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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

WEDNESDAY 24 JANUARY 1996 (14H00) E249

REVISED DOCUMENTATION

Entire Document Embargoed until
24 January 1996

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CONSTITUTIONAL ASSEMBLY

22 January 1996

To all Constitutional Committee Sub-Committee Members

Re: Meeting of the Constitutional Committee Sub-Committee on 24 January 1996 at 14h00

1. At the Constitutional Committee Sub-Committee held on the 22 January 1996, it was decided to cancel the meeting for Tuesday, 23 January 1996.

2. The Constitutional Committee Sub-Committee meeting for the 24 January 1996 will take place at **14h00 hours** instead of the **10h00 hours** announced in the earlier CA schedule and documentation package.

3. For your convenience, we include a revised documentation pack. This consists of:

   3.1 An Agenda;

   3.2 A memorandum by the Technical Refinement team on "***The need for Automatic Referral Procedures in Certain Circumstances: Sections 96 (4) and 99(3)***" *and*

   3.3 A revised opinion by the Panel entitled: "***Appointment of judges: Comparative Survey***". Please note that this is an **amended** version of the document distributed in the original documentation package for the 24 January 1996. This document replaces the earlier version.

Thanking you.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Wednesday, 24 January 1996

TIME: 14h00

VENUE: E249

DRAFT AGENDA

1. **Opening**
2. **Discussion of the Working Draft, Third Edition:**
   - 2.1 **Courts and the Administration of Justice**
     - **Section 95**
     - **Sections 96(1); 96(3); 96(4)**
     - **Section 97(2)**
     - **Section 98(2)**
     - **Section 100**
     - **Section 101(3)**
     - **Section 103(1)(a)**
     - **Section 104(1)(h); 104(1)(k); 104(3)**
     - **Section 105**
     - **Attorney General**
   - 2.2 **National Assembly:**
     - **Sections 42; 42(1)(a); 42(2)**
     - **Section 45(3)**
     - **Sections 46(2); 46(4)**
     - **Section 50(2)**
     - **Section 52**
     - **Section 53**
     - **Section 54**
   - 2.3 **National Executive**
     - **Sections 78; 78(3)**
     - **Section 79(3)**
     - **Section 83**
     - **Section 85**
     - **Section 93(4)**
3. **AOB**
4. **Closure**

N.B. Please bring your copy of the Third Edition of the Refined Working Draft to the meeting

---

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

Enquiries: Ms M M Sparg, Tel 245-031, Page 418 4616 code 6970

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee

FROM: Executive Director

DATE: 18 January 1996

RE: Memorandum on the Need for Automatic Referral Procedures

We enclose for your consideration a memorandum produced by the Technical Refinement Task Team entitled *"The Need for Automatic Referral Procedures in Certain Circumstances: Sections 96(4) and 99(3)."*

H EBRAHIM
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MEMO

THE NEED FOR AUTOMATIC REFERRAL PROCEDURES IN CERTAIN CIRCUMSTANCES: SECTIONS 96(4) AND 99(3)

Section 99(3) of the Working Draft provides for appeal or application to the Constitutional Court in the event of a finding of unconstitutionality of an Act or conduct of the President (S.99(2)). Both procedures (i.e. appeal or application) are clearly premised on the assumption that the relevant rules of court will provide for such procedure(s) and will contain more details regarding the requirements in order to utilize each respective procedure. The Appeal procedure apparently envisages a series of appeals through the hierarchy of Courts (e.g. from the High Court to the Intermediate Appeal Court to the Supreme Court of Appeal to the Constitutional Court) while the application procedure will apparently allow for direct access to the Constitutional Court in certain given circumstances as determined by the Rules of the Constitutional Court.

Leaving aside possible jurisdictional problems which may arise (e.g. whether a party should rather have lodged an appeal to the "ordinary" Courts than bringing an application to the Constitutional Court, or vice versa), the more fundamental question is: what happens if no party with "sufficient interest" either appeals or launches an application? In civil cases one is then faced with a finding of unconstitutionality and possibly temporary relief which had been granted, but with no prospect that the matter will ever be finalised. What are the legal consequences of such a "finding" of unconstitutionality? Does it bind lower courts? What happens to the "temporary" relief: does it become permanent? May the successful litigant invoke execution procedures? In criminal cases similar problems may arise e.g. an accused's acquittal is based on or directly relates to a finding of unconstitutionality of a statutory provision. An eventual finding by the Constitutional Court that the initial finding of unconstitutionality was wrong could not result in the accused then being found guilty. The most plausible solution to prevent this kind of situation would be to provide for referral of the constitutional issue to the Constitutional Court before judgment is given.

It goes without saying that it is impossible to foresee all the different kinds of problematic situations which might arise. However, if referral is provided for, most if not all of such difficulties will hopefully be catered for.

The question therefore arises whether, in the event of a finding of unconstitutionality, provision should not be made for a compulsory referral by the court that made the finding to the Constitutional Court, if no party with a sufficient interest acts within a set time limit in civil suits, or if the trial court regards it as necessary to first have a finding by the Constitutional Court in criminal matters.. If the principle of referral is established by the Constitution, procedural aspects could be dealt with by the Rules of the Constitutional Court. However, if the principle of referral is not established by the Constitution itself, each of the relevant

Acts regulating each respective level of courts (i.e. the High Courts, the Intermediate Appeal Courts and the Supreme Court of Appeal) will have to lay down appropriate measures to regulate referrals.

It is suggested that it will be much simpler to follow the course of a statement of principle regarding referrals to be included in the Constitution and the details to be set out by the Rules of the Constitutional Court. Also, it will not suffice if referrals are only provided for by the Rules of the Constitutional Court (and not by the Constitution itself) as it is extremely doubtful whether the "domestic" Rules of the Constitutional Court could have a binding effect on other Courts.

CONSTITUTIONAL ASSEMBLY

To: Chairpersons of the Constitutional Assembly

From: Panel of Constitutional Experts

Date: 22 January 1996

Re: SURVEY: APPOINTMENT OF JUDGES - SUBMISSION BY PANEL OF CONSTITUTIONAL EXPERTS TO CONSTITUTIONAL ASSEMBLY

Dear Mr Ebrahim

Enclosed please find our submission. Could it please be circulated amongst the members of the Sub-Committee of the CA.

Yours sincerely

Prof G. Erasmus
(Panel)

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APPOINTMENT OF JUDGES : COMPARATIVE SURVEY

1 INTRODUCTION

This survey has been compiled in response to a request by members of the Sub-Committee of the Constitutional Assembly. It describes the appointment of judges in a number of common law, continental and other systems. Recommendations by international conferences are also provided. In several instances the provisions in the constitutions of the selected countries are provided.

Although the methodology adopted here follows a country by country approach, the common factors can be devided into two basic areas: (i) The procedures for nomination, screening and appointment. (ii) The criteria for selecting judges.

Attention should be drawn to the fact that the countries with Constitutional Courts (mostly of the continental tradition) as a rule distinguish between the appointment of judges of Constitutional Courts and the other (regular) courts. Federal and unitary systems also differ. Some federations have both federal and state (provincial) judiciaries and the respective judges may be appointed through different procedures.

The purpose of this document is only to describe a number of systems. No direct recommendations are made. We have benefitted greatly from recent studies dealing with this topic and which focus on the position in common law countries.[1]

---

1 Hugh Corder "The Appointment of Judges: Some Comparative Ideas" Stell Law Review 1992 (2) 207; Martin S Friedland *A Place Apart - Judicial Independnece and Accountability in Canada*, Canadian Judicial Council, 1995.

2 HOW TO DETERMINE NEW PROCEDURES AND APPOINTMENT CRITERIA: IDENTIFY EXISTING WEAKNESSES - LESSONS FROM CANADA

New procedures and criteria for the appointment of judges can be developed by identifying and addressing the weaknesses and dangers present in the existing system. The historical and political factors unique to a particular society have to be studied. By identifying the specific needs and problem areas in a given society, a set of suitable selection and appointment criteria can hopefully be developed. The following example of such an exercise is taken from the Canadian experience.

2.1 The Appointment of Federal Judges

The appointment of federal judges in Canada is made by the Governor General on the advice of the Cabinet. "Although the name is put forward by the Minister of Justice in the case of all federally appointed judges with the exception of chief justices and members of the Supreme Court, where the Prime Minister makes the recommendation, the formal decision is made by the Cabinet. This necessarily risks introducing strong political considerations into the selection."[2]

As a result various studies have been undertaken and measures proposed in order to improve the system. A study undertaken in the 1980s revealed the following weaknesses then:

* Secrecy;
* Susceptibility to political influence;
* The undue influence of regional ministers and special advisers;
* Inadequate consultation;
* Insufficient data on potential appointees;
* Delays in filling vacancies;
* Tax problems encountered by newly-appointed judges;
* Inadequate remuneration of judges and insufficient training for new judges; and
* Political patronage through judicial appointments.

---

2 Frieland 236.

In order to address these problems, the following recommendations were made:

(i) Appointments should be made "as the result of an established, well-known and understood advisory process to facilitate selection of the best candidate", including nomination from a wide variety of sources (including the public), meaningful consultations with appropriate parties (including political and judicial authorities in the provinces) and avoidance of perceptions of political bias.

(ii) Representativity of regions and legal systems has to be taken into account in Supreme Court appointments.

(iii) Timeous steps to be taken to fill anticipated vacancies.

(iv) No role for Parliament in the selection or appointment of federal judges.

(v) The establishment of Advisory Committees on Federal Judicial Appointments in each province in order to facilitate the process of consultation. They should nominate candidates and advise the minister on both provincial and Supreme Court appointments. The proposed composition was as follows:
The Chief Justice of the province (as chair), one person each appointed by the Federal Minister of Justice and the provincial Attorney-General/Minister of justice (a political officer), two lawyers (one by the branch of the Canadian Bar Association in the province concerned) and two lay persons "representative of the public to be appointed by majority vote of the other members of the committee"

(vi) The stipulation of the following list of "essential qualities" of a potential judge: "high moral character; human qualities: sympathy, generosity, charity, patience; experience in the law; intellectual and judgmental ability; good health and good work habits; and bilingualism (if required ...)"[3]

These proposals aimed at the removal of the stigma of political patronage.[4] The most important mechanism for achieving this was the proposed power of **nomination** by advisory committees. It should also be noted that the Canadian Charter of Rights and Freedoms was adopted in 1982. It focussed public

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3 Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada (1985) pp 64-68. Quoted by Corder 211.

4 One Canadian scholar, Prof. Peter Russell, responded to a particular insident when the Trudeau government appointed 6 Liberal politicians, by writing:

> "The vulnerability of the appointing process to the personalities and whims of the governing party which this episode so vividly demonstrates, ... is a strong part of the case for a more enduring institutional reform: that is, for the establishment of true nominating commissions." (In Friedland p. 238.)

attention "on the law-making role of the judiciary and therefore the importance of the appointment of good judges."[5]

Some of these recommendations were adopted. Screening became the responsibility of provincial committees. They did not, however, nominate candidates. The new process distinguished between three important stages: nomination, screening (assessment) and appointment. It worked as follows:

> The "commissioner of federal judicial affairs" will solicit and maintain records of all those interested in appointment to a federal judgeship. Individuals may submit their own names and the legal community is invited to propose candidates. If the statutory requirement is met, the commissioner refers the name(s) to the appropriate provincial assessment committee. These five-person committees (with representatives of the provincial law society, bar association, judiciary and Attorney-General, and a nominee of the federal Minister of Justice) vet each nominee as "qualified" or "not qualified" for office, an assessment which remains valid for two years. This screening applies only to new judges and not those already on the Bench who are eligible for "promotion". Supreme Court appointments are also exempt from this procedure. In regard to the Supreme Court, it should be noted that the Supreme Court Act 1970, requires that three of the nine judges come from Quebec. In addition, custom apparently indicates that the remaining six seats will be filled by one judge from the Atlantic provinces two from Ontario, and three form the Western provinces.

Merit was apparently still a "touchstone" and was defined to include the following:

> "proficiency in the law, a well-rounded legal experience, maturity and objectivity in judgment, evidence of human qualities indicating that the judge would be receptive to and appreciative of social issues arising in litigation , the capacity to exercise the larger policy role conferred upon the judiciary by the Charter of Rights and Freedoms, and the idea of public service as a prime motivation"[6].

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5 Friedland. 237.

6 Corder 212-213.

Further changes were made following a review of the procedures which was completed in 1991. The following summary of the new proposals is taken from Friedland:[7]

> "Several changes were made following a review of the procedures completed in 1991. The committees, instead of using the categories 'qualified' and 'not qualified', were now to use 'recommended', 'highly recommended', and 'unable to recommend'. Further, candidates would no longer be told their classification, although they would be notified of the date they were assessed. Committees would henceforth give to the Minister a précis of the candidate's qualities that caused them to make a positive recommendation. Another change was to ask those making nominations to the committees to give the Minister two or three names from which to choose in order to provide 'greater flexibility and balance in the composition of the committees.' As was the case with federal elevations, provincial court judges would no longer be assessed by the committees.
>
> A further review was commenced by Justice Minister Pierre Blais in 1993, but was not completed before the Conservatives left office. It was continued by the new minister of justice, Allan Rock, and a number of modest changes were announced in the spring of 1994. The C.B.A. had once again argued for the 1985 concept of a short list from which the Minister would choose: 'The Canadian Bar Association is strongly of the view that the time has come for the Minister of Justice to adopt this recommendation.' As other ministers have done in the past, Rock rejected the proposal. He did, however, publicly undertake not to appoint any person who had not been recommended by a committee. To cut down on the heavy workload of the committees in Ontario and Quebec and to increase the possibility for interviews, three regional committees were established in Ontario and two in Quebec.
>
> Another change was to increase the number of members of the committees from five to seven by giving the Minister the power to add two more persons, a lawyer and a lay person. According to the

7 At 241-242.

Minister, 'this will facilitate the appointment of committees that more fully reflect the diversity of society in each jurisdiction and, in the case of lawyer members, of the legal community.' It also, of course, gives the Minister greater input into the committees. Decisions would be dept on file for three years, rather than two, as previously was the practice. The system, according to the Minister, would achieve greater visibility by publishing advertisements about the committees and by having committees produce annual reports. (The first annual report is expected to be published in the fall of 1995.) The process would be improved by requiring more detailed information from applicants, establishing more detailed written guidelines to assist committee members, and encouraging the use of interviews. 'Interviews will not be mandatory,' the Minister wrote, 'but their use will be encouraged in those circumstances in which the committees consider them to be both practical and desirable.' There will be a one year 'cooling-off' period for committee members, but not for members of Parliament, as had been recommended by the C.B.A.

The Minister continued the practice of not submitting names of provincial court judges to committees, although he noted that 'a clear majority of those consulted favoured committee assessment of provincial court judges who had applied for federal judicial office.' The Minister stated, 'for reasons of judicial independence, I feel it would be inappropriate for the advisory committees to be asked to assess sitting judicial officers.' Further, no change was made with respect to other elevations, including appointments to the Supreme Court."

2.3 The Appointment of Provincial Judges

The system adopted by some of the Canadian provinces apparently functions more satisfactorily. (Canada has a system of provincial courts, in addition to the federal judiciary.) Provincial judicial councils play an important role in the recruitment and selection stages of the process. These councils consist of judges, lawyers and lay people and they may consider nominations for judges from various sources, as well as looking for their own candidates. They also conduct their own interviews and make their own assessment of the suitability of

nominees. A short list of names is then submitted to the Attorney-General and the appointment is made thereafter. Vacancies are sometimes advertised.

Further changes have been introduced in 1994. More regional committees were established in certain provinces. The possibility for interviews has been increased and additional members have been appointed on the committees. This has to "... facilitate the appointment of committees that more fully reflect the diversity of society in each jurisdiction and, in the case of lawyer members, of this legal community"[8].

Greater "visibility" is to be achieved by publishing advertisement about the committees and through annual reports by these committees.

The following criteria have been developed through the provincial procedures for the purpose of evaluating candidates:

- professional excellence (including "good writing and communication skills");
- community awareness (including "awareness of ... the social problems that give rise to cases ..." and "sensitivity to changes in social values relating to criminal and family matters" and an interest in alternative dispute resolution);
- personal characteristics (including "an absence of pomposity and authoritarian tendencies", "politeness", "moral courage", "patience", "punctuality" and "good health");
- demographic considerations (the judiciary should be representative of the province as far as possible); and
- career plans (the judiciary should be open to those who wish to serve a short term as well as those who wish to serve until retirement).[9]

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8 Friedland. 241. A detailed description of the various provincial systems is contained in Friedland 243-246.

9 Corder 215.

3 AUSTRALIA

Here appointments are made by the Governor-General in council. (This is the same system that applied in South Africa earlier.) It means that cabinet is responsible. When the Australian Constitution was recently reconsidered it was decided not to introduce the Canadian model of advisory committees. (Political patronage seems to be considered less of a problem than in Canada.) Another important recommendation was that parliament should have no role in judicial appointments.

Informal steps have, however, been proposed in order to enable appointing authorities to receive advice about those best qualified for appointment. It has been suggested that the federal Attorney-General (a political officer) should consult on a confidential basis with the chief judge of the court concerned and with the leaders of the most appropriate legal professional organizations.[10]

Another important recommendation was that the states of Australia (Australia is a federation) ought to be consulted with respect to appointments to the High Court. This court often has to rule on the relationship between the central government and the states. Consultation includes the opportunity for the state governments to propose candidates and to comment confidentially on persons whom the federal government wants to nominate.

4 ENGLAND

It has been observed that this is a tradition-bound society where the "old boy" network still exercises a powerful influence in the appointment process.[11] Appointments are made by the Queen on the Advice of the Lord Chancellor, without going before Cabinet. The Chancellor is assisted by a special section within that office. This body maintains extensive links with the judiciary and the practising lawyers and is well informed about suitable candidates. It has an almost full-time screening function of the legal profession - it also recommends barristers for appointment as the Queen's Council.

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10 Corder 216.

11 Corder 217.

The fact that the judiciary is drawn from the ranks of accomplished barristers cuts out solicitors. It also makes it difficult to appoint women and minority candidates.

Since 1992 certain changes have been proposed. While "merit" is still strongly emphasized, consideration is now given to open advertisements for some judicial vacancies, the holding of specific competitions and measures to encourage applications by women, black and Asian practitioners. These proposals are in the process of implementation.[12]

5 NEW ZEALAND

The Governor-General makes appointments on the recommendation of the cabinet. This is preceded by an informal procedure involving the Chief Justice and sitting judges, the Attorney-General (a political officer), the Solicitor-General, the President of the New Zealand Law Society and the Cabinet.

6 UNITED STATES OF AMERICA

The American judiciary consists of both federal and state courts. There is no "constitutional court" as it is known in some European countries. The Supreme Court does however have constitutional review powers. The constitution is "supreme law of the land".

Judges to the Supreme Court are nominated and then appointed by the President of the United States on the advice and consent of the Senate.[13] No specific criteria are laid down and political appointments are often made. Appointments are for life "during good behaviour".

The public interviewing by the Senate of nominations has at times attracted considerable attention.[14] The Senate Judiciary Committee has recently decided

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12 Friedland 248-49. In 1994 the Lord Chancellor's Department issued a document entitled "Developments in Judicial Appointment Procedures".

13 USA Constitution. Art II. section 2. For lower courts see Art I. section 8.

14 Robert Bork was rejected in 1987 and a "wounded" Clarence Thomas confirmed in 1991.

to close hearings when dealing with allegations concerning personal conduct of nominees. This has been criticized on the basis of the greater public need to "witness proceedings that have so vast an impact on the nation".[15]

The Senate is also involved in the selection of other federal judges (trial judges and court of appeal circuit judges). Appointment is again by the President.

Since 1952 the American Bar Association is playing a role in the selection of all federal judges. It examines nominees referred to it by the Attorney-General. This takes place before Senate hearings, where the rating by the ABA forms part of the record. This procedure has been criticized for excessive emphasis on trial work experience. This is said not necessarily to be the "best background for a federal judge".[16]

State judges were often elected in the past. Since the 1940's "merit selection" has been introduced in most states. The most common system consists of a commission (of lawyers and non-lawyers) which recruits, investigates, interviews and evaluates candidates. Final appointment is by the state executive. A probationary period often applies for first appointments.[17]

7 INDIA

In India the relevant constitutional provision reads as follows:

> Every judge of the Supreme Court shall be appointed by the president ... after consultation with such of the Judges of the Supreme court and of the High Courts in the States as the President may deem necessary for the purpose ... ; Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted..."

India is a federation. When appointing judges on the High Courts of the constituent states the President acts in consultation with the Governor and Chief Justice of the state concerned and the Chief Justice of India.[18]

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15 Quoted by Friedland. 251.

16 Quoted by Friedland. 252.

17 Friedland. 252-253.

18 Corder 223-224.

8 NAMIBIA

The interesting aspect about the Namibian appointment procedure is the central role of the Judicial Service Commission. All appointments to the Supreme Court and the High Court are made by the President, acting on the recommendation of the Judicial Service Commission.[19]

The Judicial Service Commission consists of the Chief Justice, a judge appointed by the President, the Attorney-General (who is a politician) and two lawyers nominated by the legal profession organization.

Judges may be removed from office only by the President; acting on the recommendation of the Judicial Service Commission. The grounds for removal are listed in the Constitution. The Judicial Service Commission must investigate the matter first.

Judicial Service Commissions are also found in Nigeria, Botswana, Gambia, Kenya, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Uganda and Zambia.

9 ISRAEL

Israeli judges are appointed by the Head of State, the President. This is done on the recommendation of a statutory appointment committee, consisting of the President of the Supreme Court and two other Supreme Court judges, the Minister of Justice and one other minister elected by the Government, two members of the Knesset (Parliament) elected by secret ballot, and two practising lawyers elected by the council of the Israel Bar Association.

10 JAMAICA

Under the Jamaican Constitution of 1962 senior appointments are made by the Governor-General, acting on the recommendation of the Prime Minister and after

19 Sec 82(1) Constitution of Namibia.

consultation with the Leader of the Opposition. Other judges are appointed on the advice of a Judicial Service Commission.

11 MALAYSIA

In Malaysia the head of state makes appointments on the advice of the Prime Minister. In the case of senior judges the Prime Minister has to consult with the Conference of Rulers. This latter body consists of the Governors of the various states of Malaysia, which is a federation.

12 CONTINENTAL SYSTEMS

12.1 Introduction

Most continental systems have a professional judiciary. People enter this "profession" at a relatively young age and training is then provided. To be a judge is a life-long career which starts at an early stage of a professional career. Such judges preside over the ordinary courts - which are often of a specialized kind. (For labour law, administrative law, criminal law, tax etc.)

Constitutional court judges are in a different position. They are appointed through special procedures and are senior lawyers (often academics) by the time of appointment. A few examples are discussed.

12.2 Germany

Germany is a federal state. The Länder (provinces) have their own judiciaries. This often includes Länder Constitutional Courts. The federal judiciary on the other hand consists of the Constitutional Court and the federal specialized courts of final instance.

The Federal Constitutional Court is empowered to rule on disputes between Länder and between the Länder and the federal government. In addition it also is responsible for the final application of the German Bill of Rights and for deciding on the constitutionality of laws. The following provisions from the German

Constitution will explain the position in that country. (Note that the full position is not found in the Constitution alone. Some of the detail are to be found in a separate federal law concerning the Federal Constitutional Court.)

Section 94(1) of the German Basic Law provides:

> "The Federal Constitutional Court shall be composed of federal judges and other members. Half of the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding institutions of a Land."

The federal law concerning the Federal Constitutional Court supplements this provision:

> **"Article 2**
>
> (1) The Federal Constitutional Court shall consist of two panels.
>
> (2) Eight judges shall be elected to each panel.
>
> (3) Three judges of each panel shall be elected from among the judges of the highest federal courts of justice. Only judges who have served at least three years with a highest federal court of justice shall be elected.
>
> **Article 3**
>
> (1) The judges must have reached the age of 40, be eligible for election to the Bundestag, and have stated in writing that they are willing to become a member of the Federal Constitutional Court.
>
> (2) They must be qualified to exercise the functions of a judge pursuant to the Law on German Judges.
>
> (3) They may not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding organs of a Land. On their appointment they shall cease to be members of such organs.
>
> (4) The functions of a judge shall preclude any other professional occupation save that of a lecturer of law at a German institution of higher education. The functions of a

judge of the Federal Constitutional Court shall take precedence over the functions of such lecturer.

Article 4

(1) The term of office of the judges shall be twelve years, not extending beyond retirement age.

(2) Immediate or subsequent re-election of judges shall not be permissible.

(3) Retirement age shall be the end of the month in which a judge reaches the age of 68.

(4) Upon expiration of his term of office a judge shall continue to perform his functions until a successor is appointed.

Article 5

(1) Half of the judges of each panel shall be elected by the Bundestag and the other half by the Bundesrat. Of those to be selected from among the judges of the highest federal courts of justice one shall be elected by one of the electoral organs and two by the other, and of the remaining judges three shall be elected by one organ and two by the other.

(2) A judge shall be elected at the earliest three months before expiration of his predecessor's term of office or, if the Bundestag is dissolved at the time, within one month of the first meeting of the Bundestag.

(3) If a judge relinquishes his office prematurely, his successor shall be elected within one month by the same federal organ as elected him.

Article 6

(1) The judges to be selected by the Bundestag shall be elected indirectly.

(2) The Bundestag shall elect twelve of its members as electors according to the rules of proportional representation. Each parliamentary group may submit a list of twelve candidates. The number of candidates elected on each list shall be calculated from the total number of votes cast for each list in accordance with the d'Hondt method. The members shall be elected in the sequence in which their names appear on the

list. If an elector retires or is unable to perform his functions, he shall be replaced by the next candidate on the same list.

(3) The eldest elector shall immediately with one week's notice convene a meeting of the electors for the purpose of electing the judges and shall chair the meeting, which shall continue until all of them have been elected.

(4) The members of the electoral committee are obliged to maintain secrecy about the personal circumstances of candidates which become known to them as a result of their activities in the committee as well as about discussions hereon in the committee and the voting.

(5) To be elected, a judge shall require at least eight votes.

Article 7

The judges to be selected by the Bundesrat shall be elected with two thirds of the votes of the Bundesrat.

Article 7a

(1) If a successor is not elected in accordance with the provisions of Article 6 above within two months of the expiration of a judge's term of office or his early retirement, the eldest elector shall immediately request the Federal Constitutional Court to propose candidates.

(2) The plenum of the Federal Constitutional Court shall decide with a simple majority on whom to propose as a candidate. If only one judge needs to be elected, the Federal Constitutional Court shall propose three candidates; if several judges are to be elected simultaneously, the Federal Constitutional Court shall propose twice as many candidates as the number of judges to be elected. Article 16(2) below shall apply mutatis mutandis.

(3) If the judge is to be elected by the Bundesrat, paragraphs 1 and 2 above shall apply save that the eldest elector shall be replaced by the President of the Bundesrat of his deputy.

(4) The right of the electoral organ to elect a person not proposed by the Federal Constitutional Court shall remain unaffected.

Article 8

(1) The Federal Minister of Justice shall draw up a list of all federal judges meeting the requirements of Article 3(1) and (2) above.

(2) The Federal Minister of Justice shall keep another list in which he shall enter all the candidates who are proposed for the post of judge of the Federal Constitutional Court by a parliamentary group of the Bundestag, the Federal Government or a Land government and who meet the requirements of Article 3(1) and (2) above.

(3) The lists shall be continually updated and be forwarded to the Presidents of the Bundestag and Bundesrat at least one week before an election.

Article 9

(1) The Bundestag and the Bundesrat shall alternately elect the President of the Federal Constitutional court and his deputy. The deputy shall be elected form the panel of which the President is not a member.

(2) At the first election the Bundestag shall elect the President and the Bundesrat his deputy.

(3) The provisions of Articles 6 and 7 above shall apply mutatis mutandis.

Article 10

The Federal President shall appoint the judges elected."

German Länder have their own constitutional courts. The Länder constitutions regulate the appointment of such Länder judges.[20]

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20 See e.g. sec 68 of the Land constitution of Bavaria and sec 52 of the Land constitution of Mecklenburg-Vorpommern. In Bavaria it is a mixture of senior judges of other Land courts and members elected by the Land legislature. In Mecklenburg-Vorpommern the Constitutional Court consists of a president and 6 members. The president and 3 members must be qualified for "judicial office". They are all elected by the Land legislature.

12.3 Spain

The Spanish position is typical of a continental one in the sense that it also knows professional judges and magistrates, in addition to constitutional court judges. Of interest is the General Council of the Judiciary which performs several functions, including that of advice to the King on the appointment of "ordinary" judges. These aspects are explained in articles 122 and 123.

Article 122

1. The organic law of the Judiciary shall determine the setting up, operating and control of the Courts and Tribunals as well as the legal status of professional Judges and Magistrates, who shall from a single body, and of the staff serving in the administration of justice.
2. The General Council of the Judiciary is the latter's governing body. An organic law shall set up its statutes and the system of disabilities applicable to its members and their functions, especially in connection with appointments, promotions, inspection and the disciplinary system.
3. The General Council of the Judiciary shall consist of the President of the Supreme court, who shall preside over it, and of twenty members appointed by the King for a five-year period, amongst whom shall be twelve judges and magistrates of all judicial categories, under the terms established by the organic law; four nominated by the Congress of Deputies and four by the Senate, elected in both cases by three-fifths of their members from amongst lawyers and other jurists of acknowledged competence and over fifteen years' experience in the exercise of their profession.

Article 123

1. The Supreme Court, with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to the provisions concerning Constitutional guarantees.
2. The President of the Supreme Court shall be appointed by the King, on being proposed by the General Council of the Judiciary, in the manner to be laid down by the law.

A different procedure applies with respect to the Constitutional Court. Sections 159 and 160 deal with the appointment of these judges:

Article 159

1. The Constitutional Court shall consist of twelve members appointed by the King. Of these, four shall be nominated by Congress by a majority of three-fifths of its members, four shall be nominated by the Senate with the same majority, two shall be nominated by the Government, and two by the General Council of the Judiciary.
2. The members of the Constitutional Court shall be appointed from among Magistrates and Prosecutors, University professors, public officials and lawyers, all of whom must be jurists of recognized standing with at least fifteen years' experience in the exercise of their professions.
3. The members of the Constitutional Court shall be appointed for a period of nine years and shall be renewed by thirds every three years.
4. Membership of the Constitutional Court is incompatible with: any representative function, any political or administrative office, a management role in a political party or trade union or any employment in their service, a career as a Judge or Prosecutor, and any professional or commercial activity whatsoever.
   Furthermore, the disabilities relative to the members of the Judiciary shall also be applicable to the Members of the Constitutional Court.
5. The members of the Constitutional Court shall be independent and irremovable during their term of office.

Article 160

The President of the Constitutional Court shall be appointed by the King among its members, on the recommendation of the Plenum of the Court itself, for a term of three years.

Some of these constitutional court judges have indicated (in personal interviews) a preference for a single, non-renewable period of appointment (of 12 years).

The reason given is that this is more in line with the independence of the court. Clerks (usually senior academics or senior state legal advisers) play an important role in the work of the Constitutional Court. Three are appointed per judge, although a judge has only one personal clerk. The other two work "for the court".

12.4 Portugal

Portugal has a Constitutional Court and the following regular courts: (i) A Supreme Court of Justice and the courts of law of first and second instance; (ii) The Supreme Administrative Court and other administrative and fiscal courts; (iii) The Court of Audit; (iv) Courts martial. Maritime Courts and Arbitration courts may be established.[21]

Article 219 deals with the appointment of judges to the regular courts. A Superior Council for the Judiciary appoints, assigns, transfers and promotes judges. This body is presided over by the President of the Supreme Court of Justice. Two of its members are appointed by the (State) President, 7 are elected by the Assembly and 7 are elected "by their peers by a system of proportional representation".

The selection of judges "shall be made prevailingly on merit, by means of competition ... based on their curricula."[22] Members of the Judiciary, public prosecutors and other jurists of merit are considered for the Supreme Court.

The President of the Supreme Court of Justice is elected by the other judges of that court.[23]

Section 224 deals with the composition of the Constitutional Court. Ten of these judges are appointed by the Assembly, the remaining 3 are coopted. Six of them must come from judges of the other courts. The President is elected by the other members of that court.

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21 Sec 211, Constitution of Portugal.

22 Sec 212, Constitution of Portugal.

23 Sec 217, Constitution of Portugal.

13 BRAZIL

The procedure with respect to the Supreme Federal Court and the Superior Court of Justice is explained in articles 101 and 104 of the Brazilian Constitution. They provide as follows:

> **Article 101**. The Supreme Federal Court is composed of eleven Justices, chosen from among citizens over thirty-five and under sixty-five years of age, of notable juridical learning and spotless reputation.
>
> Sole paragraph - The Justices of the Supreme Federal Court shall be appointed by the President of the Republic, after their nomination has been approved by the absolute majority of the Federal Senate.
>
> **Article 104**. The Superior Court of Justice is composed of a minimum of thirty-three Justices.
>
> Sole paragraph - The Justices of the Superior Court of Justice shall be appointed by the President of the Republic, chosen from among Brazilians over thirty-five and under sixty-five years of age, of notable juridical learning and spotless reputation, after the nomination has been approved by the Federal Senate, as follows:
>
> I - one-third shall be chosen from among judges of the Federal Regional Courts and one-third from among judges of the Courts of Justice, nominated in a list of three names prepared by the Court itself;
>
> II - one-third, in equal parts, shall be chosen from among lawyers and members of the Federal Public Prosecution, the Public Prosecution of the states, the Public Prosecution of the Federal District and the Territories, alternately, nominated under the terms of article 94.

14 INTERNATIONAL NORMS

Certain international bodies have adopted guidelines on the appointment of judges. The following comes from the survey by Corder:

'(i) The World Conference on the Independence of Justice of 1983, which was attended by an extraordinarily wide range of lawyers' organizations, adopted the Universal Declaration on the Independence of Justice at its final plenary session, in Montreal, Canada. The conference recommended to the United Nations the consideration of the Declaration, which includes the following provisions relating to the appointment of judges:

"Qualifications, selection and training"

2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14 (a) There is no single proper method of judicial selection but the method chosen should provide safeguards against judicial appointments for improper motives.

(b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate."

(ii) The Basic Principles on the Independence of the Judiciary adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, Italy in 1985, contain a briefer version of the above, to much the same effect.

(iii) In late 1986 and early 1987 two seminars with their focus on the independence of judges and lawyers were held in English-speaking Africa. Each seminar reached certain conclusions and

recommendations, some of which relate to the appointment of judges as follows:

"Qualifications, Selection and Training"

29 Principle 10 of the UN Basic Principles providing for the non-discriminatory selection of judges of integrity and ability should be implemented at the national level.

30 A qualified judicial service commission is an appropriate mechanism for the selection of persons for appointment to judicial office, and the membership of such a commission should reflect the various fields of the legal profession.

31 With the exception of the person holding the office of Attorney-General, it is undesirable that a member of the executive be a member of such a commission."

The Banjul seminar reached greater specificity:

"Appointment of Judges"

19 The appointment of judges other than the Chief Justice, the President of the Court of Appeal and members of the Supreme government on the advise of a body such as a Judicial Service Commission consisting predominantly of nominees of the Bench and the Bar Association.

20 The appointment of the Chief Justice, the President of the Court of Appeal and members of the Supreme Court should be made by the Head of State acting in consultation with the Judicial Service Commission or similar body and, where appropriate, ratified by the legislature.

23 Temporary judges may be appointed where necessary, but acting and probationary appointments should not be made.

24 Appointment of judges should be made from all branches of the legal profession without discrimination ... in accordance with the following criteria: integrity and independence of judgement, professional competence, experience, humanity and commitment to uphold the rule of law."

15 CONCLUSIONS

This survey deals with a number of dispensations, both from common law as well as continental traditions. It has not been structured in a manner which aims at making direct recommendations or to provide specific guidelines. The following brief observations may, however, be made:

* When new appointment procedures are adopted, a careful prior study of historical and present problem areas and existing deficiencies may be useful. What is to be remedied and what is to be achieved? How are the new goals to be achieved?
* What foreign systems provide really useful examples? If the final South African Constitution will e.g. not provide for provincial judiciaries, the examples of that kind will, at least with respect to provincial institutions, not apply.
* South Africa now has a Constitutional Court. In most systems with constitutional courts the appointment of Constitutional Court Judges differs from the appointment of other judges. The special significance of this court and its powers are reflected in carefully devised appointment procedures.
* Transparency, public involvement and accountability are increasingly recognized in countries where new appointment procedures are adopted. The possibility for candidates to apply for appointment as judges, is provided for in some countries.
* In addition to criteria which aim at accommodating concerns about *legitimacy* and *democracy*, *institutional* factors are also to be considered. Federal or decentralized systems often provide for the participation of provinces (directly or indirectly) in the appointment of federal (national) judges, especially when it concerns Constitutional Court judges.
* Special bodies (judicial service commissions, appointment committees) are increasingly used to select judges.
* This survey shows a modern trend which aims at finding the correct balance between political involvement in the appointment process and the need for an independent and competent court.

PANEL OF CONSTITUTIONAL EXPERTS