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# CONSTITUTIONAL ASSEMBLY

## CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

## WEDNESDAY 24 JANUARY 1996 (10H00) E249

## *DOCUMENTATION*

**Entire Document Embargoed Until 24 January 1996**

## CONTENTS

# 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:** 10H00 - 18H00

**VENUE:** E249

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## 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

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

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H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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

CONSTITUTIONAL ASSEMBLY

# CONSTITUTIONAL ASSEMBLY

## MEMORANDUM

**TO:** **Members of the Constitutional Committee Sub-committee**

**FROM:** **Executive Director**

**DATE:** **18 January 1996**

**RE:** **Comparative Survey on the Appointment of Judges**

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We enclose for your consideration a comparative survey produced by the Independent Panel of Experts entitled *"The Appointment of Judges: Comparative Survey."*

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**H EBRAHIM**
**EXECUTIVE DIRECTOR**
**CONSTITUTIONAL ASSEMBLY**

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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 onthe position in common law countries.[1]

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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

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.

The Cabinet used to give the final approval of judges (before appointment by the Governor-General) on the basis of a list prepared by ministerial advisers and after prior assessment by a governing body of the legal profession. A study undertaken in the 1980s revealed the following weaknesses in that system 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.

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 ...)"[2]

These proposals aimed at the removal of the stigma of political patronage.[3] It should also be noted that the Canadian Charter of Rights and Freedoms was adopted in 1982. It focussed public attention "on the law-making role of the judiciary and therefore the importance of the appointment of good judges."[4] The most important mechanism for achieving this was the proposed power of **nomination** by advisory committees.

This plan was not adopted. In terms of the new procedure which came in force in 1989 the Canadian Bar Association screening function is replaced. That is now performed by provincial committees. They do not, however, nominate candidates. The new process distinguishes between three important stages: nomination, screening (assessment) and appointment. The procedure works as follows:

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

3 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.)

4 Friedland, 237.

> 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 is apparently still a "touchstone" and is 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"[5].

Has the new Canadian procedure been a success? The new screening procedure apparently is an improvement but the role of the new committees is said to be too restricted.[6]

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

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5 Corder 212-213

6 Corder 213.

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"[7].

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).[8]

This system has been described as a success and a predictable, public and accountable means of appointing judges.[9]

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7 Friedland. 241.

8 Corder 215.

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.) 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, 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, Quana, 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.

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19 Sec 82(1) Constitution of Namibia

# 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 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:

(i) Section 4 provides for the appointment of these judges for a non-renewable period of 12 years;

(ii) Section 10 deals with the appointment by the federal president;

(iii) Section 3 lays down an age requirement of at least 40 years, eligibility for the Bundestag; and to meet the requirements which apply for appointment or a federal court;

(iv) Section 8 requires that the Federal Ministry of Justice prepares a list of all federal judges who qualify for appointment on the Federal Constitutional Court as well as the recommendation for other members which are made by political parties, the federal government or Land governments. These lists are submitted to the presidents of the Bundestag and the Bundesrat to be used in the final election of federal constitutional court judges by these two bodies;

(v) Section 2 deals with the composition of the Federal Constitutional Court. It is composed of two Senates consisting of 8 judges each. Three of these are elected from the federal judges.

German Länder have their own constitutional courts. The Länder constitutions regulate their appointment.[20]

## 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.

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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.

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 BRASIL

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:

* A careful prior study of historical and present problem areas and deficiencies in the existing procedures may be useful. What is to be remedied and what is to be achieved? How to achieve the new goals? How do other countries do it?
* 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. The appointment of Constitutional Court Judges is distinguished from the procedures applicable to the appointment of other judges. This is confirmed by all the systems displaying constitutional courts. 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 express participation of provinces (directly or indirectly) in the appointment procedure, especially when it concerns Constitutional Court judges.
* Distinctions should be drawn between recruitment and identification; assessment and evaluation; interviewing; and appointment. Specific selection criteria are to be adopted.

- Special bodies (judicial service commissions, appointment committees) are increasingly used to perform some of the functions listed in the previous paragraph. Its composition will require careful reflection.
- Some systems display different degrees of discomfort with respect to the involvement of the political branch in the appointment process.

PANEL OF CONSTITUTIONAL EXPERTS
DECEMBER 20, 1995