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THE APPOINTMENT OF JUDGES: SOME COMPARATIVE IDEAS*

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Amidst the fog of posturing and prevarication which envelops most of the talking about a future constitution for South Africa, one aspect is clear: as a branch of government, the judiciary will emerge with greater power. Whether this will be at the expense of the legislature or the executive remains to be seen. Certainly, if one believes that a measure of separation of powers and mutual "checking and balancing" among the departments[1] of government is a desirable feature of a constitution, such a shift of emphasis would be welcomed (and preferably by constraining the executive, in the circumstances).[2]

The chief reason for this rise to power of the judiciary (for which, one hastens to add, it has not campaigned) is the prominence given to 'the law' (if not the rule of law?) in the transitional phase towards and proposals for a new constitution. This is to be seen most obviously in the form of a bill and charters of rights, but also in codes of conduct, ombuds/men/persons and several commissions,[3] all of which will be established by and enforce 'the law' in the form of legislation. The ultimate authority on the interpretation of the supreme law (the constitution, including the bill of rights) is, however, almost certain to be some form of judicial body, called a constitutional court.[4] Whatever shape this court takes, it will have

* Some of the materials on which this article is based were collected incidentally while the author was researching a different matter. The financial assistance of the Centre for Science Development towards this research is hereby acknowledged. Opinions expressed in this paper and conclusions arrived at are those of the author and are not necessarily to be attributed to the Centre for Science Development.

1 As Montesquieu would have had it.

2 It would be readily acknowledged that executive power has grown to the detriment of Parliament in this country over the past 25 years, without the concurrent development of controls through the law or otherwise.

3 Such as Land and Human Rights Commissions. See *Constitutional Principles and Structures for a Democratic South Africa* (1991), a discussion document of the ANC Constitutional Committee, 29–31, and the *Interim Report: Group and Human Rights* Project 58 (1991) of the South African Law Commission, a 36 and 37.

4 Whether in the form of a court separate from the Supreme Court (ANC Constitutional Committee *A Bill of Rights for a New South Africa* (1990) a 16.2) or a section of the

immense political power, as will the ordinary courts, before which the constitutionality of laws and government action will be disputed in the first instance.

I have suggested elsewhere[5] that we are hopelessly ill-prepared as regards judicial policy on the constitutional review function, which is at least largely explained by the absence of a written constitution till now. But the lack of detail published so far by the main participants in negotiations on the matter of the appointment of the judiciary in the future is disturbing. So we read that:

> "There will be an independent judiciary responsible for the interpretation of the Constitution and the application of the law of the land . . . A Constitutional Court, appointed by the President on the recommendation of a judicial service commission, or by other methods acceptable in a democracy, comprising of judges, practitioners and academics would be set up."[6]

Slightly greater specificity is revealed by the proposals of the Democratic Party, as follows:[7]

> "Federal judges should be appointed from the legal profession on the advice of a Judicial Appointments Commission representing the judiciary and the legal profession, and approved by the Senate. In making its recommendations, the Judicial Appointments Commission should consider not only demonstrable competence, but also the need for the Bench adequately to reflect the broad population of South Africa."

The Law Commission and the National Party appear to have ignored the issue thus far.[8]

When one recalls the oft-cited words of Bishop Hoadly almost 300 years ago,

> "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them",[9]

the lack of attention paid to the method of judicial appointment is lamentable. A striking exception to this dearth of published speculation comes not from the political parties nor the academy, but from the practising profession. Two contributions of note have appeared in the advocates' professional journal, which have focussed on the South African situation in the context of the English[10] and

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current Appellate Division (as proposed by the Law Commission *Interim Report: Group and Human Rights* a 35.)

[5] "Lessons from (North) America" (forthcoming).

[6] ANC Constitutional Committee *Constitutional Principals* 26 cl 5.

[7] As reported in *Monitor* (October 1991) 78 par 3.4.3.

[8] It might be that the Law Commission is reserving its comment for its paper on *Constitutional Models*. It ought, in my view, to have canvassed the issue of the composition of the various enforcement mechanisms in greater detail in its *Human Rights* work.

[9] Spoken in 1717, quoted in Bork *The Tempting of America* (1990) 176.

[10] See Gauntlett "Appointing and Promoting Judges: Which Way Now?" 1990 3 *Consultus* 23.

American[11] systems, and they seem to have sparked some interest.[12] There has also been a closed seminar on the role of a constitutional court,[13] including discussion on its composition, and we await news of its deliberations and conclusions with interest.

In addition, the attorneys' journal has made an eloquent editorial plea[14] for immediate changes in the method of appointing judges (in accordance with the proposals of the Law Society of the Transvaal in 1980) to a system where the branches of the legal profession and the public or Parliament would combine in an independent judicial appointments commission, chaired by the Chief Justice. More recently, a senior member of the ANC's Constitutional Committee has expressed himself on the subject thus:[15]

> "We would like to see a majority of lay people involved in the investigation and proposal stage. These committees could recommend three people for each available post, and the senate judicial committee would then choose one, who the State President would appoint as a formality. This would get away from today's system of lawyers judging lawyers. For the constitutional court, I prefer the German or Italian or Spanish system, where these judges are elected by the Upper House (preferably), on a proportional basis of party strength, to reflect the philosophical assumptions of society at large. So we will have whites, blacks—even, for the first time, women. We must have such open systems—electoral systems. We must get away from closed systems and cronyism."

The purpose of this article is to stimulate discussion on this matter by describing practices and proposals in regard to the appointment of judges in several countries whose legal systems are not unlike South Africa's, and suggesting some ways in which we might proceed. (I am assuming that a future constitution in this country will require the supreme court judiciary to pronounce on questions of constitutionality.)

1 A comparative survey of methods of appointing judges

A very useful review of methods of appointing judges is that undertaken by a Canadian Bar Association Committee.[16] While it concentrates on the situation in Canada, the report also refers to the position in several other jurisdictions. The Canadian experience is, however, particularly relevant as the Canadian constitution includes

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[11] See Nienaber "United States Supreme Court Appointments: Implications for a Future Constitution in South Africa" 1991 4 *Consultus* 19.

[12] See the comments by Seligson, chairman of the General Council of the Bar and Wiechers on Nienaber 1991 4 *Consultus* 19, in 1991 4 *Consultus* 27 and 29 respectively.

[13] Organised by the Centre for Applied Legal Studies of the University of the Witwatersrand in conjunction with the Legal and Constitutional Committee of the ANC and the American Lawyers Committee for Civil Rights under Law, held in February 1991 in the Transvaal.

[14] See October 1990 *De Rebus* 680.

[15] See *Monitor* (October 1991) 88.

[16] *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (1985), (hereafter *CBA Report*).

a Charter of Rights and Freedoms for the first time in 1982, with a "testing power" in the hands of the Supreme Court in the final instance.[17] I shall therefore start this survey by looking at the situation in that country, then move on to others, concentrating on those which share some of our British heritage in this area of the law.

2 Canada

Canada has federal and provincial courts, but the power of appointing judges to all the federal and the most important provincial courts resides with the federal government.[18] These judges were appointed in the following way at the time of the report:[19] (a) the federal Minister of Justice appointed special advisers to accumulate information about potential judges, who would then solicit names from a wide variety of sources; (b) a list of candidates was then sent to the Canadian Bar Association National Committee on the Judiciary (set up in 1967), which assessed the candidates informally[20] and in confidence, before pronouncing whether a candidate was "qualified" or "not qualified" for judicial office, which assessment was communicated to the minister; (c) the minister and his adviser drew up a short list of candidates, after which the provincial Attorneys-General and the Chief Justice of the court to which the appointment was to be made, as well as the federal minister who came from the region concerned, were usually consulted; and (d) the final selection was laid before the Cabinet for approval and forwarding to the Governor General, in whose name the appointment was made.

The Committee proceeded to assess this process against the background of procedures adopted elsewhere[21] and in the light of its perceived weaknesses,[22] being its 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, and so on. Further shortcomings identified were tax problems encountered by newly-appointed judges, inadequate remuneration of judges and insufficient training for new judges.[23] After surveying the effect of political patronage on judicial appointments (and noting regional variations in the degree

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[17] Which has not been uncontroversial. See eg Mandel *The Legalization of Politics* (1989) and Beatty *Talking Heads and the Supremes* (1990).

[18] See *CBA Report* ch 1. The Constitution Act of 1867 preserved the power to appoint provincial judges (in s 96) for the central government in an attempt to maintain a common standard and preserve judicial independence.

[19] See *CBA Report* 11–12.

[20] Often by making telephonic inquiries: see *CBA Report* ch 4.

[21] See *CBA Report* ch 3.

[22] See *CBA Report* ch 5.

[23] 52.

to which this affects the situation),[24] the Committee reached the following conclusions and recommendations, among others:[25]

(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 consultation 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 in Supreme Court appointments;

(iii) timeous steps to fill anticipated vacancies;

(iv) no role for Parliament in the selection or appointment of federal judges;

(v) to facilitate the process of consultation referred to above, the establishment of Advisory Committees on Federal Judicial Appointments in each province, to nominate candidates for and advise the minister on both provincial and Supreme Court appointments, and consisting of 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 appointed by the governing body of the legal profession and 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"; and

(vi) the stipulation of the following list of "essential qualities" of a potential judge:[26] "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 . . .)"

The chief purpose of these proposals was the removal of the stigma of political patronage which was seen to pervade the appointment of judges in Canada, particularly in the last days of the Trudeau administration,[27] and the most important mechanism for achieving this was the proposed power of *nomination* by the advisory committees. In the event, the Mulroney government rejected these proposals,[28] waiting until 1988 to implement a plan which replaced

[24] Ch 6.
[25] 64–68.
[26] 69.
[27] 9–10.
[28] While apparently continuing to exercise political patronage in appointing judges. See the study of Russell & Ziegel "Federal Judicial Appointments: An Appraisal of the

the Canadian Bar Association's screening committee with provincial committees (constituted superficially along the lines of the advisory committees). Crucially, however, these new committees do *not* have the power to nominate candidates for judicial office.[29]

Under this new system 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.[30] 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.[31] 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 from the Western provinces.[32]

These new committees began operating early in 1989, but so far little is known about their activities, beyond that they initially considered a large number of candidates, many of whom had been "taken over" from the old system.[33] In vetting candidates, the committees are enjoined to use "merit" as their touchstone, 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

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First Mulroney Government's Appointments and the New Judicial Advisory Committees" 1991 41 *Univ of Toronto LJ* 4.

[29] 7.

[30] 27–28. Interestingly, a nominee who is assessed negatively may request an opportunity to "correct or clarify information placed on file" and to comment on the committee's determination.

[31] 28. The government had anticipated that the Meech Lake Accord would regulate this matter. After the lapsing of that accord, the government has issued further proposals for amendment and addition to the Constitution, including the aspect of appointment of Supreme Court judges. It now suggests that the Constitution Act should "provide for a role for the provinces . . . whereby appointments would be made by the federal government from lists of nominees submitted by provincial . . . governments, the individual appointed being acceptable to the Queen's Privy Council of Canada" (ie the Cabinet). See *Shaping Canada's Future Together* Proposal 12, as reported in the *Toronto Globe and Mail* 1991–09–25 A10.

[32] See Lederman *Continuing Canadian Constitutional Dilemmas* (1981) 206.

[33] See Russell & Ziegel 1991 41 *Univ of Toronto LJ* 29–32.

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".[34]

While a more systematic improvement on the former screening function of the Canadian Bar Association committee, the new structure has been described as "deeply disappointing", essentially because of the continued restrictions on the role of the committees.[35] This is particularly evident when the federal approach to judicial appointments is juxtaposed with the innovative mechanisms set up by provincial governments in exercising their power to appoint judges to the provincial courts.

Formally, the procedure follows the same route as at the federal level, in that the provincial Cabinet, acting on the provincial Attorney-General's recommendation, nominates candidates for judgeship, for appointment by the Lieutenant Governor of the province.[36] In most of the provinces, however, a prominent role in the "recruitment and selection" stages of this process is played by provincial judicial councils, which have existed for about the past twenty years. Most of these councils are statutory creations, whose membership is drawn from the ranks of judges, lawyers and lay people. These judicial councils may generally consider nominations for judgeships from any source, as well as looking for candidates themselves, after which they interview and assess the suitability of the nominees. Once this stage has been completed, a short list of names for each vacancy on the Bench is submitted to the Attorney-General, who in practice (though in only one province, British Columbia, by law) confines her/his selection to that list. It seems that this system constitutes a "significant improvement" on the former procedure.

In Quebec,[37] the judicial council function, as described, is discharged by *ad hoc* selection committees, consisting of only the Chief Judge of the forum in which the vacancy exists, a lawyer and a layperson. Vacancies are advertised and those lawyers who apply are interviewed and assessed. The selection committee submits up to three names to the Minister of Justice, who selects one for judicial office: if s/he fails to do so, the position must be re-advertised. Manitoba's Law Reform Commission has recently suggested that that province follow Quebec's model.[38]

Ontario has, in a sense, duplicated the process by having a body to nominate as well as one to review candidates for judicial appoint-

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[34] Set out in a government pamphlet publicising the new scheme—see Russel & Ziegel 1991 4 *Univ of Toronto LJ* 33.

[35] Russel & Ziegel 1991 4 *Univ of Toronto LJ* 34–35.

[36] Much of the detail which follows is based on the *CBA Report* 12–15.

[37] 14.

[38] See the Ontario Judicial Appointments Advisory Committee's *Interim Report* (Sept 1990) 4 (hereafter *JAAC Report*).

ment.[39] The latter function is fulfilled by the Ontario Judicial Council, which since 1968 has interviewed those persons whose names are submitted to it by the Attorney-General, and then commented on their suitability for appointment.[40] The nominating function is exercised by Ontario's Judicial Appointments Advisory Committee, operating since the beginning of 1989 for a three-year trial period but not established on a formal legal basis. The remarkable feature of this Advisory Committee is its membership: six non-lawyers (including the chairperson) and one lawyer, all appointed by the Attorney-General; and three further lawyers, appointed respectively by the Ontario Judicial Council, the provincial Law Society and the provincial section of the Canadian Bar Association.[41] All of these members act in their own time and without compensation.

The Advisory Committee advertises judicial positions and recruits suitable candidates on being notified that an office will be falling vacant. An applicant is required to fill in a personal information form, including details of their community and civic activities, professional experience and participation in professional associations, publications record and her/his view of her/his personal suitability or office, career goals and personal development.[42] Referees are then contacted, discreet inquiries made and confidential interviews held.[43] Ranked recommendations of suitable candidates (normally not more than two or three for each vacancy) are then submitted to the Attorney-General, who, while bound only by honour to do so, has always selected one of the listed candidates, and almost without exception the top-ranked one. S/he in turn refers the selected candidate to the Ontario Judicial Council, which repeats the interview stage, and comments on the candidate to the Attorney-General.[44]

During its first twenty months the Advisory Committee proposed candidates to fill thirty judicial vacancies,[45] of whom only two were not confirmed by the Judicial Council, the rest without exception being appointed by the Lieutenant Governor in Council.[46] Of these 28 appointees, nine (32 %) have been women, while the proportion of female lawyers meeting the statutory requirement of ten years professional experience was probably about 12 %.[47] In the course of

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[39] The *JAAC Report* provides much of the detail which follows. I am further indebted to the chairperson, Prof Peter Russell, for agreeing to see me at short notice, and for his kind advice.

[40] *JAAC Report* 3.

[41] 5.

[42] See the form set out in full in the *JAAC Report* from 35–44.

[43] 12–15.

[44] 15–16.

[45] Out of 233 judges in the Ontario Court of Justice (Provincial Division)—*JAAC Report* 7.

[46] 17.

[47] 10.

its work, the Advisory Committee has developed, as part of its mandate, the following criteria[48] for the evaluation of 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).

While the future of the Advisory Committee is uncertain at this point, the evident success of its operation and the sensitive care with which it has proceeded are instructive for those seeking a more predictable, public and accountable means of appointing judges. The Committee is also refreshingly open about the way it works and the personalities of those who serve on it—it clearly appreciates that public understanding and support are its lifeblood. Having considered the situation in Canada in some detail, I wish to move on to a more cursory review of judicial appointment procedures in other countries.

3 Australia

The Australian Constitution[49] provides that all federal judges be appointed by the Governor General in Council, the effective decision being that of the Cabinet. The Australian Constitution has recently been extensively reconsidered by a Constitutional Commission,[50] one of whose advisory committees focussed on the Australian Judicial System.[51] After paying detailed attention to the Canadian Bar Association Report just considered, the advisory committee was not of the view "that in Australia considerations exist which have given rise to the perceived need for advisory committees in Canada": the group from which judges were appointed was relatively small, and political patronage appeared not to have had a significant part in

[48] 17–19.
[49] Of 1900 s 72(i).
[50] See *Final Report of the Constitutional Commission* (*I* and *II*) Australian Government Publishing Service (1988). The appointment of judges is dealt with in *I* 398–402, largely reliant on the views of an Advisory Committee.
[51] See *Report of the Advisory Committee to the Constitutional Commission—Australian Judicial System* (1987), particularly 69–74.

such appointments in Australia.[52] The committee also thought that Parliament should have no role in judicial appointment, other than the already-existing ministerial responsibility to the legislature.[53] As a result, the advisory committee concluded that no constitutional amendment was necessary in regard to appointment of federal judges, a conclusion with which the Constitutional Commission concurred.[54]

On the other hand, the advisory committee did propose that "less formal steps should be taken to enable appointing authorities to receive well-informed advice upon those best qualified for appointment".[55] Thus it suggested that the federal Attorney-General (a political officer) and her/his advisers should consult "on a confidential basis with the Chief Judge of the court concerned and with the . . . leaders of the most appropriate legal professional organisations" to assess the suitability of a candidate for office.[56] In addition, the advisory committee recommended that the States (of Australia) ought to be consulted on appointments to the High Court (the effective court of final instance in constitutional matters) as many decisions of that court determined the boundaries of power between the Australian Commonwealth and the States.[57] The existing statutory procedure[58] was that the federal Attorney-General was bound to consult with the State Attorneys-General on the filling of a vacancy on the High Court. In fact, this consultation took the form of a letter to the State Attorneys-General requesting the submission of the names of those whom they wished to have considered for appointment.[59] The advisory committee felt that this obligation to consult should be interpreted as including the opportunity for the States not only to propose candidates but also to comment confidentially on persons whom the federal government was intending to nominate.[60] The Constitutional Committee approved of both of these informal suggestions, which it passed on to the Attorney-General for his consideration.[61]

In the Australian States, judicial appointment is by the Governor in Council, again effectively by the Cabinet of the day, with no formal steps, prior to recommendation to Cabinet, required of the State Attorneys-General. Informal consultations vary from state to state and over time. Despite the absence of formal procedures,

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[52] See *Report of the Advisory Committee* par 5.15—5.21.
[53] Par 5.11.
[54] See *Final Report* par 6.162.
[55] See *Report of the Advisory Committee* par 5.22.
[56] Par 5.23.
[57] Par 5.29.
[58] High Court of Australia Act 1979 s 6.
[59] *Report of the Advisory Committee* par 5.31.
[60] Par 5.33.
[61] See *Final Report* par 6.173 and 6.178.

purely political appointments have been rare, and there are examples of the appointment of those whose political sympathies are perceived as being very much opposed to those of the government.[62]

4 England

The key figure in appointments to the English Bench, at High Court and Circuit Court levels, is the Lord Chancellor, who is assisted in the discharge of this personal responsibility by a section within his office, the Judicial Appointments Division. Such appointments are not a matter for discussion at Cabinet. The Prime Minister is responsible for appointments to the Court of Appeal and the House of Lords, usually relying on advice from the Lord Chancellor. The Lord Chancellor, the Permanent Secretary of his department and the head of the Judicial Appointments Division maintain extensive links with the judiciary and practising lawyers in order to keep informed of those barristers suitable for appointment to judicial office.[63]

The task of the Judicial Appointments Division is simplified by the "clubby" atmosphere and close-knit nature of the English Bar, as also the fact that the Division recommends barristers for appointment as Queen's Counsel, which means that some sort of assessment has already been made. This office is therefore engaged full-time in various functions related to the appointment of judicial officers at every level, including interviewing all candidates for permanent positions as Recorders. While political affiliation has declined in overt significance in the past few decades, there can be little doubt that the "old boy" network still exercises a powerful influence in the appointments process.[64]

Radical changes to the constitution of the United Kingdom, including the court structure and the judicial power, have recently been proposed.[65] They bear recounting here because of the substantial political influence[66] exercised by those involved in drafting the proposals, and also the intrinsic significance of the proposals. Essentially it is suggested that the UK have a written constitution, including a justiciable Bill of Rights, that the House of Lords be replaced by an elected Second Chamber, that a system of

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[62] See the *CBA Report* 24.

[63] 17–19. See also Gauntlett 1990 3 *Consultus* 23 for a fuller historical account.

[64] If proof of this was required, one need only note the controversy (indeed horror) which greeted recent attempts by the current (Scottish) Lord Chancellor, Lord Mackay of Clashfern, to appoint more women and blacks as QCs and judicial officers and to restructure the legal profession, including making it possible for solicitors to be appointed to the Bench.

[65] See the Institute for Public Policy Research *The Constitution of the United Kingdom* (September 1991).

[66] Chiefly with the Labour and Liberal Democratic Parties, but moving beyond these circles, through the eminence of most of those who participate in the activities of the Institute.

regional assemblies be established, and that several new commissions be created to ensure the "modernisation" and efficacy of the new constitution. The judicial power receives considerable attention, particularly in the light of the envisaged right of judicial review of legislation.

A Supreme Court of the UK (consisting of the President and ten other Justices) is proposed as the highest court in the land.[67] The Justices shall be selected from persons who have served as judges of a superior court or who, "in the opinion of the United Kingdom Judicial Appointments Commission, have shown outstanding distinction in the practice or teaching of law . . ."[68] The Supreme Court shall be representative of the regions of the UK,[69] and shall have wide-ranging appellate (and limited original) jurisdiction.[70] Further national courts for England and Wales, Scotland and Northern Ireland are provided for.[71]

As regards judicial appointments, the following structures and procedures are mooted: the creation of a UK Judicial Appointments Commission,[72] comprising representatives[73] from the Judicial Services Commissions to be set up[74] in England and Wales, Scotland and Northern Ireland; the establishment, in addition to such Judicial Services Commissions, of Judicial Councils for each of England and Wales, Scotland and Northern Ireland;[75] the appointment of the President and other Justices of the Supreme Court by the Head of State on the advice of the Prime Minister "who shall select one of two names submitted by the . . . Judicial Appointments Commission";[76] a crucial role for the respective Judicial Services Commissions in the appointment of judges[77]—the Minister of Justice[78] or Chief Executive[79] shall appoint one of the two persons (in the case of superior courts) or the person (in the case of intermediate or inferior courts) recommended to her/him by the Commission:[80] in discharging such a function, the Commissions[81] "shall adopt procedures for the identification of candidates for judicial office which will ensure, so far as practicable, that adequate numbers of candidates of both

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[67] See *The Constitution of the UK* a 93.1 and 96.1.
[68] A 96.2.
[69] A 96.3: at least five justices drawn from England and Wales, at least two from Scotland and at least one from Northern Ireland.
[70] A 98 and 99.
[71] In Schedule 4 parts 1 2 and 3 respectively.
[72] See *The Constitution of the UK* a 102.1.
[73] Ten from England and Wales, four from Scotland, two from Northern Ireland.
[74] A 103.1.
[75] A 103.1.
[76] A 96.4.
[77] A 104.1 and Schedule 4.
[78] In the case of England and Wales: Schedule 4 a 3.1.
[79] In the case of Scotland and Northern Ireland: Schedule 4 a 10.2 and 16.1.2.
[80] Schedule 4 a 3 10 and 16.
[81] A 104.2.

sexes and from diverse racial, religious and social backgrounds are considered for appointment"; and the stipulation of some general qualifications for appointment as a judge, which are able to be supplemented by Act of Parliament or the Assemblies for Scotland and Northern Ireland.[82]

While the membership and structure of the Judicial Services Commissions for Scotland and Northern Ireland are left to future acts of their National Assemblies,[83] details are provided as regards the Judicial Services Commission for England and Wales.[84] Such a body would consist of: a lay president, five judges (at least one justice of the Court of Appeal, one justice of the High Court and one judge of an intermediate court) elected by all judges (in a manner to be prescribed by Parliament), two persons "who have regularly exercised rights of audience in the superior courts for not less than 15 years", one lay member resident in Wales, and six other lay members, "broadly representative of the community". The non-judicial members "shall be appointed by the Minister of Justice after consultation with the Master of the Rolls and the Chief Justice of the High Court", the lay members being selected from a list of names submitted by the Public Services Commission. In addition, provision is made for Welsh and Regional Appointments Committees (for the proposed twelve regions within England), with fewer members but composed of similar categories and proportions of persons as just described.

For a tradition-bound society such as Britain, these changes are nothing short of revolutionary, and they remain at present in the realm of theory. Whether a change of government will lead to their implementation is itself doubtful, although aspects of the proposals may well be enacted. Nevertheless, the suggested scheme is remarkable for its boldness, clarity and thoughtfulness of detail; on the other hand, we in South Africa have produced nothing approaching this quality, despite being faced with a much more practical and urgent challenge.

5 United States of America

The President of the USA appoints about 500 federal judges, subject to Senate approval, to the Supreme Court, the Courts of Appeal of eleven regional circuits and District Courts exercising federal jurisdiction throughout the 50 states, as well as the many specialised federal tribunals.[85] No specific qualifications are laid down and party politics plays a significant role, especially in regard

[82] Schedule 4 a 2 10.1 and 15.
[83] A 103.2.2.
[84] Schedule 5.
[85] See the *CBA Report* 20 and Nienaber 1991 4 *Consultus* 19.

to courts high in the hierarchy.[86] Various customary practices exist in relation to nomination of federal judges to office in the states, and those nominated are screened by the Justice Department, a White House committee, the American Bar Association and the Federal Bureau of Investigation.[87]

At state level, there is no uniform method of appointing judges, though most states use some form of the electoral process, as well as the "Missouri plan". This scheme, devised in 1913, provides for the drawing up of a short list of qualified candidates for the Bench by an impartial commission (on which lawyers and lay people are represented), from which list the appropriate state official selects a nominee for appointment. After several years in office, the electorate is required to vote on the simple question of whether s/he should continue as a judge—there is no direct competition or political partisanship involved. If rejected, the process is repeated; if confirmed s/he remains a judge for a relatively long term, after which s/he may seek re-confirmation. No state which has adopted this plan has ever returned to a direct election system, and the quality of appointees is acknowledged to have improved.[88]

While there is much more detail which could be added to this account, it is perhaps sufficient to indicate that the American experience reflects the necessity of mediating popular participation in the appointment of judges in some way. I am not aware of anyone who is seriously arguing for direct election of the judiciary in South Africa, but if there is such a school of opinion, it will need to devise a mechanism to achieve this mediation of the public will in some manner.

6 New Zealand

As the Commonwealth country whose constitution has followed Westminster most closely, it should not be a surprise that the formal appointments to the Bench are made in the name of the Queen's representative, the Governor General, on the recommendation of the Cabinet. Behind this façade, however, there appears to be a smooth and effective informal procedure which is followed prior to the appointment of the Chief Justice and judges of the High Court, involving nomination and consultation between 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. The key figures in this process are the judges and the Attorney-General. Political patronage appears to play an

[86] The Senate confirmation hearings of Judge Bork and Judge Thomas, both nominated for the Supreme Court in the past few years, were vivid, if distressing, demonstrations of this fact.

[87] See the *CBA Report* 21.

[88] 22–23.

insignificant role in judicial appointment, largely due to the small size of the pool from which candidates can be drawn and the intense criticism that would result from such manipulation.[89]

7 Continental Europe

Most of the states of Europe follow the model of a professional judiciary which has undergone specialized training and is regarded as a life-long career, starting as a low-level functionary in the ministry of justice, and being promoted in time to judicial office with greater degrees of seniority and responsibility. It is unlikely (indeed, it would be revolutionary at superior court level) that a future South African government would throw the present system entirely overboard and move to the European model. For that reason, I will pay no further attention to it—although it might be instructive as regards the magistracy in this country.

8 Israel

Israeli judges are appointed by the head of state, the President, on the recommendation of a statutorily-created appointments committee. This committee is composed of the president of the Supreme Court and two other Supreme Court judges (elected by all the judges); the Minister of Justice and one other minister elected by the government; two members of the Knesset (Parliament) elected by that body by secret ballot; and two practising lawyers elected by the council of the Israel Bar Association.[90] Thus all three branches of government have a say in the process, while none can control it directly.

9 Namibia

Namibia has followed Israel in many respects in its constitutional provisions relating to the appointment of judges. Judges of the superior courts are appointed by the President on the recommendation of the Judicial Service Commission.[91] This body consists[92] of "the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation . . . representing the interests of the legal profession in Namibia".

10 Nigeria

The Constitution of the Federal Republic of Nigeria of 1979 provides that justices of the Supreme Court and the Federal Court of

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[89] This account is based on the *CBA Report* 25–26.
[90] 28.
[91] *The Constitution of the Republic of Namibia* (1990) a 82(1).
[92] A 85(1).

Appeal, and judges of the Federal High Court shall be appointed by the President on the advice of the Federal Judicial Service Commission.[93] Approval of a simple majority of the Senate is required for the appointment of justices of the Supreme Court,[94] as well as for appointments to the Chief Justiceship[95] and the Presidency of the Federal Court of Appeal.[96] The Federal Judicial Service Commission is comprised of the following:[97] the Chief Justice of Nigeria (as chair); the President of the Federal Court of Appeal; the federal Attorney-General; two persons, qualified to practise as a legal practitioner in Nigeria for not less than fifteen years, from a list of not less than four such persons recommended by the Nigerian Bar Association; and two other persons, not being legal practitioners, "who in the opinion of the President are of unquestionable integrity".

A similarly-structured system of appointments and Judicial Service Commission[98] applies at State level in regard to the appointment of judges to the State High Court,[99] the Sharia Court of Appeal of the State,[100] and the Customary Court of Appeal of the State.[101] The Governor of the State acts where the President acts at a federal level, and the House of Assembly of the State substitutes for the federal Senate where appropriate. It is interesting to note that, of the at least fifteen justices of the Federal Court of Appeal, at least three must be learned in each of Islamic personal law and customary law.[102]

11 Jamaica

The Jamaican Constitution[103] of 1962 provided for judicial appointments in the following way: Both the Chief Justice of the Supreme Court and the President of the Court of Appeal were to be appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.[104] The other judges of the various superior courts were to be appointed by the Governor-General on the advice of the Judicial Service Commission.[105]

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[93] See the Constitution of the Federal Republic of Nigeria (1979) s 211(2) 218(2) 229(1).
[94] S 211(2).
[95] S 211(1)—otherwise in the discretion of the President.
[96] S 218(1).
[97] Schedule 3 part I D.
[98] Schedule 3 part II D.
[99] S 235(1).
[100] S 241(1).
[101] S 246(1).
[102] S 217(2)(b).
[103] Officially the Jamaica (Constitution) Order in Council 1962.
[104] S 98(1).
[105] S 98(2). See the discussion of these provisions in Barnett *The Constitutional Law of Jamaica* (1977) 318–319.

The Judicial Service Commission was also provided for in the Constitution.[106] It is comprised of the Chief Justice as Chair, the President of the Court of Appeal and three "appointed" members, each of whom is appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. One of the "appointed" members must have held office as a judge of a Commonwealth superior court and the other two must be chosen from a list of six persons submitted by the General Legal Council.[107] There are several other qualifications and details of service prescribed in section 111 of the Constitution,[108] which need not detain us here, but point to the care with which the constitution of such bodies must be drafted.

12 Malaysia

The Constitution of Malaysia[109] stipulates that the Lord President of the Federal Court, the Chief Justices of the High Courts and other judges of those courts are to be appointed by the Yang di-Pertuan Agong (the supreme Head of State), on the advice of the Prime Minister, and having consulted the Conference of Rulers.[110] This latter body is composed of the Rulers or Governors of the constituent states of Malaysia and stands outside federal and state legislative and executive organs, yet can block certain bills, has to be consulted on appointments, can take a range of executive decisions and can deliberate on anything.[111]

Before tendering his advice, the Prime Minister is bound by the Constitution to consult the Lord President and the Chief Justices of the High Courts, in the appropriate circumstances.[112]

13 India

The Indian Constitution provides for the appointment of the Union judiciary as follows:[113]

> '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 . . ."

As regards appointment to the Bench of the High Courts of the constituent States of the Union, the President acts in consultation

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[106] S 111(1).
[107] S 111(3)(11).
[108] See Barnett *The Constitutional Law of Jamaica* 320.
[109] Of 1957, as amended on several occasions, most notably in 1963 and 1965. See Sheridan & Groves *The Constitution of Malaysia* (1967) 2–4.
[110] See the Malaysian Constitution a 122B(1).
[111] A 38 and the Fifth Schedule; Sheridan & Groves *The Constitution of Malaysia* 7.
[112] A 122B(2) (3) and (4).
[113] The Constitution of India (1947) a 124(2).

with the Governor and Chief Justice of the State concerned, and the Chief Justice of India.[114]

14 Other African States

If one excludes the independent states of Africa which were formerly the colonies of France, Spain, Portugal and Belgium, and concentrates on the members of the British Commonwealth, the constitutional provisions at independence as regards appointment to the judiciary are very much the same. The following tabulated information[115] shows that all of these countries adopted the Judicial Service Commission model (with slight variations in membership) but that almost all of them provided for the Head of State alone (or acting in consultation with the Head of Government) to appoint the Chief Justice. While this information is dated and there is no indication of how the constitutional arrangements have worked out in practice, it at least signifies the intent of the makers of the constitution, which is, after all, the stage which we have reached in South Africa.

15 International norms

Several international bodies and conventions have adopted guidelines on the position of the judiciary in government, including methods of appointment. It might be useful to note some of the standards and principles proposed:

(i) The World Conference on the Independence of Justice of 1983, which was attended by an extraordinarily wide range of lawyers' organisations, 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[116] 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.

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[114] The State Judiciary is discussed at length in Seervhai *Constitutional Law of India II* 2 ed (1976) ch XXVI.

[115] Drawn from *Constitutions of African States I* and *II* (1972), prepared by the Asian-African Legal Consultative Committee, New Delhi.

[116] See Section II National Judges.

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."

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.[117]

(ii) In late 1986 and early 1987 two seminars with their focus on the independence of judges and lawyers were held in English-speaking Africa.[118] Each seminar reached certain conclusions and recommendations, some of which relate to the appointment of judges, as follows:[119]

"*Qualification, 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:[120]

"*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 Court should always be made by the executive arm of government on the advice 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.

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[117] See principle 10. The UN General Assembly "welcomed" the principles by resolution later in 1985 and invited governments to respect them. The Universal Declaration and the Basic Principles are published as Annex II and I (respectively) by the International Commission of Jurists *The Independence of the Judiciary and the Legal Profession in English-speaking Africa* (1987) 157–184 (hereafter *IJLPEA*).

[118] The seminars were convened by the Centre for the Independence of Judges and Lawyers and the African Bar Association. They were held in Lusaka, Zambia, in November 1986 and in Banjul, The Gambia, in April 1987.

[119] Which arose out of the Lusaka Seminar: see *IJLPEA* 83.

[120] See *IJLPEA* 144–145.

21 . . .
22 . . .
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."

16 Conclusions and some proposals

This article has attempted to put as much comparative information, on methods of appointing judges in a range of countries, in as digestible a form as possible. While it is hoped that it will have produced a series of different reactions from the reader, from full approval to outright horror at the methods employed in the countries surveyed, it seems that at least the following features will form an indispensable part of any such process in a future South African constitution.

First, it is clear that the present informal, secret and unaccountable method employed in South Africa will have to disappear, not only because it is secret and substantially unregulated by the law, but also because it is susceptible to abuse and political pressure and because it has been abandoned in almost every other country. Even in its place of origin, England, its days appear to be numbered.

Second, the establishment of *some form* of advisory body to participate in the process appears inevitable and highly desirable. If one goes by what has occurred, at least in form, in most newly-independent nations over the past 30 years or so, a Judicial Service Commission (JSC) seems to be the best sort of institution, especially because its brief usually extends beyond that of mere advice on appointments to general supervision of the administration of justice in the superior courts.

Third, it seems that the executive remains a crucial part of the appointment process, but that the formal and public involvement of the legislature (as in the United States) is not favoured by many other systems. On the other hand, there is no reason why the legislature should not be involved in some other way, for example by its representation on the JSC or by some scrutinising role for a Justice Standing Committee of Parliament. Indeed, with a view to popular legitimation of any new appointment mechanism, some form of legislative involvement is probably indispensable.

Fourth, direct popular involvement via the electoral process appears to be rejected as a means of appointing judges, at least at the level of the superior courts. It may well be that at community and magistrates' court levels a degree of expression could be given to local sentiment, but that is a separate issue which is beyond the scope of this article.

Fifth, on the assumption that some sort of JSC will be created, the question of its composition and powers arises. Despite the trend to

relatively small and lawyer-dominated bodies in Commonwealth Africa, political conditions in South Africa are likely to dictate a larger committee with its members drawn from the judiciary, lawyers' professional organisations, public representatives and the community generally. "Non-legal" members may even be in the majority, and it would be important, again with a view to popular legitimacy, that fair representation of regions, gender and class be attained. Some will argue that, bearing in mind the attitudes of most South African lawyers and judges, a lay majority would be non-negotiable.

As regards function, the preferred option in my view is the one implemented recently in Ontario, and described above. This would involve, on a national basis, the setting up of an advisory body in each division of the Supreme Court to "recruit and select" a short-list of potential candidates for the Bench, leaving it to the Minister of Justice to refer those whom s/he favours for further review by the JSC. The executive would then be bound to appoint one of the selected and approved candidates. This might seem unduly expensive and complex, but the gains in legitimacy in the regions and the likely widening of the pool of possible candidates should far outweigh these costs, especially since the signs are that the Bar will no longer be the exclusive source from which judges will be drawn.

Sixth, attention will have to be paid to the criteria which will be used in the selection of judges. It is not known what criteria are presently used, but in the future it will be imperative that those recommended by the Banjul seminar be the minimum requirement, while the fuller set of guidelines used by the Ontario Judicial Appointments Advisory Committee provides a desirable goal. It must be stressed that, while the criteria employed and the mechanisms of appointment would be public knowledge, the actual discharge of any JSC or appointment body's functions must be marked by an exceptionally high degree of honesty and confidentiality, otherwise the quality of those appointed and public trust in the system are bound to decline.

Finally, a judgeship must be a sought-after position, both financially and in terms of status. Special attention will have to be paid to the difficulties which can be encountered at the stage of moving from one career to that of judge, so that the adjustment is a smooth one, both financially and in other respects. This might mean that a fair degree of initial training and continuing judicial education is appropriate—a common occurrence in many other countries.

These are some of the matters which require urgent and detailed attention. While a fair measure of flexibility will be needed in the transition to and early stages of a new constitution, it is imperative that the negotiating parties and all lawyers participate in an informed discussion of the above issues, so that the general public can know and understand the workings of the most neglected branch of government.

Country	Official Appointer of Judges	On the advice of	Is there a Judicial Services Commission	Composition of Judicial Services Commission	Date of Constitution	Relevant Articles in Const
Botswana	President	JSC	Yes	(a) CJ of the High Court (b) Chair of the PSC (c) one other appointed by decsn of (a) and (b)	1966	97 101 104
Gambia	Governor-General	Prime Minister for CJ and President of the Court of Appeal; All other judges—JSC	Yes	(a) CJ (b) Chair of the PSC (c) one other appointed by the Governor-General on the advice of the CJ	1965	89 94 103
Ghana	President	Council of State for CJ; All other judges—JSC	(Yes)	(a) CJ (b) the most senior judge of each of the Supreme Court, Court of Appeal and High Court (c) A-G (d) three practising counsel appointed by Ghana Bar Assn; (e) one person not a counsel appointed by the Pres	1969	115 119
Kenya	President	No one, for appt of CJ; All other judges—Judicial Council	Yes	(a) CJ (b) Chair of the PSC (c) two persons designated by the Pres from judges of the High Court and Court of Appeal	1963	61 68
Lesotho	King	Prime Minister for CJ and President of the Court of Appeal; All other judges—JSC	Yes	(a) CJ (b) Chair of the PSC (c) one other person appointed by the King on the advice of the Chief Justice	1966	111 116 125
Malawi	President	No one, for appt of CJ; All other judges—JSC, but non-binding advice	Yes	(a) CJ (b) Chair of the PSC (c) a judge appointed by the President after consultation with the CJ	1966	63 71
Mauritius	Governor-General	Prime Minister for CJ; All other judges—JSC	Yes	(a) CJ (b) the senior puisne judge (c) Chair of the PSC (d) one other person appointed by the Governor-General after consultation with the CJ	1968	77 85
Swaziland	King	JSC	Yes	(a) CJ (b) Chair of the PSC (c) one other person appointed by the King, on the advice of the CJ, from holders or former holders of high judicial office	1968	98 106 113

Country	Official Appointer of Judges	On the advice of	Is there a Judicial Services Commission	Composition of Judicial Services Commission	Date of Constitution	Relevant Articles in Const
Tanzania	President	No one, for appt of CJ; All other judges—CJ	(Yes)	(a) CJ (b) puisne judge of the High Court, appointed by Pres after consultation with CJ (c) one other person appointed by the Pres (This JSC only involved with appointment of court officials and magistrates)	1965	57 60
Uganda	President	No one, for appt of CJ; All other judges—JSC	Yes	(a) CJ (b) A-G; (c) up to three members appointed by the President	1967	84 90
Zambia	President	No one, for appt of CJ; All other judges—JSC	Yes	(a) CJ (b) Chair of the PSC; (c) a judge or judge of appeal designated by the CJ (d) one other person appointed by the Pres	1964	99 104

Abbreviations: CJ: Chief Justice; JSC: Judicial Service Commission;
PSC: Public Service Commission;
A-G: Attorney-General; Pres: President;
appt: appointment;
decsn: decision

OPSOMMING

In hierdie artikel word prosedures waarvolgens regters in verskillende lande aangestel word vergelykenderwys ondersoek. Die skrywer maak die volgende aanbevelings betreffende 'n toekomstige bedeling in Suid-Afrika:

1. Dat weggedoen moet word met die huidige informele en geheime aanstellingsprosedure en dat daar kanale moet wees waardeur diegene wat aanstellings maak, tot verantwoording geroep moet kan word.
2. Dat 'n adviserende liggaam moet deelneem aan die aanstellingsproses en dat noulettend aandag gegee sal moet word aan die samestelling en magte van hierdie liggaam.
3. Dat oorweeg moet word om ook aan 'n wetgewende liggaam soos die parlement sekere funksies in verband met regterlike aanstellings te gee.
4. Dat duidelike riglyne neergelê word vir die keuring van kandidate vir die regtersamp.
5. Dat die vergoeding sowel as die status verbonde aan die regtersamp sodanig moet wees dat dit 'n posisie sal wees waarna gestreef word.

Die skrywer oorweeg ook die moontlikheid dat regters by wyse van populêre stemming aangewys kan word, maar is nie ten gunste daarvan nie.


JUTA
Est 1853