Advisory Panel Report (n 193) para 4.

²⁰⁸ See text to n 89 and nn 113-115.

²⁰⁹ The reports are archived on the JAC website, <https://jac.judiciary.gov.uk>.

²¹⁰ Constitutional Reform Act 2005, s 137A.

²¹¹ Constitutional Reform Act 2005, s 64(2).

rise to significant diversity concerns. Traditionally, High Court judges have been selected from among the subset of senior barristers who have been awarded the status of Queen’s Counsel (QC). Even today, 97% of High Court judges are former QCs but women comprise only 14% of QCs, and BAME minorities 6%.²¹² It is now abundantly clear that the gender imbalance in particular cannot be simply attributed to the time it takes to achieve QC status, since women have made up a larger proportion of new barristers than men each year for several decades.²¹³ A working culture that features long, irregular hours that are difficult to combine with child-rearing still appears to be one of the leading reasons why female barristers are more likely to leave private practice in preference for other forms of legal employment. While the Bar grapples with these challenges, the JAC has been urged to look beyond the traditional pool of QCs to other categories of lawyers with a more diverse demography, including solicitors, lower court and tribunal judges, government lawyers and legal academics. The JAC has carefully reformulated its selection criteria, as discussed above, to make it clear that lawyers from these categories should see themselves in contention for High Court positions. Yet so far very few have been appointed.

At the other end of the “legal and judicial career” is the working life of a judge. The Advisory Panel called for a number of changes to judicial working conditions, and also identified “widespread myths about the judicial culture that are deterring good candidates from underrepresented groups from coming forward”.²¹⁴ It is not difficult to understand why women and minority lawyers might have reservations about an overwhelmingly white and male working environment, and particularly in the small and tight-knit ranks of the High Court and appellate judiciary. The Panel called for “a proactive campaign of mythbusting”²¹⁵ to counteract such perceptions. The judiciary’s efforts to do so now include a number of initiatives recommended by the Panel, including work-shadowing opportunities, a mentoring scheme and application workshops targeted at potential candidates who are women, BAME or demonstrate social mobility.²¹⁶ The Panel also recommended that induction and on-the-job training be strengthened and tailored to the circumstances of a range of new judges who might not all have the traditional QC background,²¹⁷ arguing that “[t]he provision of high quality tailored training, particularly in the practical skills of judging and continuing education is likely to encourage lawyers from underrepresented groups to apply for judicial appointment as it will help to reassure those who lack the confidence to apply that they will receive tailored training and support once appointed.”²¹⁸ The Judicial College, formerly the Judicial

²¹²JUSTICE (n 198) 11.

²¹³Shetreet and Turenne (n 3) 123.

²¹⁴Advisory Panel Report (n 193) para 44.

²¹⁵Ibid para 9.

²¹⁶See Judicial Diversity Committee of the Judges’ Council, *Report on Progress and Action Plan 2016-17* (April 2017).

²¹⁷Advisory Panel Report (n 193) para 130.

²¹⁸Advisory Panel Report (n 193) para 157.

Studies Board, has been hampered by the restrictive financial climate of government austerity in the years since the Advisory Panel's report. However, in the 2017 High Court selection exercise, it was possible to advertise training courses for new judges, which is a sign of progress.²¹⁹

A remarkable measure recommended by the Advisory Panel and enacted in 2013 has been the extension of salaried part-time working right up to the level of the Supreme Court. This expansion of an existing scheme in the lower courts was recommended by the Advisory Panel as a means of making judicial work more attractive to applicants with child-rearing or caring responsibilities, partly in recognition of the fact that women are still more likely than men to undertake such roles.²²⁰ However, the only application of these provisions to date in the higher judiciary has been a job-share arrangement involving two judges of the High Court.²²¹

Judicial selection: calls for assessing merit collectively, and quotas

Notwithstanding the broadening of diversity strategies, a considerable part of the discourse has continued to focus on the question of how selection decisions could be made differently to produce a more diverse bench. Two proposals stand out in this debate. The first would require selection bodies to go beyond the assessment of candidates' individual strengths and weaknesses and also consider how each candidate would affect the collective attributes, including diversity, of the court they would join. The second proposal is to introduce quotas designed to remedy imbalances in the areas of diversity that are of greatest concern.

The first of these two proposals has so far attracted more support. In 2010, the Advisory Panel on Judicial Diversity cautiously observed that it was valuable for a court to have judges "from a wide range of backgrounds and life experiences", particularly "where there is scope for the exercise of judicial discretion or where public interest considerations are a factor",²²² which is a feature of higher courts that have responsibility for developing the law. The Panel did not fully draw out the implications of this insight for selection decisions, which have since been articulated more forcefully by others, including most recently the JUSTICE Working Party on Judicial Diversity.²²³ The idea is far from new, and has also long had judicial support. More than 10 years ago, Lord Bingham of Cornhill, a distinguished judge who held a series of judicial leadership positions in 1990s and 2000s, made the point that merit "is not self-defining".²²⁴ With respect, Lord Bingham was clearly right since the meaning of merit must always be sensitive to the role or function for which a person is being selected. Lord Bingham further argued that the assessment of merit

²¹⁹ <<https://jac.judiciary.gov.uk/041a-high-court-judge-2017-track-1-information-page>>.

²²⁰ Advisory Panel Report (n 121) para 174-177.

²²¹ JUSTICE (n 198) 71.

²²² Advisory Panel Report (n 121) para 26.

²²³ JUSTICE (n 198) 21-23. See also Paterson and Paterson (n 174) 48-51; Bindman and Monaghan (n 194) 20-22.

²²⁴ "The Law Lords: Who has Served" in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords* (Oxford University Press) 126.

in a judicial selection process “directs attention to proven professional achievement as a necessary condition, but also enables account to be taken of wider considerations, including the virtue of gender and ethnic diversity”.²²⁵ This argument introduces the idea of collective assessment of merit. Lord Bingham was writing about how the Constitutional Reform Act 2005 should be applied when selecting Justices of the UK Supreme Court. Others take a narrower view of the Act, arguing that it requires “merit” to be assessed individually for each applicant.²²⁶ Certainly, neither the JAC nor any of the *ad hoc* selection bodies has ever stated that it takes a collective approach to the assessment of merit under the Act.

If arguments about the interpretation of the Constitutional Reform Act are left to one side, the more interesting question is whether it would be desirable to allow collective considerations of bench diversity in the context of judicial selection (if it is, the Act could be appropriately amended). On this underlying issue there is no consensus either. In his “Home Truths” lecture, Lord Sumption insisted that the ability of court to adjudicate could not depend on its members sharing the life experience of the litigants, not least because most High Court cases are heard by a single judge.²²⁷ In his view, the claim that diversity improved judicial decision-making was only intelligible in relation to courts which sat in panels. Even then, the gender and racial or ethnic background of judges would make no difference, he argued, to their ability to determine questions of law. However, by 2017, the JUSTICE Working Party was able to cite behavioural science research that has provided evidence of multiple ways in which judicial decision-making stands to benefit from diversity:

[D]ifferent but complementary perspectives are better for collective decision-making than homogenous excellence. ... A breadth of backgrounds is important in the higher courts sitting as panels—but judges sitting alone also benefit from the wisdom of their colleagues, whether through personal contact or reading their decisions. Conversely, there is a risk that those with very similar backgrounds assume an uncritical “common sense” view, which does not accord with the experience of the public.²²⁸

The research cited in the JUSTICE report suggests that improving the quality of courts’ decision-making can be a valid justification for pursuing judicial diversity. However, this does not quite clinch the argument for introducing collective considerations into judicial selection decisions. The costs or disadvantages of doing so must also be considered. A significant problem here is that the task of the selection body is made more complex. In addition to assessing the skills and potential of each applicant for a vacancy in a particular court, the selection body would also have to develop and maintain a detailed knowledge of the backgrounds and personal strengths of all existing members of the court. This might just about be feasible for a Supreme Court bench of 12 Justices, which Lord Bingham had

²²⁵ *Ibid.*

²²⁶ Sumption (n 201) 3-4.

²²⁷ *Ibid.* 19-20.

²²⁸ JUSTICE (n 198) 21, citing Iris Bohnet, *What Works: Gender Equality by Design* (Harvard University Press 2016) 229-230.

in mind, but would be considerably more difficult in the case of the 30 or more judges of the Court of Appeal, let alone the High Court. In order to be most useful, such collective assessments would take into account the time each court member has left until retirement, and might even involve looking beyond the applicant pool to consider other known individuals who would have reasonable prospects of appointment if they were to apply in future. The JUSTICE report acknowledges this increased burden on selection bodies and argues that it calls for the selection system to be strengthened in various ways: the *ad hoc* selection bodies for appellate and leadership positions should be replaced by a permanent senior selection committee, and the new committee and the JAC should consider collaborating with the existing judiciary to plan for the filling of judicial vacancies in a manner that would support diversity.²²⁹ There is a logic to these suggestions, but they would involve some modification of the independence of the JAC as it is currently conceived. Moreover, deciding what would be best for a court collectively is likely to become more difficult as the bench becomes diverse. It may be easier for a selection body to agree on the need to reduce the present distributional skew towards white men than it will be to agree on when a situation of balance has been reached. Nor is it likely to be easy for members of the body to develop a shared approach to more complex issues such as socio-economic privilege (related to the pernicious effects of what used to be called the class system, but difficult to measure in practice) and the tension between collective considerations of demographic diversity and other collective considerations such as diversity of legal knowledge or specialisation.

A simpler solution, in some respects, would be to introduce quotas. These offer the advantage of a relatively clear-cut approach to selection. So far the Bindman-Monaghan report has been the only major study to call for quotas to redress the underrepresentation of women and racial and ethnic minorities.²³⁰ The main reservation expressed in other leading studies has been that quotas would be damaging both to those intended to benefit from them, and more broadly to equality on the bench, by creating uncertainty about the professional and judicial qualities of appointees from underrepresented groups. This is empirically uncertain, and Sir Geoffrey Bindman QC and Karon Monaghan QC refer to a changing climate of perception among women and minority lawyers and quote remarks by Baroness Hale which includes the pithy rebuttal that “no-one should apply for any job unless they think they are worth it”.²³¹ They note that quotas need not track demography exactly, so for example the provision could be for at least one third, rather than 50%, of the senior judiciary to be women; also, quotas could be phased in rather than requiring all appointments to be made from the underrepresented groups

²²⁹ JUSTICE (n 198) 30, 44-45.

²³⁰ Bindman and Monaghan (n 194) 51-61. JUSTICE (n 198) 29, 32-40 sets out a proposal for introducing “targets with teeth”. Unlike quotas, these would not be legally binding during the selection process, but selection bodies would be required to provide explanations for any failure to meet their targets to a parliamentary committee. The difficulties of parliamentary oversight are discussed above: text to nn 176-188.

²³¹ Quoted in Bindman and Monaghan (n 194) 51.

until the prescribed level is reached. Their account explores the different quota models that exist in a number of European jurisdictions. The Kenyan requirement that women and men should each comprise at least one third of the judiciary, which is discussed in this volume, could now be added to this list as a precedent from within the Commonwealth.

The Bindman-Monaghan proposals for quotas would be a more precise and therefore possibly more workable strategy for selection bodies to implement than a less structured discretion to evaluate candidates in light of collective considerations. However, one of the lines of argument deployed by Bindman and Monaghan is difficult to accept. Their arguments are not confined to improving the quality of the bench, or to enhancing fairness, which they persuasively argue will be advanced when there is a critical mass of women and minority lawyers in the higher courts who can serve as role models (or, one might add, as judicial members of selection bodies, referees and consultees).²³² More troublingly, they also argue that a rapid transition to a much more diverse bench is essential because the courts as currently composed lack “democratic legitimacy”.²³³ In keeping with this view, they draw an analogy with all-women shortlists in elections to the UK Parliament.²³⁴ The fallacy of this approach is that it conflates judicial power with other forms of political power. This is not to deny that judges make law, when developing the common law or interpreting statutes, but it is quite another thing to imply that judicial law-making is open-ended in the way that legislative power is, or that it somehow overshadows the primary judicial functions of legal analysis and application of the law.

Lord Sumption has offered the most detailed critique of quotas in judicial selection. He is also troubled by arguments for quotas that appeal to judicial legitimacy. Although conceding that perceptions of the courts matter, not least because judges are not accountable in the conventional democratic sense because of their secure tenure, he deplored the growth of “a widespread belief that judicial decisions are vitiated by the social ignorance of judges, or by their tacit loyalty to their class, gender, race or other constituency, or by inescapable social conditioning”.²³⁵ This insight is a salutary one for those engaged in discourse about the judiciary, as it points out that a reductive view of judicial motives and psychology can have corrosive consequences for the public confidence in the administration of justice that is integral to a rule of law culture. Moreover, in an age of populism and anti-immigration sentiment it cannot be taken for granted that a diverse judiciary will command the most public support. Somewhat surprisingly, Lord Sumption went on to develop a speculative and rather pessimistic assessment of his own concerning the future legitimacy of the judiciary if quotas were to be introduced. He argued that public confidence is likely to fall rather than rise as a result of quotas, since he predicted that many of the best white, male lawyers will decline to seek judicial

²³² Bindman and Monaghan (n 194) 61.

²³³ Bindman and Monaghan (n 194) 7-8.

²³⁴ Bindman and Monaghan (n 194) 51-52.

²³⁵ Sumption (n 129) 21.

office under a quota system. In his view, quotas would undermine the sense of judicial appointment as a competitive accolade which currently makes up for the financial sacrifice that many lawyers would be making if they became judges.²³⁶ The speculative aspect of this argument is apparent as it does not seem to take into account the possibility that for some lawyers their sense of public service will be heightened by the opportunity to seek office in an institution which is trying to become more inclusive and reflective of the entire society it services.

At the time of writing, there did indeed appear to be a recruitment crisis in the High Court judiciary, although there is no evidence to suggest that either the present approach to judicial diversity or the possible introduction of quotas in future are among the causes. Of the 14 High Court vacancies advertised in the 2016 selection exercise, only eight were filled.²³⁷ Even more troublingly, the JAC has so far announced only 10 appointments for the 2017 selection exercise, in which 25 judicial vacancies were advertised.²³⁸ Selection policies concerning diversity have not been cited as a likely reason for this crisis, however. Surveys of current judges suggest that many are disenchanted with the stagnation of judicial pay (in the wake of reductions in judicial pensions at the start of the decade), and overwork.²³⁹ Prospective applicants may well be influenced by some of the same considerations. Perhaps, as the 2017 JUSTICE report suggests, the recruitment crisis should be taken as an opportunity for a new approach to diversity, whether it be via collective assessment of merit or the more clear-cut approach offered by quotas.²⁴⁰

CONCLUSION

The content of the Constitutional Reform Act 2005 justifies its name. The old “tap on the shoulder” system vested judicial selection power in the Lord Chancellor, a government minister, and provided no legal safeguards against political patronage (apart from an attempt to introduce independent monitoring and oversight when the system’s days were already numbered). The 2005 Act brought genuine constitutional change insofar as it entrusted most of the responsibility for judicial selection up to the level of the High Court to an independent commission, the JAC. The Executive was left with little influence over individual selection decisions, but some ability to shape selection criteria, which could be imposed by the Lord Chancellor with the Lord Chief Justice’s consent. This prominent role for the judiciary was laid down in the 2004 Concordat, an agreement negotiated by the Lord Chief Justice with the government which also ensured that selection for the Court

²³⁶These motivations are to some extent confirmed by a qualitative study undertaken some years ago: Genn (n 100).

²³⁷Adrian Jack, “A low benchmark?” *New Law Journal* (12 January 2017).

²³⁸<<https://jac.judiciary.gov.uk/high-court-judges>>, last accessed 5 October 2017.

²³⁹See Jack (n 237) and Gee and Rackley (n 174), both citing data from the UK Judicial Attitude Survey. The most recent survey bulletin is the *2016 UK Judicial Attitude Survey* <<https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>>.

²⁴⁰JUSTICE (n 198) 4.

of Appeal, the Supreme Court and other judicial leadership posts would be carried out by *ad hoc* bodies in which senior judges would be well represented.

Much was left for the new selection bodies to do. As discussed in this chapter, when the government laid out its proposals for the Constitutional Reform Act it made clear that the JAC itself would undertake the work of designing a new selection process which would be effective, transparent, and trustworthy, and specifically capable of earning the trust of potential applicants from underrepresented groups such as women and racial or ethnic minorities. This chapter has examined the evidence-based process of selection which the JAC has developed over its first decade. It is in many ways an extremely impressive model of judicial selection, although it has not so far resulted in as rapid progress towards a diverse judiciary as was hoped. The reasons for this are complex and have been extensively debated. Within the debate, a degree of consensus has emerged about the need for a broad diversity strategy which does not hold the selection bodies solely responsible for progress but also calls upon other actors including government, the judiciary and the organised legal profession to play their part. This widening of focus has not, however, completely deflected attention from arguments about the need for reforming the selection process. Here differences of opinion tend to be wider. Among other proposals, there have been calls for a collective rather than individual approach to merit, for the introduction of quotas, and to replace the *ad hoc* selection bodies currently responsible for the most senior appointments with a permanent mechanism that offers greater accountability. All three ideas are controversial, and might even be regarded as ground-breaking if they were to be implemented in England and Wales. Yet there is relevant experience of similar initiatives to be found elsewhere, as the chapters in this book demonstrate.²⁴¹ It is difficult to make any predictions for the development of the judicial appointment system in England and Wales, but if one looks back over the period that led up to the Constitutional Reform Act and the first decade of its implementation it would be unwise to rule out further significant changes being made in the near future.

APPENDIX

Exercising judgement

Demonstrates exceptional intellectual ability, integrity and independence of mind to make incisive, fair and legally sound decisions

- Demonstrates exceptional intellectual ability and professional expertise to deal with the most complex work
- Demonstrates willingness to challenge established norms and practices, and develop the law

²⁴¹ While Kenya is the only jurisdiction examined in this book which has formal quotas, elements of collective merit assessment are detectable in several of the other jurisdictions and, with the exception of Canada, a permanent body is involved in judicial selection for the highest courts in each case.

- Reaches decisions which are soundly reasoned and easy to follow, after full consideration of implications
- Demonstrates independence of mind
- Ensures fairness; demonstrates integrity and acts without bias and prejudice, especially in challenging, highly complex situations

Possessing and building knowledge

Possesses a detailed knowledge of the relevant area of law and practice. Demonstrates an ability and willingness to learn and develop professionally

- Demonstrates extensive knowledge and profound understanding of one or more areas of law
- Demonstrates a high ability to acquire knowledge, especially of unfamiliar or highly complex subject matter
- Keeps abreast of changes in law and in wider society
- Actively pursues continuous learning and professional development
- Regularly shares relevant information and developments with others when appropriate

Assimilating and clarifying information

Quickly assimilates information to identify essential issues, develops a clear understanding and clarifies uncertainty through eliciting and exploring information, managing multiple complex issues at once

- Effectively assimilates and processes large amounts of complex information from multiple sources
- Demonstrates an ability to manage different matters simultaneously, switching from one to another
- Identifies and focuses on the relevant issues and encourages others to do the same
- Demonstrates precision in analysis
- Weighs evidence fairly in order to reach a reasoned decision
- Identifies information gaps and appropriate means for obtaining further details

Working and communicating with others

(‘Others’ includes judges and those involved in the administration of justice, as well as all court users.)

Values diversity and shows an appreciation of the wider impact of communications. Demonstrates empathy and sensitivity in building relationships. Demonstrates good communication skills and authority

- Demonstrates courtesy and authority, gaining the confidence of others by using effective verbal and non-verbal communication
- Listens attentively throughout to ensure all parties have a fair opportunity to present relevant evidence and information while progressing the case efficiently

- Shows an awareness of the importance of diversity and sensitivity to the particular needs of different communities and groups
- Communicates succinctly and in a well-reasoned manner, ensuring that complex information is understood
- Provides direction, using appropriate strategies to maintain control and defuse tension

Managing work efficiently

Works effectively and plans to make the best use of resources available

- Manages time and deals with cases proportionately, ensuring efficient completion of the workload
- Utilises available resources, including the latest technology, to carry out the role in the most efficient way
- Demonstrates resilience, responding calmly and flexibly to changing circumstances and high pressure situations
- Resolves problems independently but seeks guidance from others as appropriate

Leadership

Demonstrates the ability to provide professional leadership to meet existing and future needs. Ensures the efficient and effective discharge of judicial business and acts as the public face of the judiciary for all court users

- Works effectively with others, leading through personal example
- Supports and encourages fellow Judges, offering advice where appropriate
- Supports and implements change effectively within the judiciary
- Encourages a shared sense of responsibility out of court, among judiciary and court staff
- Supports and engages with court staff to ensure efficient dispatch of business

Constitutional Reforms and Judicial Appointments in Kenya

YASH GHAI, JILL COTTRELL GHAI, LINETTE DU TOIT AND MAXWEL MIYAWA¹

INTRODUCTION

The current mechanisms for the appointment of judges and magistrates in Kenya are set out in the Constitution adopted in a referendum in August 2010.² In the process that led to the adoption of the Constitution, a great deal of thought was given to the status and role of the judiciary. The Constitution did more than try to establish an honest and competent judiciary. It aims to set up an entirely new system of governance based on fundamental values and principles.

While the emphasis here is on the process governing the appointment of superior court judges—the focus of this book—this chapter situates this issue in the context of Kenya's constitutional history. During many years of dictatorial rule, the judiciary had been stripped of its independence, with judges appointed or dismissed effectively by the President and the Attorney-General. Corruption was rampant, leading also to incompetence. Major reform of the judiciary was one objective of constitutional change, and of later developments.

The chapter makes a few comparative observations on the situation in two of Kenya's neighbours, Tanzania and Uganda. Uganda adopted a new Constitution in 1995, though there have been some amendments. Tanzania's constitutional process seems to have stalled, despite a draft having been prepared.

I CONSTITUTIONAL REFORM

The wider project of constitutional reform began in late 2000 at the official level—though agitation for it had already been under way within civil society for some

¹ Yash Ghai was a law teacher most of his professional life, in several countries. He has advised on the making of the constitutions of a number of countries, including his own country Kenya. He has researched extensively on ethnicity and minorities, human rights, federalism, state enterprises and comparative public law. He chaired the Kenya constitutional commission and the constituent assembly (2000-2004). Jill Cottrell is a retired law teacher, now working with Katiba Institute in Nairobi, which she founded with Yash Ghai and Waikwa Wanyoike, and is otherwise active in promotion of the Constitution. Linette du Toit works as a research and advocacy officer at Human Rights Awareness and Promotion Forum, an organization which promotes and protects the rights of marginalised groups in Uganda. At the time of writing she was a foreign law clerk to former Chief Justice Willy Mutunga at the Supreme Court of Kenya. Maxwell Miyawa is currently a PhD student at Osgoode Hall Law School of York University. He was formerly a Law Researcher to the immediate former Chief Justice of Kenya Willy Mutunga. The authors are grateful to Jan van Zyl Smit for his careful editing.

² More details of procedure for appointment of judges are found in the Judicial Service Act 2011.

years³—and culminated only in August 2010 with a new constitution, after many ups and downs on the way.⁴ The Constitution can be called radical or transformative. A transformative constitution seeks not only to change the structures of the state but also to bring about changes in society and the economy, to achieve social justice and fairness, protect rights (especially socio-economic), enhance national unity and safeguard the environment. It tends to require of state officers high standards of integrity (as in Chapter 6 of the Kenya Constitution), and can be regarded as threatening by senior politicians, bureaucrats and the business community. The Constitution places great importance on national values and objectives. Principal among these are national unity, pluralism and political integration, the rule of law, human rights, equality, social justice and equity; and also, with specific reference to institutions, participatory democracy, good governance, integrity, transparency and accountability.⁵ Executive authority must be exercised “in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit”.⁶

Other features that have implications for the role of the judiciary include devolution of power to counties, so that Kenya ceases to be a centralised state, with division of powers between the institutions of central government and those at county level. The security services are also re-organised, to free them from their colonial orientation and brutality; henceforth they are to be protectors of the rights of the people and largely independent of Executive authorities.

Other relevant aspects of the Constitution relate to gender equity, fairness in access to land, redress of past injustices, environmental protection, and detailed regulation of public finance and of the purpose and organisation of political parties.

The drafters of the Constitution decided on what we might call the “judicial” strategy, placing a major responsibility for the implementation and promotion of the Constitution upon the judges. In support of this, easy access is given to anyone who seeks the decision of courts on human rights⁷ or other provisions of the Constitution,⁸ even if they have no personal interest in the matter. The Constitution also provides guidance on its interpretation. In relation to the Bill of Rights the courts must adopt the interpretation that “most favours the enforcement of a right or fundamental freedom”.⁹ More generally, Article 259(1) requires

³ See Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo 1999).

⁴ For accounts of the various stages see Yash Ghai and Jill Cottrell, “Constitution Making and Democratisation in Kenya (2000-2005)” (2007) 14 *Democratisation* 1; Makau Mutua, *Kenya’s Quest for Democracy: Taming Leviathan* (L Rienner Publishers 2008); PLO Lumumba, *Kenya’s Quest for a Constitution: The Postponed Promise* (Jomo Kenyatta Foundation 2008); Office of the AU Panel of Eminent African Personalities, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (African Union 2014).

⁵ Constitution of the Republic of Kenya 2010 (hereafter “Constitution 2010”), art 10.

⁶ Constitution 2010, art 129.

⁷ Constitution 2010, art 22.

⁸ Constitution 2010, art 258.

⁹ Constitution 2010, art 20(3)(b).

the interpretation of the Constitution “in a manner that (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance”—perhaps a high-risk strategy. The judiciary was also given an unusual, if temporary, role: that of dissolving Parliament, on the petition of a litigant, if it failed to pass certain laws which were required to implement parts of the Constitution within the specified time.¹⁰

Thus, the judiciary becomes the ultimate interpreter and custodian of the Constitution; reinforced by the adoption of the rule of law as a national principle.¹¹ Its independence and competence are therefore crucial.

II BACKGROUND TO JUDICIAL REFORM

In 1963 Kenya became independent with a constitution that provided for the Chief Justice to be appointed by the Governor-General (Kenya being a dominion for the first year of its independent existence) acting in accordance with the “advice” of the Prime Minister (itself to be conveyed only if half of the Presidents of Regional Assemblies agreed).¹² Puisne judges were to be appointed by the Governor-General in accordance with the advice of a Judicial Service Commission.¹³

Various amendments over the years whittled down the democratic credentials of the Constitution, including the creation of a de jure one-party state in 1982. In 1988 the security of judicial tenure was formally done away with,¹⁴ but the provisions were essentially restored in 1990. However, the independence of the judiciary had ceased to be a reality some years before 1988. An Africa Watch publication in 1991 argued:

At the heart of the human rights crisis in Kenya is the lack of an independent judiciary. Courts are used to dispose of political opponents and critics. On a broader basis, the courts have also become a weapon for the powerful and wealthy to settle personal vendettas and local disputes.¹⁵

Of the restoration of judicial independence in 1990, Africa Watch wrote that “legal critics described it as cosmetic”.¹⁶

The judiciary readily became complicit in the repression of political dissidents spearheaded by the Executive during the Kenya African National Union (KANU) era.¹⁷ Furthermore, the absence of any criteria or guidelines made judicial appointments prone to manipulation, in numerous cases resulting in unmerited and undeserving individuals being appointed to judicial office, and from this a culture of

¹⁰ Constitution 2010, art 261(5), and see Fifth Schedule on timetable.

¹¹ Constitution 2010, art 10(2).

¹² Constitution of Kenya 1963, s 172.

¹³ Constitution of Kenya 1963, s 184.

¹⁴ Constitution of Kenya (Amendment) Act No 4 of 1988.

¹⁵ Africa Watch Committee, *Kenya: Taking Liberties* (Africa Watch 1991) 145.

¹⁶ *Ibid* 155.

¹⁷ *Ibid* 105.

subservience and loyalty to the Executive and other political forces arose.¹⁸ The net effect was the diminution of the legitimacy of the judiciary and the erosion of the rule of law.¹⁹

A committee appointed by the then Chief Justice in 1998 to inquire into the administration of justice and chaired by a Court of Appeal Judge, RO Kwach, concluded that both petty and grand corruption existed in the judiciary. The corruption took the “form of inducing court officials to lose or misplace case files, delay trials, judgements and rulings. Then there is the actual payment of money to judges and magistrates to influence their decisions.”²⁰ The Kwach committee made a number of recommendations to stop corruption, including vetting of candidates, a Code of Ethics, declaration by members of the judiciary of assets on appointment and thereafter every three years, and hearing of all cases in public.²¹

It was clear that, by the end of 2000, few reforms had been adopted. When the Constitution of Kenya Review Commission²² (CKRC) sought public views and recommendations for the new constitution, it found widespread dissatisfaction with the judiciary. There were numerous complaints about its inefficiency, incompetence and corruption, from ordinary Kenyans in small towns to big commercial corporations in major cities. The CKRC was told that there should be no interference in the work of the judiciary by the Executive or politicians and that all people should be treated fairly and equally before the courts.²³ It even received recommendations that all judges then in office should be dismissed on the adoption of the new constitution.

In view of the widespread complaints and drastic recommendations it had received, the obdurate attitude of Chief Justice Chunga and some of his colleagues, as well as the delicacy of the subject, the CKRC, in conjunction with the International Commission of Jurists (Kenya section), set up a high-powered group of Commonwealth judges and lawyers to advise it on what provisions to include in the new Constitution. The *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts*²⁴ was very critical of the standards and integrity of judges. Professing

¹⁸ P Mbote and M Akech, *Kenya Justice Sector and the Rule of Law: A review by AfriMap and the Open Society Initiative of Eastern Africa* (Open Society Foundation 2011) 106.

¹⁹ *Ibid.*

²⁰ Kenya Judiciary Committee on the Administration of Justice (Chairman: Hon Mr Justice RO Kwach), *Report of the Committee on the Administration of Justice* (Government Printer 1998) 9-12.

²¹ *Ibid.* 11. For other committees on the judiciary, see Luis G Franceschi, “Judicial Independence and Accountability in Light of the Judiciary Code of Conduct and Ethics of Kenya, 2016” in Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists (Kenya section) 2016) 103-131.

²² Chaired by Yash Ghai.

²³ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission* (CKRC 2005) 202-214.

²⁴ *The Kenya Judiciary in the New Constitution: Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* (CKRC 2002) (hereafter “*Advisory Panel Report*”). The report is available in html format at <<http://www.commonlii.org/ke/other/KECKRC/2002/8.html>>. The members were Justices George Kanyeihamba (Uganda), Yvonne Mokgoro (South Africa), Damian Lubuva (Tanzania), Robert Sharpe (Canada), and Professor Ed Ratushny (Canada).

itself “shocked and dismayed by the widespread allegations of corruption in the Kenya Judiciary”,²⁵ the Panel noted:

While many of Kenya’s judges continue to fulfil their judicial office faithfully to their judicial oath, public confidence in the independence and impartiality of the Judiciary has virtually collapsed.

This in turn threatens the principle of the Rule of Law, the very foundation of all modern democracies. The Judiciary must be the one bastion where the citizen may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her legal rights when they conflict with those of the rich and powerful in society. A court of law is the forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust. Where justice is not dispensed with impartiality, there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions.

The Panel highlighted the connection between judicial accountability and judicial independence:

It is our view that the twin goals of accountability and independence can best be achieved by exposing the judicial structure to public view. ...We have concluded that more transparent processes are called for and we make several recommendations in that regard in relation to appeals, the appointment of judges, the conduct and removal of judges and the Judicial Service Commission.²⁶

The judiciary and the constitution review process

The attitude of the judiciary to the review process was symptomatic of its apprehensions. Chief Justice Chunga refused to allow the judges to give evidence as individuals (though a few chose to disobey this order, under promise of confidentiality by the CKRC). In August 2002, a group of judges, backed, it was reliably learned, by the Chief Justice himself and with the connivance of the President’s office and some CKRC commissioners, obtained an interim injunction to the effect that the CKRC must not discuss the judiciary. The litigation served to galvanize public opinion; it was reported that the judges responsible for this could not walk down the street for fear of public abuse. And the legal profession led a “We want a new Constitution now” campaign. Lawyers and members of the public wore yellow ribbons in support of a new constitution.²⁷

“Vetting”

The Advisory Panel noted the failure by the judiciary to implement the Kwach Committee recommendations and made a number of its own recommendations.

²⁵ Ibid.

²⁶ Ibid. At about the same time the International Commission of Jurists (Kenya) produced a report, *Strengthening Judicial Reforms in Kenya, Vol II: The Role of the Judiciary in a Patronage System* (2001), that points to major perceptions of corruption, and some efforts at improvement.

²⁷ There is a brief contemporary report in the *East African*: Juma Kwayera, “Keiwua and Mulwa: Judges at the Centre of the Crisis” (20 October 2003) <<http://www.theeastafrican.co.ke/news/-/2558/241554/-/t6x42rz/-/index.html>>.

For our purposes these included an independent and transparent process for the appointment and promotion of judges (primarily through an independent Judicial Service Commission with a broad membership). The Panel was so struck by judicial corruption that it wanted a process of vetting—as the process of mass investigation of existing office holders with a view to removal has become known in Kenya—to start immediately, without waiting for the adoption of the new constitution. But no steps were taken to implement its recommendations—until 2003, when the government elected in 2002 instituted a process which was widely believed to be designed to remove some judges the government did not like and to enable the government to replace them with those it considered reliable (from its perspective), inevitably a choice with its roots in ethnic politics.²⁸

A more thoroughgoing vetting took place only after the 2010 Constitution. The CKRC's own draft Constitution (2002) proposed that existing judges should have the chance to resign, but that an interim Judicial Service Commission should consider all outstanding complaints against judges to any previously existing disciplinary body; if the Commission found there was a “case to answer” they would refer it to the removal machinery set up by the Constitution.²⁹ That provision survived the National Constitutional Conference (completed in 2004), but was eliminated by the government when it took over the process in 2005 (presumably because the government was satisfied that it had the judiciary it wanted). However, the idea was revived with the renewed constitution-making process that followed the post-election violence of 2007-2008. Concerns about corruption in the judiciary were still prominent, with yet another committee stating in 2010 that “corruption remains a major contribution to the Judiciary's institutional decline and low public confidence in the judicial process.”³⁰

The new Committee of Experts (CoE) on the Constitution proposed a “vetting” process in both its own drafts, with considerable detail in its second draft, and added the removal of the existing Chief Justice within 60 days of the adoption of the Constitution.³¹ But when the draft was submitted, as required, to parlia-

²⁸ There is a highly critical account of this process, commonly known as the “radical surgery”, in International Commission of Jurists, *Kenya: Judicial Independence, Corruption and Reform* (ICJ 2005). The ICJ's expert mission was chaired by Justice Kanyehamba, who had chaired Kenya's own Panel of Commonwealth Experts. See <<http://www.icj.org/high-level-mission-calls-for-comprehensive-reform-of-judiciary/>>. See also Laurence Juma and Chuks Okpaluba, “Judicial Intervention in Kenya's Constitutional Review Process”, 11 Wash U Global Stud L Rev 287 (2012) <http://openscholarship.wustl.edu/law_globalstudies/vol11/iss2/2/> which comments (at 304) that “[the judiciary] was worsened by the reorganisation and pruning that occurred immediately when the Kibaki clique arrived in state house”; and (at n 102) that “examples of these contests include the forced removal of Chief Justice Bernard Chunga, a non-Kikuyu, and the so-called radical surgery that culminated in the removal of twenty-three senior High Court and Court of Appeal judges (non-Kikuyus) and eighty-five Magistrates on charges of corruption, without due process”.

²⁹ CKRC Draft Constitution, Eighth Schedule, s 10.

³⁰ Task Force on Judicial Reforms (Chairman: The Hon Mr Justice William Ouko), *Final Report of the Task Force on Judicial Reforms* (Government Printer 2010) 73.

³¹ *Final Report of the Committee of Experts on Constitutional Review* (CoE 2010), para 6.4.4.

mentarians, they removed it.³² However, the CoE reinstated it, though in a less detailed form, in the draft eventually adopted by the people, and also gave the Chief Justice six months to vacate his position, following which he could either retire completely or remain to face vetting.³³

Legislation in 2011 set up the process,³⁴ which came to an end in 2016.³⁵ One consequence of this process, which has resulted in the dismissal of a significant number of judges and magistrates (four judges of the Court of Appeal (out of nine), seven High Court Judges and 14 magistrates), has been the necessity to appoint replacements.

It was a brave step of the drafters of the Constitution to clothe the judiciary with supreme authority to uphold and enforce the Constitution while simultaneously effecting its transformation. The remainder of this chapter considers the frameworks and mechanisms put in place to attempt the mammoth task of creating an independent judiciary.

III STRUCTURE OF THE COURTS³⁶

The fundamental principles of the judicial system are set out in the Constitution.³⁷ A more comprehensive framework for the workings of the institution is set out in the Judicial Service Act 2011. The judiciary consists of judges, magistrates, kadhis³⁸ and other judicial officers and staff.³⁹ Courts and tribunals which exercise judicial authority are classified into superior and subordinate courts. The superior courts consist of the Supreme Court, the Court of Appeal, the High Court, the Industrial Court and the Land and Environment Court.⁴⁰ The subordinate courts are the Magistrates' Courts, Kadhis' Courts, Courts Martial and any other tribunals.⁴¹ All the courts are national: the devolved units under the Constitution, the counties, do not have their own courts. The judiciary is making efforts to ensure that there are courts sitting in every county, with the aim of obviating the necessity to travel long distances for legal suits.

³² Ibid para 8.11.

³³ Constitution 2010, Sixth Schedule, ss 23-24.

³⁴ Vetting of Judges and Magistrates Act 2011.

³⁵ For the final account of the process see the final report of the Board, *Restoring Confidence in the Judiciary: Vetting of Judges and Magistrates in Kenya* (2016) <<http://www.jmvb.or.ke>>.

³⁶ See a fuller account in Jill Cottrell Ghai, "An Overview of the Kenyan Judiciary" in Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists (Kenya section) 2016) 23-46.

³⁷ Chapter 10. The Judicial Service Commission is governed also by Chapter 15 ("Commissions and Independent Offices"), insofar as this is consistent with Chapter 10.

³⁸ Kadhis are experts in Islamic law who preside over kadhi courts which apply Islamic law on matters of family law and charities. Such courts preceded the English courts introduced by the British, but they were restricted to the coastal strip where most Muslims resided. Now they are to be found in most parts of the country. For an interesting sociological study of kadhi courts at the coast, from a feminist perspective, see Susan F Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (University of Chicago Press 1998).

³⁹ Constitution 2010, art 162(1).

⁴⁰ Constitution 2010, art 162(1)-(2).

⁴¹ Constitution 2010, art 169(1).

The Supreme Court is an innovation in the 2010 Constitution, created to spearhead the development of a new jurisprudence, and a new era of judicial competence and integrity. It is made up of the Chief Justice, who is also its President, the Deputy Chief Justice, who is the Vice-President of the Court, and five judges.⁴² The Chief Justice is the administrative head of the Supreme Court and the judiciary,⁴³ and serves for a maximum of ten years in this position.⁴⁴ The Supreme Court has exclusive original jurisdiction in Presidential election disputes,⁴⁵ advisory opinion jurisdiction in matters of devolution,⁴⁶ and appellate jurisdiction in matters of constitutional interpretation or application and other matters of general public importance.⁴⁷ The Supreme Court Act 2011 sets out the powers and procedures of the Court in more detail, and further outlines its constitutional mandate: to assert the supremacy of the Constitution and sovereignty of the people and provide authoritative and impartial interpretations of the Constitution.⁴⁸

The Court of Appeal hears appeals of any nature from the High Court and other courts of the High Court's status.⁴⁹ The court must consist of no fewer than 12 and no more than 30 judges.⁵⁰ The Court is headed by a President elected by its judges,⁵¹ who serves a non-renewable five-year term.⁵²

The High Court has unlimited original jurisdiction in criminal and civil matters, and over enforcement of fundamental rights enshrined in the Bill of Rights and in interpreting and safeguarding the supremacy of the Constitution.⁵³ It consists of not more than 150 judges.⁵⁴ It is headed by a Principal Judge elected by all High Court judges⁵⁵ and whose role, in consultation with the Chief Registrar, is to manage the High Court.⁵⁶ The Principal Judge also serves a non-renewable five-year term in that position.⁵⁷

The Constitution requires the establishment of two courts of equal status with the High Court to deal with labour relations and employment, and land and

⁴² Constitution 2010, art 163(1).

⁴³ Constitution 2010, art 161(2)(a)–(b), and the Judicial Service Act 2011, s 5.

⁴⁴ Constitution 2010, art 167(2).

⁴⁵ Constitution 2010, art 163(3)(a).

⁴⁶ Constitution 2010, art 163(6).

⁴⁷ Constitution 2010, art 163(4)(a)–(b).

⁴⁸ Supreme Court Act 2011, s 3. It is unclear what Parliament meant by “impartial”. If it meant impartial as between the litigating parties, that is as it should be. But if it means, for example, that the Court cannot choose between competing values, as it may have to when deciding on limitations on rights, the Constitution is clear that the courts must choose that option which promotes human rights (art 20, particularly clause (4)), and more generally, those that promote constitutional purposes, values and principles (art 259).

⁴⁹ Constitution 2010, art 164(3).

⁵⁰ Constitution 2010, art 164(1)(a), and Judicature Act 1967, s 7(1) (as amended).

⁵¹ Constitution 2010, art 164(2).

⁵² Judicial Service Act 2011, s 6(1).

⁵³ Constitution 2010, art 165(3).

⁵⁴ Judicature Act 1967, s 7(2).

⁵⁵ Constitution 2010, art 165.

⁵⁶ Constitution 2010, art 165.

⁵⁷ Constitution 2010, art 165.

environment, respectively.⁵⁸ This odd provision, retained by the Committee of Experts to obviate jurisdictional issues between the courts,⁵⁹ has been the source of some difficulty in connection with the efforts of Chief Justice Mutunga to clear the criminal case backlog. His assignment of judges from the “equal status” courts to hear criminal appeals from magistrate courts has been successfully challenged. The Court of Appeal said:

Angote, J. having been appointed as a judge of the ELC [Environment and Land Court] can only perform the functions and duties of the ELC and cannot purport to discharge the functions and duties of the High Court because that is not the office or the court to which he was appointed. ... A judge is appointed to a particular court and ... can only perform the duties of that court.⁶⁰

The law was amended to enable Chief Justices to transfer judges between the High Court and the Environment and Land Court, on the recommendation of the JSC.⁶¹ But if the Court of Appeal is right, it is not clear that this is constitutional.

Prior to the transformation of the judiciary that began in 2010, the judiciary was grossly understaffed. In June 2011, 11 Court of Appeal judges, 42 High Court judges, 330 magistrates and 15 kadhis served a population of 40 million.⁶² At the time of writing, there were seven Supreme Court, 26 Court of Appeal, 82 High Court, and 12 Industrial Court judges, 15 judges in the Environmental and Land Court, 458 magistrates and 32 kadhis.⁶³ However, the judiciary has still complained that there are insufficient judges and judicial officers in relation to population.⁶⁴

IV JUDICIAL SERVICE COMMISSION⁶⁵

The pre-2010 judicial service commissions

During colonial rule, British territories had no independent body charged with the appointment of judges.⁶⁶ Conceived as part of the colonial administration, judges

⁵⁸ See Constitution 2010, art 162(2); Industrial Court Act 2011; Environment and Land Court Act 2011.

⁵⁹ CoE, *Final Report* (n 31) para 8.11.3.

⁶⁰ *Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic* Criminal Appeal No 44, 45 and 76 of 2014 [2015] eKLR.

⁶¹ Statute Law (Miscellaneous Amendments) Act, No 25 of 2015.

⁶² *Report of the State of the Judiciary and the Administration of Justice 2011-2012* (Republic of Kenya Judiciary 2012) 14-15.

⁶³ See the website of the Judiciary <<http://www.judiciary.go.ke/>>.

⁶⁴ *State of the Judiciary and the Administration of Justice Annual Report, 2014–2015* (Republic of Kenya Judiciary), para 2.3.1.

⁶⁵ See also Walter Khobe Ochieng, “The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective” in Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists (Kenya section) 2016) 47-71.

⁶⁶ Even England and Wales had no judicial appointment commission until 2006. Judges were appointed by the Lord Chancellor until the Constitutional Reform Act 2005 created the Judicial Appointment Commission, which is now responsible for selection of judges for appointment by the Lord Chancellor.

were appointed by the Governor and held the positions effectively at his pleasure.⁶⁷ At independence, judicial service commissions were established.⁶⁸ In Kenya, the chairman of the JSC was the Chief Justice. Two other members were nominated by the Chief Justice from among other judges, and two by the chair of the Public Service Commission from among its members.⁶⁹ The JSC also appointed and disciplined magistrates and registrars. After a year, Kenya became a republic, and the powers of the Governor-General passed to the President, who was also head of government. The membership of the JSC (other than the Chief Justice as chair) also changed: the Attorney-General (appointed by the President) became a member, as did the chair of the Public Service Commission, and two among the judges of the Court of Appeal and the High Court chosen by the President.⁷⁰ Although the JSC was supposed to be independent, it became evident quickly that the President, often acting through the Attorney-General, controlled its decisions; one way or another, all the members effectively owed their own substantive appointments to the President.⁷¹

Reforming the JSC

In their report to the CKRC, the Commonwealth Judicial Experts noted concerns about the non-transparent process of appointment of judges.⁷² Relying on the Kwach report (1998),⁷³ the Panel noted that judicial vacancies were never made public and individuals of questionable integrity were appointed, thus lowering the stature and image of the judiciary. They recommended an open, transparent recruitment process that targets those with the most suitable qualifications.⁷⁴ They also proposed restructuring the JSC and a transparent process specifying qualifications including integrity as criteria for appointment. A further recommendation was that all judges, including the Chief Justice, be appointed by the President in accordance with written recommendations of the JSC, and after consultation with a parliamentary committee.

The CKRC was in any case inclined towards an independent JSC, particularly in its role of appointing and removing judges. Independent commissions were basic to

⁶⁷ See YP Ghai and JPWP McAuslan, *Public law and political change in Kenya: A study of the legal framework from colonial times to the present* (Oxford University Press 1970) Chapter IV, for the colonial system of justice, heavily dependent on the administration; John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004) 151-152.

⁶⁸ Hatchard, Ndulo and Slinn (n 67) 152. BO Nwabueze, *Judicialism in Commonwealth Africa: The role of the courts in government* (C Hurst and Co 1977) 266.

⁶⁹ Constitution of Kenya 1963, s 184.

⁷⁰ Constitution of Kenya 1969, s 68.

⁷¹ M Mutua, "Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya" (2001) 23 *Human Rights Quarterly* 104.

⁷² *Advisory Panel Report* (n 24).

⁷³ See n 20.

⁷⁴ *Advisory Panel Report* (n 24).

its restructuring of the state (“the fourth arm of the state”), and it proposed several independent commissions to:

- (a) protect the sovereignty of the people;
- (b) secure the observance by all organs of government of democratic principles and values; and
- (c) ensure the maintenance of constitutionality.⁷⁵

These proposals survived the various phases of constitution-making. They faced some opposition in certain respects from the Parliamentary Select Committee that reviewed the CoE’s second draft, and the CoE felt obliged to accede to some of its suggestions, notably that the JSC should be chaired by the Chief Justice.⁷⁶

Composition and functions of the JSC

The JSC is established by the Constitution but its functions and organisation are elaborated in the Judicial Service Act 2011.

The significance of its composition depends on its functions. According to the Constitution, these are “to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice”. More specifically the JSC “recommends” persons for appointment as superior court judges to the President, who makes the appointments “in accordance with the recommendation of the Judicial Service Commission”.⁷⁷ “Recommendation” was deliberately used. There seems some reluctance among drafters to make it crystal clear that a head of state actually has no choice.⁷⁸ Uganda retains the more traditional, and even more misleading, “advice”.⁷⁹ Recent law in Kenya tried to give the President more of a choice.⁸⁰ The role of Parliament in Kenya is also discussed below.

The JSC also makes recommendations on the conditions of service of judges and judicial officers (magistrates, registrars and kadhis)—except for judges’ and judicial officers’ remuneration, which is the responsibility of the Salaries and Remuneration Commission.⁸¹ It appoints judicial officers and all staff other than superior court judges, and is responsible for their discipline. It is responsible for the continuing education of judges and judicial officers (a task which it carries out through the Judiciary Training Institute).⁸² It is also to advise the national government on improving the efficiency of the administration of justice.⁸³ The

⁷⁵ Article 271 in the 2002 draft, now in art 249, with “constitutionalism” substituted for “constitutionality”.

⁷⁶ CoE, *Final Report* (n 31) para 8.11 and see text to nn 101-103 below.

⁷⁷ Constitution 2010, art 166(1).

⁷⁸ When this wording was adopted in the CKRC draft and in the CoE’s first two drafts the President was to be the largely formal head of the state, like the British Queen and the Indian President, without any discretion on this point.

⁷⁹ Constitution of the Republic of Uganda 1995, art 142(1).

⁸⁰ See text to nn 174-180.

⁸¹ Constitution 2010, art 172(1).

⁸² See <https://www.facebook.com/kenyajudiciarytraininginstitute/>.

⁸³ Constitution 2010, art 173.

Commission has established committees in areas such as human resources, the administration of justice, learning and development, finance, audit, governance and risk management.⁸⁴ Interestingly, the judiciary refers to its functions as including “oversight” of “the Judiciary Administration”,⁸⁵ though this sounds like a more extensive role than “advise[ing] the national government on improving the efficiency of the administration of justice”, in the Constitution’s language.⁸⁶

A major role relates to the removal of superior court judges. The JSC can initiate the formal process, on the basis of a petition or on its own initiative. At the time of writing it had done so three times. The first Deputy Chief Justice resigned after the tribunal to which the JSC had referred her matter found her guilty of gross misconduct and misbehaviour, in an incident in which she allegedly threatened a security guard with a firearm. She abandoned her appeal to the Supreme Court.⁸⁷ A tribunal found a High Court judge guilty of improper conduct in the hearing of cases, and recommended his dismissal.⁸⁸ And the President set up a tribunal to consider the removal of a Supreme Court Judge, on the basis of corruption in an election petition appeal; before the tribunal completed its work, the judge was compelled to leave the bench by a court decision that he had passed the retirement age.⁸⁹

The JSC has 11 members: the Chief Justice as the chairperson; one Supreme Court judge and one Court of Appeal judge elected by their respective courts; one High Court judge and one magistrate (one a man and one a woman) elected by the association of judges and magistrates; the Attorney-General; two advocates (one a woman and one a man) representing the legal profession (and elected by its members); one person nominated by the Public Service Commission; and two non-lawyers (a woman and a man) appointed by the President, with the approval of the National Assembly, to represent the public.⁹⁰ Apart from the Chief Justice and the Attorney-General, Commissioners are appointed for five years and are eligible for a maximum of two terms, whether consecutive or non-consecutive.⁹¹

The Commission has thus on the face of it a fair representation of key interests, bringing in not only the various interest groups among lawyers, but also the

⁸⁴ *State of the Judiciary and the Administration of Justice: Annual Report 2012-2013* (Republic of Kenya Judiciary 2013) 139.

⁸⁵ *State of the Judiciary and the Administration of Justice: Annual Report 2013-2014* (Republic of Kenya Judiciary 2014) 21.

⁸⁶ Constitution 2010, art 172(1)(e).

⁸⁷ See “Baraza resigns, withdraws appeal” *Daily Nation* (Nairobi, 18 October 2012) <<http://www.nation.co.ke/News/-/1056/1536322/-/xsnnjmz/-/index.html>>.

⁸⁸ This case is discussed in various contributions to Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists (Kenya section) 2016), including at 21, 40 and 62; see also *Final Report of the Tribunal Investigating the Conduct of Hon Mr Justice Joseph Mbalu Mutava*, available at <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Tribunal_Investigating_the_Conduct_of_Justice_Mutava.pdf>. The judge is reported to be going to court to challenge the tribunal decision.

⁸⁹ “Retirement saves Tunoi as tribunal ends probe prematurely” *Business Today* (Kenya, 27 June 2016) <<http://businesstoday.co.ke/retirement-saves-tunoi-as-tribunal-ends-probe-prematurely/>>. The litigation about the retirement age is discussed in text to n 138.

⁹⁰ Constitution 2010, art 171(2).

⁹¹ Constitution 2010, art 171(4).

public. There is also an attempt at some sort of gender parity (though only three members are guaranteed to be women).⁹² Unlike in some countries, the loudest voice is that of the judiciary itself—provided they speak with one voice. The government has a significant voice—three out of 11 members, because the Attorney-General is not independent and the President is responsible, on his or her initiative, for appointing two members to represent the public.

The original CKRC draft would have had as chairperson someone qualified to be appointed a judge of the Supreme Court,⁹³ and, in addition to the current members, a Muslim woman, the Chief Kadhi, a second magistrate, two law teachers, a member nominated by the Council of Legal Education, and there would have been three lay members nominated by an NGO umbrella body.

In Uganda, by contrast, the President selects a majority of the members of the nine-member JSC: two people qualified to be Supreme Court judges (they must not actually be the Chief Justice, Deputy Chief Justice or Principal Judge of the High Court); two members of the public, not lawyers; and the Attorney-General (ex officio).⁹⁴ One other member, a Supreme Court judge, is also appointed by the President, but in consultation with superior court judges. This leaves only three in whose appointment the President has no discretion (one person nominated by the Public Service Commission and two advocates nominated by the Law Society). All must be approved by Parliament, unlike in Kenya where once a member of a represented group has been nominated by that group, the President must appoint that person within three days.⁹⁵ In Tanzania there is a six-member JSC. The Chief Justice, Principal Judge of the High Court and Attorney-General are ex officio members; one Justice of Appeal is appointed by the President after consultation (not “in consultation”⁹⁶) with the Chief Justice only;⁹⁷ and there is no guaranteed representation of the legal fraternity or of the public since the Constitution does not specify from what category the President has to select the two other members.⁹⁸ All High Court judges are appointed by the President “after consultation with” the JSC,⁹⁹ and that consultation is not even required for appointment of the Chief Justice or the members of the Court of Appeal.¹⁰⁰

Having a JSC with the Chief Justice as the chair is common in Commonwealth jurisdictions.¹⁰¹ Two notable exceptions are Uganda—where the body is chaired

⁹² Constitution 2010, art 171(1)(d),(f),(h).

⁹³ This was based on the recommendations of the Panel of Commonwealth Experts (*Advisory Panel Report* (n 24)), discussed further in text to n 103.

⁹⁴ Constitution of the Republic of Uganda 1995, art 146.

⁹⁵ Judicial Service Act 2011, s 15(2).

⁹⁶ The phrase “in consultation with” requires agreement, “after consultation” does not.

⁹⁷ Constitution of the United Republic of Tanzania 1977, art 112(2).

⁹⁸ Constitution of the United Republic of Tanzania 1977, art 112(2)(e).

⁹⁹ Constitution of the United Republic of Tanzania 1977, art 109(1).

¹⁰⁰ Constitution of the United Republic of Tanzania 1977, art 118.

¹⁰¹ See the discussion in Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law)* (British Institute of International and Comparative Law 2015) para 1.6.22.

by a person qualified to be appointed as justice of the Supreme Court, but *not* the Chief Justice, Deputy Chief Justice or Principal Judge of the High Court¹⁰²—and, more recently, the Judicial Appointment Commission of England and Wales. The Panel of Commonwealth Experts in Kenya had said:

[W]hile the Panel is aware of the stature and position of the Chief Justice as head of the Judiciary, it is concerned that the inclusion of the Chief Justice as chairman of the Judicial Service Commission may inhibit it from properly exercising its functions. Given his position, the Chief Justice is directly affected by and interested in the Judicial Service Commission's recommendations relating to both the appointment and removal of judges. His direct involvement in the functions of the Judicial Service Commission risks putting him or her in the unenviable role of a judge in his or her own cause.¹⁰³

The CoE had not originally designed that the Chief Justice should chair. It said it considered that “it was important to keep the Chief Justice out of the JSC if the latter institution was to be independent and effective”.¹⁰⁴ But it felt obliged to accept the parliamentarians' view to the contrary. The provision about two members of the public seems to have come from Uganda, but Kenya at least indicated that they were supposed to represent the public. The potential of the system for giving the government a significant voice was demonstrated recently. After the retirement of one of the lay members and the sudden resignation of the other (who was then appointed by the President an adviser to him), President Kenyatta nominated Kipng'etich Bett and Winnie Guchu. Ms Guchu was President Kenyatta's party executive director before the 2013 elections, while there was some doubt about the other lay member, and it could hardly go unremarked that he is from the ethnic group of the Deputy President. The National Assembly (where the President and Deputy have majority support) rushed through the approval hearings, disregarding some objections from the public.¹⁰⁵

Other problems have come to light in the process of election for members of the JSC. The former Chief Justice has described the elections (by judges and magistrates) as “riddled with corruption”.¹⁰⁶

¹⁰² Constitution of the Republic of Uganda 1995, art 146.

¹⁰³ The Panel informally designated Justice George Kanyeihamba, from Uganda, as its chair. This is mentioned because of the similarity of the provision the Panel recommended (and the CKRC adopted) on the chair of the JSC to Uganda's, though it is not identical.

¹⁰⁴ CoE, *Final Report* (n 31) para 8.11.2.

¹⁰⁵ Jeremiah Kiplang'at, “Uhuru JSC nominees deny graft claims” *Daily Nation* (Nairobi, 24 March 2015) <<http://www.nation.co.ke/news/Uhuru-JSC-nominees-deny-graft-claims/-/1056/2664740/-/97a1wy/-/index.html>>; Three other JSC members had been accused of “abusing their offices” and “impropriety” by former High Court Registrar Gladys Boss Shollei: “Judiciary Registrar Gladys Shollei accuses three JSC members of impropriety” *Daily Nation* (Nairobi, 21 August 2013) <<http://www.nation.co.ke/news/Shollei+accuses+three+JSC+members+of+impropriety+/-/1056/1962608/-/y9v0je/-/index.html>>. Two authors of this chapter made representations to Parliament as did some other people, but did not get much attention <<http://www.jamiiforums.com/kenyan-politics/509287-the-shollei-saga-and-the-invisible-hand-of-ahmednassir.html>>.

¹⁰⁶ Pauline Kairu, “Election for key post in Judiciary marred by corruption, says CJ Willy Mutunga” *Daily Nation* (Nairobi, 29 January 2016) <<http://www.nation.co.ke/news/1056-3053490-7mebsaz/index.html>>.

Independence of the JSC, and its individual members

In creating the JSC, the general intent of the Constitution is that, like other commissions, the JSC must be independent and not amenable to influence or control by any person or authority,¹⁰⁷ protecting the sovereignty of the people, securing observance of democratic values and principles and promoting constitutionalism.¹⁰⁸ As a positive step, the JSC retains lawyers itself to represent it in court, decoupling it from the office of the Attorney-General who has traditionally been legal counsel for government agencies.

Members' individual independence is reinforced by their remuneration and benefits being a charge on the Consolidated Fund.¹⁰⁹ The Constitution also bars any possibility of varying such benefits and remuneration to the disadvantage of a Commissioner.¹¹⁰ Commissioners work on a part-time basis and receive such allowances as set by the Salaries and Remuneration Commission (SRC).¹¹¹ The Commissioners receive large allowances for their often frequent meetings, and have been engaged in a dispute with the SRC that is trying to limit how many meetings they can claim for.¹¹²

There is also an onerous procedure for removing Commissioners. Members (other than those serving *ex officio*) can only be removed for serious violation of the Constitution (including a contravention of Chapter 6 on leadership and integrity) or any other law; gross misconduct; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy.¹¹³ The removal procedure begins with a petition to the National Assembly.¹¹⁴ The Assembly considers the merits of the petition and, if satisfied that there is a *prima facie* case, makes a recommendation to the President, who must appoint a tribunal to investigate the matter.¹¹⁵ The President must act on the tribunal's recommendation within 30 days.¹¹⁶

The institutional autonomy of the JSC is secured through a secretariat separate from the civil service,¹¹⁷ comprising staff appointed by the Commission

¹⁰⁷ Constitution 2010, art 249(2).

¹⁰⁸ Constitution 2010, art 249(1).

¹⁰⁹ Constitution 2010, art 250(7)–(8).

¹¹⁰ Constitution 2010, art 250(8).

¹¹¹ Judicial Service Act 2011, s 41.

¹¹² The matter is before the High Court. See Kamau Muthoni, "Court directs JSC and SRC to resolve stand-off on allowances" *Standard* (Nairobi, 11 November 2016) <<https://www.standardmedia.co.ke/article/2000222975/court-directs-jsc-and-src-to-resolve-stand-off-on-allowances>>.

¹¹³ Constitution 2010, art 251(1).

¹¹⁴ Constitution 2010, art 251(2).

¹¹⁵ Constitution 2010, art 251(3)–(4). In terms of art 251(5) the tribunal shall consist of a person who holds or has held office as a judge, at least two persons who are qualified to be appointed High Court judges and one other member who is qualified to assess the facts in respect of the particular relevant ground for removal.

¹¹⁶ Constitution 2010, art 251(6).

¹¹⁷ The defunct JSC under the repealed Constitution never had a functioning secretariat.

or seconded from the public service on the Commission's request.¹¹⁸ The Chief Registrar of the judiciary, appointed by the JSC, who must have qualifications and experience similar to those for appointment as a High Court judge,¹¹⁹ is secretary to the JSC¹²⁰ and head of the JSC secretariat.¹²¹ The Chief Registrar is the custodian of the Commission's documents and responsible for the enforcement of its decisions¹²² as well as being in overall charge of the administration of the judiciary.¹²³

Financial independence

Part of the sad legacy of Executive emasculation of the judiciary was that the latter essentially operated as a department within the Attorney-General's chambers and therefore channelled its budgetary needs through that office. Now the Constitution tries to guarantee the financial independence of the judiciary, including the Commission, by setting up a separate fund, administered by the Chief Registrar, which is a charge on the Consolidated Fund.¹²⁴ The Chief Registrar prepares and submits the budgetary estimates to the Commission for review before submission direct to Parliament.¹²⁵ The Commission must present a report to the President and Parliament at the end of each financial year.¹²⁶ The JSC's accounts are prepared under the supervision of the Chief Registrar and submitted to the clerks of the two houses of Parliament and the Auditor-General.¹²⁷ This divests the JSC of any formal accountability to the Executive. It does not make the judiciary independent of Parliament, of course, and the National Assembly has reduced the judiciary's funding to "punish" it for decisions it does not like.¹²⁸ Until the Judiciary Fund Act was passed in 2016 the judiciary was not independent of the Executive because the judiciary's finances were controlled by the Ministry of Finance.¹²⁹ It is not entirely clear why this was so, as subordinate legislation provides that the money appropriated by Parliament for the judiciary is to be paid into an account by the Treasury, and the Chief Registrar is to administer the account.¹³⁰ Now, however, principal legislation clarifies the independent control of the Fund.

¹¹⁸Judicial Service Act 2011, s 20.

¹¹⁹Judicial Service Act 2011, s 9.

¹²⁰Constitution 2010, art 171(3).

¹²¹Judicial Service Act 2011, s 20.

¹²²Judicial Service Act 2011, s 21.

¹²³Judicial Service Act 2011, s 8.

¹²⁴Constitution 2010, art 173 and Judicial Service Act 2011, s 26.

¹²⁵Judicial Service Act 2011, s 29.

¹²⁶Constitution 2010, art 254.

¹²⁷Judicial Service Act 2011, s 39.

¹²⁸Alphonse Shiundu and Roselyne Obala, "Kenyan MPs cut Senate, SRC and Judiciary budgets to fund counties" *Standard* (Nairobi, 4 June 2015) <<http://www.standardmedia.co.ke/article/2000164515/kenyan-mps-cut-senate-src-and-judiciary-budgets-to-fund-counties>>.

¹²⁹*Annual Report 2013-2014* (n 86) 116-117.

¹³⁰Judiciary Fund Regulations 2012, LN 35/2012.

V CRITERIA AND SELECTION PROCESS

Qualifications for judicial office

The Constitution spells out the minimum requirements for appointment as a judge. The personal requirements are competence, integrity, and financial probity.¹³¹ Professional qualifications are firstly to be either an advocate of the High Court of Kenya, or possess a law degree from a recognised institution or an equivalent qualification in another common law jurisdiction.¹³² In order to qualify for appointment to the Court of Appeal, a candidate must have a total of at least 10 years' experience as a legal practitioner, a superior court judge, a distinguished academic or other relevant legal experience.¹³³ The 10 years need not be all in the same capacity. In the case of a High Court judge, experience as a professional magistrate is sufficient. The last permits what has been a very common practice in many former British colonies (a continuation from the colonial practice) of promotion from the subordinate courts, unlike the English practice of drawing mainly from the Bar. To be eligible for the position of a Supreme Court judge a candidate must have accumulated 15 years' experience.¹³⁴

Application procedure

The analysis of the procedure will be informed by the events, and court cases, of 2016. Two factors created vacancies in the posts of the Chief Justice, Deputy Chief Justice and a judge of the Supreme Court in mid-2016. Chief Justice Mutunga decided to retire in June 2016, almost a year before he reached the retirement age of 70.¹³⁵ He explained that national elections were due shortly after his required retirement. He thought it would be unfair to the new Chief Justice to have to deal with a presidential election petition case very soon after his or her appointment (mindful, no doubt, of his own trauma soon after the 2013 elections¹³⁶)—the

¹³¹ Constitution 2010, art 166(2)(c). Judges and magistrates, as well as members of the JSC, are "state officers" (see art 260) and so are subject to the duties and principles of leadership and integrity in Chapter 6 of the Constitution.

¹³² Constitution 2010, art 166(2). Unlike other state offices, judges and members of commissions do not need to be Kenyan citizens. This is in order to enable outstanding lawyers from other common law countries to strengthen the judiciary and ensure a measure of impartiality in otherwise ethnicity-ridden politics. To the best of our knowledge, only one application has been received from abroad.

¹³³ Constitution 2010, art 166(4) and (5).

¹³⁴ Constitution 2010, art 166(3).

¹³⁵ Constitution 2010, art 167(1).

¹³⁶ There is no space to elaborate: the presidential election petition was almost the first case decided by the Supreme Court. It was "robustly criticized by a section of Kenya's legal fraternity and other commentators" (Francis Ang'ila Away, "A Critique of the Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya" in Collins Odote and Linda Musumba (eds), *Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence* (International Development Law Organization (IDLO) and Judicial Training Institute (JTI) 2016) 46 (downloadable from <<http://www.judiciary.go.ke/portal/page/reports>>). Raila Odinga, who initiated the case but lost to Uhuru Kenyatta, has recently complained that the Court was biased in favour of Kenyatta. It certainly appears that, were a presidential election case to come before the Supreme Court, the public would

Supreme Court being the original court for such a challenge.¹³⁷ The other two posts opened up because the sitting judges reached retirement age, as decided by the Court of Appeal.¹³⁸

The old JSC did not advertise vacancies or receive applications but simply approached those individuals it wanted to see appointed to the bench, which is effectively the tap on the shoulder system. (This was the system long practised in England, though now superseded even there, though in Kenya the power to “tap” candidates was placed in the hands of a committee rather than an individual.) The new application process introduces competition, openness, public consultation and integrity which are expected to increase trust in the appointment system, both among lawyers who are eligible for appointment and the general public.

When a vacancy arises, the Chief Justice must make an announcement in the *Kenya Gazette* within 14 days.¹³⁹ The Commission must then circulate a notice of the vacancy to the Law Society of Kenya, any other lawyers’ professional association as well as in the print media and the judiciary’s website.¹⁴⁰ The Commission apparently declined, on the basis of this provision, to initiate the process for Mutunga’s replacement before he retired, despite knowing well in advance that he would. But the provision surely could not apply to replacing the Chief Justice, because there would be no Chief Justice to advertise, since it is not possible to have an acting Chief Justice.¹⁴¹ Had the Commission replaced Mutunga sooner, the crisis of having no quorum in the Supreme Court, not to mention of having no Chief Justice to perform functions specific to that office, such as appointing a multi-judge bench for constitutional cases,¹⁴² would not have arisen.

watch the proceedings with some scepticism about its impartiality (see *The Star* (Nairobi, 28 May 2016) <http://www.the-star.co.ke/news/2016/05/28/many-kenyans-dont-trust-supreme-court-can-fairly-handle-an-election_c1359021>). The judgment is *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, Petitions 3, 4 and 5 of 2013 [2013] eKLR. For comment on the case see John Harrington and Ambreena Manji, “Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013” (2015) 9 *Journal of Eastern African Studies* 175.

¹³⁷ Constitution 2010, art 140.

¹³⁸ The Deputy Chief Justice and the other judge due for retirement at 70 argued that they were appointed to the bench when the law specified retirement at 74. They had considerable support from some other Supreme Court judges and several other superior court judges; the judiciary was deeply divided. The resistance to the retirement age was regarded by the public as unseemly and made the Chief Justice’s last weeks extremely difficult. The High Court (five judges) and the Court of Appeal (seven judges) held that the Constitution (in its Sixth Schedule, s 31) required judges to retire at 70 (*Rawal v Judicial Service Commission Civil Appeal (Application) No 1 of 2016* [2016] eKLR). There was then an attempt to appeal to the Supreme Court, which by a slim majority held it had to recuse itself (Civil Application No 11 of 2016, decided three days before the Chief Justice retired). The three retirements made the court inquorate.

¹³⁹ Judicial Services Act 2011, First Schedule, s 3(1).

¹⁴⁰ Judicial Services Act 2011, First Schedule, s 3(1).

¹⁴¹ Between Mutunga and Maraga, now Chief Justice, there was no acting Chief Justice, because the Constitution makes no provision for such an appointment. It only permits an Acting President of the Supreme Court (which could not sit).

¹⁴² Constitution 2010, art 165(4).

The application form requires the applicant to provide “background information ... including ... academic, employment, legal practice and judicial or financial discipline; community service, *pro bono* activity and non-legal interests; involvement as a party in litigation; criminal record”.¹⁴³ An applicant must supply three professional and two character references, detailed information about the applicant’s practice of law or other engagement in the last five years, a sample of any writings, a declaration of income and liabilities and a brief written summary of the applicant’s bio-data (including legal education and legal experience).¹⁴⁴

The Act provides that a lawyers’ professional body or organization may invite its members to submit applications to that body for evaluation and submission to the Commission.¹⁴⁵ This presumably means the body (usually the Law Society of Kenya, but there are others such as the East Africa Law Society) would forward the application with an endorsement. It is not clear if they would have to inform the member if they propose to forward it with a negative evaluation. But Article 47 of the Constitution (right to fair administrative action) would surely require this.

The Act specifies in some detail what those involved in the appointments should be looking for.¹⁴⁶ From the long list, of particular interest are professional competence, including intellectual capacity, legal judgment, diligence, knowledge of the law, administrative skills, and the ability to work well with a variety of people. Also specified are “the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life”. Then come fairness, including “open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views”, and good judgement, including common sense, and a “demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles”. Finally, “legal and life experience” including “diversity of personal and educational history, exposure to persons of demonstrable interests and cultural backgrounds, and in areas outside the legal field”.

The JSC constitutes a selection panel of at least five Commissioners (its make-up is not otherwise specified) to shortlist eligible applicants before interview.¹⁴⁷ The elaborating provision in the Act’s schedule, oddly, does not use the word “short-listing”. This provision was central to a court case over the recruitment of a new Chief Justice in 2016.

The schedule says that within 14 days of the closing date, applications must be screened for completeness and conformity with the minimum constitutional and statutory requirements for the position.¹⁴⁸ Within 21 days of the initial review

¹⁴³Judicial Service Act 2011, First Schedule, s 4(3)(a).

¹⁴⁴Judicial Service Act 2011, First Schedule, s 4(3)(b)–(e).

¹⁴⁵Judicial Service Act 2011, First Schedule, s 4(5).

¹⁴⁶Judicial Service Act 2011, First Schedule, s 13.

¹⁴⁷Judicial Service Act 2011, s 30.

¹⁴⁸Judicial Service Act 2011, First Schedule, s 6.

a reference check is conducted,¹⁴⁹ and the Commission may not share with the applicants any information it obtains or reveal the source unless the latter waives anonymity.¹⁵⁰ The JSC has then 30 days to investigate and verify, with the relevant professional bodies “or any other person”, “the applicant’s professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed”.¹⁵¹

In the 2016 Supreme Court appointment exercise, a few days after the deadline for applications the JSC announced its three shortlists. For the Chief Justice, it shortlisted six out of 14 applicants: five judges (one from the Supreme Court, four from the Court of Appeal (one woman), and one practising advocate). An eminent Kenyan scholar, former dean at a US law faculty, a world authority on human rights with considerable experience of legal practice, and active in civil society, was left out—as was also an eminent Supreme Court judge. In a case by some civil society groups, seeking an order that the JSC give reasons for shortlisting, Justice Odunga, in a learned and balanced judgment, held (though finding in favour of the JSC on some counts) that the JSC had not abided by the Constitution and the JSC legislation. Shortlisting was possible, but should be done on the basis of satisfaction of constitutional or statutory qualifications (outlined above). He held that the JSC had erred in using extra requirements of producing clearance from the tax, anti-corruption and other authorities at the preliminary stage.¹⁵²

Perhaps out of pique, the JSC then “shortlisted” all the applicants, including those who patently did not qualify, such as a third-year law student! Predictably, the chosen Chief Justice was among the original three it had nominated.

After the expiry of the period set for applications, the Commission issues a press release announcing the names of the applicants, and their names are published in the *Kenya Gazette*.¹⁵³ Members of the public are invited to provide any relevant information to the Commission about any of the applicants. This information is to be kept confidential, and the Commission is required to interview members of the public who have submitted any such information.¹⁵⁴

Candidates are notified in writing of their interview times at least 14 days in advance.¹⁵⁵ It seems that interviews are conducted by the entire Commission (or at least by a quorum, which is six members).¹⁵⁶ All interviews are conducted in public.¹⁵⁷ In the case of Supreme Court judges the interviews are televised, and

¹⁴⁹Judicial Service Act 2011, First Schedule, s 7.

¹⁵⁰Judicial Service Act 2011, First Schedule, s 7.

¹⁵¹Judicial Service Act 2011, First Schedule, s 7.

¹⁵²*Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission*, Petition No 314 of 2016 [2016] eKLR.

¹⁵³Judicial Service Act 2011, First Schedule, s 9.

¹⁵⁴Judicial Service Act 2011, First Schedule, s 9.

¹⁵⁵Judicial Service Act 2011, First Schedule, s 10(1)–(2).

¹⁵⁶Judicial Service Act 2011, s 22(5).

¹⁵⁷Judicial Service Act 2011, First Schedule, s 10(4).

watched by thousands¹⁵⁸ (even as far away as Uganda, Tanzania and South Africa when the interviews for the first appointments were held).

The questions asked at the JSC interviews in 2011 for the first Supreme Court appointments displayed the underlying concerns of the public that the reformed judiciary would lack independence and that judges would not be sufficiently experienced and competent. Among those whose applications were ultimately successful, Njoki Ndung'u, a former nominated MP, well known for her role in the enactment of the Sexual Offences Act, her membership of the CoE on the new Constitution and her close ties with the Kibaki establishment, was questioned about her independence and impartiality. JSC member Emily Ominde read out sections of a letter written to the Commission, alleging that she was a "political operative".¹⁵⁹ Smokin Wanjala was questioned about his resignation from the former Anti-Corruption Commission in 2009 after he was irregularly reappointed by President Kibaki.

Questions surrounding judicial experience were asked of Willy Mutunga, subsequently appointed Chief Justice, and Smokin Wanjala, who had no such prior experience. Kalpana Rawal, later Deputy Chief Justice, who had been a judge for over a decade, was nevertheless asked about her lack of judicial experience outside Nairobi when applying unsuccessfully for Chief Justice.¹⁶⁰

The JSC soon adopted an internal policy of interrogating and investigating past judgments.¹⁶¹ Justice Ibrahim was interrogated about his 2010 decision in the High Court at Mombasa, holding that Kenyan courts did not have jurisdiction to try nine Somali pirates because the crime they were accused of was committed beyond Kenya's territorial waters. (His decision to have the accused extradited instead was later overturned by the Court of Appeal.) Justice Rawal was also asked about her decision in a case in which the KACC unsuccessfully sought the forfeiture of unexplained assets of a public officer.¹⁶²

These candidates survived the sometimes aggressive questioning by the JSC. One newspaper report observed, "it was [Law Society member, Ahmednasir Abdullahi's] abrasive questioning which was the key highlight of the interviews. He was accused of getting personal and ridiculing the applicants."¹⁶³ "Victims" included candi-

¹⁵⁸ G Musila, "The State of constitutionalism in Kenya in 2012: Embarking on a journey to re-establish a new order" in C Mbazira (ed), *Annual State of Constitutionalism in East Africa 2012* (Kituo Cha Katiba 2013).

¹⁵⁹ P Juma, "I'm not a gun for hire, Njoki tells JSC" *Daily Nation* (Nairobi, 9 June 2011) <<http://www.nation.co.ke/News/politics/-/1064/1178042/-/7sr35w/-/index.html>>.

¹⁶⁰ W Oeri, "Justice Rawal put to task over experience" *Daily Nation* (Nairobi, 6 May 2011) <<http://www.nation.co.ke/News/-/1056/1157552/-/10xprq8z/-/index.html>>.

¹⁶¹ A Abdullahi, "Restoring public confidence in Kenya's discredited, corrupt, inefficient and overburdened judiciary: The Judicial Service Commission's agenda for reform" (Kenya Annual Judges Colloquium, Mombasa, 2011) <<http://kenyalaw.org/kl/index.php?id=1930>>.

¹⁶² Oeri (n 160). The case is *Kenya Anti-Corruption Commission v Amuti* Civil Suit 448 of 2008 [2011] eKLR, reversed by the Court of Appeal Civil Appeal 213 of 2011 [2015] eKLR. Oeri's item misses the main point of the case, but he clearly refers to *Amuti*.

¹⁶³ Emeka-Mayaka Gekara, "Judges in the dock over court decisions" *Daily Nation* (Nairobi, 7 May 2011) <<http://www.nation.co.ke/news/Judges-in-the-dock-over-court-decisions/-/1056/1158118/-/view/printVersion/-/rfe4dhz/-/index.html>>.

dates accused of intellectual mediocrity, for having a mere pass degree or a lower second. Justice Riaga Omolo was accused of having favoured former President Moi in election cases: he “was painted as a man who rendered loyal service to the Moi regime in disregard of the Constitution”.¹⁶⁴ Justice Nyamu was accused of “favouring the rich and politicians in his judgments, especially in corruption cases”,¹⁶⁵ and criticised for a peculiar case that had tried to upset the constitutional apple cart by declaring kadhi courts unconstitutional—even in a constitution yet to be adopted.¹⁶⁶ Justice Bosire “was accused of being harsh to a widow in a burial dispute”.¹⁶⁷ Interestingly, far from becoming Chief Justice, Justices Nyamu, Omolo and Bosire were early victims of the vetting process.¹⁶⁸ Justice Alnashir Visram was interrogated about his record of never failing to find in favour of those who yield power, including having awarded 30 million Kenya shillings as damages in defamation in favour of a prominent politician.¹⁶⁹ He remains on the Court of Appeal bench, and was not shortlisted for Chief Justice in 2016.

Incidentally, Visram had been formally appointed Chief Justice by Kibaki earlier in 2011, but without following the constitutional procedure of consulting the then Prime Minister under power-sharing arrangements in place. Kibaki had to retreat from this and some other appointments. There was comment that maybe Visram’s commitment to the Constitution was not sufficient to justify his being appointed the second time around.¹⁷⁰ Somewhat similarly, in Uganda, when former Chief Justice Benjamin Odoki reached retirement age in March 2013, he was reappointed by President Museveni without consultation with the JSC.¹⁷¹ Parliament refused to approve the appointment. The Constitutional Court held the reappointment unconstitutional on the age ground.¹⁷² A new Chief Justice was appointed only in March 2015.

Ahmednasir has been assumed to have been a dominant player in the first round of judicial appointments. Rumours abound about how the JSC makes its

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Jesse Kamau & 25 others v Attorney-General* High Court Miscellaneous Civil Application 890 of 2004 [2010] eKLR. The court held (at para 8) “We grant a declaration that any form of religious courts should not form part of the Judiciary in the Constitution as it offends the doctrine of separation of state and religion.”

¹⁶⁷ Gekara (n 163).

¹⁶⁸ See Judges and Magistrates Vetting Board, First Announcement: Determinations Concerning the Judges of the Court of Appeal (2012) <<http://www.jmvb.or.ke/determinations/>>.

¹⁶⁹ Moses Njagih, “Visram’s past judicial rulings haunt his bid for CJ post” *Standard* (4 May 2011) <<http://www.standardmedia.co.ke/business/article/2000034450/visram-s-past-judicial-rulings-haunt-his-bid-for-cj-post>> The defamation case is *Biwott v Clays Limited & 5 others* [2000] eKLR.

¹⁷⁰ Moses Njagih, “Visram out to prove a point in race for CJ position” *Daily Nation* (Nairobi, 16 April 2011) <<http://www.nation.co.ke/News/politics/Visram+out+to+prove+a+point+in+race+for+CJ+position+/-/1064/1145838/-/w2nhky/-/index.html>>.

¹⁷¹ The Law Society, “Law Society urges Uganda to appoint new Chief Justice” (*The Law Society*, 23 January 2014) <<http://www.lawsociety.org.uk/news/stories/law-society-urges-uganda-to-appoint-new-chief-justice/>>.

¹⁷² *Karuhunga v Attorney General* (Constitutional Petition Number 0039 of 2013) [2014] UGCC 13.

decision, and the credibility of these is very varied. However, Ahmednasil's own comment on that early stage is interesting:

[W]hen ... we undertook the first recruitment of the Chief Justice and members of the Supreme Court, former Attorney-General, Senator Amos Wako surprisingly played the most influential and progressive role in the process. He put to devastating effect his personal knowledge of the candidates right from their days in Dar-es-Salaam University, how some of the judges played to the tune of the old political order and why, in his view, Dr Willy Mutunga was the right person for the job.¹⁷³

He did not anticipate the current Attorney-General playing a similar role.

From JSC to bench

The transition from JSC "recommendation" to Presidential appointment has not always been easy. In the view of the drafters of the Constitution it was perfectly clear that the President has no choice but to appoint those names "recommended" by the JSC for vacant judicial positions (provided—in the case of the Chief Justice and Deputy—the National Assembly approves). This did not sit well with President Uhuru Kenyatta and he dragged his heels on the appointment of High Court judges, apparently to make a point. But eventually he did appoint several nominees on the list, and more than another year later, the remainder.¹⁷⁴ That is not the end of the story. In 2015 Parliament amended, through a Statutory Law (Miscellaneous Amendments) Act, section 30(3) of the Judicial Service Act, to provide that for appointment as Chief Justice and Deputy Chief Justice, the JSC must submit three nominees to the President.¹⁷⁵ Not surprisingly, five High Court judges, in a suit by the Law Society with several civil society interested parties, held that the amendments "violated the letter and the spirit of Article 166(1)".¹⁷⁶ The Court took the opportunity to stress the transformative nature of the Constitution, the purposive approach to its interpretation, the value of an independent judiciary and the conditions for judicial independence.¹⁷⁷

¹⁷³ "Exclusion of a community, taming of Makau Mutua and the need for an old CJ" in *Nairobi Law Monthly* (of which he is the editor) (25 August 2016) <<http://nairobilawmonthly.com/index.php/2016/08/25/exclusion-of-a-community-taming-of-makau-mutua-and-the-need-for-an-old-cj/>>.

¹⁷⁴ See Maera Ndurya, "President Kenyatta appoints 14 High Court judges" *Daily Nation* (Nairobi, 5 May 2015) <<http://www.nation.co.ke/news/President-Uhuru-Kenyatta-appoints-14-High-Court-judges/-/1056/2706756/-/uw8o3cz/-/index.html>>.

¹⁷⁵ Statute Law (Miscellaneous Amendments) Act 2015, amending the Judicial Service Act 2011, s 30. Interestingly, a Presidential choice out of three is in the draft Constitution of Tanzania (art 175).

¹⁷⁶ *Law Society of Kenya v Attorney General & National Assembly* Constitutional Petition 3 of 2016 [2016] eKLR.

¹⁷⁷ The Court also held that Miscellaneous Amendments Act "ought to be confined only to minor non-controversial and generally house-keeping amendments" (para 234). It also decided against the validity of the amendment because it was itself a late amendment to the Bill and "for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions" (para 245).

The advice that the President has apparently been receiving is illustrated by a recent article in the press by Jasper Mbiuki, Secretary, Legislative Affairs and Regulatory—Executive Office of the President, who argues:

If the President has no power or authority in the process of nomination and appointment of Judges, why does the Constitution require him to be part of the process both at the beginning and at the end? Why didn't the Constitution simply provide that the Judicial Service Commission would forward the names of the nominees directly to Parliament? Clearly the Constitution intends for the President to play an active role in that process and to act as a "vetting officer" and a safeguard.¹⁷⁸

The question is not invalid, but shows a misapprehension of the ceremonial roles of the President. The conclusion is clearly wrong.

Parliamentary approval

The Chief Justice and the Deputy Chief Justice must be approved by the National Assembly before formal appointment by the President.¹⁷⁹ This provision first entered constitutional drafts in the National Constitutional Conference (Bomas) draft of 2004. In the first CoE draft, all superior court judges would have been approved by the National Assembly, a provision found in the Ugandan Constitution. However, the CoE then revised its position to restrict the parliamentary approval requirement to the two most senior judicial positions, citing "[c]oncern that the appointment of judges should be protected from political pressures".¹⁸⁰ The Parliamentary Select Committee sought to reinstate the principle that all superior court appointments should be subject to parliamentary approval, but the CoE stuck to their guns:

After lengthy deliberations and especially noting the role of the Chief Justice in the JSC, the CoE agreed to retain the requirement of parliamentary approval for the appointment of the Chief Justice and the Deputy Chief Justice. However, the CoE was not satisfied that there were sufficient safeguards in the parliamentary process to shield other judicial appointees from political negotiation and political horse-trading. The CoE settled for a competitive and transparent appointment process conducted by the JSC, and for the President to appoint the other judges on the JSC's recommendation.¹⁸¹

There have been four parliamentary vettings so far: two for Chief Justices and three for Deputies. Chief Justice Mutunga was asked to set out his assets, and among other issues was asked about his sexual orientation because he wears a single earring. The Deputy Chief Justice, Nancy Baraza, was also asked why she was doing research on homosexuality. The new Chief Justice, David Maraga, was questioned over his verdict in a case arising out of the 2007–2008 post-election violence, and defended himself on the basis of the police's shoddy investigation.¹⁸² The new Deputy Chief

¹⁷⁸ "President has Power to Hire Court Judges" *The Star* (Nairobi, 13 January 2016) <http://www.the-star.co.ke/news/2016/01/13/President-has-power-to-hire-court-judges_c1274134>.

¹⁷⁹ Constitution 2010, art 166(1)(a). And for the procedure see Public Appointments (Parliamentary Approval) Act 2011.

¹⁸⁰ CoE, *Final Report* (n 31) para 8.11.4.

¹⁸¹ *Ibid.*

¹⁸² Beth Nyaga, "Parliament vets Chief Justice nominee David Maraga" (*KBC TV blog*, 13 October 2016) <<http://kbctv.co.ke/blog/2016/10/13/>>

Justice, Philomena Mwilu, was asked her view of gays under the law, and how she dealt with advocate members of the JSC who appeared before her.¹⁸³

The principle of inclusiveness

One of the major challenges which faced the Kenyan JSC was to restore the public's trust in the judiciary. The public had lost faith that they would be accorded a fair hearing before an unbiased decision-maker. As one academic noted in 2001, "An aggrieved party cannot expect the rule of law to be upheld by a Kenyan court if the offender is a public official or is connected to the KANU elite."¹⁸⁴ The violence following the disputed 2007 elections had been attributed to the fact that the public could not rely on the judiciary to settle their disputes fairly and felt compelled to take justice into their own hands. The ultimate success of the "reformed society" thus depends in no small degree on the perceived legitimacy and "representativeness" of the post-2010 judiciary.

The Constitution provides that "inclusiveness" is one of the national values and principles of governance which bind all state organs, state officers, public officers and persons when applying or interpreting the Constitution or any other law or when making or implementing public policy decisions.¹⁸⁵ Under the equality provision, the state is obliged to take legislative and other measures in order to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.¹⁸⁶ There are thus clear objectives that relate to the composition of the judiciary in terms of gender. However, in 2011 a court challenge to the make-up of the Supreme Court on the basis of the "no more than two-thirds of either gender" rule was defeated.¹⁸⁷ The High Court held that "Article 27 imposes no duty on the part of the Government other than the requirement to progressively take legislative and other measures to implement the said principle."¹⁸⁸ In 2016 the National Gender and Equality Commission tried to challenge the appointment of Justice Isaac Lenaola to the Supreme Court, on the basis that the Court would again have only two women, but it withdrew the case after the High Court declined to issue an order stopping Lenaola's swearing in.¹⁸⁹

parliament-vets-chief-justice-nominee-david-maraga-2/>. Part of the interview is on YouTube at <https://www.youtube.com/watch?v=0q_T7p7n20>.

¹⁸³ Her interview with the committee is available at <<https://www.youtube.com/watch?v=28hbw-kMiho>>.

¹⁸⁴ Mutua (n 71) 99.

¹⁸⁵ Constitution 2010, art 10.

¹⁸⁶ Constitution 2010, art 27(8).

¹⁸⁷ *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney-General & another* High Court Petition No 102 of 2011 [2011] eKLR. A somewhat similar approach, characterising art 27(8) of the Constitution as mandating only progression towards the realisation of the principle concerned Parliament: *In the Matter of the Principle of Gender Representation in The National Assembly and The Senate*, Supreme Court Reference No 2 of 2012 [2012] eKLR, with a powerful dissent by the Chief Justice.

¹⁸⁸ *Ibid.*

¹⁸⁹ Racheal Mburu, "Gender Commission seeks to block Justice Lenaola's appointment" *Capital News* (Nairobi, 26 October 2016) <<http://www.capitalfm.co.ke/news/2016/10/>>

The Constitution also provides that the JSC shall be guided by the promotion of gender equality as well as competitiveness and transparent processes of appointment.¹⁹⁰ The Judicial Service Act 2011 requires the JSC to deliberate upon and select the most qualified applicants, taking into account gender, regional, ethnic and other diversities of the people of Kenya.¹⁹¹ Uganda's Constitution has a general provision about affirmative action for women, and provides that one-third of the members of every local government council must be women, but has no provisions about gender or other diversity in the judiciary in its constitution. And Tanzania's draft constitution has provisions about general equal opportunity for both sexes, and for representation of women in elected bodies, but nothing in relation to the judiciary.¹⁹²

The Kenyan JSC has recognised that the initial stages of the application process are also relevant to implementing the national value of "inclusiveness" in the judiciary. It advertises judicial vacancies widely. The JSC reopened application processes when dissatisfied with the low number of applicants to fill the position of former Deputy Chief Justice Baraza, and re-advertised to get more women because it had been agreed that the Supreme Court could not go below two women out of seven, despite the decision in the Article 27 case on the two-thirds rule.¹⁹³

The fact that the Chief Justice and Deputy Chief Justice who were originally appointed had no judicial experience signalled that the JSC sought to make a "clean break" from the corrupt judiciary.¹⁹⁴ But there is little guarantee that a continuing process of diversification of professional background is under way. In 2016 all three Supreme Court appointees were from the existing judiciary, and there is a strong sense that this was the JSC game plan.¹⁹⁵

The JSC has made major progress on gender representation. Overall the judiciary is reasonably "gender-balanced", if one includes judicial officers and staff, being 46% female (judges 17%, magistrates 25.5%).¹⁹⁶

Turning to the issue of ethnicity, the 11 judges who have been appointed to the Supreme Court since its inception represent nine different ethnicities.¹⁹⁷ Although

gender-commission-seeks-block-justice-lenaolas-appointment/).

¹⁹⁰ Constitution 2010, art 172(2)(a)–(b).

¹⁹¹ Constitution 2010, First Schedule, s 4.

¹⁹² See Draft Constitution 2014, available at <http://www.constitutionnet.org/files/the_proposed_constitution_of_tanzania_sept_2014.pdf>.

¹⁹³ See Paul Ogemba, "Woman to replace Baraza will be known in a month's time" *Daily Nation* (Nairobi, 21 February 2013) <<http://www.nation.co.ke/News/Interviews-for-Deputy-CJ-end/-/1056/1699842/-/k9jyuaz/-/index.html>>.

¹⁹⁴ Moses Njagih, "JSC seeks clean break by picking Mutunga, Baraza" *Standard* (Nairobi, 14 May 2011) <<http://www.standardmedia.co.ke/business/article/2000035113/jsc-seeks-clean-break-by-picking-mutunga-baraza>>.

¹⁹⁵ Based on discussions rather than written sources.

¹⁹⁶ *State of the Judiciary and Administration of Justice 2014–2015* (Republic of Kenya Judiciary 2016) 119.

¹⁹⁷ Former Chief Justice Mutunga is from the Kamba community, former Deputy Chief Justice Baraza and Justice Wanjala are both Luhya, Justice Tunoi is Kalenjin, Justice Njoki Ndung'u is Kikuyu, Justice Ojwang is Luo, Justice Ibrahim is a Somali Kenyan and former Deputy Chief

some communities seem to believe they have a right to be represented on the Court, Justice Tunoi was not replaced by another Kalenjin (the fourth largest group) but by a Samburu (a very small group). The judiciary does not include ethnicity in its annual report, but a November 2016 analysis of the make-up of the judiciary¹⁹⁸ analyses the higher judiciary. Of 161 judges, 42 (26%) were Kikuyu, 25 (15.5%) Luo, 22 (13.6%) Luhya, 19 (11.8%) Kamba and 15 Kalenjin (9.3%). These are the “big five” ethnic groups, though not represented in direct relation to their presence in the country, where Kikuyus are now about 18% and the Kalenjin 13.3% so are respectively over- and under-represented on the bench. The Kisii seem to be over-represented at 7.4% (they are about 6% of the population).¹⁹⁹ The Somalis have four judges or 1.8% (but are now about 6.4% of the population, though not everyone is convinced about this). Close communities to the Kikuyu, the Meru and the Embu have respectively five and four judges. Nine other indigenous communities have one or two judges each, or under 1%, including the Mijikenda (5.2% of the population), leaving 24 of the traditional 42 tribes of Kenya without any presence on the higher bench. The Asians are said to have one, but in fact have two.²⁰⁰

VI JUDICIAL TRANSFERS

Kenyan public servants, including the police and teachers, may be transferred to any part of the country. In the case of the judiciary, under the old regime, frequent transfers by the Chief Justice, often at short notice, caused disruption to and delay in the system,²⁰¹ and unfairness to those transferred.²⁰² Transfer, or non-transfer, was used as means of discipline, victimisation and patronage.²⁰³

The Kwach Report²⁰⁴ proposed regular transfers from one location to another to “reduce undue familiarity”, while the Ouko Report recommended that:

The JSC develops and implements a transparent transfer policy, taking into account the need for succession planning, regular transfers every three (3) years, the requirement that judicial officers must finalise pending or part-heard matters before proceeding to their new court stations and linkages between judicial transfers and performance management.²⁰⁵

The judiciary has adopted a transfer policy, which observes that judges of the High Court and equal status courts, magistrates and kadhis “who serve for too long in

Justice Rawal is Kenyan Asian, new Chief Justice Maraga, Kisii, Deputy Chief Justice Mwilu, Kamba, and Justice Lenaola, Samburu.

¹⁹⁸ “Report on Ethnic and Gender Composition of Judges in the Judiciary”, on file with the authors.

¹⁹⁹ For population figures—2009 census—see Kenya National Bureau of Statistics <www.knbs.go.ke>. That census allowed people to self-identify, producing many groups, including 13 within the coastal Mijikenda and 19 within the Kalenjin.

²⁰⁰ Justice Visram, still on the Court of Appeal, and Justice Farah Sheikh Mohammed of the Commercial Division of the High Court, who is listed as Somali.

²⁰¹ Ouko Report (n 30) 51–52.

²⁰² Ibid 105.

²⁰³ Ibid 2.

²⁰⁴ Kwach Report (n 20).

²⁰⁵ Ibid xxxiv.

one station will become too familiar with the community in the area including lawyers, litigants, police, prosecutors and other members of the public”.²⁰⁶ A normal period to serve in a particular place is about three years (two years in hardship postings), and three months’ notice is usually to be given. Transfers are not to be used as punishments.

However, although “[t]he Transfer of Judicial Officers should not result in undue disruption and delay in the delivery of justice”,²⁰⁷ the policy says nothing about how part-heard cases are to be dealt with. In reality, transfers remain disruptive to the system, with cases having to be re-started when almost complete, or have to be completed, including judgments being made by those who have not heard witnesses.²⁰⁸

Interestingly, at the time of writing, a matter of weeks after the new Chief Justice took office, he is reported to be transferring judges including some who have only recently been transferred,²⁰⁹ a practice said to have been common for incoming Chief Justices in the past, stamping their mark on the system.²¹⁰

CONCLUSION

The judiciary, and the way in which judges are selected in Kenya, have undergone major reforms since 2010, in the wake of the post-election violence of 2007 when the courts had not been trusted to adjudicate election disputes. It remains to be seen whether a future presidential election petition will be taken to the Supreme Court, and how far it will be trusted,²¹¹ though the new Chief Justice has been at pains to reassure the public about the judiciary’s impartiality.²¹²

The rigorous, fair and transparent process through which new appointments have generally been made by an independent JSC has undoubtedly contributed to greater public support for the judiciary, though there is less enthusiasm for some aspects of the most recent Supreme Court appointment exercise. (This is not to criticise the ultimate appointees, who have much to recommend them.)

The place of the judiciary in Kenya is very different from in the past. People are making far greater use of the courts. There are far more judges and magistrates than ever before.

An efficient, fair and independent judiciary is crucial, especially in the context of the Kenya constitution. Independence is of course not enough: integrity,

²⁰⁶ *Transfer Policy and Guidelines for Judicial Officers* (2015) 5.

²⁰⁷ *Ibid* 5.

²⁰⁸ Personal knowledge and anecdotal information. See also *Performance Management Directorate, Court Case Delays: Impact Evaluation Diagnostic Study Report* (Judiciary 2014) 27.

²⁰⁹ Personal knowledge of the authors.

²¹⁰ Personal knowledge of the authors.

²¹¹ See Felix Olick, “Many Kenyans don’t trust Supreme Court can fairly handle an election petition” *The Star* (Nairobi, May 28 2016) <http://www.the-star.co.ke/news/2016/05/28/many-kenyans-dont-trust-supreme-court-can-fairly-handle-an-election_c1359021>.

²¹² Patrick Lang’at, “Maraga seeks to allay Cord fears on election petitions” *Daily Nation* (Nairobi, 2 November 2016) <<http://mobile.nation.co.ke/news/Maraga-seeks-to-allay-Cord-fears-on-election-petitions/1950946-3437972-2by1ycz/index.html>>.

commitment to justice and competence are also required, as the Constitution itself emphasises, especially in Chapter Six on integrity. But the reform in appointments processes, coupled with the wide range of other initiatives taken in the last few years, within the framework for radical change in the judiciary,²¹³ have made a significant contribution to making the judiciary what it was designed to be: a key element in the fulfilment of the constitutional vision. This is especially so when one considers the obstacles that the Constitution and the judiciary face from the Executive and the legislature.

However, even the former Chief Justice has raised the alarm about corruption.²¹⁴ This and the various inquiries described earlier have done much to damage the reputation of the judiciary, which had started on a high note with the open process of the appointment of the Supreme Court judges and some excellent decisions by the newer High Court judges. The Executive and Parliament have not been slow to denigrate the judiciary for failing to observe constitutional standards.

This situation is not very surprising. The judiciary was cast in a difficult role by the Constitution, especially in its relationship with the Executive and legislature. These institutions have repeatedly violated the Constitution (and have been taken to the courts) and now seem to find some solace in attacks on the judiciary. In a country with massive corruption, a somewhat inefficient public service, cosy relations between the top members of the Executive, a legal profession not entirely committed to its high responsibility, and the lack of the traditions of the rule of law, it is not surprising that the judiciary has got caught in the web.²¹⁵

There are apprehensions that President Uhuru Kenyatta would like a greater role for the Executive in matters judicial, as this chapter demonstrates. He has the support of the Speaker of the National Assembly and many of its members who also tend to resent the role of the judiciary in its examination of their conduct.

But, finally, it is important to stress that there has been much improvement, and the appointment process has played a major part in this.

²¹³See *Judiciary Transformation Framework 2012-2016* (Republic of Kenya Judiciary 2012) <<http://www.judiciary.go.ke/portal/portal/assets/downloads/reports/Judiciary%20Transformation%20Framework-fv.pdf>>.

²¹⁴See, for example, his Preface to Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists (Kenya section) 2016).

²¹⁵Some of this context is captured in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press, 2014) and Jill Cottrell Ghai (ed), *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists (Kenya section) 2016).

Judicial Appointments in Malaysia

KEVIN YL TAN¹

INTRODUCTION

Malaysia is the only federal state in Southeast Asia. After successive periods of imperial conquest, and latterly various forms of British colonial rule in different parts of the country, the Federation of Malaya gained its independence from Britain and the Federal Constitution of 1957 came into operation.² Initially, the independent Federation consisted only of territory on the mainland of South-East Asia (known today as Peninsular Malaysia).

In 1963, the Federation of Malaya merged with the formerly British territories of Sabah and Sarawak, located on the island of Borneo, and the former British colony of Singapore to form the Federation of Malaysia. The Federal Constitution of 1957 remained largely intact although separate state constitutions were crafted for the new states. Singapore seceded from the Federation in 1965. The current Federation of Malaysia consists of 13 states and three Federal Territories (Kuala Lumpur, Putrajaya, and Labuan) with its administrative capital at Putrajaya, and commercial capital at Kuala Lumpur. It is governed by the Barisan Nasional (BN), an umbrella alliance of over 10 political parties led by the dominant United Malays National Organisation (UMNO). The BN has been in power continuously since 1957 and is the only government known to citizens of independent Malaya/Malaysia.

Malaysia is a constitutional monarchy with a parliamentary system of government. The King or Yang di-Pertuan Agong is the head of state, but unlike most constitutional monarchies, the position is not hereditary. Each of the nine traditional rulers, or Sultans, is a member of the Conference of Rulers who elect a King every five years. While the Constitution does not regulate these elections, it has become political convention that the post of Yang di-Pertuan Agong will rotate between the Sultans, with each taking turns to be King. The current Yang di-Pertuan Agong, Sultan Abdul Halim of Kedah (born 1927), first served as Yang di-Pertuan Agong from 1970 to 1975. He was again installed as Yang di-Pertuan Agong in 2012. The head of government is the Prime Minister, who is the member of the House of Representatives (Dewan Rakyat) who “is likely to command the confidence of the majority of the members of that House”.³

¹ Professor (Adjunct), Faculty of Law, National University of Singapore. The facts and law in this chapter are accurate as of March 2015.

² See generally, Barbara Watson Andaya and Leonard Y Andaya, *A History of Malaysia* (Palgrave Macmillan 2001).

³ Federal Constitution (first introduced as the Constitution of the Federation of Malaya on Merdeka Day, 1957; subsequently introduced as the Constitution of Malaysia on Malaysia Day, 1963; Fifteenth Reprint 2010), art 43(2)(a).

I THE JUDICIARY IN MALAYSIA

The courts

Although Malaysia is a federation its judicial structure is centralised in the federal system.⁴ There are no state-level superior courts. However, the political history that led to the establishment of the Federation of Malaysia in 1963 has resulted in the High Court system being divided into two geographically separate divisions. The superior courts of record are the Federal Court, the Court of Appeal and the two High Courts—the High Court of Malaya and the High Court in Sabah and Sarawak. As can be seen from the nomenclature, the two High Courts—which are of co-ordinate jurisdiction—are named according to geographical locations.

The Federal Court (Mahkamah Persekutuan)

At the apex of Malaysia's judicial system is the Federal Court. The Federal Court was established in 1957, upon the Federation of Malaya's independence from Britain. However, it was not then the highest court in the land as appeals continued to lie to the Judicial Committee of the Privy Council in London. It was only in 1985 that appeals to the Privy Council were abolished. At that time, what was then the Federal Court was reconstituted as the Supreme Court of Malaysia. In June 1994, as part of reforms to the judiciary, a new Court of Appeal⁵ was created and the Supreme Court was renamed the Federal Court of Malaysia.

Like most apex courts around the world, the Federal Court functions mainly as an appellate court, hearing appeals from the Court of Appeal. In addition, the Federal Court has exclusive jurisdiction to determine “any question whether a law made by Parliament or by the Legislature of a State is invalid on the grounds that it makes provision with respect to a matter with respect to which Parliament or ... the Legislature of the State has no power to make laws” and “disputes on any other question between States or between the Federation and any State”.⁶ The Federal Court is constitutionally empowered to render advisory opinions. The Yang di-Pertuan Agong may refer “any question as to the effect of any provisions” of the Constitution “which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it”.⁷

⁴On the structure of the Malaysian judiciary generally, see Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia*, (3rd edn, Pacifica Publications 2007) 113–116 (hereafter “*Suffian's Introduction to the Constitution*”). On its history generally, see Mr Justice Dato James Foong, *Malaysian Judiciary: A Record*, (2nd edn, Sweet & Maxwell 2002); and Tun Mohamed Suffian, “Four Decades in the Law: Looking Back” Braddell Memorial Lecture 1982 (1982) 2 MLJ 23.

⁵Federal Constitution, art 121(1B).

⁶Federal Constitution, arts 28(1) and 128.

⁷Federal Constitution, art 130.

The Court of Appeal (Mahkamah Rayuan)

The Court of Appeal was established in 1994 as an intermediate appellate court between the High Courts and the Federal Court. It has jurisdiction to “determine appeals from decisions of the High Court or a judge thereof ... and such other jurisdiction as may be conferred by or under federal law”.⁸

The High Courts

There are two High Courts of coordinate jurisdiction—the High Court of Malaya and the High Court in Sabah and Sarawak. Like high courts around the common law world, they have both original and appellate jurisdictions and exercise general supervisory and revisionary jurisdiction over all subordinate courts and inferior tribunals and administrative bodies. Each High Court has unlimited civil and criminal jurisdiction except in matters involving the application of Islamic law.⁹

Composition of the courts*Federal Court*

The Federal Court consists of a President of the Court (known as the Chief Justice of the Federal Court); the President of the Court of Appeal; the two Chief Judges of the High Court; and 11 other judges.¹⁰

However, the Yang di-Pertuan Agong “acting on the advice of the Chief Justice of the Federal Court may appoint for such purposes or for such period of time as he may specify any person who has held high judicial office in Malaysia to be an additional judge of the Federal Court” provided that this additional judge is below the age of 66.¹¹ At the same time, any judge of the Court of Appeal (other than the President of the Court of Appeal, who is already a member of the Federal Court), may “sit as a judge of the Federal Court where the Chief Justice considers that the interests of justice so require, and the judge shall be nominated for the purpose (as occasion requires) by the Chief Justice”.¹²

Court of Appeal

The Court of Appeal consists of a President and up to 32 other judges. A judge of the High Court may sit as a judge of the Court of Appeal “where the President of the Court of Appeal considers that the interests of justice so require, and the judge shall be nominated for the purpose (as occasion requires) by the President of the Court of Appeal after consulting the Chief Judge of that High Court”.¹³ At the time

⁸ Federal Constitution, art 121(1B).

⁹ Courts of Judicature Act 1964, ss 22–24.

¹⁰ On the composition of the courts, see generally *Suffian's Introduction to the Constitution* (n 4) 127–140.

¹¹ Federal Constitution, art 122(1A).

¹² Federal Constitution, art 122(2).

¹³ Federal Constitution, art 122A.

of writing, there were 24 judges in the Court of Appeal (other than the President of the Court).

High Court

Each of the two High Courts consists of the Chief Judge and no fewer than four other judges. The number of judges shall not “until the Yang di-Pertuan Agong by order otherwise provides” exceed 60 in the High Court of Malaya; and 13 in the High Court in Sabah and Sarawak.¹⁴

In addition, the Yang di-Pertuan Agong may, “acting on the advice of the Prime Minister” and “consulting the Chief Justice of the Federal Court”, appoint a person as Judicial Commissioner “for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed”.¹⁵

Judicial Commissioners are, for all intents and purposes, judges of the High Court but have been appointed for a fixed term with no security of tenure. There is no limit to the total number of Judicial Commissioners who may be appointed. At the time of writing, there were 26 Judicial Commissioners in Malaysia. It is also a matter of concern that the period for which each Judicial Commissioner is appointed is not fixed by law but subject to the discretion of the Yang di-Pertuan Agong, acting on the Prime Minister’s advice (to be given after he consults the Chief Justice of the Federal Court). Judicial Commissioners are currently viewed as a probationary appointment for eventual elevation as High Court judges given that direct appointments to the High Court from the Legal Service or from the Bar are “regrettably rare”.¹⁶

The courts and judicial review

Like most common law courts under a written constitution, the Malaysian courts have jurisdiction to pronounce on the constitutionality of statutes. For example, in the case of *Dato Yap Peng v Public Prosecutor*,¹⁷ the Supreme Court held section 418A of the Criminal Procedure Code to be unconstitutional on the ground that it violated the judicial power of the court by giving the Public Prosecutor an unbridled discretion to transfer cases from the criminal subordinate courts to the High Court. The Malaysian High Courts also habitually exercise their supervisory jurisdiction and judicially review acts of the Executive and decisions of inferior tribunals.¹⁸

¹⁴ Federal Constitution, art 122AA.

¹⁵ Federal Constitution, art 122AB.

¹⁶ Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Star Publications 2008) 640.

¹⁷ [1987] 2 MLJ 311.

¹⁸ *Suffian's Introduction to the Constitution* (n 4) 124–127.

II THE EXECUTIVE AND JUDICIAL APPOINTMENTS

Constitutional background

Under the Federal Constitution, judges are appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister who is obliged to consult certain senior judges and in some cases, the Conference of Rulers. The specifics of this process are covered in Part IV of this chapter. Prior to 2009, it was the Executive branch of government, working in consultation with senior members of the judiciary, who identified potential judicial candidates in an appointment procedure that has come to be known as the “tap on the shoulder” process. Favoured candidates would be privately approached (“tapped on the shoulder”) and asked if they would accept an appointment to the bench. This seemed to have worked fairly well for Malaysia in the first 30 years of its history, but fell apart after the judicial crisis of 1988.

For the first thirty years after independence, Malaysia’s judiciary proved equal to the best in the common law world, both in terms of its fierce independence, and the quality of its judgments. Indeed, former Lord President Tun Suffian (as the Chief Justice of the Federal Court was known at that time), writing in 1977 observed:

Before *Merdeka* [independence] I often wondered whether or not locals could maintain the standards set by expatriate Judges and expatriate practitioners. I can honestly say that their local successors have not been found wanting.¹⁹

In its first years, the Malaysian judiciary was “recognized to have achieved a high standard of competence”.²⁰ This situation came to an abrupt end in 1988 with the removal of the Lord President Salleh Abas and two other Supreme Court judges from office.

The 1988 constitutional crisis

The events that precipitated the “Constitutional Crisis of 1988” spawned much commentary and analysis.²¹ In sum, the increasingly activist Malaysian judiciary (especially after the abolition of appeals to the Privy Council in 1985), ran head-long into a ruling party embroiled in a fierce internecine battle. A series of judicial

¹⁹ Tun Mohamed Suffian, “The Judiciary in the First Twenty Years of Independence” in Tun Suffian, HP Lee and FA Trindade (eds), *The Constitution of Malaysia: Its Development 1957–1977* (Oxford University Press 1978) 239.

²⁰ Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal Sdn Bhd 1996) 131.

²¹ See Andrew Harding, “The 1988 Constitutional Crisis in Malaysia” (1990) 39 ICLQ 57; FA Trindade, “The Removal of the Malaysian Judges” (1990) 106 LQR 51; RH Hickling, “The Malaysian Judiciary in Crisis” (1990) PL 20; HP Lee, “A Fragile Bastion Under Siege: The 1988 Convulsion in the Malaysian Judiciary” (1990) MULR 386; Andrew Harding, “The Malaysian Judiciary Crisis” (1989) 8 Com Jud J 3; HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press 1995) Chapter 3; Tun Salleh Abas and K Das, *May Day For Justice* (Magnus Books 1989); Peter Aldridge Williams, *Judicial Misconduct* (Pelanduk Publications 1990); K Das, *Questionable Conduct Over That May Day Caper: the ABC of a Sham Defence* (K Das 1990); Raja Aziz Addruse, *Conduct Unbecoming: In Defence of Tun Mohd Salleh Abas* (Walrus 1990); and Lawyers Committee for Human Rights, *Malaysia: Assault on the Judiciary* (Lawyers Committee for Human Rights 1989).

decisions went against the government and events came to a boil when the leading member of the Barisan Nasional coalition, UMNO, was, on a technicality, declared an illegal society by the Court as several of its branches were established without the prior approval of the Registrar of Societies.²² It was, as Harding observed, “a concatenation of events in which the judiciary was caught in a perfect storm: involved in an intense conflict with the executive power it was then trapped in an internal conflict within the dominant party”.²³

After the UMNO decision, Prime Minister Mahathir Mohamed began a series of attacks on the judiciary, accusing it of overstepping its judicial powers and interfering in matters over which the Executive had sole discretion. To avert a showdown between the judiciary and the Executive, judges gathered in Kuala Lumpur and decided that the Lord President, Tun Salleh Abas, as the highest judicial official in the land, should write a letter to the King, expressing disappointment over the Prime Minister’s attacks and the hope that the unfounded accusations would be stopped. The King informed the Prime Minister of this letter and they decided to take Tun Salleh to task and commenced proceedings for his removal. Attempts to stop the Tribunal from proceeding led to five other Federal Court Judges—George Seah, Wan Sulaiman Pawan Teh, Eusoffe Abdoolcader, Azmi Kamaruddin, and Wan Hamzah Mohd Salleh—being subject to removal proceedings as well. The politically-motivated dismissals of Lord President Tun Salleh Abas and Supreme Court Judges George Seah and Wan Sulaiman Pawan Teh for “misbehaviour” in the aftermath of this decision sent shockwaves around the world. The suspension and removal of the country’s best judges effectively destroyed the judiciary and its independence.

The post-1988 quagmire

The 1988 dismissals shattered the public’s confidence in Malaysia’s judiciary and this was not helped by subsequent events. The appointment of Tun Hamid Omar as Chief Justice following Tun Salleh Abas drew roars of disapproval, considering that Tun Hamid had presided over the Tribunal that recommended Tun Salleh’s dismissal. In the same vein, Tun Eusoff Chin, who chaired the second Tribunal that recommended the removal of Judges George Seah and Wan Sulaiman Pawan Teh was appointed Chief Justice in 1994 in succession to Tun Hamid.²⁴ Both Chief Justices were the subject of grave allegations over their behaviour and independence but attempts by the Malaysian Bar Council to convene a Royal Commission of

²² *Mohamed Noor bin Othman & Ors v Mohd Yusof Jaafar & Ors* [1988] 2 MLJ 129; affirmed by the Supreme Court in *Mohamed Noor bin Othman v Haji Mohamed Ismail* [1988] 3 MLJ 82. Under section 41 of the Societies Act 1966, a society “which establishes a branch without the prior approval of the Registrar” is deemed to be an unlawful society.

²³ Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart 2012) 207.

²⁴ See E Ershadul Bari, M Ehteshamul Bari and Safia Naz, “The Establishment of the Judicial Appointment Commission in Malaysia to Improve the Constitutional Method of Appointing the Judges of the Superior Courts: A Critical Study” (2015) 41 CLB 1, 6.

Inquiry were twice thwarted by Justice RK Nathan who declared that the Council's applications potentially constituted contempt of court.²⁵

In the ensuing years, the Malaysian judiciary's credibility and quality suffered greatly. As Harding noted:

[M]atters got worse rather than better, the judiciary not simply neutered in public law matters, but mired in corruption allegations in relation to private law matters. In a string of commercial and defamation cases throughout the 1990s it seemed that some judges were not deciding cases according to law, but in order to please powerful business interests. ...

By 1996 the judiciary had reached an ebb probably even lower than that of 1988. An anonymous 33-page "poison-pen" letter was circulated at the annual judges' conference. It detailed extensive accusations of judicial corruption and incompetence, naming judges and itemising instances.²⁶

The VK Lingam tape

From 2005, the Bar and the public urged the government to establish an independent Judicial Appointment Commission, but these calls were met by a stiff rebuff from the Chief Justice, Tun Dato Seri Ahmad Fairuz.²⁷ Things came to a head when in 2007, opposition leader Anwar Ibrahim released on the internet, a secretly-taped video dating from 2002. It showed well-known lawyer VK Lingam speaking on the phone with a person who appeared to be none other than Ahmad Fairuz himself, who had been Chief Judge of the High Court of Malaya at the time.²⁸ The tape appeared to show Lingam brokering senior judicial appointments and conspiring to use a series of defamation suits to silence critics of well-known business tycoon, Vincent Tan. This latest scandal led to the establishment of a Royal Commission of Inquiry (RCI) on 12 December 2007 to verify the Lingam video.

The Royal Commission of Inquiry

The RCI's terms of reference were as follows:

- (i) to enquire and ascertain the authenticity of the video clip;
- (ii) to enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation;
- (iii) to enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;
- (iv) to determine whether any act of misbehaviour has been committed by person or persons identified or mentioned in the video clip; and

²⁵ Ibid 6–9.

²⁶ Harding, *The Constitution of Malaysia* (n 23) 217.

²⁷ Bari, Bari and Naz (n 24).

²⁸ Harding, *The Constitution of Malaysia* (n 23) 220. Tun Dato Seri Ahmad Fairuz was appointed Chief Justice of the Federal Court in 2003.

- (v) to recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehaviour.²⁹

The Commission, which was appointed by Prime Minister Abdullah Ahmad Badawi on 12 December 2007, was chaired by former Chief Judge of the High Court in Malaya, Haidar Mohamed Noor. The other members were Steve Shim (former Chief Judge of the High Court in Sabah and Sarawak), Zitun Zawiyah Puteh (former Solicitor General) Khoo Kay Kim (Emeritus Professor of History); and Mahadev Shankar (retired Court of Appeal Judge). After a series of public hearings between 14 January and 15 February 2008, the RCI found that the video clip was authentic, confirmed that VK Lingam was speaking with Ahmad Fairuz and gravely observed:

In the course of the Enquiry, ample evidence has emerged which clearly indicates that there is cause for concern about how Judges in the upper echelons of the Judiciary were appointed and the selection criteria employed. More specifically the evidence has disclosed inherent flaws and weaknesses regarding the process of appointment and promotion of High Court Judges as well as the Chief Judge of Malaya, President of the Court of Appeal and the Chief Justice of the Federal Court.³⁰

The RCI thus made the following recommendation:

In the circumstances, we are of the view that there is an urgent need for the necessary judicial reforms to be effected by the relevant authorities. In this connection, the Malaysian Bar Council has urged the Commission to consider recommending to the Government the setting up of two bodies, namely, (a) a Judicial Appointments Commission and (b) a Judicial Complaints Tribunal.³¹

This was followed by very detailed recommendations on how the Commission and Tribunal should be established, how it should be constituted, who its members should be, criteria of qualifications etc. Following the release of the RCI report in May 2008, Tun Dato Seri Ahmad Fairuz, who had retired as Chief Justice of the Federal Court in November 2007, applied to court to quash the findings of the Commission on the grounds that it was tainted by “bias and prejudice” and “contrary to the principle of law”.³² Leave to file the application, which went all the way up to the Federal Court, was denied. The Federal Court held that the findings of the Commission were not “decisions” within the meaning of Order 53 Rule 2(4) of the Rules of Court and as such, were not amenable to judicial review. Furthermore, it was against public interest to allow the findings of a Commission of Inquiry to be subject to judicial review.

²⁹ *Commission of Inquiry on the Video Clip Recording of Images of a Person Purported to be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges*, vol 1 (National Printers 2008) 35–36.

³⁰ *Ibid* 178.

³¹ *Ibid*.

³² *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato” Seri Ahmad Fairuz bin Dato” Sheikh Abdul Halim* [2011] 6 MLJ 490 (Federal Court).

The Judicial Appointments Commission

In April 2008, a month before the Royal Commission of Inquiry submitted its report on the VK Lingam affair, Prime Minister Badawi announced the government's decision to establish a Judicial Appointments Commission to ensure transparency in the appointment of superior court judges.³³ The Judicial Appointments Commission Act³⁴ (JAC Act) was passed in January 2009 and came into force on 2 February 2009. Its long title reads:

An Act to provide for the establishment of the Judicial Appointments Commission in relation to the appointment of judges or the superior courts, to set out the powers and functions of such Commission, to uphold the continued independence of the judiciary, and to provide for matters connected therewith or incidental thereto.

The Commission established by the Act has nine members, five judges and four "eminent persons". Its structure and functioning are discussed in Part IV of this chapter.

III CRITERIA FOR SELECTION

The legal basis for the appointment of judges is found in Article 123 of the Federal Constitution, which provides that to qualify for appointment as a judge of the Federal Court, or of the Court of Appeal or of any High Court, a person must be a citizen of the Federation and an advocate of these courts or a member of the judicial or legal service of the Federation or the legal service of a State "for the ten years preceding" his or her appointment.

These minimal criteria of eligibility for judicial office are supplemented by the provisions of the JAC Act. Section 23 of the Act provides that in selecting candidates for appointment, the Commission "shall take into account amongst others, the following criteria":

- (a) integrity, competency and experience;
- (b) objective, impartial, fair and good moral character;
- (c) decisiveness, ability to make timely judgments and good legal writing skills;
- (d) industriousness and ability to manage cases well; and
- (e) physical and mental health.

The drafting of this section invites a conjunctive reading of these criteria. However, since the proceedings of the Commission are confidential, it is not known what relative weight members of the Commission place on each of the criteria when they assess candidates.

In a clear signal of the importance attached to judicial diligence, a serving judge or Judicial Commissioner is precluded from being appointed to a different judicial post if he or she "has three or more pending judgments or unwritten grounds of

³³ Bari, Bari and Naz (n 24) 10. For further discussion of the reforms that led to the establishment of the Commission, see FS Shuaib, "Malaysian Judicial Appointment Process: An Overview of the Reform" [2011] 7(13) J Appl Sci Res 2273.

³⁴ Act 695.

judgments that are overdue by sixty days or more from the date they are deemed to be due”.³⁵

In selecting candidates, the Commission “must also take into account the need to encourage diversity in the range of legal expertise and knowledge in the judiciary”.³⁶ At the same time, the Judiciary has openly stated that “a more diverse judiciary can bring different perspectives to bear on the development of law and justice”.³⁷ The statement affirms that judicial diversity—in the wider sense of representing a cross-section of the community—makes an important contribution to engendering “confidence in judges” and levels of “trust are likely to be greater if the judiciary reflects a cross-section of society”; by contrast, a lack of diversity “leaves room for the perception that there is discrimination in the process of adjudication”.³⁸ Statistics on the background of members of the judiciary are not readily available, however.

In addition to the above statutory criteria, the section “Evaluation criteria” on the Judicial Appointments Commission’s website provides further guidance.³⁹ It stipulates that the judicial system is best served by selecting judges on merit and that the criteria listed “are designed to ensure that nominees have the intellectual capacity, the efficiency and personal qualities which would enable them to resolve disputes impartially and decide solely upon the facts of the cases and the law”. In this regard, the Evaluation Criteria provide “the minimum essential qualities for successful performance of the judicial function”.⁴⁰ The list includes: integrity; legal knowledge and ability; professional experience, judicial temperament, diligence, health, financial responsibility, public service, and desirable special qualities. The text of the Evaluation Criteria provides a useful elaboration and explanation of how each of these matters is relevant to a candidate’s suitability for judicial office. This text is reproduced in the Appendix to this chapter.

IV THE JUDICIAL APPOINTMENTS COMMISSION WITHIN THE LEGAL FRAMEWORK FOR APPOINTMENTS

Constitutional Framework

The rationale for the establishment of the Judicial Appointments Commission has already been explained in Part II above. The creation of the Judicial Appointments Commission in 2009 was considered a major milestone in the appointment process of judges in Malaysia. However, the Commission was created by an ordinary Act of Parliament with no corresponding amendment to the Federal Constitution.

³⁵ JAC Act 2009, s 23(3).

³⁶ JAC Act 2009, s 23(4).

³⁷ See further “Diversity in the Judiciary: The Court of Appeal” in *The Malaysian Judiciary Yearbook 2012* (Malaysia National Printers 2013) 100.

³⁸ *Ibid.*

³⁹ See Judicial Appointments Commission, “Evaluation Criteria for the Appointment of Superior Court Judges” <http://www.jac.gov.my/index.php?option=com_content&view=article&id=267&Itemid=138&lang=en>.

⁴⁰ *Ibid.*

The Federal Constitution provides that the Yang di-Pertuan Agong appoints judges of the superior courts on the Prime Minister's advice, provided that before the Prime Minister tenders his advice, he undertakes certain consultations.⁴¹ The Prime Minister is required to consult the Chief Justice (unless that is the position to which the appointment is to be made) and other specified senior members of the judiciary depending on the vacancy to be filled. The Prime Minister is also required to consult the Conference of Rulers in the case of appointments of heads of court or to the Federal Court.

The terms of the Constitution do not require the Prime Minister to do more than this, nor indeed do they require the Prime Minister to consult the JAC. The JAC Act simply states that one of the Commission's functions is to "select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration".⁴² The JAC's task is thus to prepare a shortlist of suitably qualified candidates for the Prime Minister's consideration before the latter renders his "advice" to the King.

Nowhere in the Act nor the Constitution does it require the Prime Minister to rely solely on the Commission's recommendations. In other words, a plain reading of the Constitution and the Act suggests that while the Commission may submit names of suitable candidates, it does not have an exclusive right to do so and the Prime Minister may consider other candidates who are not included in the list submitted by the Commission.

This reading has been accepted by the courts. In *Robert Linggi v Government of Malaysia*,⁴³ the High Court in Sabah and Sarawak had occasion to consider the nature of the Prime Minister's consultations with the Commission and observed that the JAC Act "merely provides a process in which candidates for judgeship are vetted by the JAC":

It is patently clear that the Federal Constitution does not provide any process in which the credentials of the candidates for judgeship are discussed before their names are presented to the Prime Minister for consideration. Neither is there any guideline provided

⁴¹ Federal Constitution, art 112B(1) requires the Prime Minister to consult as follows:

- The Conference of Rulers for appointments of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the High Courts, and judges of the Federal Court;
- The Chief Justice for appointments of any judge, other than the Chief Justice of the Federal Court himself;
- The Chief Judge of each of the High Courts in respect of the appointment of the Chief Judge of the High Court in Malaya;
- The Chief Judge of each of the High Courts and the Chief Ministers of the states of Sabah and Sarawak in respect of appointment of the Chief Judge of the High Court of Sabah and Sarawak;
- The President of the Court of Appeal for appointments of judges to the Court of Appeal;
- The Chief Judge of the High Court in Malaya for appointments of judges to the High Court of Malaya; and
- The Chief Judge of the High Court in Sabah and Sarawak for appointment of judges to the High Court of Sabah and Sarawak.

⁴² JAC Act 2009, s 21(1).

⁴³ [2011] 2 MLJ 741.

for in the Federal Constitution to determine which candidates for judgeship are qualified to be appointed. The JAC Act attempts to rectify those shortfalls and it can be said that the JAC Act is a welcome piece of legislation. Be that as it may, it must not be a “backdoor” legislation to circumvent the Federal Constitution as that would be unconstitutional.⁴⁴

The approach of the court in the *Linggi* case preserves the formal power of the Prime Minister to consider persons not selected by the JAC. However, it is unclear how frequently Prime Ministers have made use of this power, or are likely to do so in future, since the JAC Act obliges the Commission to present the Prime Minister with a shortlist of names in respect of each vacancy, and in the case of certain senior positions to provide additional names upon the Prime Minister’s request.⁴⁵

The Judicial Appointments Commission

Functions

The principal function of the Commission is to select suitable candidates to be recommended to the Prime Minister for judicial appointment. In addition, the Commission is charged with reviewing and recommending programmes to the Prime Minister to improve the administration of justice; making other recommendations about the judiciary; and doing “such other things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions under the Act”.⁴⁶

The Commission has undertaken some notable initiatives in respect of its additional functions. In its first year of operations, the Commission discussed “the steps taken and being taken by the Judiciary to overcome the delay in disposing cases”.⁴⁷ In its third year of operations, the Commission started organising and conducting training programmes for superior court judges,⁴⁸ and establishing a Judicial Training Institute (now called the Judicial Academy). In 2012, it started a Judicial Outreach Programme “to instil a spirit of *esprit de corps* among the judges in addition to going to the ground and identifying legal issues at grassroots level”.⁴⁹

Composition

The Commission comprises the following members:⁵⁰

- (a) the Chief Justice of the Federal Court who shall be the Chairman;
- (b) the President of the Court of Appeal;
- (c) the Chief Judge of the High Court in Malaya;
- (d) the Chief Judge of the High Court in Sabah and Sarawak;
- (e) a Federal Court judge to be appointed by the Prime Minister; and
- (f) four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the

⁴⁴ Ibid 762.

⁴⁵ This stage of the selection process is discussed in Part V below.

⁴⁶ JAC Act 2009, s 21(1)(d)–(f).

⁴⁷ Judicial Appointments Commission, *Annual Report 2009*, 36.

⁴⁸ Judicial Appointments Commission, *Annual Report 2011*, 24–31.

⁴⁹ Judicial Appointments Commission, *Annual Report 2012*, 65.

⁵⁰ JAC Act 2009, s 5(1).

Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.

The appointees listed in paragraphs (a) to (d) are members of the Commission for the period during which they hold the relevant office while those listed in (e) and (f) are members for a period of two years and are eligible for reappointment, though no member is allowed to hold office for more than two terms.⁵¹ To avoid conflicts of interest, members of the Commission listed under paragraph (f) are disqualified from consideration for any appointment to any superior court during the tenure of their office as a member of the Commission and for two years after they cease to be members of the Commission.⁵²

Independence

There is no security of tenure for the “eminent persons” who are members of the Commission since any such member may have his or her appointment revoked by the Prime Minister at any time “without assigning any reason therefor”.⁵³ In addition, all members of the Commission are subject to removal in certain circumstances including conviction of a criminal offence of specified severity, bankruptcy, mental or physical incapacity or failure to attend a number of consecutive meetings of the Commission without leave.⁵⁴

To ensure the independence and impartiality of the Commission, the Act requires members of the Commission to disclose if they are “related or connected to any candidate being considered for selection”.⁵⁵ In the event of such a possible conflict of interest, the member concerned “shall not be present in any discussion or deliberation, or decision of the Commission when the matter is discussed or deliberated, or decided upon”. This is the most significant provision dealing with how members of the Commission should conduct themselves. Members of the Commission do not take any oath of office nor are they bound by any code of conduct.

A number of further provisions provide indirect safeguards for the independence of members of the Commission. Members are protected from personal liability for any loss or damage caused by any act or omission in administering the affairs of the Commission unless the loss or damage was intentional.⁵⁶ The Act makes it an offence for any person to influence or attempt to influence “any decision of the Commission or any member thereof” either “directly or indirectly by himself or by any other person in any manner whatsoever”; any person convicted

⁵¹JAC Act 2009, s 6(1).

⁵²JAC Act 2009, s 6(2).

⁵³JAC Act 2009, s 9(1).

⁵⁴JAC Act 2009, s 10(1).

⁵⁵JAC Act 2009, s 11. A “related” person is defined by reference to a specified list of family and marriage relationships while a “connected” person refers to business connections including partnerships, employment and certain corporate relationships.

⁵⁶JAC Act 2009, s 12.

of this offence is liable to a fine not exceeding RM\$100,000 or imprisonment of up to two years, or both.⁵⁷

All members of the Commission are “paid such allowances as the Prime Minister may determine”.⁵⁸ The actual allowances paid to Commissioners are not known. However, Table 1 shows the budget allocation of the Commission from 2009 to 2014:⁵⁹

Table 1
Budget allocation of the JAC, 2009–2014

Year	Allowances & Emoluments (RM\$)	Services & Supplies (RM\$)	Training (RM\$)
2009	743,571	256,101	—
2010	1,168,800	1,257,800	—
2011	1,266,000	994,300	—
2012	1,365,500	757,750	320,000
2013	1,338,400	957,687	202,012
2014	1,431,200	1,053,800	—

Administration

The Act provides that the Prime Minister shall appoint a Secretary to the Commission “from amongst members of the general public service of the Federation for such period and on such terms and conditions as may be specified in the instrument of appointment”.⁶⁰ The Secretary of the Commission is responsible for “the general conduct, administration and management of the functions and activities of the Commission” and “carrying out the decisions of the Commission”.⁶¹ In addition to the Secretary, there “shall be appointed such number of officers and servants of the Commission as may be necessary from amongst members of the general public service of the Federation for such period and on such terms and conditions as may be specified in their instruments of appointment to assist the Commission” in carrying out its functions.⁶²

The effect of these provisions is that the Commission functions as a division within the Prime Minister’s office and apart from the relatively modest sums set out in Table 1, is funded by a budget from the Prime Minister’s Department.⁶³

⁵⁷ JAC Act 2009, s 34.

⁵⁸ JAC Act 2009, s 7.

⁵⁹ This table has been compiled from the Annual Reports of the JAC.

⁶⁰ JAC Act 2009, s 19

⁶¹ JAC Act 2009, s 19(2).

⁶² JAC Act 2009, s 20(1).

⁶³ *Judicial Appointments Commission Annual Report 2009*, 48.

This raises further questions about the Commission's practical and perceived independence.

V THE JUDICIAL SELECTION PROCESS

Vacancies, applications and nominations

The selection process commences when the Commission advertises a vacancy. Where there are vacancies for judicial posts in the superior courts, candidates may either apply for the positions or consent to be nominated for appointment.⁶⁴ Ordinarily, the Commission advertises a vacancy on its website, or any other medium deemed appropriate. The Commission's Regulations outline the requirements for the advertisement, requiring it to specify the office that is vacant, the experience and qualifications required, the remuneration and allowances and the closing date of application.⁶⁵ At High Court level, any qualified person may apply to the JAC to be selected.⁶⁶ Persons wishing to be considered for appointment as High Court judge or Judicial Commissioner may fill in an electronic form available at the JAC website.⁶⁷ The intention here, by allowing applications to be made directly for judicial posts, is to widen the pool of candidates.

Candidates for selection to the Court of Appeal and the Federal Court have to be nominated, and there are limits on who can propose names. The Regulations specify the following persons as being qualified to propose candidates to high judicial office:

- (a) the retiring Chief Justice, for a vacancy in the office of Chief Justice;
- (b) the Chief Justice and the retiring President of the Court of Appeal, for vacancy in the office of President of the Court of Appeal;
- (c) the Chief Justice and retiring Chief Judge of the High Court in Malaya or the retiring Chief Judge of the High Court in Sabah and Sarawak, as the case may be, for vacancy in the office of Chief Judge of the High Court in Malaya or Chief Judge of the High Court in Sabah and Sarawak;
- (d) the Chief Justice, for vacancy in the office of judge of the Federal Court; and
- (e) the Chief Justice and President of the Court Appeal, for vacancy in the office of judge of the Court of Appeal.⁶⁸

The Commission may, notwithstanding the above, "consider names proposed by eminent persons who have knowledge of the legal profession or who have achieved distinction in the legal profession in respect of vacancies in the Federal Court and the Court of Appeal".⁶⁹

⁶⁴ See JAC Act 2009, s 21 and Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Court) Regulations 2009, PU (A) 209/2009 ("JAC Regulations 2009").

⁶⁵ JAC Regulations 2009, reg 3.

⁶⁶ JAC Regulations 2009, reg 4.

⁶⁷ *Official Website of the Judicial Appointments Commission* <<http://www.jac.gov.my/applicationjac/application.php>>.

⁶⁸ JAC Regulations 2009, reg 5(1).

⁶⁹ JAC Regulations 2009, reg 5(2).

Although in previous years it seems that the Chief Justice made it a point to consult the Bar Council on the appointment of Court of Appeal and Federal Court judges, in recent years this has not been the case.⁷⁰ Ragunath Kesaven, Bar Council President from 2009 to 2011 stated that Chief Justice Tun Zaki Azmi consulted him on candidates for elevation, while his successor, Lim Chee Wee who was President from 2011 to 2013, also stated that the Chief Justice had sought feedback from the Bar Council during his tenure.⁷¹ These were clearly informal consultations, which ceased after 2013.⁷² In an interview given in September 2013, Bar Council President Christopher Leong stated that the Bar Council was not consulted over the promotion of six judges to the Federal Court and to the Court of Appeal.⁷³ The Bar was particular concerned over the fact that two senior Court of Appeal judges, Datuk Abdul Malik Ishak and Datuk Mohd Hishamuddin Mohd Yunus, had been overlooked in the promotion exercise.⁷⁴

Assessing and shortlisting candidates

The Secretary of the JAC is responsible for receiving applications and vetting candidates to ensure that candidates are indeed qualified. The Secretary is obliged to send the names of all applicants who fulfil the selection criteria in the JAC Act to various government agencies—the Malaysian Anti-Corruption Commission; Royal Malaysian Police; Companies Commission of Malaysia; and the Department of Insolvency—for screening.⁷⁵ Once a report has been received from each agency, the Secretary must prepare a deliberation paper on each applicant, and inform the JAC of those who failed to qualify.⁷⁶ Very little information is made available, either in general terms about the number and breakdown of those shortlisted or specifically with reference to individuals as these are matters that the Commission considers to be highly confidential.⁷⁷ Indeed, members and staff of the Commission are sworn to secrecy.⁷⁸

⁷⁰ *Judicial Appointments Commission Annual Report 2009*, 19.

⁷¹ V Anbalagan, “Lawyers Question Criteria for Promoting Judges” (*Malaysian Insider*, 30 September 2013) <<http://www.themalaysianinsider.com/malaysia/article/lawyers-question-criteria-for-promoting-judges>>.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ The non-promotion of Hishamuddin continued to be a major point of contention, see “Is Justice Hishamuddin blacklisted?” (*FMT News*, 25 February 2015) <<http://www.freemalaysiatoday.com/category/nation/2015/02/25/is-justice-hishamuddin-blacklisted/>>; and V Anbalagan, “Senior Judge in Negri Transgender Case Left out in Promotion Exercise” (*Malaysian Insider*, 16 February 2015) <<http://www.themalaysianinsider.com/malaysia/article/senior-judge-in-negri-transgender-case-left-out-in-promotion-exercise>>. Hishamuddin ultimately retired in September 2015, without being elevated to the Federal Court.

⁷⁵ JAC Regulations 2009, reg 8.

⁷⁶ JAC Regulations 2009, reg 8.

⁷⁷ Zalita bte Dato Hj Zaidan to Kevin Tan, email communication dated 17 September 2015, replying on behalf of Chief Justice Tun Afirin Zakaria, Chairman of the Judicial Appointments Commission (hereafter “JAC Communication”).

⁷⁸ JAC Act 2009, s 32.

Under the Act, the Commission meets at least once a month, and a quorum of seven members, including the Chief Justice as Chairman, is required.⁷⁹ Each member present has one vote, exercisable by secret ballot, and in the event of a tie, the Chairman has the casting vote.⁸⁰

A selection meeting is called on the Prime Minister's request.⁸¹ The Chief Justice must chair all selection meetings unless the meeting is to select judges of the High Court, in which case he may nominate a judge from among the members of the Commission to chair that meeting.⁸² The meetings of the Commission are not open to the public.

The Commission must select not fewer than three persons for each vacancy in the High Court, and not fewer than two persons for each vacancy in the Court of Appeal or Federal Court.⁸³ Beyond that which is described above, there are no other rules of process or procedure regulating the Commission's selection of candidates. The Commission is a master of its own procedure.⁸⁴

There is no provision requiring the interviewing of candidates, but in practice all shortlisted candidates are notified of their nomination and are called for an interview by the Commission. The interview is by a panel of judges, presided over by either the Chief Judge of Malaya or the Chief Judge of Sabah and Sarawak. The interview is "carried out according to the standard interview procedure where there could be a panel of three" as determined by the Commission.⁸⁵ At times, other members of the Commission (including former judges) sit as interviewers. This practice has been in place since 2010.⁸⁶ Candidates are selected based on the result of a private ballot.

Interaction between the Commission and the Prime Minister

After making its selection, the Commission must submit a report to the Prime Minister, providing a list of recommended candidates and the reasons for their appointment, along with any other information the Commission deems necessary.⁸⁷ This report is sent with an accompanying letter from the Chief Justice.

Before making his decision, the Prime Minister may request a further two names for vacancies in any post except that of High Court judge.⁸⁸ He is empowered to do so without any statutory obligation to provide reasons. There being no limit stated as to how many times the Prime Minister may disagree, he may, theoretically, wait

⁷⁹JAC Act 2009, s 13(4).

⁸⁰JAC Act 2009, ss 13(1), 13(4) and 13(6).

⁸¹JAC Act 2009, s 22.

⁸²JAC Act 2009, ss 24(1) and 24(2).

⁸³JAC Act 2009, s 22(2).

⁸⁴JAC Act 2009, s 16.

⁸⁵JAC Communication (n 77).

⁸⁶Ibid.

⁸⁷JAC Act 2009, s 26.

⁸⁸JAC Act 2009, s 27. The Prime Minister also enjoys this power in respect of the position of Chief Judge of either of the two High Courts.

until a preferred candidate is suggested. Because of this, the JAC Regulations require it to prepare reserve candidates when selecting and recommending candidates.⁸⁹

There is no documentary record of how the Prime Minister decides between the candidates put forward by the Commission. According to Chief Justice Arifin Zakaria, the Commission does not keep a statistical record of the number of occasions when the Prime Minister comes back to the Commission to ask for additional candidates but there have certainly been such occasions.⁹⁰ The following table shows the number of judges who have been successfully recommended for appointment or elevation by the Commission:⁹¹

Table 2
Recommendations for judicial appointment accepted, 2009–2015

Year	Federal Court	Court of Appeal	High Court	Judicial Commissioner
2009	3	3	6	0
2010	—	4	18	12
2011	3	7	12	1
2012	4	4	5	5
2013	4	10	5	10
2014	1	1	12	12
2015	1	1	2	0
TOTAL	16	30	60	40

Given the requirement that the Commission selects at least three candidates for every vacancy in the High Court, and at least two candidates for all other vacancies, the Commission would have selected at least 300 candidates for the posts of High Court Judge or Judicial Commissioner, and at least 92 candidates for the other posts.

The Prime Minister and the constitutional consultation requirements

The Prime Minister then consults with senior judges and the Conference of Rulers in accordance with the constitutional requirements for the vacancy that is to be filled. The Court of Appeal had occasion to consider the meaning of the word “consult” in Article 122B of the Federal Constitution in the case of *In the Matter of an Oral Application by Dato Seri Anwar bin Ibrahim to Disqualify a Judge of the Court of Appeal*.⁹² In that case, the appellant claimed that when he was Deputy Prime Minister, he had represented the Prime Minister to the Conference of Rulers in the

⁸⁹ JAC Regulations 2009, reg 9.

⁹⁰ JAC Communication (n 77).

⁹¹ These statistics were compiled from the JAC’s Annual Reports and website.

⁹² [2000] 2 MLJ 481 (Court of Appeal).

appointment of Moktar Sidin J to the Court of Appeal as the Conference of Rulers did not agree with the Prime Minister's advice. The Court of Appeal held:

To "consult" does not mean to "consent". The Constitution uses the words "consent" and "consult" separately. For example the word "consent" is used in art 159(5) of the Constitution which states that the amendments to certain provisions of the Constitution cannot be passed by Parliament without the "consent" of the Conference of Rulers. The *Black's Law Dictionary* provides for the meaning of the word "consent" thus, "Agreement, approval or permission as to some act or purpose especially given voluntarily by a competent person."

So in the matter of the appointment of judges, when the Yang di-Pertuan Agong *consults* the Conference of Rulers, he does not seek its "consent". He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di-Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion given but he is not bound by it. But art 40(1A) of the Constitution provides specifically as to whose advice the Yang di-Pertuan Agong must act upon. Clause (1A) of article 40 reads:

In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice on advice or after considering advice the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

Clearly therefore the Yang di-Pertuan Agong must act upon the advice of the Prime Minister. The advice envisaged by art 40(1A) is the direct advice given by the recommender and not advice obtained after consultation.⁹³

There has been no known instance of the Yang di-Pertuan refusing to accept the advice of the Prime Minister in the appointment of judges although there were reports that the Conference of Rulers had, in 2007, opposed the Prime Minister's nominee for the post of Chief Judge of the High Court in Malaya.⁹⁴ According to the August 2007 press report, the Conference of Rulers asked Prime Minister Ahmad Badawi to "reconsider the candidate named for the post of Chief Judge of Malaya (CJM), the third highest-ranking official in the judiciary" as there "were concerns as to why the candidate was picked over three other more senior judges".⁹⁵ The post of Chief Judge had been vacant since Tan Sri Siti Norma Yaakob retired in January 2007. At the end of August 2007, shortly after the news of this impasse had broken, it was announced that two respected Federal Court judges, Datuk Alauddin Mohd Sheriff, and Datuk Abdul Hamid Mohamed, were being appointed to the posts of Chief Judge of Malaya and President of the Court of Appeal respectively.⁹⁶ The post of President of the Court of Appeal had fallen vacant when the incumbent, Tan Sri Abdul Malek Ahmad, died on 31 May 2007.

⁹³ Ibid 483.

⁹⁴ Carolyn Hong, "Malaysian Sultans Reject KL's Choice of Chief Judge" *Straits Times* (Singapore, 8 Aug 2007).

⁹⁵ Ibid.

⁹⁶ Alauddin Mohd Sheriff retired as Chief Judge of Malaya in September 2008 and was succeeded by Ariffin Zakaria (who is the current Chief Justice). Abdul Hamid Mohamed was President of the Court of Appeal for only a few months before he was promoted to Chief Justice of the Federal Court when Ahmad Fairuz retired in October 2007. Abdul Hamid himself retired in 2008, and was succeeded by Zaki Azmi.

Challenging appointment decisions

There is no provision in the Act for any form of review of the recommendations made to the Prime Minister. Deliberations and selections are all done in secret and no information is given to “candidates”.

The recommendation of the Commission has hitherto not been challenged, nor has the bona fides of its proceedings.⁹⁷ The only litigation concerning the suitability of a candidate for appointment occurred in the case of *Badan Peguam Malaysia v Kerajaan Malaysia*⁹⁸ concerning an appointment to the post of Judicial Commissioner in 2007, two years before the Commission came into existence.

In that case the Bar Council sought a declaration that the appointment of Dr Badariah bte Sahamid—a well-known academic and former professor at the Faculty of Law at the University of Malaya—as Judicial Commissioner was null and void on the ground that it contravened Article 122AB read with Article 123 of the Federal Constitution. Specifically, the Bar Council argued that the words “advocate of those courts” appearing in Article 123 of the Federal Constitution required a nominee for appointment as judge or Judicial Commissioner to have been in legal practice for a period of 10 years prior to his or her appointment. In this instance, Dr Badariah, who graduated with a first class honours degree from the University of Malaya in 1978 was a “qualified person” within the meaning of the Legal Profession Act 1976. In 1987, she was admitted as an advocate and solicitor of the High Court of Malaya. She did not enter the practice of law but pursued a career in academia, being promoted through the ranks till she became a full Professor in 2006. The Federal Court held, by a majority, that Dr Badariah was sufficiently qualified under Article 123 of the Constitution.

CONCLUSION

The creation of Malaysia’s Judicial Appointments Commission (JAC) was not the product of some enlightened vision on the part of its political leaders to protect the independence of the country’s judicial branch of government, but rather a result of a series of scandals and controversies concerning the judiciary which led to a diminution of its prestige. The judicial crisis of 1988, brought about by the dismissal of Tun Salleh Abas, Malaysia’s top judicial officer, as well as George Seah and Azmi Kamaruddin, two of the most senior judges in the land, on account of alleged “misconduct”, brought the judiciary to its knees. This blow to the judiciary was followed by almost two decades of scandals in which judges’ impartiality was seriously questioned. Things came to a head with the VK Lingam tapes when Parliament determined that a Judicial Appointments Commission should be established.

While the JAC is a statutory body charged with selecting suitable candidates for appointments to the senior judiciary, its members lack security of tenure, which weakens their independence. The Commission’s powers are also limited.

⁹⁷ JAC Communication (n 77).

⁹⁸ *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 (Federal Court).

After what appears to be a very credible selection process of advertisement, sifting and interviews, based upon an appropriately detailed set of criteria, the JAC provides the Prime Minister with a list of suitable candidates for consideration, but the Prime Minister—who is empowered to make appointment recommendations to the King—is not obliged to accept any of the candidates recommended by the JAC and may either require the Commission to submit further names or simply prefer his own. It is this apparent loophole or side-door that continues to plague Malaysia's judicial appointment process. If the Act and the Constitution can be amended to require the Prime Minister to heed the JAC's recommendations, even the Government's most fearsome critics will have to concede that political influence on the appointment of senior judges has been reduced significantly.

APPENDIX

Minimal essential qualities

(i) Integrity (this should be undisputed)

It should be regarded as the keystone of the judicial system. It enables a judge to base his decision strictly on the facts and the law. It enables him to disregard personalities and all other extraneous matters. Consequently this quality should be rigorously sought in any candidate to the point that it may be preferable to err on the side of caution in this investigation. A candidate must be honest, truthful and be able to admit responsibility for mistakes. Integrity is also reflected by impartiality, moral courage, intellectual honesty and obedience to the law and high ethical standards. An examination of a candidate's personal and professional conduct should reflect adherence to these principles.

(ii) Legal knowledge and ability

To secure successful performance of the function of a judge, a candidate should possess a sufficiently high level of knowledge of the law, substantive as well as procedural, and be able to interpret and apply the law. He should be able to communicate, both orally and in writing, his reasoning in coming to a decision. In all this, he is expected to conduct himself so as to demonstrate that he has the ability to understand the issues presented and to respond to them effectively and be able to reach a decision efficiently. Given that legal knowledge and ability should be continually refreshed, updated and enhanced, a candidate should possess a willingness to assimilate new ideas and skills.

(iii) Professional experience

Professional experience is any substantial exposure to legal problems and the judicial process. It should not refer exclusively to practising law at the Bar. The experience however should be long enough to provide a basis for the evaluation of the candidate's experience. The extent and variety of the candidate's experience should be considered in light of the requirements of the judicial office that is being

considered. Although trial experience is desirable, other types of legal experience are relevant. Experience in government legal work, corporate legal work, in public interest bodies and as a successful law teacher and writer, for instance, are relevant and can contribute towards the desired professional experience.

(iv) Judicial temperament

This quality is universally regarded as an important criterion of a judge. Qualities of judicial temperament stem from the nature of the judicial function. Since the function is essentially concerned with conflict resolution, it requires the ability to deal with counsel, witnesses and parties with fairness, calmness, patience and courtesy, and the willingness to hear and consider all news presented. As an arbiter, it requires a judge to be even tempered, open-minded and confident, without losing firmness. He should be willing to understand and appreciate the whole range of topics and issues that may be presented, whether he is initially familiar with them or otherwise. Underlying all these is his understanding of the importance of his role to the administration of justice and to the rights of parties and therefore he needs to overlook his personal desires in order to serve those objectives. Factors which are incompatible with judicial temperament include arrogance, impatience, pomposity, loquacity, irascibility and arbitrariness.

(v) Diligence

A candidate should have the care and earnest effort to accomplish that which he undertakes. Diligence implies good work habits and the ability to set priorities to his work. As procedural deadlines are important in court work, a candidate should have a good record for punctuality and respect for the time of other lawyers, litigants and parties and others involved.

(vi) Health

This is directed to ascertain that a candidate does not have any serious condition (physical or mental) that could affect his abilities to perform his duties as a fair and impartial judge, including any erratic or bizarre behaviour or addiction to alcohol or drugs.

(vii) Financial responsibility

Financial responsibility demonstrates self-discipline and important in predicting his ability to withstand pressures that might compromise independence.

(viii) Public service

A judge is required to be sensitive, compassionate and considerate. His involvement in public service can indicate his social consciousness and consideration for others.

(ix) Views on public issues

Merit selection should not preclude any person from being favourably considered on account of his opinion on public issues. However, if such opinions indicate an easily prejudiced mind, he may not be suitable for judicial office.

(x) Desirable special qualities

Different courts and at different levels require judges to have special knowledge and skills. Though special knowledge and skills are desirable, it should not be over-emphasized resulting in otherwise good candidates being passed over. Certainly knowledge, experience and special interest in issues of families and children would be an added advantage if the candidate is largely to deal with cases involving juveniles. For a candidate for the Appeal Court and the Federal Court, because of the collegial decision making process, it is important for the candidate to understand and respect differing opinions; also experience in scholarly research and writing on the development of the law.

The Role of Special Judicial Bodies in Judicial Appointments in Nigeria

AMEZE GUOBADIA¹

INTRODUCTION

Since the country's return to civilian rule in 1999, there has been a significant increase in the engagement of courts with the process of governance in Nigeria. This has been further reinforced by the emphasis on the rule of law and separation of powers as pillars of the system of government established by the Constitution of the same year. The pronouncements of the courts have had far-reaching effects on the system. This fact has, predictably, led some to cast a spotlight on the individual judges behind judicial pronouncements. Judicial activity and its fall-out have thus not lost their appeal for scholars of jurisprudence. Rather, the ever-expanding literature on judicial behaviourism, judicial activism and related issues continues to delve into the composition of courts, examining the factors that shape individual judges and their judgments and ultimately, the character of the courts. The onerous responsibility of the judiciary, it is widely agreed, requires that only the best should be appointed to judicial office. There is also widespread recognition that judicial appointments must be made within clear and transparent parameters that will not only promote merit but also bolster public confidence in the judiciary and the rule of law.

Underlying contemporary views of this subject in Nigeria and elsewhere, is a sense that there is a correlation between the end product of the judiciary and the quality of its judges, and that some responsibility for the latter is traceable to the appointment of the judges. Nigeria is one of a number of jurisdictions where special institutions not only initiate the process of appointing judges, but in large measure also determine whether or not a person will ultimately be appointed. Prominent among these institutions are the various Judicial Service Commissions and the National Judicial Council. These special judicial bodies have, at different periods in Nigeria's history, performed important roles in the appointment, discipline and removal of judges. In doing so, they have had an important part to play as guardians of the independence of the judiciary. Proceeding from an historical perspective, this chapter examines the role of special judicial bodies in judicial appointments in Nigeria. Among the issues it considers are the composition of the

¹ Ameze Guobadia, Professor of Law, Nigerian Institute of Advanced Legal Studies. This chapter draws on an earlier work by the author, "Judicial/Executive Relations in Nigeria's Constitutional Development: Clear Patterns or Confusing Signals?" in CM Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016) 239.

special judicial bodies, the overlapping roles which they play in appointments to both the federal and the state courts and the twist this gives to the federal arrangement in Nigeria. The chapter also considers how the special judicial bodies have used procedural and other guidelines to supplement the constitutional criteria of eligibility and give further shape to the appointment process.

I JUDICIAL APPOINTMENTS IN NIGERIA: A HISTORICAL PERSPECTIVE

The story of Nigeria's judiciary is directly linked to her constitutional history. The different systems by which the country has been governed over time, have determined what the structure and workings of the judiciary would be. The appointment and removal of judges, their remuneration and, in varying degrees, the idea of building and sustaining the judiciary as an institution, have been part of these developments. In the immediate post-independence period of 1960–1963, under the 1960 Constitution, appointments to the federal and state judiciaries were made by the Governor-General and regional Governors respectively, acting in each case on the advice of the Judicial Service Commission (JSC) of the federation or their region, as the constituent units were then known.² The federal JSC was chaired by the Chief Justice of the country. The other members were: the Chief Justices of the regions and Lagos; the Chairman of the Public Service Commission; and a serving or past judge in a Commonwealth member state, appointed by the Governor-General on the advice of the Prime Minister.³ The regional JSCs were similarly composed.⁴

There was no JSC or similar body under the 1963 Constitution. The power to appoint federal judicial officers was vested in the President, acting on the advice of the Prime Minister.⁵ The Governors exercised similar powers in the regions. The JSCs (federal and state) were reintroduced by the Constitution of 1979 under which the appointment of the Chief Justice of Nigeria was made by the President in his discretion, subject to confirmation of such appointment by a simple majority of the Senate.⁶ The other Justices of the Supreme Court were appointed by the President on the advice of the federal JSC subject to the approval of such appointments by a

² In the immediate post-independence period, Nigeria operated the parliamentary system which was part of her British colonial heritage and was divided into regions.

³ The Governor-General's nominee not involved in the appointment of federal justices, and the Chief Justices of the regions were not involved in the appointment of judges to the High Court of Lagos. For a fuller discussion, see BO Nwabueze, *A Constitutional History of Nigeria* (Longman 1982) 112–114.

⁴ Each regional JSC was chaired by the Chief Justice of the region. The other members were: the Chairman of the Public Service Commission of the region; a judge of the High Court of the region chosen by the Governor acting on the advice of the Premier of the region; and a serving or former judge of a superior court in the Commonwealth similarly chosen by the Governor on the advice of the Premier. The inclusion of this member was not obligatory in the Northern region, where membership also included the Grand Kadi. See Nwabueze (n 3) 112–113.

⁵ See Constitution of the Federal Republic of Nigeria 1963, s 112(1). Each region also had its own Constitution that provided for appointments to regional courts.

⁶ Constitution of the Federal Republic of Nigeria 1979, s 211(1) (hereafter "Constitution 1979").

simple majority of the Senate.⁷ The President of the Federal Court of Appeal⁸ (as it was then known) was appointed by the President acting on the advice of the federal JSC and subject to confirmation by the Senate.⁹ A similar process was employed in the case of the Chief Judge and judges of the Federal High Court.¹⁰

In the continuing evolution of the judicial appointments process, the 1999 Constitution, which is presently in force, retained the JSCs (federal and state), allocating specific roles to them in the appointment of judges. It also created the National Judicial Council, a special judicial body composed largely of judges (serving and retired) with a more fundamental role in the appointment and discipline of judges as well as financial responsibility for the court system. Under this Constitution, all judges are appointed by the relevant Chief Executive (the President or Governor), on the advice or recommendation of the Council and for some categories of judges, subject to confirmation by a legislative body. The establishment of this overarching body was a response to strident calls and demands by both the judiciary and the legal profession over the years for the judiciary to have greater control of its own affairs and for judicial independence to be strengthened. It should also be noted that there are no acting appointments to judicial office except for temporary headship of courts. This happens in the period between the date on which a vacancy in the position is declared and the date on which a substantive head is appointed. Under the Constitution, the next most senior judge in that court is appointed acting head.¹¹

This brief historical sketch of the judicial appointments process in Nigeria lays a basis for the discussion of the role of special judicial bodies in the process under the present Constitution. The nuances of language and terminology in the constitutional provisions have since become key factors in evaluating their role. The argument has sometimes turned on seemingly simple expressions like acting “on the advice” or “on the recommendation” of these bodies, particularly in the appointment of some heads of court. That distinction proved to be crucial in the controversy, discussed below, about attempts to appoint a successor to the retiring Chief Judge of Rivers State in 2014, which brought these issues to the front burner of public discourse. This does not suggest that the procedure for appointing other judges (federal and state) who are not heads of court, is necessarily devoid of these or other challenges.

⁷ Constitution 1979, s 211(2).

⁸ It is now known as the Court of Appeal and takes appeals from all high courts (federal and state). Appeals go from the Court of Appeal to the Supreme Court which is the highest court of the land.

⁹ Constitution 1979, s 218(1) and (2).

¹⁰ Constitution 1979, s 229(1).

¹¹ Constitution of the Federal Republic of Nigeria 1999 (hereafter “Constitution 1999”) ss 231(4), 238(4) and 250(4).

II THE PRESENT FRAMEWORK FOR JUDICIAL APPOINTMENTS

The institutional landscape

Overview

The appointment of judicial officers in Nigeria is a key aspect of the relationship between the three arms of government. While the exercise can indeed provide the opportunity for co-operation between the different branches of government, the process has also set the stage for very serious power play between the Executive and the judiciary in particular, with the principle of checks and balances sometimes being taken to extremes. Apart from this, Nigeria's federal character means that the Constitution creates both federal and state courts. Under an arrangement which deviates from a strict construction of the federal principle, a federal judicial body, the National Judicial Council, plays an active role in the appointment of judicial officers to both federal and state courts.

The Constitution contains provisions setting out the criteria for eligibility of persons for appointment to different cadres of judicial office,¹² the institutions and persons responsible for making these appointments as well as the procedures for doing so.¹³ Apart from the involvement of the President in the case of appointments to the federal courts, the Governor in the case of state courts and the Senate and state Houses of Assembly in the confirmation of certain judicial appointments,¹⁴ three special judicial bodies are vital to the process of judicial appointments. They are the Federal Judicial Service Commission (FJSC), the Judicial Service Commissions of the different states (SJSCs)¹⁵ and the National Judicial Council (NJC). Although the powers of the NJC extend to both tiers of government, as has already been noted, its functions in relation to both the federal and state judiciaries are initiated largely by the activities of the JSCs established for either tier of government.

Members of these special judicial bodies are not full time "staff" of the bodies. They are not paid salaries, but do receive allowances when they hold meetings. The administration of the NJC is under the judiciary itself and it is headed by the Secretary to the NJC who is appointed by the judiciary and has to be a lawyer. Financing of the NJC and the judiciary as a whole is provided for in the Constitution. The relevant provisions have been pronounced upon by the courts. The case of *Olisa Agbakoba v The Attorney General of the Federation and two others*¹⁶ for

¹² It should be noted here that the definition of judicial officer does not include persons who preside over lower courts, such as magistrates or Area Court judges. See Constitution 1999, s 318.

¹³ It is fair to say that the Constitution 1999 gives broad outlines which, in practice, the special judicial bodies augment with their own guidelines to facilitate the process of selection in the first place and final appointments ultimately.

¹⁴ These legislative houses have to confirm the appointees of the President to headship of the courts. In addition, the Senate confirms all appointments to the Supreme Court.

¹⁵ The Federal Capital Territory, Abuja, has a Judicial Service Committee which functions like the SJSCs.

¹⁶ Suit No FH/LABJ/CS/63/2013 *In the Matter of Interpretation of Sections 81(1) (2) and 84 (1), (2), (3) of the Constitution of the Federal Republic of Nigeria 1999* decided by AR Mohammed J on the 26 May 2014.

instance, successfully challenged the extant process of budgeting and appropriations for the judiciary as unconstitutional. In successfully obtaining among others, a declaration that funds standing to the credit of the judiciary should not be paid in warrants but should be wholly paid to the NJC for appropriate disbursement, the financial autonomy of the judiciary and its agencies was established in principle.¹⁷ In due time, the benefits of this ruling should also extend to the special judicial bodies, to promote the effective performance of their functions and enhance the independence of the judiciary.

The State Judicial Service Commissions

The Constitution provides for the establishment in each state of an SJSC.¹⁸ Chaired by the Chief Judge of the state, its members include the state's Attorney-General and the Grand Kadi of the Sharia Court of Appeal and the President of the Customary Court of Appeal in states where such courts are established. Apart from these ex officio members, the rest of the SJSC's membership, like that of the FJSC which will shortly be discussed, consists of two legal practitioners and two lay persons. The SJSC is empowered to advise the NJC on suitable persons to nominate for appointment to the superior courts in the state namely, the High Court, the Sharia Court of Appeal and the Customary Court of Appeal, if any.

The Federal Judicial Service Commission

The Constitution also creates the FJSC.¹⁹ It is chaired by the Chief Justice of Nigeria and the other ex officio members are the President of the Court of Appeal; the Attorney-General of the Federation; the Chief Judge of the Federal High Court; and the President of the National Industrial Court. The rest of the membership comprises two persons, each of whom has been qualified to practise as a legal practitioner in Nigeria for not less than 15 years, chosen from a list of no fewer than four persons so qualified, recommended by the Nigerian Bar Association, as well as two non-lawyers, who in the opinion of the President are of unquestionable integrity.²⁰ The ex officio members remain members of the FJSC as long as they hold the relevant office, and the other members hold office for a period of five years.

The FJSC is empowered to "advise" the NJC in nominating persons for appointment to the federal courts listed in the Constitution including: the Supreme Court, the Court of Appeal, the Federal High Court and the National Industrial Court.²¹ The FJSC has devised guidelines for the appointment of judicial officers. Its most recent guidelines were adopted in October 2014 and they make detailed provisions for the process. The role of the FJSC, like that of the SJSCs, is better understood against the backdrop of the more fundamental role of the NJC.

¹⁷ The factors that could militate against the implementation include such variables as the funds actually available to or accruing to the federal government.

¹⁸ Constitution 1999, s 197 and the Third Schedule, Part II, para 5.

¹⁹ Constitution 1999, s 153.

²⁰ Constitution 1999, Third Schedule, Part I, para 12.

²¹ Constitution 1999, Third Schedule, Part I, para 13.

The National Judicial Council

The NJC, which is also created by the Constitution,²² is chaired by the Chief Justice of Nigeria. It comprises 24 members, most of whom are judges. In addition to the Chief Justice, holders of certain judicial offices are ex officio members of the NJC. These are the next most senior Justice of the Supreme Court after the Chief Justice, who is the Deputy Chairman of the Council; the President of the Court of Appeal; the Chief Judge of the Federal High Court; and the President of the National Industrial Court.²³ Other judicial members of the NJC are five retired justices of the Supreme Court or Court of Appeal, selected by the Chief Justice; five Chief Judges of states, selected by the Chief Justice of Nigeria from among their peers to serve in rotation; one President of the Customary Court of Appeal of a state and one Grand Kadi of the Sharia Court of Appeal of a state, both also selected by the Chief Justice of Nigeria to serve in rotation. Finally, the NJC includes five members of the Nigerian Bar Association (who only sit on the Council to consider the nominees for appointment to superior courts of record, and not other matters such as institutional financing or judicial discipline) and two non-lawyers considered by the Chief Justice of Nigeria to be persons of unquestionable integrity. Except for the heads of state courts who serve for rotational periods of two years, the other members not holding ex officio positions on the Council serve for a renewable term of five years.

It is important to note that the Attorney-General of the federation is not a member of the NJC and that the Executive branch does not appoint members to the body. Apart from ex officio members whose membership of the NJC is contingent upon holding another office, members of the NJC may only be removed by the President on an address supported by two thirds majority of the Senate.²⁴ Thus, members cannot be removed on a whim. The principle of checks and balances between the three arms of government plays out clearly in an arrangement designed to foster an effective level of independence for the Council in its operations.

The composition of the NJC largely insulates it from the Executive branch of government. However, the question does arise as to whether the establishment of the NJC has simply substituted the tyranny of the Executive with that of the judiciary itself. As has been observed elsewhere,²⁵ the overwhelming majority of its members (17 out of 24) are appointed directly or indirectly by the Chief Justice of Nigeria,²⁶ who chairs both the NJC and FJSC. Is this not a limitation of sorts?

²² Constitution 1999, s 153.

²³ Constitution 1999, Third Schedule, Part I, para 20.

²⁴ Constitution 1999, s 157(1)–(2).

²⁵ IE Sagay, "The Judiciary in a Modern Democracy" in IA Ayua, DA Guobadia and AO Adekunle (eds), *Nigeria: Issues in the 1999 Constitution* (Nigerian Institute of Advanced Legal Studies 2000) 76, 109.

²⁶ The influence of the Chief Justice is even greater than at first appears. Even in the case of NJC members who are nominated by other groups, such as the five members of the Nigerian Bar Association, these groups do not have the final as their choices must be acceptable to the Chief Justice.

Is there a possibility of packing the Council? Here, it must be observed that in recent years, there has been a high turnover of Chief Justices in comparison to the tenure of members of the NJC, which has made it practically difficult for most of them to exercise a substantial influence over the composition of the body.²⁷ This notwithstanding, reducing the power of the Chief Justice of Nigeria with regard to the composition of the NJC would aid its independence. To do so, the Constitution could be amended to broaden the sources of nomination of members to include the body of law academics and civil society. These sources should also have authority to confirm their nominees. In addition, membership of those who serve in rotation from a group could be specifically stated in the Constitution to follow the alphabetical order of states in order to remove the element of discretion in their appointment.

The constitutional criteria for eligibility

The Constitution sets out minimum criteria for appointment to the superior courts. In the case of the Chief Justice of Nigeria and the other members of the Supreme Court, these are that:

A person shall not be qualified to hold the office of Chief Justice of Nigeria or of a Justice of the Supreme Court, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.²⁸

The Constitution provides in similar terms for eligibility for appointment to the other courts, with variations only in the length of the post-qualification experience required.²⁹ There is also the added requirement of acceptable expertise in Customary law and Islamic law for the state's Customary Court of Appeal and Sharia Courts of Appeal respectively.³⁰ These are straightforward criteria that do not pose challenges to the appointing authority. It is of course expected that within these criteria, those who qualify for appointment would be hard-working persons of unimpeachable integrity³¹ who have a sound knowledge of the law.

Within the criteria spelt out in the Constitution, the special judicial bodies formulate their own guidelines for deciding on nominations for appointment, which are discussed below in Part III of this chapter.

The functions of the NJC in judicial appointments

As already observed, the NJC is involved in judicial appointments at both the federal and state levels. The involvement of the NJC is the culmination of the work

²⁷ Between 2006 and 2015, there were six Chief Justices of Nigeria. Were this not the case, the threat of being able to "pack" the NJC could be real!

²⁸ Constitution 1999, s 231(3).

²⁹ The period is 12 years in the case of the Court of Appeal and 10 in the case of the Federal High Court and High Courts, Customary Courts of Appeal and Sharia Courts of Appeal of the states: Constitution 1999, ss 238(3), 250(3), 271(3), 285(3) and 276(3) respectively.

³⁰ Constitution 1999, ss 285(3) (a) and (b), and 276(3)(a) and (b), respectively.

³¹ The requirement of integrity can be inferred from the judicial oath to which judicial officers subscribe. See Constitution 1999, Fifth Schedule.

done by the special judicial bodies in the appointments process, which is then left in the hands of the Executive to finalise, sometimes subject to parliamentary confirmation. In order to understand the important functions which the NJC performs in this pivotal position, it is necessary to examine the relevant constitutional provisions.

At federal level, the Constitution empowers the NJC to recommend to the President, from the list of persons submitted to it by the FJSC, persons for appointment to the Supreme Court, the Court of Appeal, the Federal High Court and the National Industrial Court.³² In addition, the NJC is empowered to recommend to the President from the list of persons submitted to it by the Judicial Service Committee of the Federal Capital Territory, Abuja (FCT Abuja), persons for appointment to the High Court, the Sharia Court of Appeal and the Customary Court of Appeal of the FCT Abuja.³³

With regard to the states, the NJC is empowered to recommend to each Governor, from the list of persons submitted to it by the relevant SJSC, persons for appointments to the High Court, the Sharia Court of Appeal and the Customary Court of Appeal of the state.³⁴

The NJC also has a specifically defined role in the process of appointing the heads of all these federal and state courts. However, the precise terminology used in the Constitution to describe the input of the NJC in relation to these appointments is important as there are variations in the language, as well as requirements for parliamentary confirmation of some appointments and not others. In the case of the Chief Justice of Nigeria:

The appointment of a person to the office of a Chief Justice of Nigeria shall be made by the President *on the recommendation* of the National Judicial Council subject to confirmation of such appointment by the Senate.³⁵

The procedure for appointment of the other Justices of the Supreme Court is somewhat differently expressed:

The appointment of a person to the office of a Justice of the Supreme Court shall be made by the President *on the advice* of the National Judicial Council subject to confirmation by the Senate.³⁶

The wording of the power to appoint state Chief Judges mirrors that of the power to appoint the Chief Justice of Nigeria:

³² Constitution 1999, Third Schedule, Part I, para 21(a)(ii).

³³ Constitution 1999, Third Schedule, Part I, para 21(a)(ii).

³⁴ Constitution 1999, Third Schedule, Part I, para 21(c).

³⁵ Constitution 1999, s 231(1), emphasis added. This provision is a marked contrast to and an improvement on Constitution 1979, s 211(1), which gave the power of appointment of the Chief Justice of Nigeria to the President in his discretion, subject to confirmation by a simple majority of the Senate.

³⁶ Constitution 1999, s 231(2), emphasis added. An earlier attempt during the 1995 Constitutional Conference to make the appointment of Supreme Court Justices the prerogative of the President acting only on the advice of the NJC without Senate confirmation failed. See the Report of the 1995 Constitutional Conference, vol 1, containing the Draft Constitution; Draft Constitution, clause 231.

The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State *on the recommendation* of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly of the State.³⁷

Finally, the appointment of judges to the state High Courts reverts to the language used in relation to the other Justices of the Supreme Court, but without the requirement of parliamentary confirmation:

The appointment of a person to the office of a Judge of the High Court of a State shall be made by the Governor of the State acting *on the recommendation* of the National Judicial Council.³⁸

A few observations need to be made. The first is to acknowledge the vital role of the Senate in the appointment of heads of federal courts and other members of the Supreme Court and similarly of state legislative bodies (the House of Assembly) in the confirmation of the heads of the various state courts, without which the appointment process is incomplete. Confirmation proceedings, though held in public and televised, have generally been fairly routine and devoid of drama.

The second observation is that the differences in wording that were highlighted above also have a bearing on the nature of the involvement of the NJC in the process. While in some appointments its role is to advise the Chief Executive to appoint a person to judicial office, in others it is to recommend a person to the Chief Executive for such appointment. Although in common parlance both terms mean “to tell somebody what you think they should do in a particular situation,” the Oxford Advanced Learner’s Dictionary further states that “[a]dvice is a stronger word than recommend and is often used when the person giving the advice is in a position of authority.”³⁹ As the eminent scholar BO Nwabueze points out in a comment on the procedure under the 1979 Constitution, “Legally, when a power is made exercisable by someone on the advice of another, no discretion is imported; the power has to be exercised only as advised, the role of the repository of the power being the purely formal and nominal one of merely executing the advice.”⁴⁰

This rather detailed consideration of both terms is relevant to the controversy that arose in the effort to appoint a substantive Chief Judge for Rivers State in 2013. The SJSC had sent a list of two judges to the NJC for consideration. The Governor did not however appoint the candidate ultimately recommended to him by the NJC, who was also the most senior judge in the state High Court. Instead, the Governor sent the name of another judge in the state judiciary, the President of the state’s Customary Court of Appeal, to the House of Assembly for confirmation. The House of Assembly confirmed this nominee and he was promptly sworn into office. The newly appointed Chief Judge was subsequently queried by the NJC

³⁷ Constitution 1999, s 231(2).

³⁸ Constitution 1999, s 271(2), emphasis added.

³⁹ AS Hornby and others (eds), *Oxford Advanced Learner’s Dictionary* (8th edn, OUP 2010).

⁴⁰ *The Presidential Constitution of Nigeria* (Hurst & Co 1981) 303. He concludes on the debatable note that “the real maker of the appointment under this method is thus the federal or state Judicial Service Commission”. These were the bodies charged with the responsibility under the 1979 Constitution before the establishment of the NJC by the 1999 Constitution now in force.

and suspended from judicial office. Consideration of the disciplinary action taken against the Chief Judge by the NJC is outside the remit of this chapter. What is relevant here is the extent of the powers of the NJC over judicial appointments.

The Governor of Rivers State had earlier gone to court in the case of *Governor Rivers State and another v National Judicial Council and another*,⁴¹ seeking a resolution of certain questions concerning the role of a Governor and the NJC in the appointment of the Chief Judge of a state. Among them was whether the NJC was constitutionally bound to recommend only the most senior judge in the state judiciary to the Governor for appointment. Lambo Akanbi J, sitting in the Federal High Court in Port Harcourt, answered this in the negative. The Court also pronounced on whether there are any other factors to be considered by the NJC in making a recommendation to the Governor. It should be reiterated here that the Constitution simply provides a minimum post-qualification experience of ten years as a legal practitioner.⁴² There is no constitutional restriction as to where the appointee can be chosen from. This much was confirmed by the Federal High Court in the case.

Was the Governor bound to accept the recommendation of the NJC? In the opinion of this author, he was clearly not. The constitutional provision does not rule out the Governor's discretion altogether. As so pithily stated by Nwabueze, "A binding recommendation is a contradiction in terms."⁴³ This does not however leave the appointment of the Chief Judge entirely in the hands of the Governor. Procedurally, the Governor cannot appoint a person who has not been recommended by the NJC. After the NJC has made its recommendation, however, it has no further role unless the matter were to return to it if the Governor rejected the NJC's recommended candidate. What becomes clear is that there is a potential for a stalemate between the Governor and the NJC in the appointment process seeing that neither can act alone. A Governor can continue to reject the recommendation of the NJC until it comes up with an acceptable name.

The practical resolution of such a deadlock would require better management of relations between the special judicial bodies and the Executive. To prevent the problem, the Constitution could be amended to place a limit on the number of times a Governor can reject the recommendation of the NJC after which he must appoint a Chief Judge. As a further safeguard for the process and so as not to completely override the discretion of the Governor, the NJC could also be compelled to send at least three names in each recommendation to the Governor from which a choice can ultimately be made.⁴⁴ The issue of whether the NJC should accompany its recommendations and/or insistence thereon with reasons and whether

⁴¹ Suit No FHC/PH/CS/421/2013 (unreported).

⁴² Constitution 1999, s 271(3).

⁴³ Nwabueze, *The Presidential Constitution of Nigeria* (n 40) 303.

⁴⁴ The Constitution of the Republic of South Africa 1996, s 174, forestalls this dilemma by limiting to two the number of times the President may reject the recommendation of the JSC in the appointment of other judges of the Constitutional Court apart from the Chief Justice and Deputy Chief Justice. It further requires the JSC to send a list of three names more than the number of appointments to be made to the President.

the Governor should also give reasons for rejecting the nominees of the NJC are also germane to formulating a transparent and accountable judicial appointments procedure.

III THE SPECIAL JUDICIAL BODIES AND THEIR PROCESSES FOR JUDICIAL APPOINTMENTS

This part of the chapter will look more closely at the procedures followed by the NJC and the FJSC when they perform their role in the judicial appointment process. Although both are federal bodies, it has already been noted that the NJC is also mandated to have an input into judicial appointments in the states, so the choice of these two bodies serves to give a feel of appointments nationwide. The qualities expected and eligibility criteria as well as the procedure followed by these bodies from the initiation of the process to the presentation of recommendations to the Executive are addressed in the published guidelines adopted by each of them.⁴⁵

Persons may become candidates for appointment by submitting an expression of interest (i.e. an application), or being nominated. The opportunity to do so only arises if a vacancy is officially advertised. Whenever there are vacancies⁴⁶ to be filled in the federal judiciary, the head of the court concerned so declares in writing to the Chief Justice of Nigeria, in his or her capacity as Chair of the FJSC.⁴⁷ The head of the court must also confirm in writing that facilities such as courtrooms, vehicles, accommodation etc. are available for the new judicial officer or officers before the appointment process can commence.⁴⁸ A copy of this notice is also sent to the Secretary to the NJC who advises the Chief Justice on the capability of the budget to accommodate such new appointees in the relevant year. Thereafter, the Chief Justice will give approval for the process with appropriate reductions in the proposed number of appointees where necessary.⁴⁹

It is based on such approval that the FJSC calls for expressions of interest by notices posted on its website and the notice boards of the courts and branches of the Nigerian Bar Association (NBA). At the same time, the FJSC is required to write letters seeking nominations to: the heads of all federal courts and superior state courts; the members of the court in which the vacancy has occurred (and to the members of both the Supreme Court and the Court of Appeal in the event of a vacancy in either of those courts); and the President of the NBA.⁵⁰ The FJSC

⁴⁵ The latest guidelines issued by these bodies are the Revised NJC Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria ("NJC Guidelines"), issued on 3 November 2014, and the FJSC's Procedural Rules for Appointment and Removal from Office of Judicial Officers ("FJSC Guidelines") issued on 31 October 2014. The NJC Guidelines apply to the various JSCs as rule 1 directs these bodies to comply with the NJC Guidelines in their advice to the NJC.

⁴⁶ Vacancies can arise on the death, retirement or removal of a judge, on the creation of a new division of an existing court among other instances.

⁴⁷ NJC Guidelines, rule 2.

⁴⁸ FJSC Guidelines, rule 4.

⁴⁹ FJSC Guidelines, rule 4.

⁵⁰ NJC Guidelines, rule 3(1).

Guidelines also recommend that the heads of court send to the FJSC a shortlist of not less than four times the number of judicial officers intended to be appointed to their court. This would ensure a large pool of candidates from which selections can be made.

At this point, it is pertinent to ask whether a person can be compelled by these special judicial bodies to take a judicial appointment or to accept elevation to a higher court. It has been demonstrated that not every elevation even to the Supreme Court is welcomed by the person chosen, who may consider such an appointment a Greek gift as the motive for such elevation may be questionable.⁵¹ In a particular instance, the proposal from the NJC that a serving President of the Court of Appeal be elevated to the Supreme Court was rejected by the nominee.⁵² A series of events followed, culminating in the suspension of the nominee from office and the subsequent filing of an action against the NJC and the Chief Justice of Nigeria, among others. It is reasonable to conclude that the individual has the right to choose whether or not to accept a judicial appointment.

After the close of nominations, a provisional shortlist of not less than twice the required number of proposed appointees is drawn up by the Chief Justice in his capacity as Chairman of the FJSC. The Chief Justice is required to circulate this provisional shortlist to the members of the FJSC, the President of the NBA, and to all serving and retired judicial officers of the court in which the vacancy has arisen, unless it is a vacancy in the position of head of court, in which case the shortlist is to be circulated to all serving and retired heads of federal courts, including retired Chief Justices of Nigeria and retired Presidents of the Court of Appeal.⁵³ The question does arise as to the utility of asking retired Chief Justices and Presidents of the Court of Appeal for instance, to comment on nominees. In reality, many of the old justices may hardly know the nominees, being so far removed from them in the context of age and era of service. The FJSC then debates the Chief Justice's shortlist and may modify or adapt it prior to the forwarding of names to the NJC. Unlike the NJC Guidelines on procedure which include interviews for shortlisted candidates, interviews are not provided for in the FJSC Guidelines. However, at the time of writing, it was widely believed that interviews would soon be introduced as part of the procedure.

The criteria used for shortlisting require discussion. According to the latest FJSC Guidelines, shortlisting of candidates is to be based on: the character, practical/actual experience and expertise in the profession, either gained through serving in some capacity in the public service or private practice. In the case of those aspiring to a higher judicial office from the bench, experience is assessed by reference to the number of judgments delivered in contested cases, while for practitioners the

⁵¹ Where special judicial bodies are "packed", there could be room for using the appointment process for less than altruistic purposes.

⁵² This was the case of Justice Isa Salami who in 2013 preferred to remain President of the Court of Appeal until retirement.

⁵³ NJC Guidelines, rule 3(4).

number of judgments obtained in a specified number of contested cases is considered. The number required varies according to the level of judicial office to which the appointment is to be made.⁵⁴ The emphasis by the JSC on the number as opposed to the quality of such judgements is a flaw. The process could benefit from critical appraisal of such judgments. Although the NJC actually includes the quality of a candidate's judgments as a criterion for appraising nominations to the appellate courts sent to it by the JSCs,⁵⁵ it is doubtful whether a credible procedure is in place for assessing these judgments. However, the NJC Guidelines adopted in 2014 do contain a salutary change, as they specifically recognise academic careers as providing a relevant background for judicial appointment.⁵⁶ This is a welcome development. While some academics have been appointed in the past, in the context of the number of judges and courts nation-wide, these appointments have been few and far between. It cannot be contested that the Court of Appeal and Supreme Court can benefit from the membership of outstanding academics. At that level, issues of procedure having been settled, the emphasis is on substantive law and its development. These are areas where even their greatest opponents cannot deny the potential for academics to make incisive contributions. It is therefore hoped that subsequent exercises will go beyond the level of tokenism.

It is also troubling that the FJSC Guidelines place much emphasis on the seniority of nominees, which is measured by length of service relative to other members of the Bench (in appointments to the Court of Appeal and the Supreme Court) for example. Seniority should however not be at the expense of merit. Seniority should rightly prevail where all other criteria are equally met by the candidates under consideration. Moving up to the appellate courts should also not be like promotion in the ranks of the civil service because the system would then run the risk of becoming less than it can be. Merit should carry a lot of weight particularly at the appellate levels along with room for invigorating these courts with more diverse membership as already noted. Seniority as a criterion for elevation to the appellate courts might work better where the process of initial appointments to the first instance courts produces the right calibre of judges from among whom appellate judges may in due course be appointed. At the same time, it is vital for appropriate checks and disciplinary processes to be in operation in order to promote the highest ethics and professional standards among judges throughout their judicial careers, so that the system continually flushes out bad eggs.

The FJSC Guidelines take into account the national policies designed to manage the multiple identities and divides within the country. Clearly set out in the Constitution, for example, is the federal character principle by which there shall be no predominance of persons from a few states or areas in the composition of the Government of the federation or a state and their agencies.⁵⁷ The Guidelines

⁵⁴ FJSC Guidelines, rules 7, 11, 14, 16, 19, and 21.

⁵⁵ NJC Guidelines, rule 3(6).

⁵⁶ NJC Guidelines, rule 3(6).

⁵⁷ Constitution 1999, s 14(3)–(4).

specifically provide that the federal character principle should be employed in short-listing candidates for nomination.⁵⁸ The six zone geo-political division of the country as a whole and the local government areas within each state, provide the framework for the operation of this principle. It must be observed that while they do have an important role to play in the selection process given the socio-political milieu, excessive reliance on the criteria of geographic spread at the expense of merit is just as inimical to the system as excessive reliance on seniority. Although citizenship is not specifically listed as a criterion for selection, the application of the federal character principle works out as such because the principle links eligibility for participation in government and its agencies to persons from states and ethnic groups in Nigeria.

Neither the FJSC Guidelines nor the NJC Guidelines refer to gender. Although relevant statistics were not available at the time of writing, the sheer visibility of female judicial officers in superior courts, including heads of court at all levels in the Nigerian judiciary, counters any suggestion of female marginalisation.

Once the FJSC has discussed the Chief Justice's provisional shortlist, it decides on a final shortlist to be forwarded to the NJC. The shortlist must be accompanied by a memorandum from the FJSC which covers such matters as the requisite establishment details, justification for the number of judicial officers proposed for appointment and relevant information and reports on each candidate. The deliberations and decision of the NJC on the recommendations of the FJSC will be informed by, among other factors, the workload of the relevant court and its judicial officers as well as the performance of judicial officers serving in the court in question. On the basis of these, the NJC has another opportunity, as it does at the outset of the selection process, to reduce the number of appointments to be made. This highlights an interesting aspect of the role and power of the NJC in the administration and control of the judiciary. It fits in clearly with its constitutional functions to "collect, control and disburse all moneys, capital and recurrent, for the judiciary"⁵⁹ and "deal with all other matters relating to broad issues of policy and administration".⁶⁰ In addition to the foregoing, there are forms from the NJC which must be filled in by nominees and vetted by the NJC. Thereafter, there is a process of security clearance of potential appointees by appropriate state agencies.

The NJC Guidelines indicate that "every candidate ... shall undergo interview to be conducted by the National Judicial Council to ascertain his or her suitability for the judicial office sought."⁶¹ The Guidelines further stipulate that "[t]he result of the interview shall form a major part of the decision on the candidate's suitability".⁶² Although the NJC has been known to depart from this on occasion, there is, unfortunately, a tendency to emphasise seniority as a criterion to the detriment of

⁵⁸ See, for example, FJSC Guidelines, rule 7.

⁵⁹ Constitution 1999, Third Schedule, Part I, para 21(e).

⁶⁰ Constitution 1999, Third Schedule, Part I, para 21(h).

⁶¹ NJC Guidelines, rule 6(1).

⁶² NJC Guidelines, rule 6(3).

other factors. In this regard, the observations earlier made regarding the FJSC are also tenable here in respect of the NJC.

CONCLUSION

In reviewing the role and performance of the special judicial bodies, it is important not to lose sight of the effect of the operations of the NJC on Nigeria's federal arrangements. The Council's power over the appointment and control of state judicial officers seems somewhat clumsy in a federal system. Given the relative novelty of civilian rule in the country, the present arrangement may be excused as an attempt to midwife the process. In time, however, it may need to be revisited.

Some questions also arise in relation to the appointment processes conducted by the special judicial bodies. Do the arrangements in place for the operation of these bodies make for the required independence that can ensure the credibility of the process? There is no doubt that the NJC was established to provide a stronger body, higher than the JSCs and with a large majority of judges among its members, to be a second layer of protection for the independence of the judiciary. The independence of the special judicial bodies does contribute to the independence of the judicial branch. This independence could be strengthened by reforming the membership of the special judicial bodies, reducing the influence of the Chief Justice of Nigeria over the selection of new members of the NJC and ensuring participation from academia and civil society. There is also a need to clarify the interaction between the NJC and the Executive, particularly with regard to recommendations for the appointment of heads of court.

The effort of both the NJC and FJSC to put in place standardised processes and criteria for judicial appointments is commendable. They do go some way in promoting transparency and fairness in the system. As has been observed, there is still room for improvement, to address problems such as over-reliance on considerations of seniority and geographical distribution of judicial appointments rather than the assessment of a candidate's professional output as a judge or practitioner.

This chapter has highlighted the role of special judicial bodies in the appointment of judicial officers in Nigeria. As a prelude to further discussion, it has identified some of the relative strengths and weaknesses in the system. In the context of how far they foster transparency, credibility and public confidence in the system, it is fair to assess the total package as a work in progress.

Managing a Fraught Transition: the Practice of the South African JSC

CHRIS OXTOBY¹

INTRODUCTION

The process of judicial appointments in South Africa is often controversial. Although not the only significant actor in the process, this contestation usually focuses on the role of the Judicial Service Commission (JSC). This paper will identify some of the specific challenges facing the post-apartheid South African judiciary and justice system, in the context of judicial appointments, and will discuss how the JSC has fared in addressing these challenges. The paper will also assess how the legal framework for judicial appointments in South Africa has worked in practice. The paper draws heavily on the author's experiences in observing most of the JSC's public interviews since 2009, and is thus focused primarily on the JSC's practice from that date.

These challenges include the transformation of the racial and gender composition of the judiciary; questions of whether a government holding a stable electoral majority, but holding office under a Constitution giving extensive powers to the courts, would attempt to secure the appointment of deferential candidates; and questions of whether candidates and the public would have greater confidence in the appointments system if it was more transparent.

To contextualise these discussions, a short summary of the constitutional and legal framework governing judicial appointments is necessary.² South Africa has transitioned from a system of parliamentary supremacy under apartheid (where the franchise was denied to the majority black population), to a post-apartheid constitutional democracy. The Constitution vests the courts with extensive powers of review.³ The Appellate Division of the Supreme Court, which was previously the apex court, is now the Supreme Court of Appeal (SCA), an intermediate appeals court. The Constitutional Court is now the highest court in the land.

In the pre-constitutional era, judges were appointed by the State President in Cabinet, usually with the input of the senior judge of the court to which the

¹ Senior Researcher, Democratic Governance and Rights Unit, Department of Public Law, University of Cape Town.

² For a detailed analysis of the South African judiciary, including the process of appointment, see Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014).

³ See Constitution of the Republic of South Africa 1996 (hereafter "Constitution"), ss 2, 165, and 172.

candidate was appointed.⁴ This system was widely regarded as unsatisfactory, due to a lack of transparency and of opportunities for input from the legal profession and the general public. It was felt to have produced a cadre of judges who, with some notable and honourable exceptions, were seen as complicit in the implementation of unjust apartheid laws.

In an attempt to break from this past practice of judicial appointments,⁵ a JSC was created as part of the interim constitutional settlement.⁶ The JSC in its present form is established by the 1996 Constitution. A comparatively large body, it consists of a majority of politicians and political appointees, but also contains representatives of the judiciary, the legal profession and law teachers.⁷ The JSC effectively determines almost all appointments to superior courts other than the Constitutional Court, although the President is responsible for the formal act of appointment.⁸ The JSC also plays a significant role in the appointment of justices of the Constitutional Court,⁹ and must be consulted by the President when appointing the Chief Justice and Deputy Chief Justice (who are based in the Constitutional Court), and President and Deputy President of the SCA.¹⁰

The Constitution establishes the JSC and provides the framework for judicial appointments, with further operational detail found in legislation¹¹ and regulations.¹² To close any lacunae that may remain, the Constitution empowers the JSC to “determine its own procedure”, provided that decisions are supported by a majority of members.¹³ Once shortlisted, candidates for appointment are interviewed by the

⁴ Murray Wesson and Max du Plessis, *The Transformation of the Judiciary*, paper prepared for the Fifteen Year Policy Review (South African Presidency 2008) 3.

⁵ The JSC has other functions, including enforcing judicial discipline, but this paper will focus only on its role in the appointments process.

⁶ Constitution of the Republic of South Africa 1993, s 105.

⁷ See Constitution, s 178, and the discussion at text to nn 70–79. The full composition of the JSC is: the Chief Justice; the President of the SCA; one Judge President of the High Court; the Minister of Justice; two advocates; two attorneys; one teacher of law; six members of the National Assembly (three of whom must be from opposition parties); four delegates of the National Council of Provinces (the upper house of Parliament); four persons designated by the President; and for provincial High Courts, the relevant Judge President and Premier, or their designated alternates.

⁸ The President formally makes the appointments “on the advice of” the JSC: Constitution, s 174(6). In South African law, such wording is interpreted as leaving no discretion to reject the JSC’s recommendations. Morné Olivier, “The selection and appointment of judges” in Hoexter and Olivier (n 1) 127–128. In December 2015, the Presidency omitted a nominated candidate from the announcement of official appointments following the JSC’s October 2015 sitting. It is unclear whether this was an oversight, or an attempt to countermand the JSC’s advice. Franny Rabkin, “New high court and labour court judges announced” *Business Day* (Johannesburg, 17 December 2015) <<http://www.bdlive.co.za/national/law/2015/12/17/new-high-court-and-labour-court-judges-announced>>.

⁹ The JSC prepares a shortlist of three candidates more than the number of vacancies, and the President appoints from that list. Constitution, s 174(4).

¹⁰ Constitution, s 174(3). In practice, this involves the JSC interviewing candidates, and advising the President as to the suitability of the candidate.

¹¹ Specifically, the Judicial Service Commission Act 9 of 1994, as amended.

¹² Procedure of Commission, GN R114 of 1996, as amended.

¹³ Constitution, s 178(6).

JSC in public.¹⁴ Deliberations occur in private, after which the JSC's recommendations are announced.¹⁵

It is worth highlighting specifically the significance of measures taken to transform the demographic composition of the South African judiciary, which is a thread that runs throughout the appointments process and is crucial to understanding contemporary South African appointments practice. Prior to South Africa's transition to a constitutional democracy, the judiciary was overwhelmingly made up of white men.¹⁶ The obvious incongruity of a judiciary so constituted in a country where white South Africans make up under 10% of the population,¹⁷ coupled with the judiciary's general failure to provide significant opposition to the apartheid system,¹⁸ make the impetus for change obvious. But how this change takes place has been far from straightforward.

I THE CRITERIA FOR APPOINTMENT AND THE "TRANSFORMATION MANDATE"

The Constitution gives limited guidance on the criteria to be employed in selecting judges. Section 174 provides that:

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. ...
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.¹⁹

Further qualities may be inferred from other provisions of the Constitution—for example, requirements that the judiciary be independent and apply the law impartially, and without fear, favour or prejudice,²⁰ necessitate that judges possess the abilities and mindset to act consistently with those strictures. The ability to fulfil the judicial role in such a way that the doctrine of constitutional supremacy is upheld, and that the rights and the values in the constitution are furthered, would also seem to be criteria that are self-evident from the Constitution.²¹ Responding to criticisms that the appointments process lacks clearly articulated criteria, some members of the JSC have responded by arguing that they do apply criteria, namely those in the Constitution.²² But it is apparent that the constitutional provisions

¹⁴ Procedure of Commission (n 11) para 2(i) and 3(i).

¹⁵ Procedure of Commission (n 11) para 2(j) and 3(j).

¹⁶ Wesson and du Plessis (n 3) 3.

¹⁷ Statistics South Africa, "Census 2011" 17 <<http://www.statssa.gov.za/publications/P03014/P030142011.pdf>>.

¹⁸ Wesson and du Plessis (n 3) 3–4.

¹⁹ For a full discussion of these criteria, and judicial appointments in South Africa generally, see Susannah Cowen, "Judicial Selection in South Africa" (DGRU Working Paper 2013) <<http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf>>. See especially 15–63 on the question of criteria.

²⁰ Constitution, s 165(2).

²¹ Constitution, s 2 provides that: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

²² Richard Calland and Chris Oxtoby, "Rational, consistent process for choosing judges needed" *Business Day* (Johannesburg, 18 April 2013) <<http://www.bdlive.co.za/opinion/2013/04/18/rational-consistent-process-for-choosing-judges-needed>>.

alone cannot give all the answers, and there has been much difference of opinion over how those criteria are to be understood.

In 1998, the JSC identified substantive criteria and guidelines for appointment. Several authors with privileged access have discussed this early set of criteria, although they have never been officially released.²³ The fact that a set of criteria and guidelines were adopted is significant, suggesting that the JSC accepted that it was necessary to elaborate on the criteria found in the Constitution. It appears that, in terms of the s 174(1) requirement, a need for integrity, energy and motivation were identified, as well as competence and experience, in the sense of both technical expertise and an ability to give effect to the values of the Constitution. A further factor was knowledge of the needs of the community. The JSC also accepted that potential should be taken into account in an overall assessment of a candidate.²⁴

Section 174(2) requires the appointing authorities to consider “the need for the judiciary to reflect broadly the racial and gender composition of South Africa”. According to Catherine Albertyn, the JSC criteria set out the following approach to this requirement:

Race and gender are not envisaged as screening or trumping criteria, but are relevant to a wider set of judicial qualities. There is not a simple equation between a judge’s race or gender and his or her ability to adjudicate fairly ... The JSC nevertheless allows itself space to advance a black or female candidate over a more qualified white or male candidate should the former lack experience but display competence and ability in relation to the criteria under s 174(1). ... This reading redefines merit to include an appreciation of South Africa’s different communities and an understanding of the values of the Constitution, while s 174(2) enables a flexible approach to appointing black and women judges when presented with promising candidates.²⁵

Albertyn notes, however, that “[t]he JSC seems to have been unable to sustain this more substantive and transparent approach”.²⁶ In 2009, in response for a request for access to information, the JSC identified a “wide range of factors” to be taken into account when deliberating on a candidate’s suitability for appointment. These included:

- the recommendation of the relevant head of court;
- support from professional bodies;
- the need for transformation of the judiciary in order to reflect the racial and gender composition of the country (i.e. the section 174(2) criterion);
- the “judicial needs” of the relevant court;
- a candidate’s age and range of experience, including experience as an acting judge; and

²³ See Catherine Albertyn, “Judicial Diversity” in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 279.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

- the merits of the candidates in relation to each other.²⁷

Albertyn critiques this approach as paying “surprisingly little attention to judicial character and the content of ‘merit’: it focuses on external factors and seems to elevate these above the actual abilities of a judge”.²⁸ She goes on to observe:

It seems to suggest that the JSC uses s 174(2) as a screening criterion ... This tends to reduce s 174(2) to a requirement of “mere representivity”, where race becomes the key determinant for appointment and trumps other considerations suggested by s 174(1).²⁹

In 2010, the JSC convened a special sitting to review the 1998 criteria, and agreed to make public the criteria it would use.³⁰ These criteria are grouped under two headings. Under the heading “criteria stated in the Constitution”, they identify three questions, namely whether the applicant is an appropriately qualified person, a fit and proper person, and whether their appointment would help reflect the racial and gender composition of South Africa. Then there are the following “supplementary criteria”:³¹

- Is the proposed appointee a person of integrity?
- Is the proposed appointee a person with the necessary energy and motivation?
- Is the proposed appointee a competent person?
 - (a) Technically competent
 - (b) Capacity to give expression to the values of the Constitution;
- Is the proposed appointee an experienced person?
 - (a) Technically experienced
 - (b) Experienced in regard to values and needs of the community
- Does the proposed appointee possess appropriate potential?
- Symbolism. What message is given to the community at large by a particular appointment?

While they overlap with, but do not completely restate, the reported contents of the 1998 criteria, the 2010 criteria still remain strikingly open-ended. It is noticeable that the JSC does not elaborate on its understanding of the criteria in the Constitution, and many of the “supplementary criteria” are so broad as to give little sense of how the JSC assesses candidates. Furthermore, the 2010 criteria as a whole give no indication of how the JSC weighs and balances the two sub-sections of section 174.³² Some degree of flexibility and discretion for the appointing body is certainly desirable, but the openness and transparency of the appointments process would benefit either from more precise definition, or some greater degree of explanation from the JSC to clarify how such criteria are interpreted.

²⁷ Chris Oxtoby and Abongile Sipondo, “Judicial Appointments: Do procedural shortcomings hinder access to justice?” in Kristina Bentley, Laurie Nathan and Richard Calland (eds), *Falls the Shadow: Between the promise and the reality of the South African Constitution* (UCT Press 2013) 137.

²⁸ Albertyn (n 22) 281.

²⁹ *Ibid.*

³⁰ Judicial Service Commission, *Summary of the Criteria used by the Judicial Service Commission when Considering Candidates for Judicial Appointments* <<http://www.constitutionalcourt.org.za/site/Admin/Criteria-for-Judicial-appointment.pdf>>.

³¹ *Ibid.*

³² Albertyn (n 22) 282.

II TRANSFORMATION AND THE APPLICATION OF THE SELECTION CRITERIA

The need for further elaboration of the selection criteria is all the more pronounced as it has not always been apparent how closely the 2010 criteria have been followed in practice. In private discussions, some Commissioners have complained that their colleagues proceed straight to a discussion of the section 174(2) requirements, without dealing with the requirements of section 174(1). With only the interviews, rather than the deliberations, being held in public, it is difficult to know exactly what factors are taken into account in making selections, and whether the hints that interview questioning patterns give in fact correspond to the grounds on which decisions are made.

In light of the prominence of section 174(2), it is not surprising that one of the most controversial aspects of the JSC's performance concerns the appointment, or the non-appointment, of white male judges. As has already been suggested, it was inevitable that this would be a ground of contestation, taking into account the transformative requirements of section 174(2), and the overwhelming dominance of the judiciary by white men when the Constitution came into force. But exactly how the transformation of the judiciary (as with other sections of society) is to be carried out is often the source of divisive debate. Competing understandings of the transformation mandate vary from a narrow understanding of transformation, focusing heavily on changing the demographics of the bench, to broader understandings which emphasise the need to cultivate diversity of outlook and life experience on the bench, which may not always be co-extensive with race and gender.³³

On the narrower, "purely demographic" understanding of transformation, the pace of transformation of the judiciary has been far quicker in terms of race than in terms of gender. Although improvement has been evident recently, the proportion of female judges (34% at the time of writing)³⁴ remains some way short of being representative of the overall population. The situation is worse in judicial leadership positions and on the apex courts.³⁵ There are of course many diverse factors contributing to this, not all of which can be blamed on the JSC. But it does provide an ongoing challenge for the appointments process to address.

To illustrate some of these controversies, a highly publicised situation arising from the October 2012 sitting of the JSC will be discussed. It provides an illustration of some of the controversies surrounding the JSC's application of s 174(2), and insight into the JSC's decision making process.

³³ For an excellent discussion of this issue, see *ibid* 245–287.

³⁴ As at 30 June 2015, there were 239 permanent superior court judges in South Africa, 158 of whom were men, and 81 women (statistics obtained from the Office of the Chief Justice, on file with the author).

³⁵ The Constitutional Court has never had more than three out of 11 women judges. As of mid-2015, only four of 23 judicial leadership positions were held by women, with one of those due to retire imminently.

Shortly before the sitting, the SCA gave judgment in the *Cape Bar Council* case,³⁶ establishing the principle that, when properly called on to do so, the JSC may be required to give reasons for a decision not to recommend a candidate for appointment.³⁷ In October 2012, the JSC interviewed eight candidates for four vacancies on the Western Cape High Court. The candidates comprised a white woman, a black African man (Mokgoatji Dolamo), two black African women, one coloured man,³⁸ and three white men, including Owen Rogers SC and Jeremy Gauntlett SC.

Rogers and Gauntlett had both been passed over for appointment before. Both had reputations as among the top advocates in the country. But whereas Rogers maintained a relatively low public profile, Gauntlett's reputation was of an abrasive and controversial figure. Perhaps most pertinently, he had previously been accused of racism in a report prepared by Western Cape Judge President, John Hlophe.³⁹

The interviews were cordial, compared to some carried out by the JSC. Dolamo had perhaps the most difficult interview, with questions being raised about his conduct as an attorney, which had led to 26 complaints being made to the Law Society.⁴⁰ After the interviews, the JSC announced that it was to nominate one more candidate than the number of vacancies originally advertised—an option it sometimes uses to allow it to fill vacancies that might come into existence after the initial advertising of posts. Five candidates were accordingly nominated for appointment, including Dolamo and Rogers. Demographically, two white, two black African and one coloured persons were nominated; and two women and three men. Gauntlett's name was the most striking omission.

Following the announcement of the JSC's recommendations, the former Deputy President of the Supreme Court of Appeal, Louis Harms, invoked the *Cape Bar Council* decision, to ask why Gauntlett's appointment had not been recommended.⁴¹ Harms argued that Gauntlett's omission was irrational and legally assailable, in particular the preference for Dolamo over Gauntlett, in light of the information which had emerged during Dolamo's interview.

³⁶ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).

³⁷ *Ibid* para 45. The Court held that questions of how extensive the reasons should be, who would be entitled to request them, and the circumstances under which such reasons could be legitimately requested, would depend on the facts and circumstances of each case.

³⁸ In common South African parlance, "coloured" refers to a person of mixed race origins.

³⁹ See Philip de Bruin, "Hlophe hiding behind race" *News24* (South Africa, 27 February 2005) <<http://www.news24.com/SouthAfrica/News/Hlophe-hiding-behind-race-20050227>>.

⁴⁰ Niren Tolsi, "JSC given go-ahead to explain Gauntlett snub" *Mail & Guardian* (Johannesburg, 30 October 2012) <<http://mg.co.za/article/2012-10-30-jsc-given-go-ahead-to-explain-gauntlett-snub>>.

⁴¹ Harms had nominated Gauntlett for the position. To the author's knowledge, this is the only occasion on which anyone has invoked the *Cape Bar Council* decision (n 35) concerning the duty of the JSC in certain circumstances to provide reasons for a decision if requested to do so. The correspondence between Harms' attorneys and the JSC is available at <<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=335516&sn=Detail&pid=71619>>.

In response, the JSC noted that the recommendations were determined by the Commission's normal, secret ballot voting procedure, and that Gauntlett had failed to muster the necessary majority. Elaborating further, the JSC explained:

Voting takes place after the Commissioners have deliberated on the candidates' strengths and weaknesses, the needs of a particular court and the requirements imposed by section 174(1) and 174(2) of the Constitution. The question that is answered at the voting stage is: Which of the candidates found to be fit and proper should the Commission recommend for appointment? [All the candidates interviewed were found to be fit and proper.]

As to Advocate Gauntlett SC, his excellence and experience as a lawyer were acknowledged. A concern was raised, however, that he has a "short thread" and that he can be acerbic at times. Some Commissioners accepted his assurance that as a Judge one is removed from the immediate combative situation that counsel usually find themselves in, but strong reservations were also expressed as to whether, as part of his attributes, he has the humility and the appropriate temperament that a Judicial Officer should display.

Another very important consideration was the demographic composition of the Western Cape High Court Bench. It was argued that considering the number of white male Judges in that Court as compared to other races was such that were two white males to be appointed (at that stage the focus was on Advocates Gauntlett SC and Rogers SC) the Commission would be doing violence to the provisions of section 174(2) of the Constitution.

The JSC thus identified the reasons for Gauntlett failing to obtain sufficient votes as concerns about whether he possessed humility and judicial temperament, and concerns that appointing two white men would be contrary to s 174 (2). A non-governmental organization, the Helen Suzman Foundation, has used the JSC's reasons as a factual basis to challenge the criteria used by the JSC in court. At the time of writing, the case has proceeded as far as an interlocutory application to access the recordings, or a transcript thereof, of the JSC's deliberations following the interviews. The High Court dismissed the application,⁴² and an appeal is pending before the SCA.

This saga shows the challenges faced when traditional concepts of merit meet legal realpolitik and softer criteria such as humility and the appropriate temperament for a judge. Much debate has ensued on whether issues such as humility ought to be a factor in appointing judges.⁴³ Whilst such a requirement may be implied from the JSC's criteria, it is not expressly mentioned in them. This illustrates how the JSC could make life easier for itself, and further the openness and transparency of judicial appointments, by elaborating more fully on the criteria it employs.

The episode also illustrates the complexities of following the dictates of section 174(2). At the beginning of 2012, of the 29 permanent judges at the Western Cape High Court, 20 were men, nine of them white men. At the beginning of 2013, there

⁴² *Helen Suzman Foundation v Judicial Service Commission* [2014] 4 All SA 395 (WCC).

⁴³ Cowen (n 18) 37–38 presents a compelling argument for the importance of humility as a judicial quality. Cowen discusses judicial temperament as an aspect of whether a candidate is a fit and proper person under section 174(1), defining it to include "humility, open-mindedness, courtesy and patience, and decisiveness", and highlighting that judges perform a public service.

were 33 permanent judges. 23 of these were men, of whom 10 were white men.⁴⁴ It is open to debate whether one more white man would have “done violence” to section 174(2) in this context.

But the narrative that the doors to the judiciary have been closed to white men is unhelpful and factually inaccurate.⁴⁵ White male judges are frequently appointed. As of June 2015, there were a total of 239 permanent judges, of whom 61 were white men. This is the second largest individual group disaggregated in terms of race and gender, behind black African men (70). At the beginning of 2012, there were 71 white male judges out of 233.⁴⁶

To conclude on the issue of criteria, they are critical to the proper functioning of the judicial appointments process. The lack of clear and detailed criteria, forming the subject of at least some degree of consensus among the members of the JSC as to the basis on which the Commission makes its recommendations, contributes to the procedural difficulties evident during interviews.⁴⁷ Furthermore, the absence of clearly defined criteria is harmful to public perceptions of the fairness and integrity of the interview process.

III “WHICH WHITE MEN”: IN SEARCH OF DEFERENTIAL JUDGES?

The clamour around whether or not white men stand a fair chance of being appointed to the bench has obscured more fundamentally concerning issues about how the JSC is fulfilling its constitutional mandate. The April 2013 interviews marked a nadir in this regard, when one of the representatives of the advocates’ profession, Izak Smuts SC, resigned from the JSC after an acrimonious session in which disagreements in closed-door discussions seemed to spill over into the interviews. Smuts had authored a paper, commissioned by the JSC prior to the interviews, in which he criticised the Commission for failing to appoint numerous white male candidates, and remarked that the Commission should say so openly if white men should not apply for judicial vacancies.⁴⁸

Buried under his complaint about the non-appointment of white males, Smuts highlighted a more insidious issue. As he explained shortly after his resignation:

My concern is that there is a reluctance to appoint or promote independent-minded intellectuals to the bench. In my media statement upon resignation, I mentioned the names Cachalia, Budlender, van der Linde, Paterson, Gauntlett and Plasket. Judge Cachalia was criticised in his interview for promotion to the Constitutional Court in 2009 for having expressed concern in a judgment about the calibre of judgments reaching the SCA on appeal, and expressing veiled criticism of the JSC about appointments it was effecting. He was attacked for not supporting “transformation of the judiciary”. In response, he suggested that, as a litigant, he did not expect to see a judge who looked like him, but

⁴⁴ Statistics supplied by the JSC, on file with the author.

⁴⁵ 22 white male judges were appointed between 2010 and 2012: Calland and Oxtoby (n 21).

⁴⁶ Statistics supplied by the JSC, on file with the author.

⁴⁷ These are discussed further in text to nn 83–90.

⁴⁸ Izak Smuts, “The judiciary: do white males need not apply?” *Politics Web* (South Africa, 5 April 2013) <<http://www.politicsweb.co.za/news-and-analysis/the-judiciary-do-white-males-not-need-apply>>.

rather one who would do justice by him. That, regrettably, appeared to end his prospects of judicial promotion. ... I suggest that the common denominator in respect of all these candidates is intellectual prowess and independence of mind. That is a matter for extreme concern. ... I suggest that the track record of those passed over for appointment suggests a reluctance to appoint independent, excellent and leading practitioners which is extremely disturbing.⁴⁹

Coming from an experienced legal practitioner who served on the JSC for nearly four years, these comments are a matter for grave concern, even though they must be read in the context of Smuts' rancorous departure from the JSC. This author's own observations of JSC interviews revealed a discernible increase, particularly between 2011 and 2014, in the number of questions put to candidates about issues such as the proper role of the courts in relation to other branches of government, especially regarding the formulation of policy, and the limits of judicial review. These are all questions, in other words, going to the long vexed question of the separation of powers and the limits of judicial review in a constitutional democracy. The focus on these issues was such that, when themes such as judicial philosophy or theories of adjudication were raised in JSC interviews, the focus would be almost exclusively on the separation of powers.⁵⁰ It has generally been rare for the JSC to ask questions that explore a candidate's judicial outlook at all, which made it dispiriting to see discussion confined to the separation of powers issue, on the rare occasions when candidates' judicial philosophies were interrogated.

This preoccupation with the separation of powers leads to a curious disjunct, whereby candidates who practised law under the apartheid system are frequently questioned to test their commitment to the current constitutional dispensation and its values. Commissioners seem to want to see evidence of some degree of activism and engagement with human rights issues from such candidates. But, as soon as such involvement takes place under the constitutional dispensation, Commissioners suddenly seem far more wary of it.

Does it follow that candidates who evince an independent mind and a commitment to constitutional values are inevitably not appointed? That would be going too far. During the April 2014 interviews, attorney Mahendra Chetty was asked an extraordinary question during his interview for the KwaZulu-Natal High Court. A parliamentary member of the JSC (and deputy minister) expressed "discomfort" about someone from his "activist background" presiding over a case between the state and an indigent litigant. He was nevertheless still appointed.⁵¹ Jody Kollapen, a highly regarded lawyer who had chaired the South African Human Rights Commission, was told during his interview in October 2010 that there was

⁴⁹ University of Cape Town Constitutional Law Class of 2013, Interview with Izak Smuts SC regarding his resignation from the JSC (20 April 2013) <<http://contextsblog.wordpress.com/2013/04/20/interview-with-izak-smuts-sc-regarding-his-resignation-from-the-jsc/>>. It should be noted that one of the unsuccessful candidates cited by Smuts, Advocate Willem van der Linde SC, was later appointed following the JSC's October 2015 sitting.

⁵⁰ Chris Oxtoby, "A week in the life of the JSC" *The Con* (South Africa, 9 June 2014) <<http://www.theconmag.co.za/2014/06/09/a-week-in-the-life-of-the-jsc/>> accessed 11 January 2016.

⁵¹ For a full account of this sitting of the JSC see *ibid.*

a perception that he could “go overboard” as a judge because of his background as a human rights lawyer.⁵² Although not appointed on that occasion, Kollapen was subsequently appointed following the JSC’s next sitting, in April 2011. In April 2012, Judge Xola Petse stuck to his guns under follow-up questioning, after asserting that the judiciary was the “least powerful” branch of government.⁵³ He was appointed. Judge Rogers may also be seen as a candidate of independent mind and a commitment to legal principle who was appointed to the bench, albeit at the second time of asking.

On the other hand there are the examples cited by Smuts. Perhaps the most egregious of these was the non-appointment of Judge Clive Plasket to the Supreme Court of Appeal. Plasket was first unsuccessful when interviewed in April 2012. In that session, a black African male (Petse) and an Indian male candidate were preferred to him, so his non-appointment might at least be explained on “narrow transformation” grounds. There was a warning of what was to come, perhaps, in a striking question premised on the observation that Plasket “seemed to find against government a lot”, and he was asked to identify cases where he had found in favour of government. Although he was able to do so, the premise of the question is deeply troubling, and illustrates the dangers inherent in a myopic fixation on narrow separation of powers questions. Out of context and without analysis of the substantive reasoning behind those decisions, such a trend (if it were to exist) is meaningless. Would it show an inappropriately activist judge? Or would it show a judge committed to the rule of law, applying the law without fear or favour and having no choice but to give judgment against recalcitrant government departments?⁵⁴

In the April 2013 interviews which prompted Smuts’ resignation, there were three candidates for two positions on the SCA: Judges Halima Saldulker, Plasket, and Nigel Willis. Saldulker, an Indian woman, was appointed despite reservations about her performance as an acting judge of the SCA,⁵⁵ which appointment assisted in the transformation of the SCA in terms of race and gender. Plasket and Willis are both white men. Therefore no transformational issues, in the narrow sense, were at stake. Plasket is highly regarded as one of South Africa’s leading administrative lawyers, and was commended for his performance as an acting judge of the SCA. Willis, though a more experienced judge, had not at that stage acted on the SCA (he was slated to do so later in the year). His candidacy was particularly interesting in light of the strident views he had expressed in several judgments, criticising a

⁵² Oxtoby and Sipondo (n 26) 141.

⁵³ Leila Samodien, “‘Misuse’ of powers a hot topic at Bench interviews” *The Star* (Johannesburg, 18 April 2012) <<http://www.iol.co.za/the-star/misuse-of-powers-hot-topic-at-bench-interviews-1.1278375#.ViPfuiv3hnmw>> accessed 11 January 2016.

⁵⁴ The latter is especially pertinent in Judge Plasket’s case. As a High Court judge in the Eastern Cape, he is based in a province of South Africa that is notorious for bureaucratic mishaps in many departments at all levels of government.

⁵⁵ Franny Rabkin, “JSC grills Plasket on transformation debate” *Business Day* (Johannesburg, 9 April 2013) <<http://www.bdlive.co.za/national/law/2013/04/09/jsc-grills-plasket-on-transformation-debate>>.

number of the Constitutional Court's socio-economic rights judgments, particularly regarding evictions.⁵⁶

It was natural to assume that the JSC would interrogate those remarks. In 2009, when being interviewed for a position on the Constitutional Court, Willis had been challenged by the then Chief Justice, the late Pius Langa, about a comment that the Constitutional Court's celebrated *Grootboom* decision⁵⁷ had been a "disaster". But with the exception of concerns raised by the SCA President over the propriety of criticising a superior court in a judgment, Willis' incendiary remarks were allowed to slide. When asked a question about judicial power and its limitations, Justice Willis emphasized the importance of understanding the limitations of judicial power, and not over-reaching. He stated that policy was made by the Executive, subject to parliamentary control, and that the courts ought to be careful about creating policy. This answer could have prompted interesting discussions, in light of the constitutional mandate given to courts to invalidate unconstitutional government action.⁵⁸ But this did not happen.

The difference in the intensity of the scrutiny placed on the two candidates during their interviews was striking. Plasket was interviewed for close to two hours, Willis for around 45 minutes. Plasket was subject to often aggressive questioning on the transformation of the judiciary and the scope of judicial review, the latter in light particularly of the *Cape Bar Council* decision, in which a decision by the JSC itself had been subject to review and found to be irrational and unlawful.⁵⁹ Willis received no such scrutiny. Willis himself, in a subsequent letter to a national newspaper where he sought to rebut criticisms of his appointment (this in itself being a remarkable and unusual action by a judge), attributed this to the issue having been covered in his previous interviews, although Plasket had in fact been interviewed even more recently, in April 2012.⁶⁰ Some commentators have suggested that Plasket was overlooked as "revenge" for the *Cape Bar Council* decision.⁶¹ If so, this would be outrageous—it could never be appropriate for the JSC to take out its frustrations in this way, but in any event Plasket was not even a member of the panel which decided the case. Willis was subsequently appointed, and Plasket overlooked. It is difficult not to see this as an instance of the JSC selecting a candidate who it felt to be less likely to find against the government.⁶²

⁵⁶ See, for example, *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) and *Emfuleni Local Municipality v Builders Advancement Services CC and Others* 2010 (4) SA 133 (GSJ).

⁵⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁵⁸ Constitution, s 172(1)(a).

⁵⁹ Rabkin (n 54) and Richard Calland, "JSC attitude opens door to conservatism" *Mail & Guardian* (Johannesburg, 12 April 2013) <<http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>>.

⁶⁰ Nigel Willis, "Right of reply: A concerted smear campaign" *City Press* (South Africa, 28 April 2013) <<http://www.citypress.co.za/you-say/right-of-reply-a-concerted-smear-campaign/>>.

⁶¹ Morné Olivier and Cora Hoexter, "The Judicial Service Commission" in Hoexter and Olivier (n 1) 177–179.

⁶² See further Calland (n 58). After his appointment to the SCA, Justice Willis penned a dissenting decision in *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013

There have been other instances of members of the JSC reacting against candidates who might be seen to have demonstrated an independence of mind. In April 2012, Deputy Judge President Phineas Mojapelo was one of the candidates interviewed for the position of Judge President of the Gauteng High Court. As judicial leader of the largest and busiest High Court in the country (with seats in Johannesburg and Pretoria), the position is a significant one. The year before, Judge Mojapelo had written a newspaper article urging the JSC to ensure, when the position of Chief Justice became vacant later that year, that proper consultation took place, arguing that this had not happened with the previous such appointment.⁶³ As Commissioner Dumisa Ntsebeza acknowledged during the interview, Judge Mojapelo's views on the consultation process are widely held, including by several members of the JSC at the time.⁶⁴

Whilst some might see the judge's position as one expressing a concern for proper constitutional process to be followed in a matter of great public importance, he seems to have been regarded as playing politics.⁶⁵ Commissioners subjected him to a grueling series of questions, accusing him of penning a critique of the JSC⁶⁶ (although such an action may not be wise for a sitting judge, it hardly seems a grievous offence to the extent that the questioning suggested). Some years earlier, Judge Mojapelo had written a detailed judgment on the legal meaning of consultation, in context of the declaration of toll roads.⁶⁷ It was natural to assume that this experience informed Judge Mojapelo's views on the meaning of consultation in another context. But if any members of the JSC were aware of the judgment, they did not invoke it in his defence.

Judge Mojapelo was not appointed. The chosen candidate, Judge Dunstan Mlambo, is an extremely highly regarded judicial leader, who had previously headed the Labour Court and received widespread praise for turning around what had previously been an administratively dysfunctional court. It could hardly be

(6) SA 421 (SCA). The majority had set aside the effective closure of a Refugee Reception Office. In an illuminating conclusion to his dissenting judgment, Willis JA held that: "There is an extensive range of legitimate opinions which may be formed as what should be done about this Refugee Reception Office. Opinions among reasonable men and women may differ. That is why we have politics. That is why, when it comes to political matters in a constitutional state such as ours, the courts will, as a general rule, hold their swords behind their backs." (para 90).

⁶³ Judge Phineas M Mojapelo, "Due consultation is crucial" *Sunday Times* (South Africa, 15 May 2011) <<http://www.timeslive.co.za/opinion/2011/05/15/due-consultation-is-crucial>>.

⁶⁴ For a detailed examination of the requirement of consultation in the appointment of a Chief Justice, see Jeremy Gauntlett SC, Max du Plessis and Andreas Coutsoudis, Memorandum, Ex parte: Freedom Under Law In re: the Appointment of the Chief Justice (25 August 2011) 2–13 <http://www.freedomunderlaw.org/wp-content/files/FUL_MEMO_APPOINTMENT_OF_CHIEF_JUSTICES.pdf>.

⁶⁵ This view was expressed after the article appeared: Joseph Lukwago-Mugerwa, "Are judges' appointments campaign fodder?" *Mail & Guardian* (Johannesburg, 11 June 2011) <<http://mg.co.za/article/2011-06-11-are-judges-appointments-campaign-fodder>> (insinuating that Judge Mojapelo's article might be part of a "campaign").

⁶⁶ Franny Rabkin, "Radebe grills judge over media article" *Business Day* (Johannesburg, 20 April 2012) <<http://www.bdlive.co.za/articles/2012/04/20/radebe-grills-judge-over-media-article.>>.

⁶⁷ *S v Smit* 2008 (1) SA 135 (T).

argued that an inferior candidate was appointed. But for Judge Mojapelo to be attacked on the grounds that he was is a worrying indictment of the JSC's sensitivity to any perceived criticism, and a failure to see such commentary as motivated by a commitment to the rule of law and the Constitution.

Following the national elections in May 2014, the political composition of the JSC changed, with all but one of the political representatives being replaced (a normal practice when Parliament is reconstituted). The performance of the "new" JSC in dealing with the separation of powers will be watched with great interest. At its first two sittings, in October 2014 and April 2015, the issue received significantly less attention, with an encouragingly broad range of questions being put to candidates.⁶⁸ However, the issue seems to be re-emerging in the wake of controversy over the government allowing Sudanese President Omar Al-Bashir to leave the country in spite of a court order that he should be arrested, in terms of South Africa's obligations as a member of the International Criminal Court.⁶⁹ This was followed by stringent criticisms of the judiciary by prominent political figures, and an unprecedented meeting between senior judges and government leaders to discuss the relationship between government and the courts.⁷⁰ Against this backdrop, there has been a renewed focus on questions relating to the proper sphere of operation of the judiciary, although the tone of such questioning has been less aggressive and hostile than before.

IV THE COMPOSITION OF THE JSC

The foregoing discussion of the issues raised by questions asked of candidates in the interviews invites a more detailed consideration of the composition and structure of the JSC. The JSC comprises at least 23 members, which may grow to 25 or even more, when candidates for provincial High Courts are interviewed.⁷¹ This makes the JSC a very large commission, compared to equivalent judicial appointment bodies internationally. What is also striking is the comparatively large number of politicians involved—four members of the upper house of Parliament, the National Council of Provinces (NCOP), six members of the National Assembly (three of whom are required to be members of opposition parties), as well as the Minister of Justice. This takes the number of politicians to close to half the composition of the

⁶⁸ Niren Tolsi, "Bracing wind of change buoys JSC" *Mail & Guardian* (Johannesburg, 30 April 2015) <<http://mg.co.za/article/2015-04-30-00-bracing-wind-of-change-buoys-jsc>>.

⁶⁹ See Southern Africa Litigation Centre, *South Africa/Sudan: Seeking Implementation of ICC Arrest Warrant for President Bashir* <<http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/>>.

⁷⁰ Natasha Marrian, "Zuma, judges agree on 'mutual respect'" *Business Day* (Johannesburg, 28 August 2015) <<http://www.bdlive.co.za/national/law/2015/08/28/zuma-judges-agree-on-mutual-respect>>.

⁷¹ Constitution, s 178. Pending the establishment of high courts in the provinces of Limpopo and Mpumalanga, the Gauteng High Court had jurisdiction over matters from these provinces. It has been standard practice for the JSC, when interviewing candidates for the Gauteng High Court, to include the Premier or his/her representative from each of these two provinces, as well as Gauteng.

Commission. Furthermore, the President is able to appoint four individuals of his choosing. These are usually practising lawyers.

Prior practice was for at least one of the NCOP representatives to be a member of an opposition party, in accordance with the principle of proportional representation. However, since 2009, all the NCOP representatives have been members of the governing party, leading to concerns about “a dangerously ANC heavy JSC”.⁷²

One explanation for the large proportion of politicians may be the extensive mandate given to the courts to strike down unconstitutional legislation or conduct. Age-old concerns about counter-majoritarianism might be seen to be mitigated by giving the elected branches of government a say in the process of appointing the judges vested with that power. On the other hand, the structure thus explained seems problematic and self-defeating, if politicians can simply appoint compliant judges.

Of course, matters are rarely that simple in practice. Judicial legitimacy is a particularly important issue given South Africa’s history of the exclusion and marginalisation of the majority of her people under apartheid. This is particularly so in light of the fact that the judiciary is regarded as having done less than it could to mitigate some of apartheid’s injustices.⁷³ In this context, it is probably unrealistic to expect minimal or non-existent political involvement in the judicial appointments process. But that is not to say that the current situation could not be improved.

Another nuance is that the performance of the South African JSC in recent years calls into question, at least to some extent, any assumption that lawyers and judges will necessarily serve to protect against the desire of politicians to appoint Executive-minded judges. A significant number of problematic questions regarding separation of powers issues, as discussed earlier, have been posed by lawyers rather than politicians on the Commission. One extraordinary example also occurred in April 2013, when a senior advocate (one of the four Presidential appointees) asked a candidate whether section 1(c) of the Constitution, which provides that South Africa is a democratic state founded on constitutional supremacy and the rule of law, could validly be repealed, if Parliament was minded to do so. Of all the constitutional or legislative provisions to pick in order to test a candidate’s judicial philosophy, this was an alarming one.⁷⁴

This is not the only occasion when a lawyer who is a presidential appointee has put a question that seems overly Executive-minded. Long-time observers describe previous presidential appointees as committed to providing a perspective for the state in the broad sense of the nation as a whole. The more recent trend has seemed

⁷² Helen Zille, “The judiciary: Is the rot setting in?” *PoliticsWeb* (South Africa, 13 October 2014) <<http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=745531&sn=Detail>>.

⁷³ The Truth and Reconciliation Commission found that: “the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice.” Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (1998) vol 4, 101.

⁷⁴ The candidate, attorney Pumzile Majeke, resisted the proposition as being likely to “introduce anarchy”.

to push narrower, sectional interests. Among the presidential nominees sent to the Commission by the Zuma administration, several have close professional ties with the Executive.⁷⁵ This trend calls into question whether the JSC has as broad a range of interests and perspectives represented as it might.

Other issues regarding composition are worth highlighting. In the 2009–2014 JSC, two members of the National Assembly, both from the governing party, were appointed as deputy ministers, about a year into their tenure on the JSC. As deputy ministers continue to be members of Parliament, the effect was that the Executive acquired additional, direct representation, beyond what was contemplated by the Constitution. This is not an abstract concern, since the two politicians in question were among the most vocal in interrogating candidates on the separation of powers. This situation has not repeated itself following the 2014 elections, but could quite easily recur. A constitutional amendment is probably required in order to prevent Executive over-representation. Since, in addition to having a free hand to appoint four members of the JSC, the President is also afforded significant latitude in appointing the Chief Justice and the President of the Supreme Court of Appeal,⁷⁶ and appoints the Minister of Justice,⁷⁷ the Executive is already amply represented without it effectively taking places away from the legislature.

Whatever the institutional composition of the JSC, the role played by individual Commissioners is crucial. If members seek to further narrow interests, and do not bring an independent mind to bear on their role, the institution will be weakened, however carefully crafted its composition may be. There needs to be, on the part of all members of the Commission, a strong acceptance and understanding of the courts' role in providing checks and balances on the powers of the other arms of government. Although there were plenty of signs of this in the honeymoon days of South Africa's constitutional democracy, the position seems to be more precarious now.

Is there enough awareness and knowledge about the legal system, and the role of the judiciary, among the politicians on the JSC? There are obviously variations, but some of the questions asked (as well as the presence of Commissioners who seldom ask any questions at all) suggest there is not. Broad representation on the JSC is all very well, but if this is done without an appreciation of the challenges and demands facing prospective judges, then that perspective may not always be helpful. On the other hand, it must be acknowledged that some politicians do make valuable contributions that might not be provided by those closely connected to

⁷⁵ For example, Advocates Ismael Semenya SC and Lindiwe Nkosi-Thomas SC, both current members of the Commission, were members of the legal team representing the South African Police Services at the Commission of Inquiry into the Marikana massacre. Advocate Nkosi-Thomas' predecessor on the JSC was Advocate Vas Soni SC. After his resignation from the Commission, Advocate Soni was appointed by the President to head the Special Investigating Unit, an anti-corruption agency. Advocates Semenya, Soni and Nkosi-Thomas have all regularly represented government in court.

⁷⁶ Constitution, s 174(3).

⁷⁷ Constitution, s 91(2).

the legal system. In particular, since joining the JSC in 2014, senior ANC politicians Thoko Didiza and Thandi Modise have regularly made insightful and constructive interventions.⁷⁸

Concerns about the performance of political representatives on the JSC have been articulated by the leader of the official opposition, in typically caustic fashion:

The ANC loaded Judicial Service Commission's ... selection of politically pre-determined choices, provides a thin veneer for the most extreme and dangerous form of cadre deployment. Instead of safeguarding us from a situation in which an executive chooses the judiciary, the JSC now often provides a form of legitimacy for this very process. ...

Once again, we saw evidence [at the JSC hearings in October 2014] of a pre-caused position among most of the politicians on the Commission. If this results (occasionally) in a good outcome, it is usually fortuitous. It certainly has little to do with any serious knowledge or understanding on the part of the politicians or their appointees ... of the documents that are supposed to provide an informed basis for a probing interview.

In fact, it was immediately obvious last week that very few of the politicians present had even read the documentation, which includes CVs, questionnaires, previous judgments and assessments by various bodies representing the legal profession.

One senior politician was so woefully unprepared that he did not even know how many vacancies ... had to be filled.

So it is hardly surprising that a knowledge of the law or track record at the bar or bench is not the primary test of a candidate judge. It is also painfully and repeatedly clear that politicians' grasp of even the most basic precepts of the law, is woefully lacking.⁷⁹

Objectively viewed, it would be hard to argue that the quality of appointments made to the South African judiciary is as bad as this quote would suggest. But the JSC is probably too big, and its size may well make it unwieldy and prevent it from operating effectively. Practically speaking, though, it becomes difficult to think where the size of the Commission could be reduced. It might be considered ideal to reduce the number of politicians. But politicians are hardly likely to effect the necessary constitutional amendment to reduce their own influence. And in light of the tensions around questions of separation of powers, it must also be asked whether having less political input in the appointments process might lead to even greater push-back against the courts from the political branches, manifesting in even more harmful ways.⁸⁰

It would be hard to deny that there is a "political lobby" on the Commission. Given the JSC's composition, it would be surprising if this were not the case. Yet there are occasions when that "lobby" appears to fracture, and does not deliver the appointments it might be expected to. The appointment of Glenn Goosen, a white male senior counsel, to the Eastern Cape bench in October 2011 seems to be one such example. Goosen was appointed ahead of black African candidates, including

⁷⁸ See Tabeth Masengu and Katy Hindle, "The New JSC in a Man's World" *The Con* (South Africa, 10 November 2014) <<http://www.theconmag.co.za/2014/11/10/the-new-jsc-and-the-patriarchy/>>. Didiza was previously Minister of Agriculture and Land Affairs and Minister of Public Works under the Presidency of Thabo Mbeki. Modise, previously Premier of the North West Province, is currently the chairperson of the National Council of Provinces.

⁷⁹ Zille (n 71).

⁸⁰ My thanks to Jan van Zyl Smit for stimulating this thought.

two women who appeared to have strong support from members of the JSC. So too seems to have been the JSC's refusal, on four separate occasions, to recommend the appointment of Judge Isaac Madondo to leadership positions at the KwaZulu Natal High Court. Again, Madondo appeared to have strong support from some members of the Commission, but this apparent backing could not deliver the appointment. Not enough is known about what transpires during the deliberations to understand why this should be. But these situations demonstrate the complexity of the micro-politics within the JSC.

V FAIRNESS OF PROCESS: THE INTERVIEWS AND VOTING PROCEDURE

The JSC interviews have illustrated problems of unfair procedures and uneven questioning of candidates. Other problematic issues noted in this paper would seem to be contributing factors, but there are also some quite specific problems that relate to the organisation and structuring of the interviews.

The JSC has long suffered difficulties with the time management of interviews. Interviews are generally scheduled for 40 minutes for entry-level appointments (first time appointees to the High Court or equivalent courts), and one hour for judicial leadership positions. Some interviews run to more than double the allocated time, whilst others have been perfunctory and have finished in well under the allocated time. The shortness of interviews has been attributed to the candidate having been interviewed before, but this explanation is unsatisfactory. A previously unsuccessful candidate must necessarily have been found lacking in some respect, and is surely owed the opportunity to address any shortcomings. Previous interviews may also have taken place before a differently constituted JSC, and new Commissioners may wish to ask different questions. And several perfunctory interviews have been observed with candidates who have not been interviewed before, or at least not for the same position. Equally, there are candidates who have been subjected to extensive and gruelling interviews despite having been previously interviewed.

A common pattern has been for interviews at the beginning of a day's sitting to last longer. Then, as the proceedings fell further and further behind schedule, interviews sped up as the Commission battled to make up lost time. It can be a dangerous thing for a candidate to come between Commissioners and a meal break. The unfairness to candidates may take different forms. Those subject to a longer interview may find weaknesses in their candidacy revealed; or they may have the opportunity to win Commissioners over. Those subjected to short interviews may escape scrutiny of problem areas; but may also be deprived of the opportunity to overcome doubts over their candidacy. In any event, the result is often that similarly-placed candidates are not treated equally.

The problem manifested itself differently in the April 2015 interviews, when the JSC seemed determined to follow a more rigorous approach. On the first day, interviews had—unwisely—been scheduled for two leadership positions, involving the

interviews of eight candidates. When the day's sitting was brought to a conclusion, at midnight (the scheduled finish time having been 6 pm), two candidates still remained to be interviewed. The difficulties of conducting interviews in such circumstances, for both candidates and Commissioners, are self-evident.

Of relevance for the problem of overly long interviews is a phenomenon of questioning becoming sidetracked on issues of varying relevance to the suitability of the candidate. Examples include questions which called for highly general and abstract musings about the state of the legal system, and questions relating to general challenges facing South African society. One example of tenuously relevant questioning came in the interview of Judge Mlambo for the Constitutional Court in September 2009. Judge Mlambo at the time headed the Legal Aid Board. He faced a range of questions (the author noted twelve) relating to the activities of the Board, which seemed more appropriate to a parliamentary oversight committee. The role of the JSC when interviewing candidates for Constitutional Court vacancies is to prepare a shortlist of approved candidates from which the President makes the final selection.⁸¹ In this instance, the JSC appeared to have formed so low an opinion of Judge Mlambo's suitability that it did not include his name on the list of, in this instance, seven candidates.⁸²

Other questions have been phrased in such general terms (for example, "What is your view of transformation?"), that the answers in turn tend to be of such a level of generality as to be unhelpful. Conversely, disappointingly few questions tend to be asked which invite candidates to demonstrate their individual adjudicative philosophy. As noted above, to the extent that such questions are asked, the question of the separation of powers has increasingly become all-consuming.

There have also been instances, notably during the April 2012 sitting, where candidates were generally treated equally, but in the form of perfunctory interviews that scarcely canvassed any issues central to the judicial function. Obviously such interviews are undesirable, as they make the interview process appear irrelevant to the real decision as to who is appointed.⁸³ This detracts from the constitutional value of transparency which the JSC was carefully crafted to promote.

An issue may achieve great prominence in a particular round of interviews, only to disappear from subsequent proceedings. In the April 2010 interviews, several candidates were asked to explain what involvement they had in the community, outside their legal practice. In those interviews, it seemed to be very important for candidates to show some level of engagement with the broader community, seemingly on the premise that this would show an awareness of the challenges facing the country, and the values and culture of the communities over which those appointed would preside. It is true that community engagement is among

⁸¹ See n 8.

⁸² Oxtoby and Sipondo (n 26) 138.

⁸³ Olivier and Hoexter (n 60) 181.

the criteria for appointment which the JSC identified in 2010.⁸⁴ However, this line of questioning has seldom been raised since.

Sometimes a particular line of questioning is seemingly used as a litmus test for a candidate's commitment to transformation. An example is when candidates (mostly, though not exclusively, white male candidates) are asked about briefing patterns, and particularly how often they had, as practitioners, ensured that previously disadvantaged lawyers were briefed on cases with them. This may be a useful indicator of how seriously a candidate is committed to transformation, but it would seem problematic to make transformation reducible to a fairly crude test. It does nothing, for example, to demonstrate a candidate's substantive reasoning skills on transformation issues.

Some female candidates have faced inappropriate and gender-insensitive questions, although there have been relatively few instances of these since 2009.⁸⁵

The fact that the JSC is a large and diverse body makes it difficult to have tightly controlled, uniform interviews. But the experience of some of the interviews in the October 2015 sitting, when then Deputy Chief Justice Moseneke stood in for the Chief Justice to chair some of the interviews, indicated how an engaged and pro-active chair can facilitate focused, constructive interviews.⁸⁶

There are also issues of unequal scrutiny relating to the questions that are asked of candidates. The Plasket/Willis saga of April 2013, discussed above, is a clear example.⁸⁷ Whatever one's view of the merits of the two individual judges, the JSC's differing treatment of them marked a dispiritingly low point in the fairness of its interview processes.

The fairness of questioning brings one back to the point about the value of having clear, agreed baseline criteria and a co-ordinated approach to questioning that reflects those criteria. Does it follow that human resources style questioning patterns should be adopted and rigidly applied in the same way to each candidate? It is doubtful that the JSC is optimally set up to do so, and in any event some degree of flexibility would be necessary. This is so both in light of the section 174(2) mandate and of the different backgrounds and life experiences that commissioners themselves bring to the JSC. As discussed above, a major reason for the establishment of the JSC was so that a diversity of perspectives would be brought to bear on the selection of judges. But for the sake of fairness between candidates it is highly desirable that there should be at least a greater degree of consistency than is often evident in the interviews at present.

Some candidates have been interviewed on multiple occasions—a striking example is Judge Bert Bam, who was appointed to the North Gauteng High Court following the JSC's October 2014 sitting, the fifth time he had appeared. But others

⁸⁴ See text to n 29.

⁸⁵ For examples see Oxtoby and Sipondo (n 28) 180–181.

⁸⁶ See Niren Tolsi, "Poetry of justice at the JSC" *Mail & Guardian* (Johannesburg, 9 October 2015) <<http://mg.co.za/article/2015-10-08-light-grilling-for-wannabe-judges.>>.

⁸⁷ See text to nn 54–61.

are not prepared to put themselves through the interview process repeatedly, or even at all. Anecdotally, several judges have privately told the author and colleagues that they are unwilling to seek promotion to a higher court or to a judicial leadership position since that would involve going through a further interview by the JSC, in addition to the interview they had undergone prior to appointment. When efforts were made to persuade women candidates to stand for the Constitutional Court in 2012, one inhibiting factor that came up was unwillingness to go through the JSC's interview process.⁸⁸

The Constitutional Court provides a stark illustration of the problem.⁸⁹ In 2009, 22 candidates were interviewed (and a further three withdrew before the interviews began, in an early warning of problems to come) for four vacancies on the Court.⁹⁰ In 2012, the JSC had to re-advertise the next vacancy on two occasions before it could even muster the bare minimum of four candidates to interview. For vacancies to the Constitutional Court, the JSC must send three more names than the number of vacancies to the President for an appointment to be made.⁹¹ Sending four names is thus largely a perfunctory gesture—the JSC's role was effectively limited to determining whether any of the four candidates were so unappointable that they could not be shortlisted, in which case the process would have to be restarted.⁹² In 2013, matters were little better, with five candidates being interviewed. One of those was Advocate Gauntlett, and two others were extremely junior judges who had not acted on either the Constitutional Court or the SCA (Justice Mbuyiseli Madlanga was ultimately appointed). Finally, in July 2015, after a vacancy had been left open for around a year, four candidates were interviewed. The difficulty with interviewing the bare minimum of candidates was clearly illustrated when Justice Zukisa Tshiqi had a distinctly unimpressive interview, culminating in the revelation that her former law firm was still paying a mobile telephone contract on her behalf, despite her judicial position.⁹³ A view might well have been taken that Justice Tshiqi was not suitable for appointment. But that would have meant the vacancy standing open for even longer while the process started afresh. Ultimately, Justice Tshiqi was among the names sent to the President for possible appointment (Justice Nonkosi Mhlantla was appointed). Yet, in light of the shortcomings highlighted during Justice Tshiqi's interview, this was also an undesirable outcome.

⁸⁸ Richard Calland, *The Zuma Years: South Africa's Changing Face of Power* (Zebra Press 2013) 282.

⁸⁹ See Richard Calland and Chris Oxtoby, "Crisis of confidence at the ConCourt", *Sunday Independent* (18 March 2012) <<http://www.iol.co.za/news/politics/crisis-of-confidence-at-the-concourt-1.1258732?ot=inmsa.ArticlePrintPageLayout.ot>>.

⁹⁰ This required a seven-candidate shortlist to be sent to the President for selection: Constitution, s 174(4).

⁹¹ Constitution, s 174 (4).

⁹² One would hope that candidates' performances in the interviews are a significant factor in the ultimate decision by the President on which candidate to appoint. However, little is known about the basis for these appointments.

⁹³ Jenni Evans, "Four women judges grilled over vacant ConCourt position" *City Press* (South Africa, 9 July 2015) <<http://www.news24.com/SouthAfrica/News/Four-women-judges-grilled-over-vacant-ConCourt-position-20150709>>.

There is therefore a problem with the paucity of judges putting themselves forward for promotion to the country's highest court, in part, it seems, due to an unwillingness to be subjected to the interview process, and in part due to a feeling that outcomes are pre-determined.⁹⁴ A fairer process, founded on identified and articulated criteria, would seem to be necessary to restore confidence in the JSC.

VI DELIBERATION AND DECISION-MAKING

Much of this paper has focused on the interview process, the most visible aspect of the JSC's workings. Yet when the JSC moves into closed session for deliberations, issues remain. The Constitution requires decisions of the JSC to be "supported by a majority of its members",⁹⁵ but this seems to be a deceptively simple injunction as far as voting procedures are concerned. The High Court in the *Cape Bar Council* case⁹⁶ scrutinised the voting procedure employed by the JSC, noting that the JSC had given conflicting explanations. At one point, it was said that Commissioners had one vote per candidate, while later it was averred that they had one vote per vacancy.⁹⁷

The distinction, as understood by the court, is that under a "one vote per candidate" system, Commissioners have as many votes as there are candidates, and thus would seem to vote yes or no for each individual candidate. The obvious problem with this system is that it may lead to more candidates obtaining a majority of votes than there are vacancies.⁹⁸ "One vote per vacancy" would mean that, for example, where there are three vacancies, Commissioners may vote for up to three candidates.⁹⁹ The court found that, on the probabilities, the procedure followed was one vote per vacancy, and held that this was irrational as it did not ensure that decisions were taken by a majority of the JSC's members.¹⁰⁰ The court was particularly concerned that the "value" of votes would be diluted by an increase in the number of candidates shortlisted.¹⁰¹

On appeal, the SCA expressed concern that the JSC's voting procedure was "shrouded in obscurity", but was unwilling to make "a finding of constitutional validity which would be both redundant and based on uncertain facts", and for that reason it declined to confirm the finding of the High Court.¹⁰² In so doing, the court did not uphold the constitutionality of the JSC's voting procedure, so it is conceivable that, given a clearer set of facts and a legal controversy that is "live", the High Court's finding of invalidity may yet be vindicated. Thus, voting

⁹⁴ Calland (n 84) 282.

⁹⁵ Constitution, s 178(6).

⁹⁶ *Cape Bar Council v Judicial Service Commission and Others* 2012 (4) BCLR 406 (WCC).

⁹⁷ *Ibid* para 129–131.

⁹⁸ *Ibid* para 130.

⁹⁹ *Ibid* para 131.

¹⁰⁰ *Ibid* para 133, 139.

¹⁰¹ *Ibid* para 134.

¹⁰² *Judicial Service Commission v Cape Bar Council* (n 35) para 53.

procedure is a further area where the JSC needs to assess, and clearly articulate, the practice it follows.

It is evident that, whilst the practice of holding public interviews may suggest an open and transparent process, there remain problems of secrecy and a lack of transparency in respect of other parts of the process. As well as the examples already cited, there is no information available about how candidates are short-listed, and the list of applicants pre-shortlisting is not revealed. Deliberations occur in secret,¹⁰³ although the JSC can be required to give reasons if asked. There are arguably good reasons to give the JSC latitude to hold deliberations in secret, in order to enable frank and open discussion. But this also requires that transparency and accountability be secured through other areas of the appointment process functioning properly.

CONCLUSION

The complex micro-politics of the JSC reflect a society that remains in a state of ongoing, often fraught, transition. In this context, it would be surprising if the process of judicial appointments in South Africa were not the subject of contestation. Underlying many of the issues identified in this paper seems to be the need for clearer, more detailed and more transparent criteria to supplement the existing constitutional framework, and a need for even greater openness and transparency regarding the workings of the JSC.

The JSC's treatment of the criteria for appointment has fluctuated, and it has been criticised for overlooking core judicial attributes in its treatment of section 174(1) and (2). The supplementary criteria developed by the JSC have not assisted as much as they might, due in large part to over-breadth and generality. There is a link between the issues of criteria and openness and transparency: a clearer articulation of the criteria used by the JSC, and how they are interpreted, will add to the transparency of the appointments process, and should in turn increase public and professional confidence in the appointments process, which have been dented. As it is, the JSC has struggled with issues such as the relationship between sections 174(1) and (2) of the Constitution; criteria beyond those found in the Constitution, such as humility and judicial temperament; and broad versus narrow understandings of transformation. To be sure, these are difficult questions, but the JSC could have done better in handling them.

Some of the deficiencies in the appointments process identified in this paper ought not to be contentious or unduly difficult to address. Problems around unfair procedures, unequal treatment of candidates, poor scheduling and side-tracking by irrelevant questioning, a lack of consistency in the process, and a lack of clarity around voting procedures, should all be capable of resolution in a transparent manner that furthers confidence in the appointments process. Again, the

¹⁰³ Pending the finalisation of the appeal in the *Helen Suzman Foundation* case (n 41).

identification and dissemination of agreed and detailed criteria for appointment would seem to be crucial.

There is also a need to reflect on the substance of questions which JSC members put to candidates. Whilst it is probably inevitable (and perhaps desirable) that questions of the separation of powers will feature prominently in judicial appointments in a constitutional democracy like South Africa, this cannot be used as a pretext to avoid appointing judges who are committed to fulfilling the mandate of the Constitution. Although the JSC's practice may not have been as bad as is sometimes portrayed, there have been plenty of grounds for concern in events such as the interviews of Judges Plasket and Mojapelo. The sometimes hostile environment in the JSC is an issue that must be continue to be addressed, to avoid top candidates for judicial appointment declining to make themselves available.

The JSC provides an interesting and in some ways unique model for a judicial appointments body, notably in the extensive representation of politicians. There are pros and cons to this approach, which indeed seems an apt description of the JSC's performance in general. The appointments process would probably benefit from a smaller, more streamlined JSC, although realistically this is unlikely to happen in the near future. The significant political representation on the Commission presents obvious challenges. Problems have been identified where the approach taken by presidential appointees, and the appointment of Commissioners as deputy ministers, has disrupted the balance of interests the Constitution sought to create. And yet, the JSC's experience has proved quite nuanced: whilst some politicians may appear simply to turn up in order to vote, others have brought a depth of perspective not found among lawyers and judges on the Commission. Meanwhile, lawyers who have appeared to pursue what might be called a political agenda have contributed to some of the difficulties identified with the JSC's performance.

Ultimately, whatever structure the JSC takes, its success or failure will depend in large part on the commitment of individual Commissioners to ensuring that judges are appointed who have the outlook, skills and aptitude to dispense justice under the South African Constitution. Ensuring that this happens will be one of the key indicators of the JSC's success in the years to come.

APPENDIX 1

Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth

I GENERAL

1. An independent judiciary is indispensable in any country to uphold the rule of law and to ensure access to justice through the courts. The ability of the judiciary to discharge these responsibilities depends upon the independence, impartiality, integrity and professional competence of its members. The principal objective of any system of judicial appointments must therefore be to identify and secure the appointment of persons who possess these qualities, and any additional attributes that may be stipulated for positions that require specific expertise or leadership.
2. The process of selection and appointment should be conducted fairly and in a way that encourages the best candidates from any background to seek a judicial career, and that generally enhances public confidence in the judiciary.
3. Appointment to judicial office must be open to all suitably qualified candidates without discrimination on the prohibited grounds recognised in international human rights law and applicable domestic law. Depending on the context of a particular society, measures may be required to redress past or present patterns of unfair disadvantage or exclusion affecting actual or potential candidates differentially on the basis of race, gender or other personal characteristics.

II ESTABLISHMENT OF AN INDEPENDENT COMMISSION WITH RESPONSIBILITY FOR SELECTING JUDGES

4. In many jurisdictions, commissions dedicated to judicial affairs which function at arm's length from the other institutions of government have been entrusted with responsibility for the selection of judges. If they are to make a contribution to creating and sustaining an independent judiciary, such commissions must themselves be manifestly independent, and suitably composed and resourced. The benefit of a commission will be maximised if it has a wide mandate, encompassing all levels of the superior court hierarchy and including temporary, acting or part-time judges, where such positions exist.
5. The existence, basic composition and powers of the commission should be entrenched, insofar as that is possible in a legal system, to help secure the commission's independence and in recognition of the inherently constitutional nature of its functions.
6. The commission should consist of members drawn both from the judiciary and from a range of other institutional, professional and lay backgrounds, in proportions which safeguard against unjustified dominance of the commission

by the executive or by members of parliament or representatives of political parties. It is desirable that the membership of the commission should be appropriately diverse in terms of race, gender, professional and life experience, and other relevant considerations in the context of a particular society.

7. Members of the commission should be required to apply their individual judgement to all matters of judicial selection, to avoid conflicts of interest and to observe the highest standard of ethics. As a safeguard of their individual independence, members should enjoy security of tenure, subject to appropriate term limits, and should not be vulnerable to arbitrary termination of their membership. The ethical obligations of members may be reinforced by an oath or affirmation of office, a code of conduct, and provisions that temporarily disqualify members or former members from applying for judicial office.
8. The commission, as an independent institution, should be provided with a secretariat under its direction and a sufficient complement of staff with appropriate skills and experience to enable the commission to perform all its functions efficiently and independently.

III CRITERIA AND PROCESS OF SELECTION

9. The criteria for judicial office and the process of selection should be set out in written form and published in a manner that makes them readily accessible to candidates for selection and the public at large. Such transparency provides a foundation for public confidence in the selection process.
10. It should be open to all qualified candidates to apply for available judicial posts, which should be widely advertised with sufficient time allowed for applications to be submitted.
11. The commission must make all its decisions about applications on the basis of evidence of the extent to which a candidate satisfies the criteria prescribed for the judicial post in question. The application process should include some form of self-assessment by the candidate against the prescribed criteria, and the submission of written work (such as judgments, legal opinions or articles). Evidence may also be solicited externally, either from referees nominated by the candidate or from third parties. Each shortlisted candidate should be interviewed. The commission should ensure that full records are kept of the information obtained from all sources.
12. Candidate interviews are a valuable part of any selection process. The commission must ensure that interviews are conducted in a manner that is respectful to candidates and fair between candidates. Consideration should be given to holding interviews in public, where there is reason to believe that this will promote the legitimacy of the selection process in the context of a particular society. The interview should be considered as providing additional evidence pertaining to a candidate's suitability, but not as displacing all other evidence received during the selection process.

13. The procedures for deliberation by the commission should enable it to come to a reasoned decision in matters of selection. Deliberations should take place in private, but a sufficient record of proceedings must be kept. The commission should communicate its selection decisions to the final appointing authority, if any, without undue delay.

IV APPOINTMENT

14. The commission should make the decision on which candidates are appointed to judicial office, even when the formal power of appointment is vested in another branch of government, as in the case of senior appointments that are formally made by the head of state. It should therefore be the norm that a commission will recommend a single selected candidate for a judicial vacancy, who must then be appointed to that position by the appointing authority.
15. In exceptional cases, depending on the judicial office in question and the context of a particular society, it may be justifiable to provide that the appointing authority has the right to choose from a list of selected candidates recommended by the commission, or that the appointing authority may reject or require reconsideration of a candidate or list of candidates recommended by the commission. This should only occur if express provision is made to that effect in the legal framework for judicial appointments. In any event the appointing authority should be required to provide reasons when exercising any power to reject a recommended candidate or list of candidates or to require reconsideration, and the exercise of such powers may be confined to specified grounds. The total number of selected candidates which the commission may be required to recommend in respect of any particular vacancy must be limited, and no candidate who has not been selected by the commission should be eligible for appointment.

V ACCOUNTABILITY

16. The commission should be accountable both for its decisions on individual applications for judicial office, through the provision of feedback and reasons on request, and for the general performance of its institutional functions by way of reports published at least annually and by other public interventions.
17. Decisions of the commission may be subject to examination by an independent ombudsman dedicated to judicial affairs with power to make findings and non-binding recommendations in the case of maladministration. Decisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality.

APPENDIX 2

Project Participants

The following persons participated in this project at various stages including the project workshop in Cape Town in 2015, the writing of this book, and the finalisation of the Cape Town Principles (Appendix 1) in person and by email:

- **Professor Hugh Corder**, Faculty of Law, University of Cape Town (Convenor)
- **Professor Richard Devlin** FRSC, Schulich School of Law, Dalhousie University
- **Linette du Toit**, Human Rights Awareness and Promotion Forum, Uganda
- **Professor Dame Hazel Genn** QC FBA, Faculty of Laws, University College London
- **Professor Jill Ghai**, Katiba Institute, Nairobi
- **Professor Yash Ghai**, Katiba Institute, Nairobi
- **Professor Ameze Guobadia**, Nigerian Institute of Advanced Legal Studies
- **Professor Sir Jeffrey Jowell** QC, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law
- **Professor Kevin Tan Yew Lee**, Faculty of Law, National University of Singapore
- **Tabeth Masengu**, Democratic Governance and Rights Unit, Faculty of Law, University of Cape Town
- **Maxwel Miyawa**, Osgoode Hall Law School, York University
- **Justice Kate O'Regan**, South Africa, former Justice of the Constitutional Court of South Africa
- **Chris Oxtoby**, Democratic Governance and Rights Unit, Faculty of Law, University of Cape Town
- **Harish Salve SA**, Advocate and former Solicitor-General of India
- **Gregory Solik**, Advocate of the High Court of South Africa, Western Cape Division
- **Dr Jan van Zyl Smit**, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law

The project participants have authorised the Cape Town Principles (Appendix 1) to be issued in their names. They have done so purely in their personal capacities and not on behalf of any of the institutions listed above, or any other institutions to which they are affiliated.

Valuable comments on a draft of the Cape Town Principles were received at a consultation meeting in London in May 2015, attended by senior staff of the Commonwealth Secretariat, the Commonwealth Magistrates' and Judges' Association and of the Judicial Appointments Commission for England and Wales. Those who attended this meeting were extremely generous in sharing their experience and their views on the draft Principles. They should not be held responsible in any way for the final text adopted by the project participants.

Securing Judicial Independence

ABOUT THE BOOK

As Justice Kate O'Regan notes in the Introduction to this book: "Appointing independent, competent and trusted judges is central to ensuring the rule of law in a democracy. The last few decades have seen the establishment of judicial appointment committees in many Commonwealth countries that have diminished the power of the executive over the appointment of judges."

This book asks what lessons can be learnt from the experience of the Judicial Service Commission in South Africa and its counterparts elsewhere in the Commonwealth. It contains in-depth studies of how judges are appointed in the jurisdictions of CANADA, ENGLAND AND WALES, KENYA, MALAYSIA, NIGERIA, and SOUTH AFRICA. It also presents the CAPE TOWN PRINCIPLES ON THE ROLE OF INDEPENDENT COMMISSIONS IN THE SELECTION AND APPOINTMENT OF JUDGES, which offer practical guidance both to law reformers seeking to establish new judicial appointment processes and to any existing commissions and committees wishing to review the methods by which they select judges.



ABOUT THE EDITORS

Prof HUGH CORDER is Professor of Public Law at the University of Cape Town. Dr JAN VAN ZYL SMIT is an Associate Senior Research Fellow at the Bingham Centre for the Rule of Law, British Institute of International and Comparative Law.