



DEMOCRATIC GOVERNANCE AND RIGHTS UNIT
UNIVERSITY OF CAPE TOWN

Submission to Parliament:

**COMMENT ON PRIVATE MEMBER'S BILL: DRAFT CONSTITUTION
NINETEENTH AMENDMENT BILL [PMB7 – 2013]**

INTRODUCTION

1. The Democratic Governance and Rights Unit ("DGRU") is an applied research unit based in the Department of Public Law at the University of Cape Town. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research on the judicial appointments process and on the future institutional modality of the judicial branch of government.
2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU recognises the importance of ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission research reports on candidates for judicial appointment, and to DGRU researchers attending, monitoring and commenting on the interviews of candidates for judicial appointment.¹

¹ These reports are available at <http://www.dgru.uct.ac.za/reports/researchreports/>

3. Through this work, the DGRU has had occasion to monitor the work of the Judicial Service Commission (JSC) closely, particularly through DGRU staff members regularly observing the JSC's public interviews of candidates for judicial appointment. The DGRU has monitored and commented on the JSC's sessions from September 2009 onwards. Drawing on these observations and our research in the area of judicial governance, this submission offers some thoughts in the Private Members Bill under consideration.

GENERAL COMMENTS

4. The Bill identifies three main areas of concern with the judicial selection process, which it seeks to address²:
 - a. The need for clear criteria for appointment;
 - b. The need for impartial selection processes; and
 - c. The need for a change in the composition of the Judicial Service Commission ("JSC") to reduce its size "and the political influence perceived to affect its decisions."
5. The Bill grounds its approach in the National Development Plan. We strongly agree that clear appointment criteria and an impartial selection process are critically important to an appointments' process that allows the best possible candidates to be appointed to the judiciary.
6. It may be, however, that it is not possible to enshrine these aspects of a strong appointments process in a constitutional amendment. Whilst we have concerns with many aspects of the appointments process at present, a constitutional amendment would provide a framework that binds both this and other JSCs in the future, and, subject to obtaining the necessary majorities for further amendment in the future, may constrain a future JSC's response to changing situations. This might have the unintended consequence of binding the JSC over the long term in a way that is unduly, and unhelpfully, inflexible. It may be in some cases more suitable to regulate specific details of the JSC's process through ordinary legislation.
7. Ultimately, a credible and effective appointments process will depend on the individuals entrusted with judicial selections. If – without making any insinuations about past or present members of the JSC – those members are not committed to appointing competent, independent-minded judges who are committed to upholding the Constitution, then such judges will not be appointed, regardless of how carefully the Constitution is amended.
8. We also agree that consideration should be given to reducing the JSC's size, and amending its composition. At the same time, we recognise that this issue is a complex one involving balancing issues such as efficiency and broad representation. In this submission, we seek to add further considerations to the debate on this issue.

² Government Gazette 28 June 2013, page 3.

9. Against the background of these broad considerations, we turn to make submissions on the specific amendments proposed in the Bill.

Clause 1

10. This clause would amend the operative provision of s 174(1) of the Constitution, and add three further clauses amplifying the section.

New section 174(1)(a)

11. This subsection would retain the current s 174(1)'s requirement that an appropriately qualified and fit and proper person may be appointed as a judicial officer. It adds an effective requirement that an appointee be a South African citizen. As 174(1) currently stands, the only citizenship requirement is that judges of the Constitutional Court be South African citizens.
12. We have previously raised concerns about the apparent hostility of some members of the JSC to appointing judges who hold dual citizenship, i.e. are citizens of South Africa and another country. We have pointed out that neither the Constitution nor any other law prohibits the appointment of dual citizens to the bench, and that there are no sound reasons to preclude such appointments. However, we do not have any principled difficulty with the proposed amendment, which in our view does not provide any barrier to the appointment of dual citizens.

There is no good reason why citizenship of South Africa should not be required, although we continue to maintain that there should be no prohibition on the appointment of judges who happen to hold multiple citizenships. It is anomalous to require citizenship specifically for the Constitutional Court, and not for other courts.

New subsection 174(1)(b)

13. This subsection would provide that the determination as to whether a candidate is appropriately qualified "must be made with due regard to demonstrable capability to perform judicial functions."
14. This would certainly be a desirable factor to take into account. However, the formulation does leave open certain questions. What level of scrutiny does "due regard" entail, and to what extent does it allow for additional factors to be taken into account in determining "appropriately qualified"? How do candidates' academic qualifications filter in to this analysis? How is the capability to perform judicial functions to be demonstrated? How should the factor of 'potential' be considered by the JSC when having 'due regard to demonstrable capability'? It is one thing to constitutionalise this requirement, but (as discussed above) how effective it is likely to be in ensuring that the best judges are appointed remains dependent on how the provision is interpreted by members of the JSC.
15. Furthermore, what constitutes "judicial functions" may also become contested, as much as it might seem to be self-explanatory. As illustrated by the contention over the JSC's September 2010 criterion, alluded to in the covering note to the Bill, there is not a clear acceptance and agreement around what we expect our judges to be.

16. It may be that this criterion would be better placed in ordinary legislation or in further criteria developed by the JSC itself.

New subsection 174(1)(c)

17. This clause would appear to provide for greater constitutional guidance in determining whether a candidate for judicial office is “fit and proper”, in that the proposed amendment proposes to add that the assessment must be made “with due regard to their demonstrated commitment to Constitutional values, professional conscientiousness and personal integrity.”
18. Subject to some of the concerns about the wording of the proposed s 174(1)(b) which are also applicable here, and to our general concern about “over-constitutionalising” the appointment criteria, we would support this proposed new subsection in principle. The listed criteria are, in our view, all relevant to determining whether a candidate is fit and proper. However, we would also recommend that the ‘list’ be an ‘open’ one, to enable the JSC to add more detailed criterion to ensure that it is clear about the rational basis for any judicial appointment. In other words, we would like the JSC to be able to have the scope to develop further criteria to the (good) criteria found in the proposed amendment.

New subsection 174(1)(d)

19. This clause would require that “all candidates for judicial office must be assessed equally.”
20. We have had occasion to criticise the JSC for scrutinising candidates unequally during the public interview process, and we certainly take the view that treatment of candidates should be procedurally fair in all respects. However, to say that all candidates must be assessed equally invites difficulties, especially when applying section 174(2) of the Constitution. Equal treatment of candidates runs the risk of becoming a loaded term when not all candidates have had similar career opportunities, and when s 174(2) requires that transformative issues be taken into account.
21. This is not to say that issues such as legal experience and technical skills and competence should not be taken into consideration – indeed, they must be (in order to satisfy the constitutional criteria of ‘fit and proper’). And candidates must be treated fairly, but they must also be assessed within the context of s 174(2), which may mean that, if a choice is to be made between two candidates who are both qualified for appointment in terms of the existing s 174(1), the decision may be tipped in one of the candidates’ favour by their race or gender. Arguably then the candidates are not “assessed equally” in terms of the proposed subsection, and yet this is what the Constitution as it currently stands would require.
22. This illustrates the difference between formal and substantive equality. The difference is explained thus by Currie and De Waal:

“Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike. Substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.”³

23. Currie and De Waal argue that formal equality “does not take actual social and economic disparities between groups into account”, whereas substantive equality requires these actual conditions to be taken into account “in order to determine whether the Constitution’s commitment to equality is being upheld.” They further argue that, in the context of the principles and aims of the Constitution and the historical inequality which it seeks to overcome, “a purely formal understanding of equality risks neglecting the deepest commitments of the Constitution.”⁴

24. The jurisprudence of the Constitutional Court supports an approach of substantive equality. In *President of the Republic of South Africa v Hugo*,⁵ the court emphasised the need:

“[T]o develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.”

25. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at paragraph 26, and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004(4) SA 490 (CC) paragraph 74.

26. In light of these considerations, we think that this clause ought not to be included. Whilst we are entirely in support of efforts to ensure that the JSC treats candidates fairly, we are not convinced that this proposed amendment is the best way to do so, and it runs the risk of being in tension with an existing subsection of the Constitution (section 174(2)).

27. If, however, the underlying purpose of the proposed amendment is not so much ‘equal treatment’ as procedural integrity, to ensure that, for example, similar candidates are given the same or equivalent opportunity to present their credentials to the JSC, and to be subjected to similar levels of questioning, then it relates to an urgent and much-needed reform of the JSC process. Again, however, it must be questioned whether such a provision should be appropriately be enshrined in the constitution.

Clause 2

28. This clause would make various amendments to the size and composition of the JSC. We make some specific comments on each of the proposed amendments below, followed by more general comments on the desirability or otherwise of reducing the size of the JSC.

³ Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 5th edition (2005), pages 232 – 233.

⁴ *Ibid.*, page 233.

⁵ 1997 (4) SA 1 (CC), paragraph 41.

New section 178(1)(h)

29. This amendment would reduce the number of representatives from the National Assembly from six to four, and includes a stipulation that those representatives are not also members of the executive. The existing requirement that at least three of the six members be members of opposition parties is also amended, so that the new subsection would require that two of the four members of the NA be from opposition parties.
30. It should be noted that this does not have the effect of increasing the proportion of representation by opposition parties, which remains at 50% in either scenario.
31. We support the suggestion that members of the NA not include members of the executive. In the JSC's current format, two of the NA representatives are also deputy ministers. Without seeking to impugn the integrity of either member, we submit that this is an undesirable situation, and not what was intended by the Constitutional drafters. The executive is already represented by the Minister of Justice, who serves on the JSC *ex officio*, and the President also is empowered to appoint four (subject to subsequent amendments) members of the commission in terms of s 178(1)(j). The President also has a significant role in the appointment of the Chief Justice and the President of the Supreme Court of Appeal, who are both *ex officio* members of the JSC.
32. It is therefore our submission that having representatives of the National Assembly on the JSC who are also members of the executive by virtue of being Deputy Ministers gives the executive additional representation on the JSC that was not intended by the drafters of the Constitution. We therefore support this aspect of the proposed amendment.

New section 178(1)(i)

33. This subsection would halve the number of representatives of the National Council of Provinces from four to two, and introduces a requirement that one of these be a member of an opposition party.
34. It should be noted that, unlike the equivalent proposed amendment in respect of the NA, this proposal would increase the opposition representation on the JSC. Currently, the Constitution includes no requirement for opposition representation among the NCOP representatives, and all the NCOP representatives are indeed (according to parliament's website) from the governing party.
35. If these proposals were adopted, and 2 representatives from each of the NA and the NPA were removed, the size of the core of the JSC (as found in section 178(1)(i) – (j)) would be reduced from 23 to 19. We discuss issues relating to the size of the JSC in more detail below.

New section 178(1)(j)

36. This subsection would reduce the number of commissioners designated by the President from four to two, neither of whom could be political office bearers, and would also constrain the types of appointments in which the remaining appointees would be involved. The designated commissioners would only form part of the JSC when the commission advised

national government in terms of section 178(1)(5), or when it considers appointments other than the Chief Justice, Deputy Chief Justice, and other judges of the Constitutional Court; and the President and Deputy President of the Supreme Court of Appeal.

37. We have no principled difficulty with the reduction of the number of these commissioners. As discussed above, the executive does already have significant representation on the JSC, and if reducing the size of the JSC is indeed to be a desired outcome, this would be a sensible area in which to reduce the JSC's size (if these and the reductions to the number of NA and NCOP representatives were implemented, the size of the JSC would be reduced to 17).
38. Removing the Presidential appointees from the JSC when the President exercises a discretion over the appointment⁶ has a logical appeal, but we are not sure that the assertion that the presidential appointees are "superfluous"⁷ is inevitably correct. A commissioner who is a presidential appointee might bring tremendous insight into assessing the merits, say, of candidates to be appointed to the Constitutional Court. Imagine, for instance, that the President designated a retired Constitutional Court judge to be a member of the JSC under s 178(1)(j). It would seem a waste not to be able to make use of that person's insights. Concerns that the executive would gain undue influence over the process of appointments where the President exercise a discretion would be mitigated by the reduction of the number of these commissioners from four to two.

General comments on the size of the JSC

39. It is instructive to consider comparative institutions. Annexure 1 to this submission sets out details of the size and composition of equivalent organisations to the JSC in other jurisdictions. The jurisdictions surveyed are a random sample and include both common law and civil law jurisdictions. We believe that two major themes are important.
- a. First, it is noticeable that the South African JSC is large compared to other institutions.⁸ Indeed, the JSC comprises more members than any of the other institutions surveyed bar the Italian institution. The JSC will generally consist of between 23 – 25 members, depending on the appointment being made, and it may rise as high as 27 for appointments to the Labour Court (where the Judge President and up to three NEDLAC members are present) and certain High Courts (for example Gauteng, where a Judge President is present, as well as representatives of the provincial premier from Gauteng, Limpopo and Mpumalanga).
 - b. Second, it is striking that the South African JSC has a relatively low number of judicial members. Three or four judges are members of the JSC, depending on the court in question – for high courts, the judge president is required to sit in terms of section 178(1)(k) of the Constitution.

⁶ See paragraph 2.2.5 of the Memorandum on the Objects of the Bill.

⁷ *Ibid.*

⁸ See the Country Comparison table at the end of the Annexure.

- c. It is notable that many other of the comparative institutions have a significantly greater proportion of judges. To highlight some examples:
 - i. 3 out of 9 in Israel;
 - ii. 4 out of 11 in Kenya;
 - iii. 5 out of 9 in Malaysia;
 - iv. 3 out of 8 in Nigeria; and
 - v. 6 out of 13 in Northern Ireland.
 - d. Indeed, Sri Lanka had only judges on its 3 person body. However, we would not support such an extreme approach. It would seem to us to carry potential dangers of making judicial appointments a closed shop, subject to good relations with a small group of individuals who may come to wield disproportionate power over the process.
 - e. Yet there does seem to be merit in exploring ways of getting greater judicial representation on the JSC. Judges, in theory at least, should know better than anybody what qualities to look for in prospective candidates, and should be best placed to identify them.
 - f. We would therefore urge that, if the composition of the JSC is indeed to be subject to successful constitutional amendment, such an amendment should go beyond the proposals contained in the Bill and ways should be explored of bringing retired judges onto the JSC.
 - g. This could be done in various ways. One possibility could be to have the previous Chief Justice and/or President of the Supreme Court of Appeal serve on the JSC by virtue of having previously held that position. We recognise that the possibility for personality clashes, may exist here, but on the other hand it may assist with ensuring a degree of continuity of approach. The tenure of a retired judge on the JSC could also be limited to avoid placing an undue burden on them.
40. We would, therefore, support the idea of reducing the size of the JSC. It is difficult to assess to what extent the size of the JSC hampers its ability to fulfil its mandate optimally. Not being party to the JSC's closed deliberations and discussions, one is forced to speculate, but it does seem reasonable to suggest that the JSC's size hampers it from operating as efficiently as it might.
41. The JSC is a large organisation, comparatively speaking, and it may well be that a smaller size will make it an organisation better able to focus and find consensus in fulfilling its constitutional mandate.
42. At the same time, we acknowledge that some degree of 'outsider' input on selections to the judiciary is very important, in an effort to ensure diversity of insights and to prevent an 'old

boys club' taking root. And, in light of the power of the courts to declare legislation or government conduct unconstitutional, it would in our view be unrealistic to attempt to deny any role or input to the political branches of government in making appointments to that judiciary.

43. Furthermore, we suggest revisiting the composition of the JSC even further, by bringing in retired judges.
44. How then can the size of the JSC be reduced if, as we suggest, space should be found for additional members? We are wary of making inflexible suggestions on this point. Clearly careful balancing needs to be done. Several possibilities might be considered, but many will have their own downsides. Consideration might be given to Dispensing with commissioners designated by the President altogether. Numbers could be reduced by decreasing the number of legal representatives on the JSC, but such a proposal would raise strong concerns about reducing the input of such a key group of stakeholders, and it might cogently be argued that the legal profession ought to have even greater representation. These considerations illustrate that it may be that rather than trying to reduce the overall size of the JSC, it could be preferable to change the composition rather than attempt to reduce the size of the JSC dramatically.
45. No doubt many of these suggestions, both in this submission and the Bill, will be controversial. We submit that, if a constitutional amendment to the composition and structure of the JSC is to be seriously considered, the nettle should be grasped firmly and boldly, and changes made if, after careful consideration, they are felt to be necessary to deliver a JSC that is capable of appointing the best judges in terms of the Constitutional vision.

Acknowledgments

46. The table of comparative judicial service commissions was prepared by Sarai Chisala, research assistant of the DGRU.

DGRU

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Composition of Select Judicial Services Commissions: Brief Comparative Review

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CANADA: FEDERAL JUDICIAL ADVISORY COMMITTEES

The Commissioner for Federal Judicial Affairs has overall responsibility for the administration of the appointments process on behalf of the Minister of Justice. This process applies to the appointment of judges of the superior courts of every province and territory, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. Given the large number of applications in many provinces and the limited time and resources generally available to Committees, there is no obligation to interview candidates. However, Committees are encouraged to do so whenever division within a Committee or another issue preventing the completion of an assessment arises. According to the guidelines set out by the Office of the Commissioner for Judicial Affairs these committees are composed of **nine (9) members** as follows:

1. one (1) nominee of the provincial or territorial Law Society.
2. one (1) nominee of the provincial or territorial branch of the Canadian Bar Association.
3. one (1) nominee of the Chief Justice of the province, or of the Senior Judge of the territory.
4. one (1) nominee of the provincial Attorney General, or territorial Minister of Justice.
5. one (1) nominee of the law enforcement community; and
6. three (3) nominees of the federal Minister of Justice representing the general public.
7. one (1) *ex officio* non-voting member: Commissioner for Federal Judicial Affairs or Executive Director, Judicial Appointments. The Commissioner for Judicial Affairs or the Executive Director, Judicial Appointments must attend every Committee meeting as an *ex officio* member, and serves as the link between the Minister and the Committees

Lawyer members of the Committees cannot themselves be candidates for judicial appointment for one year following the end of their term of office on the Committee. Committees are appointed for a three-year term. Exceptionally, this term can be extended by the Minister. Committee members can serve for two consecutive terms only.⁹

CANADA: ONTARIO JUDICIAL APPOINTMENTS ADVISORY COMMITTEE

The Ontario Judicial Appointments Advisory Committee was formally established on February 28, 1995 by proclamation of the Courts of Justice Act amendment passed in 1994. The Legislation requires the composition of the Committee to reflect the diversity of Ontario's population, including gender, geography, racial and cultural minorities. the committee is composed of **thirteen (13) members**:

1. seven (7) lay members who are appointed by the Attorney General,
2. two (2) judges appointed by the Chief Justice of the Ontario Court of Justice,
3. one (1) member is appointed by the Ontario Judicial Council and

⁹ Federal Judicial Affairs <www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Composition> (accessed 30 July 2013)

4. three (3) from the legal community are appointed by The Law Society of Upper Canada, Ontario Bar Association and the County and District Law Presidents' Association, respectively.

After advertising vacancies, receiving applications, short listing and interviewing candidates, the Committee sends a ranked list of its recommendations to the Attorney General who is required to make the appointment from that list.¹⁰

FRANCE: *CONSEIL SUPÉRIEUR DE LA MAGISTRATURE.*

The *Conseil supérieur de la magistrature* (CSM), is a constitutional body whose mission is defined by Article 64 of the Constitution of the French Republic of 4 October 1958 as amended in this regard by the Constitutional Law of 27 July 1993. The CSM is divided into two divisions, one that handles the appointment and disciplinary matters involving judges and magistrates, and the other that handles related matters concerning Prosecutors. Together these two divisions form the CSM whose composition is defined by Article 65 of the Constitution. There are at least **twenty (20) members** of the CSM :

the division that deals with judges is presided over by the Chief Justice of the Supreme Court. It includes, in addition,

1. five (5) judges
2. a prosecutor
3. a state councillor appointed by the Council of State,
4. a lawyer and
5. six (6) qualified persons who are neither Parliament nor the Judiciary.

the division that deals with prosecutors is chaired by the Attorney General at the Court of Cassation. It includes, in addition,

6. five (5) public prosecutors (and one judge and the state councillor, lawyer and six qualified persons mentioned above.)

Ex officio Members - the President of Republic and the Minister of Justice

The Minister of Justice may participate in any sittings of the CSM with the exception of disciplinary matters.¹¹

HONG KONG: JUDICIAL OFFICERS' RECOMMENDATION COMMISSION

The Judicial Officers Recommendation Commission (JORC) is a statutory body, established by the Judicial Officers Recommendation Commission Ordinance 79 of 1995. In accordance with statute, the JORC is composed of **nine (9) members** as follows

1. the Chief Justice, who is the Chairman;
2. the Secretary for Justice;
3. 7 members appointed by the Chief Executive of whom-
 - 2 are judges;
 - 1 is a barrister and 1 is a solicitor, each holding a practising certificate issued under the Legal Practitioners Ordinance (Cap 159); and

¹⁰ Ontario Courts "Appointments Process" <www.ontariocourts.ca/ocj/jaac/> (accessed 27 July 2013)

¹¹ The *Conseil supérieur de la magistrature* <www.conseil-superieur-magistrature.fr/> (accessed 31 July 2013)

- 3 persons who are not, in the opinion of the Chief Executive, connected in any way with the practice of law.¹²

The JORC has advisory powers in relation to the appointment of judges and can advise or make recommendations to the Chief Executive regarding the filling of vacancies in the judiciary.

ISRAEL: JUDGES' NOMINATIONS COMMITTEE

Judges are appointed by the President of the State on the nomination of the Judges' Nominations Committee. The Nominations Committee is composed of **nine (9) members**:

1. three (3) judges (the President of the Supreme Court and two Supreme Court justices)
2. two (2) members of the Knesset (Israel's Parliament)
3. two (2) Ministers (one of them being the Minister of Justice, who chairs the Committee)
4. two (2) representatives of the Israel Bar Association.

Except for the Minister of Justice and the President of the Supreme Court, Committee members are elected through secret ballot by the members of their respective institutions. This is to safeguard the independence of committee members and depoliticise the nominations process. Political considerations require the inclusion of at least one religious justice on the Supreme Court, as well as representation of Sephardim and women on the nominating committee.¹³

ITALY: *CONSIGLIO SUPERIORE DELLA MAGISTRATURA*

The Italian *Consiglio Superiore della Magistratura* (CSM) is established under article 105 of the Constitution and is responsible for recruitment, assignments and transfers, promotions and disciplinary measures for judges.¹⁴ altogether the CSM is composed of **twenty-seven (27) members** as follows:

1. three (3) members of law
 - the President of the Republic who also chairs the organ,
 - the President of the Supreme Court
 - the Attorney General at the Court of Cassation

twenty four (24) elected members, of which

¹² The Judicial Officers Recommendation Commission Ordinance. Ordinance 79 of 1995. <[www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/C96AB6D1DD6DB308482575EE00381A2A/\\$FILE/CAP_92_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/C96AB6D1DD6DB308482575EE00381A2A/$FILE/CAP_92_e_b5.pdf)> (accessed 30 July 2013)

¹³ ... <elyon1.court.gov.il/eng/judges/judges.html> (accessed 1 August 2013).

¹⁴ *Consiglio Superiore della Magistratura* <www.csm.it/pages/funzionamento/attribuzioni.html> (accessed 1 August 2013).

2. sixteen (16) are judges (election of the members who are judges is done by a majority system in a single national college for each of the categories of judges to be elected)¹⁵
 - two (2) judges of the Supreme Court,
 - four (4) of the judges who have the power of prosecutors in the jurisdiction of merit and
 - ten (10) of those who exercise judicial functions among judges of merit
3. and eight (8) are lay persons (these are elected by the Parliament)

The CSM must elect a Vice President, who, in addition to chairing the Plenary Assembly (in the absence of the President of the Republic or by proxy of these), chairs the Executive Committee, which is charged with promotion of Board, the implementation of the resolutions of the CSM and management of budgetary funds, given that the Council enjoys accounting and financial autonomy.

KENYA: JUDICIAL SERVICE COMMISSION

The Judicial Service Commission is established under Article 171 of the Constitution and is enabled by the Judicial Service Commission Act 1 of 2011. The JSC is composed of **eleven (11) members** as follows:

1. the Chief Justice, who shall be the chairperson of the Commission
2. one (1) Supreme Court judge elected by the judges of the Supreme Court;
3. one (1) Court of Appeal judge elected by the judges of the Court of Appeal;
4. one (1) High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;
5. the Attorney-General;
6. two (2) advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
7. one (1) person nominated by the Public Service Commission; and
8. one (1) woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.¹⁶

The JSC is concerned with the appointment and removal of judges and the discipline of other judicial officers and staff amongst other functions.

MALAYSIA: JUDICIAL APPOINTMENTS COMMISSION

The Malaysian Judicial Appointments Commission is composed of **nine (9) members**, as provided for under section 5 of the Judicial Appointments Act 695 of 2009.¹⁷ The Commission is composed as follows:

¹⁵ The election is based on individual applications that are submitted by not less than twenty-five and not more than fifty judges. <www.csm.it/pages/funzionamento/composizione.html> (accessed 1 August 2013).

¹⁶ The Judicial Service Commission <www.judiciary.go.ke/portal/the-judicial-service-commission.html> (accessed 26 July 2013).

1. the Chief Justice of the Federal Court who shall be the Chairman;
2. the President of the Court of Appeal;
3. the Chief Judge of the High Court in Malaya;
4. the Chief Judge of the High Court in Sabah and Sarawak;
5. a Federal Court judge to be appointed by the Prime Minister; and
6. four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.¹⁸

Members hold office for a period of two years and can only be reappointed for one further term. The functions of the Commission include selecting suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration; formulating and implementing mechanisms for the selection and appointment of judges of the superior court; and, recommending programmes to the Prime Minister to improve the administration of justice.

NAMIBIA: JUDICIAL SERVICE COMMISSION

The Judicial Service Commission is established under Article 85 of the Constitution. the Constitution stipulates that the Commission shall be composed of **five (5) members** as follows:

1. the Chief Justice,
 2. a Judge appointed by the President,
 3. the Attorney-General
 4. and two (2) members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia
- The Chief Justice and the Attorney general are *ex officio* members of the Commission.¹⁹

The Commission has the powers to make recommendations to the President regarding the appointment and removal from offices of judges; to conduct disciplinary procedures; and, make recommendations to the Minister regarding any matter that relates to the judiciary.

NIGERIA: FEDERAL JUDICIAL SERVICE COMMISSION

The Federal Judicial Service Commission is one of the Federal Executive Bodies created by Section 153 of the 1999 Constitution of the Federal Republic of Nigeria. The Composition of the **eight (8) member** Commission is as follows:

1. The Chief Justice of Nigeria, who shall also serve as the Chairman;

¹⁷ Judicial Appointments Commission "Structure" <www.jac.gov.my> (accessed 27 July 2013).

¹⁸ Judicial Appointments Act 695 of 2009 <woulibrary.wou.edu.my/library/pdf/sg_judiciary.pdf> (accessed 30 July 2013).

¹⁹ see also the Judicial Serve Commission Act no. 18 of 1995 <www.lac.org.na/laws/1995/1195.pdf> (accessed 1 August 2013).

2. The President of the Court of Appeals;
3. The Attorney-General of the Federation;
4. The Chief Judge of the Federal High Court;
5. Two (2) individuals who have been qualified to work as Legal Practitioners in Nigeria for a period of not less than fifteen years. They will be chosen from a list of no less than four qualified candidates who have been recommended by the Nigerian Bar Association; and
6. Two (2) other persons who are not Legal Practitioners, but are of unquestionable integrity in the opinion of the President.

The Commission was granted several powers and responsibilities, chief among them being to aid the National Judicial Council in finding and nominating candidates for all open positions. In addition, the Commission oversees all other Judicial staff members, including the Chief Registrars and Deputy Chief Registrars of the Supreme Court, as well as employees the Court of Appeal and the Federal High Court.²⁰

NORTHERN IRELAND: JUDICIAL APPOINTMENTS COMMISSION

the Northern Ireland Judicial Appointments Commission (NIJAC) is established under the Justice (Northern Ireland) Acts 2002 & 2004 and has **thirteen (13) members**. NIJAC's Chairman is the Lord Chief Justice of Northern Ireland. The Commission is composed of:

1. The Lord Chief Justice, the chairman of the Commission
2. five (5) judicial members
 - Lord Justice of Appeal,
 - a judge of the High Court,
 - a county court judge,
 - a resident magistrate, and
 - a lay magistrate.
3. two (2) legal members
 - a barrister nominated by the General Council of the Bar of Northern Ireland and
 - a solicitor nominated by the Law Society of Northern Ireland
4. five (5) lay members, five persons who do not hold (and have never held) a protected judicial office and are not (and have never been) barristers or solicitors.

The Commissioners are drawn from the judiciary, legal profession and other professional backgrounds. Commissioners have an equal say in the work NIJAC and are of equal status. Each judicial tier is represented. Furthermore, a person may not be appointed to be a lay member unless s/he has declared in writing his commitment to non-violence and exclusively peaceful and democratic means.²¹

The role of NIJAC includes conducting the appointments process and selecting and appointing, or selecting and making recommendations for appointment, in respect of all listed judicial

²⁰ Nigeria, The Federal Judicial Service Commission <fjsconline.gov.ng> (accessed 28 July 2013).

²¹ Section 3 of the Justice (Northern Ireland) Act 2002, <www.legislation.gov.uk/ukpga/2002/26/section/3> (accessed 30 July 2013).

appointments up to, and including, High Court Judge. They recommend individuals solely on the basis of merit.²²

SCOTLAND: JUDICIAL APPOINTMENTS BOARD

The Board became an advisory Non-Departmental Public Body (NDPB) on the 1st June 2009 under the provisions of the Judiciary and Courts (Scotland) Act 2008.²³ There are **ten (10) Board members** consisting of—

1. three (3) judicial members appointed by the Lord President,
 - one person holding the office of judge of the Court of Session (other than the Lord President and the Lord Justice Clerk),
 - one person holding the office of sheriff principal, and
 - one person holding the office of sheriff.
2. two (2) legal members appointed by the Scottish Ministers,
 - one advocate practising as such in Scotland, and
 - one solicitor practising as such in Scotland; and,
3. five (5) lay members appointed by the Scottish Ministers. (The number of lay members is to be equal to the total number of judicial and legal members.) Each lay member is to be an individual who—
 - is resident in Scotland,
 - is not a solicitor or advocate practising as such in Scotland, and
 - does not hold and has not held any judicial office within the Board's remit.

The core function of the Board is to recommend to the Scottish Ministers individuals for appointment to judicial offices.

SRI LANKA: JUDICIAL SERVICES COMMISSION

The Judicial Services Commission is established by the Constitution and is composed of **three (3) members**.

1. the Chief Justice, who shall be the Chairman,
2. a Judge of the Supreme Court,
3. and one other person who shall be, or shall have been, a Judge of the Supreme Court.

The members of the Commission, other than the Chairman, are supposed to be appointed by the Governor-General.²⁴ Judges of the Supreme Court are appointed by the president, others by the Judicial Service Commission.²⁵

²² Northern Ireland Judicial Appointments Commission <www.nijac.gov.uk/index/what-we-do.htm> (accessed 1 August 2013).

²³ The Judicial Appointments Board for Scotland <www.judicialappointmentscotland.org.uk> (accessed 30 July 2013) and the Judiciary and Courts (Scotland) Act 2008 <www.legislation.gov.uk> (accessed 30 July 2013).

²⁴ Section 53, Ceylon Constitution Order in Council <www.lawnet.lk> (accessed 30 July 2013).

UGANDA: JUDICIAL SERVICE COMMISSION

The Judicial Service Commission is constitutionally established and is enabled under the provisions of the Judicial Service Act, 1997.²⁶ The Membership of the Commission is spelt out under Article 146 of the Constitution of the Republic of Uganda, which provides for a **nine (9) member** Commission as follows:

1. A full time Chairperson who is a person qualified to be appointed as a Justice of the Supreme Court;
2. A Deputy Chairperson (part time) who is a person qualified to be appointed as a Justice of the Supreme Court;
3. Six Members (part time) whose respective nomination is directly linked to specified stakeholder institutions, viz: the Public Service Commission, the Uganda Law Society, the Judiciary, the public (excluding lawyers).
4. The Attorney General as an *ex-officio* Member of the Commission.²⁷

The Chairperson, Deputy Chairperson, and the Members are all appointed by the President with approval of Parliament. The Commission advises the President in the exercise of his/her power to appoint persons to hold or act in any of the following offices: the office of the Chief Justice, the Deputy Chief Justice; the Principal Judge; a Justice of the Supreme Court; a Justice of Appeal a Judge of the High Court; and the office of Chief Registrar and Registrar. This includes power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office.²⁸

UNITED KINGDOM: JUDICIAL APPOINTMENTS COMMISSION

The Judicial Appointments Commission was established by the Constitutional Reform Act, 2005. There are **fifteen (15) members**, including the Chairman. All are recruited and appointed through open competition with the exception of three judicial members who are selected by the Judges' Council. Membership of the Commission is drawn from the judiciary, the legal profession, the magistracy and the public. The Commission consists of—

1. a chairman who must be a lay member
2. five (5) judicial members:
 - a Lord Justice of Appeal;
 - a puisne judge of the High Court;
 - either a Lord Justice of Appeal or a puisne judge of the High Court;
 - a circuit judge;
 - a district judge of a county court, a District Judge (Magistrates' Courts) or a person appointed to an office under section 89 of the Supreme Court Act 1981 (c. 54).
3. two (2) professional members,
 - a practising barrister in England and Wales;
 - a practising solicitor of the Senior Courts of England and Wales.
4. five (5) lay members,

²⁵ Commonwealth Governance: Sri Lanka <www.commonwealthgovernance.org/countries/asia/sri_lanka/judicial-system/> (accessed 2 August 2013).

²⁶ Judicial Service Act, 1997 <www.ulii.org/ug/legislation/consolidated-act/14> (accessed 2 August 2013).

²⁷ "About JSC" Uganda Judicial Service Commission <www.jsc.go.ug> (accessed 25 July 2013)

²⁸ Article 147 of the Constitution <www.ec.or.ug/docs/Constitution.pdf> (accessed 2 August 2013).

5. one (1) holder of an office listed in Part 3 of Schedule 14, and
6. one (1) lay justice member.²⁹

The JAC selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland.³⁰

UNITED STATES OF AMERICA: SENATE JUDICIARY COMMITTEE

The procedure for appointing a Justice is provided for by the Constitution in only a few words. The "Appointments Clause" (Article II, Section 2, clause 2) states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court."³¹ Judicial nominations for all Article III courts that are sent to the Senate for consideration by the President are referred to the Senate Judiciary Committee. These include nominations for the U.S. Supreme Court, the U.S. Courts of Appeals, U.S. District Courts, and the Court of International Trade. Potential nominees are sometimes identified and recommended by members of Congress. After a nomination is received by the Senate and referred to the Judiciary Committee, the Committee typically conducts a confirmation hearing for each nominee. composition of the Senate Judiciary Committee varies from congress to congress. Today, **nineteen (19) members** from 17 states serve on the Senate Judiciary Committee.³²

At the state level, some form of appointment commission is used to select candidates for appointment. This method is termed "Missouri plans" or "merit plans". The American Judicature Society (AJS) identifies the basic elements of a merit plan as:

1. a commission comprised of both lay and lawyer members to recruit, screen, investigate and evaluate judicial candidates
2. nomination to the appointing authority of a limited number (usually two to five) of candidates
3. appointment by the State Governor [i.e. the executive] or other appointing authority.³³

²⁹ Section 1 of Schedule 12, Constitutional Reform Act (CRA) 2005 <www.legislation.gov.uk> (accessed 30 July 2013).

³⁰ United Kingdom Judicial Appointments Commission <jac.judiciary.gov.uk/index.htm> (accessed 27 July 2013)

³¹ DS Rutkus (2010) "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate " Congressional Research Service Report for Congress <www.fas.org/sgp/crs/misc/RL31989.pdf> (accessed 27 July 2013)

³² United States Senate Committee on the Judiciary <www.judiciary.senate.gov/> (accessed 30 July 2013)

³³ See Appointing Judges: A Judicial Appointments Commission For New Zealand? A public consultation paper April 2004: Appendix Two: Judicial Appointments Practice In Selected Overseas Countries <www.justice.govt.nz/publications/global-publications/a/appointing-judges-a-judicial-appointments-commission-for-new-zealand-a-public-consultation-paper-april-2004> (accessed 1 August 2013); American Judicature Society, ' Judicial Merit Selection: Current Status' <www.judicialselection.com> (accessed 1 August 2013).

ZIMBABWE: JUDICIAL SERVICE COMMISSION

The Judicial Service Commission is established by section 90 of the Constitution and enabled under the Judicial Service Act of 2010. The Commission is composed of a **minimum of five (5) and a maximum of six (6) members** as follows:

1. The Chief Justice or, if there is no Chief Justice or the Chief Justice is not available, the Deputy Chief Justice;
2. The Chairman of the Public Service Commission;
3. The Attorney-General;
4. no less than two or more than three other members appointed by the President.

Currently, the Judicial Service Commission comprises of the Chief Justice, the Chairman of the Public Service Commission, the Attorney-General, the Judge President, and two senior practising lawyers.³⁴ One of its functions is to advise the President on appointments to certain posts specified in the Constitution, including the appointment of judges. Its other equally important function is to employ all persons within the Judicial Service.

³⁴ Judicial Service Commission Zimbabwe. <www.jsc.org.zw/index.php/about-jsc/structure> (accessed 26 July 2013).

COUNTRY COMPARISON

| | Constitutionally established | Enabling legislation | Three- five members | Five - six members | Seven - eight members | Nine - ten members | Eleven - fifteen members | Fifteen to twenty members | Twenty or more members | Members of the Commission are holders of judicial office | Members of the Commission are persons practising or employed as lawyers | Members of the Commission are from the field of law enforcement | non-legally qualified members | Legislators specifically excluded | Gender specific requirements | Specific membership: The President | Specific membership: Chief Justice/President of the Supreme Court |
|--|------------------------------|----------------------|---------------------|--------------------|-----------------------|--------------------|--------------------------|---------------------------|------------------------|--|---|---|-------------------------------|-----------------------------------|------------------------------|------------------------------------|---|
| Canada: Federal Judicial Advisory Committees | | | | | | • | | | | • | • | | • | | | | |
| Canada: Ontario Judicial Appointments Advisory Committee | | • | | | | | • | | | • | • | | • | | • | | |
| France: <i>Conseil supérieur de la magistrature</i> | • | • | | | | | | | • | • | • | | • | | | • | • |
| Hong Kong: Judicial Officers' Recommendation Commission | | • | | | | • | | | | • | • | | • | | | | |
| Israel: Judges' Nominations Committee | | | | | | • | | | | • | | | | | | | • |
| Italy: <i>Consiglio Superiore della Magistratura</i> | • | • | | | | | | | • | • | | | • | | | • | • |
| Kenya | • | • | | | | | | | • | • | • | | • | | • | | |
| Malaysia | | • | | | | • | | | | • | • | | | | | | • |
| Namibia | • | • | | • | | | | | | • | • | | | | | | • |
| Nigeria | • | | | | • | | | | | • | • | | • | | | | • |
| Northern Ireland Judicial Appointments Commission | | • | | | | | • | | | • | • | | • | | | | • |
| Scotland: Judicial Appointments Board | | • | | | | | • | | | • | • | | | • | | | |
| South Africa | • | • | | | | | | | • | • | • | | • | | | | • |
| | Constitutionally established | Enabling legislation | Three- five members | Five - six members | Seven - eight members | Nine - ten members | Eleven - fifteen members | Fifteen to twenty members | Twenty or more members | Members of the Commission are holders of judicial office | Members of the Commission are persons practising or employed as lawyers | Members of the Commission are from the field of law enforcement | non-legally qualified members | Legislators specifically excluded | Gender specific requirements | Specific membership: The President | Specific membership: Chief Justice/President of the Supreme Court |
| Sri Lanka | • | | • | | | | | | | • | | | | | | | • |
| Uganda | • | • | | | | • | | | | • | | | • | | | | |
| United Kingdom | • | • | | | | | | | | • | • | | • | | | | |
| United States of America: Senate Judiciary Committee | | | | | | | | • | | | | | | | | | |

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| Zimbabwe | . | . | | . | | | | | | . | . | | . | | | | . |
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