



Judicial Appointments

August 2014

About this series

These constitution-building primers are intended to assist in-country constitution-building or constitutional-reform processes by: (i) helping citizens, political parties, civil society organisations, public officials, and members of constituent assemblies, to make wise constitutional choices; and (ii) helping staff of intergovernmental organizations and other external actors to give good, well-informed, context-relevant support to local decision-makers. The primers are designed as an introduction for non-specialist readers, and as a convenient aide-memoire for those with prior knowledge or experience of constitution-building. Arranged thematically around the practical choices faced by constitution-builders, the primers aim to explain complex issues in a quick and easy way.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

Overview

What?

- This primer covers the systems used for appointing judges in constitutional democracies.
- Various commonly used systems of appointment are discussed, including career judiciaries, appointment by an independent commission and appointment by the representative or co-operative interaction of legislative and executive branches.

Why?

- The judiciary interprets the law and applies it to particular cases. An independent, politically impartial, honest and competent judiciary is necessary for the rule of law and for the strength and resilience of a democratic constitutional order. It is therefore important that the mode of selecting judges helps to meet these requirements.

How?

- The factors to consider include: (i) independence of the judiciary from the executive and legislature, party politics and vested interests; (ii) ensuring the representativeness and inclusiveness of the judiciary, especially with regard to gender, status, ethnicity or origin; and (iii) ensuring that judges are of sufficient quality and calibre to perform their duties.

Where?

- Civil-law jurisdictions tend toward a career judiciary formed on bureaucratic lines at the lower levels, with an elected or representationally appointed constitutional court.
- Common-law jurisdictions rely increasingly on judicial appointments commissions.

What Is the Issue?

The judiciary exercises powers that affect the lives and liberties of individual citizens. A well-functioning judiciary is essential to the rule of law and to the protection of fundamental rights.

In order to perform their functions with integrity, judges must be professionally competent, politically impartial and independent from undue influence—whether from the executive, legislature or other influential public or private interests.

If judiciaries are to exercise these powers in ways that preserve and do not undermine democratic legitimacy, the judiciary needs to understand and articulate the underlying values of society, has to be responsive to public opinion and needs to be held accountable in ways that ensure that standards of professionalism and integrity are upheld.

In constituting the judicial power, two potentially opposing needs must be balanced and reconciled: first, to ensure that the judiciary is independent of executive interference, partisan pressure and powerful interests, while, second, maintaining the responsiveness, professional standards and personal integrity of the judiciary. As Ginsburg (2003: 42) states, ‘Appointment mechanisms are designed to insulate judges from short-term political pressures, yet ensure some accountability’.

This primer therefore considers how the rules, processes and mechanisms of judicial appointment embodied in the constitution, laws, and conventional practice contribute to achieving these aims.

Contextual and Conceptual Considerations

Judiciaries in Civil-Law and Common-Law Jurisdictions

Although there are many exceptions and hybrids, most of the world’s legal systems belong either to the civil-law or common-law families. These two families operate under different assumptions and therefore present different options and constraints to constitution builders in relation to judicial appointment mechanisms. In civil-law systems, for example, judges tend to belong to a professional hierarchy that, in many ways, resembles a corps of civil servants, into which they are recruited at a relatively young age, usually by competitive examination, and sometimes while still undergoing higher legal training. In some civil-law countries, the norm is for judges to spend their whole career in the judiciary, while others may move between judicial and prosecutorial services.

‘It is not just that the executive must refrain from telling the judges how to decide cases and from interfering with their decisions once made. Indirect pressure by the executive, by measures such as the setting of performance targets or league tables, is just as objectionable as overt instruction in regard to judicial decision-taking. So too is control, whether direct or indirect, by the executive over what the judge does in his or her own courtroom.’

Lord Hope of Craighead (former lord president of the Court of Session, Scotland), 2002

Judges in common-law systems, meanwhile, tend to be appointed from among senior lawyers in private practice. They are appointed in recognition of their achievements in the law, but chiefly by means of peer recognition, never by competitive examination.

Conceptual Foundations: Independence, Neutrality, Accountability and Judicial Power

Institutional independence of the judicial branch: Judicial independence can be understood as part of a scheme of separated powers that guarantees the rule of law. At the most basic level, this demands an institutional separation between judicial offices and executive offices (Plank 1996), such that in the ‘determination of civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing...by an independent and impartial tribunal’ (article 6 of the European Convention on Human Rights). Independence can be compromised if the executive is able to intervene in judicial processes at will, to overrule or ignore judicial decisions or to establish special courts under its own control.

Personal independence and impartiality of judges: Judicial independence also can be conceived in terms of the freedom of the individual judge from fear, coercion, reward or any other undue influence that might distort the judge’s actions.

In the most despotic states, judges might be in fear for their lives if they deviate from the will of those in power. Even without resorting to the murderous purging of judges, however, there are many less drastic means by which governments can render the judiciary docile and subservient to the executive. For example, executives might have the power to appoint and dismiss judges at will, to vary their salaries, to alter their opportunities for future promotion or to move them arbitrarily between courts.

Aside from such systematic negations of judicial independence, the impartiality of judges with regard to a particular case might also be compromised if, for example, a judge has previously acted as a prosecutor in the same case or has personal contacts with one of the parties. ‘Consequently, judicial independence requires that a legal system protect its judges from governmental, business, personal, or social pressures that could force a judge to deviate from her interpretation and application of the law’ (Plank 1996: 7).

Judicial legitimacy: To secure the effectiveness of its judgments, the judiciary requires legitimacy—a broad acceptance that it has the right and the duty to make judicial decisions. Judicial independence from other institutions and interests is a prerequisite for such legitimacy, but it is not sufficient by itself. It is also necessary for the judiciary to be both *politically neutral* and *accountable*. The mechanism by which judges are appointed must take both of these principles into account.

Judicial neutrality: Although judges are called upon to make decisions according to the constitution and the law, they are also individual human beings, with unique experiences and beliefs that may be impossible to separate entirely from their interpretation and application of the law. The over-representation of privileged elites (especially people of wealth and high social status) or of a dominant ethnic group in the judiciary, together with modes of judicial training and socialization that reinforce dominant and conservative attitudes, can be regarded as compromising the neutrality of the judiciary to decide on matters affecting poor or low-status citizens or citizens from minority groups. To balance this, states may develop appointment mechanisms that encourage inclusivity and diversity on the bench.

Judicial accountability: While being independent of external influences and politically neutral in their approach to the application of the constitution of the law, judges must nevertheless be accountable for the conduct of their duties. While protecting judges from arbitrary removal or censure, robust mechanisms must exist for the dismissal of judges who are corrupt, who abuse the privileges of office or who neglect their duties of independence, impartiality and legal professionalism. Most jurisdictions therefore provide for the removal of judges by impeachment or by a quasi-judicial process that strikes an appropriate balance between personal independence and accountability. A constitution may also provide for the accountability of the judiciary by independent integrity-branch institutions, such as judicial Councils or superior councils of the magistracy (see the related primer on Judicial Tenure, Removal, Immunity and Accountability).

UN Basic Principles on the Independence of the Judiciary (1985)

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

Restraints on judicial power: Judges must not usurp the legislative power or infringe upon the permissible constitutional discretion of the representatives of the people. If the courts determine value-laden and divisive questions of public policy (for example, the decision of the US Supreme Court on abortion, *Roe v. Wade*, 1973) or interpret constitutional provisions in ways that serve elite interests at the expense of general interests articulated by elected legislatures (for example, the regulation of working hours in *Lochner v. New York*, 1905), this can undermine democratic governance.

The rules of judicial appointment might therefore be shaped with a view to enabling ongoing dialogue between judicial and other political actors on matters of constitutional interpretation—for example, by inviting executive nomination or legislative confirmation of judicial appointments to ensure that the judiciary remains reflective of wider society. Such rules need to be formulated very carefully in order ‘to ensure that the democratic legitimacy of the judiciary is maintained without introducing a form of politicization that reduces the quality of the judges appointed and transforms judges into politicians’ (Maleson 2006: 6).

International Standards

A country in the process of democratic transition or constitution-building may wish, for reasons of internal and external legitimacy, to ensure that its provisions regarding judicial appointments conform to institutional standards of judicial independence and accountability.

These include Article 14 of the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary (1985), the Minimum Standards of the International Bar Association (1982) and the Latimer House Guidance on Parliamentary Supremacy and Judicial Independence (1998).

Federal and Composite Societies

As part of an overall scheme of federalism, power-sharing or consociationalism, territorial or communal entities may be guaranteed representation among the higher judiciary. For example, four members of the Constitutional Court of Bosnia and Herzegovina are selected by the House of Representatives of the Federation, and two members by the Assembly of Republika Srpska. In Germany, the upper house of parliament, which is composed of delegations of the provincial (*Land*) governments, is responsible for appointing half of the members of the Federal Constitutional Court.

Methods of Appointment

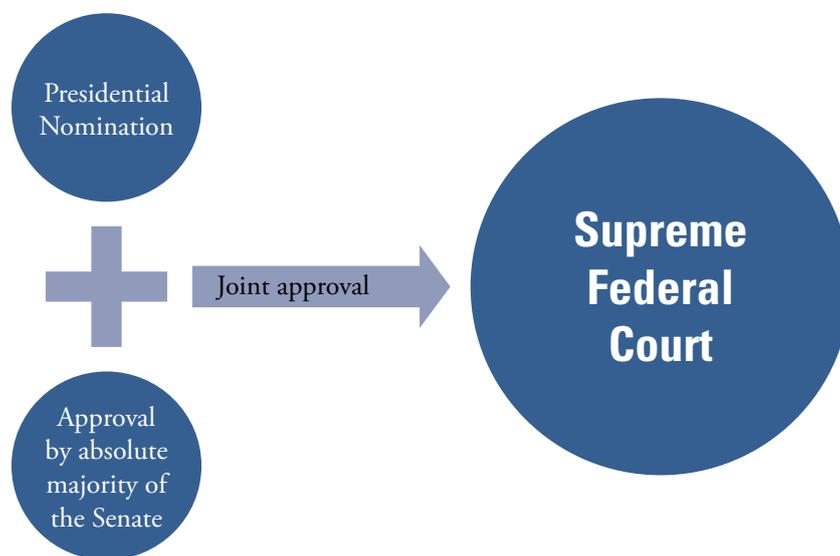
Forms of Judicial Appointment

Ginsburg (2003) identifies four methods of judicial appointment: (i) single-body appointment mechanisms; (ii) professional appointments; (iii) co-operative appointment mechanisms; and (iv) representative appointment mechanisms.

Single-body appointment mechanisms: Typically, single-body appointment mechanisms vest the power of appointing judges in the executive branch, headed by an executive president or prime minister. Several older constitutions, especially those of British origin, continue to follow this model and vest considerable discretion over judicial appointments in the executive. The process by which the executive identifies and selects candidates varies between jurisdictions, and might include: (i) closed, informal and non-binding consultation process; (ii) formal consultation with executive-appointed selection boards; or (iii) the nomination of candidates by an independent judicial appointments commission (Roth 2012).

Professional appointments: The essence of professional appointment mechanisms is that new judges are appointed by existing judges: the bench is self-perpetuating through a formal co-optation process that subjects prospective judges to approval by their superiors. Under this system, senior judges must act as guardians of their own professional ethos, relying on internal incentives—such as the desire to have a good reputation—to maintain their own professional standards and the impartiality of the bench (Mueller 1999; Ginsburg 2003: 43). A self-perpetuating judiciary can protect judicial independence and professionalism, but it can also concentrate power within the senior judiciary, undermining the independence of individual judges and making the bench conservative, unrepresentative, unaccountable and unresponsive to the public.

Fig. 1: Co-operative Appointment Mechanism for the Supreme Federal Court of Brazil

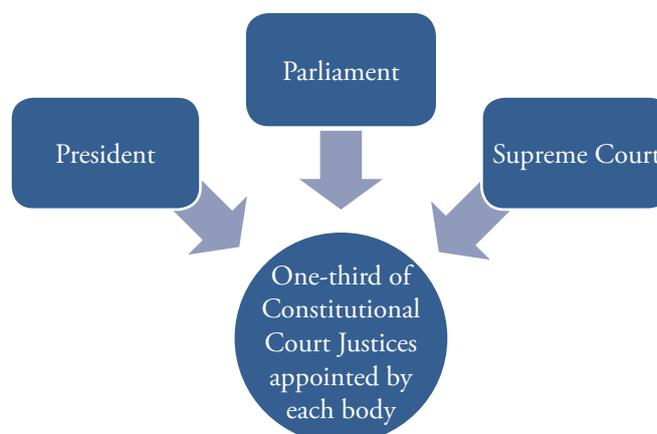


Co-operative appointments: Co-operative methods of appointment require the co-operation of two bodies. Usually, one institution nominates candidates, and the other consents to the nomination or selects judges from a shortlist of nominees. In Brazil, for example, the president nominates candidates for the Supreme Federal Court, who must then win approval by an absolute majority of the Senate (Constitution of Brazil, Article 101).

Representative appointments: Representative appointment mechanisms enable two or more bodies to each appoint a number of members to a court (usually this applies only to the Supreme Court or

Constitutional Court). In Mongolia, for example, one-third of the members of the Constitutional Court are appointed by the president, one-third by parliament, and one-third by the judiciary.

Fig. 2: Representative Appointments to the Constitutional Court of Mongolia



NOTE: There is an essential difference between a co-operative and a representative system of judicial appointments. Under a co-operative system, appointments are made *jointly*, meaning that approval (or at least the acquiescence) of all co-appointing bodies is necessary to complete each appointment. Under the representative system, in contrast, appointments are made *severally*, meaning that each co-appointing body is able to make its share of appointments unilaterally, without having to gain the consent of other bodies. Although a mutual commitment to moderation may develop amongst the appointing bodies, it is possible in a representative system for each appointing body to appoint candidates sympathetic to its own institutional interests, producing an internally fragmented court (Ginsburg 2003: 45). The extent to which this is likely to occur in practice depends not only on institutional interests but also on the party allegiances and ideological orientations of appointing bodies.

Mixed mechanisms: The above appointment mechanisms can be combined in creative ways. For example, a representative appointment mechanism may provide for some members of a court to be appointed by the executive and others to be appointed by a co-operative mechanism that requires the joint approval of two or more actors. The bodies that participate in a co-operative appointment process may themselves be constituted on a representative basis. For example, the chief justice of Jamaica's Supreme Court and the president of the Court of Appeal are formally appointed by the governor-general on the advice of the prime minister after consultation with the leader of the opposition. The other Supreme Court and Appeal Court judges are appointed by the governor-general on the advice of the Judicial Service Commission. The chief justice, the president of the Court of Appeal and the chairman of the Public Service Commission are *ex officio* members of the Judicial Service Commission; the other members of the Judicial Service Commission are appointed by the governor-general on the advice of the prime minister after consultation with the leader of the opposition. In this case, co-operative, representative and professional mechanisms of judicial appointment are intricately interwoven.

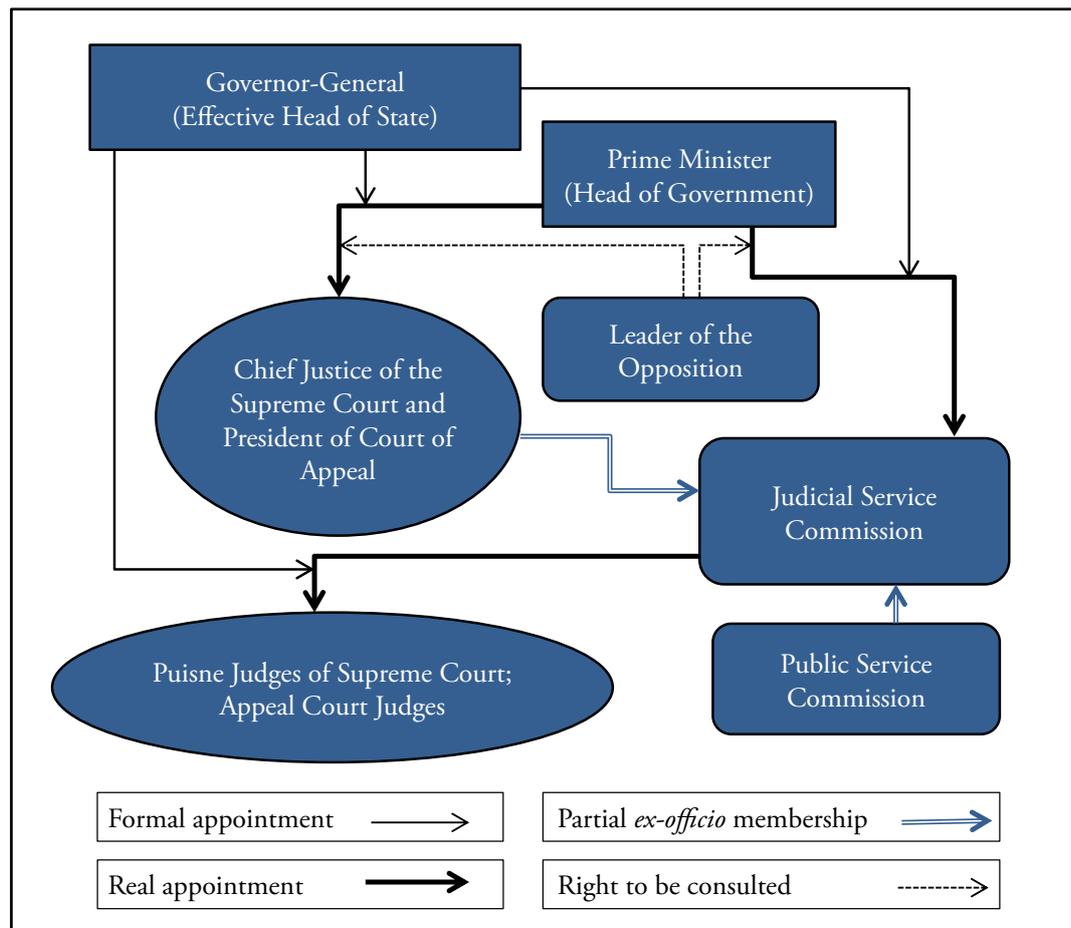
Constitutionally ambiguous mechanisms: The text of a constitution does not always reveal the true nature of the judicial appointment mechanism as it actually operates. For example, executive bodies that appear, in the constitution, to possess virtually unlimited appointment powers may be constrained in practice by conventional or statutory restrictions on the scope of their discretion that reshape them into co-operative or professional mechanisms.

- The Constitution of India states that judges are appointed by the president—on the binding advice of the Council of Ministers—in consultation with the chief justice of the Supreme Court. In principle, this appears to be a form of single-body appointment by the executive, with the professional element performing only a consultative role. In practice,

the Supreme Court of India has interpreted the consultation of the chief justice as having a binding character: not that the president (on the advice of the Council of Ministers) is obliged to accept the chief justice's recommendation, but that no appointment can be made without such a recommendation first being made. Moreover, the chief justice is bound to consult the four most senior judges of the Supreme Court before tendering advice, thereby changing the nature of this recommendation from a personal to a collegiate one. Thus, the appointment mechanism is in effect co-operative, requiring the joint assent of the executive and judicial branches (Khosla 2012: 27–30).

- A similar gap between constitutional text and reality can be found in the Netherlands. According to the Dutch Constitution, Supreme Court judges are appointed by the king (on the binding advice of the government) from a list of three nominees proposed by the lower house of parliament. This appears to be a co-operative mechanism. In practice, the lower house makes its recommendations on the advice of the Supreme Court, so the appointment mechanism is for the most part professional in nature (Ten Kate and Van Koppen 1995).
- Although such ambiguous cases may work acceptably in practice, especially in countries with a long-standing democratic tradition and an ingrained respect for judicial independence, it would usually be good practice, in designing a new constitution, to avoid ambiguity and to express the mechanism by which judges are to be appointed in clear, unambiguous terms.

Fig. 3: Mixed Judicial Appointment Mechanisms in Jamaica



Judicial elections: A small minority of jurisdictions, chiefly within the United States, select judges by means of popular elections. Popular elections offer few guarantees of professional competence and

can expose judges to political partisanship and corruption, especially if they have to raise money to fund election campaigns. According to the 2010 Constitution of Bolivia, popular elections are to be used to select members of the Supreme Court of Justice, but, in an attempt to reduce partisanship, candidates are not allowed to actively campaign or to belong to political parties.

Campaign Contributions to Judicial Elections: Texas

‘Since 1876, judges at all levels of [Texas state] courts have been elected by the people in partisan elections. In 1980, Texas became the first state in which the cost of a judicial race exceeded \$1 million. Between 1980 and 1986, campaign contributions to candidates in contested appellate court races increased by 250%. The 1988 Texas Supreme Court elections were the most expensive in Texas history, with twelve candidates for six seats raising \$12 million. Between 1992 and 1997, the seven winning candidates for the Texas Supreme Court raised nearly \$9.2 million dollars. Of this \$9.2 million, more than 40% was contributed by parties or lawyers with cases before the court or by contributors linked to those parties.’

Source: American Judicature Society, 2013

A variation known as the Missouri Plan, adopted in several US States, relies initially on executive appointment upon the recommendation of a non-partisan nominating commission, but then subjects incumbent judges to so-called retention elections, where they stand unopposed on their record. This system, which has also been adopted in Japan, mitigates some of the worst effects of judicial elections, but it would still be difficult to imagine any circumstances in which this arrangement would be recommended for a newly democratizing country.

In several countries, especially in Latin America, superior or constitutional court judges are indirectly elected by the legislature. This arrangement is also open to politicization, especially if the judges serve relatively short terms. However, this can be mitigated by using supermajoritarian electoral rules. The fifteen members of the Supreme Court of El Salvador, for example, are elected by a two-thirds majority of the legislature, which ensures that no single party is able to control appointments. Nevertheless, the process, characterized by negotiations and horse-trading, remains highly politicized (Thale 2012).

Judicial Councils

A judicial council (terms such as judicial appointments commission, judicial service commission or council of the judiciary may also be used) is an independent public institution, usually including a mixture of judicial and non-judicial members, with responsibility for making, or advising on, judicial appointments. In South Africa, for example, a Judicial Service Commission, consisting of members of the judiciary, representatives of the legal profession, academics, and politicians, makes nominations to the President for appointments to the Constitutional Court’. The mixed basis of a judicial council is designed to ensure a balance between professionalism and independence, on the hand, and an accountable and representative judiciary on the other. The Judicial Council model, in various forms, is now found in a majority of the world’s Constitutions.

Nominating powers of Judicial Councils: Judicial councils vary greatly in their functions and powers, ranging from merely advisory panels that present non-binding recommendations to decision-making institutions with control over the appointment process. For the avoidance of doubt, it is advised that the powers of a Judicial Council be ‘carefully set out by law’ (Stacy and Choudhry 2013: 12-13).

- Ireland’s Judicial Appointments Advisory Board (JAAB) is a very weak advisory institution. The JAAB can only submit a list of seven qualified candidates for each vacancy. It cannot rank these in order of merit or preference. The government is not even obliged to select a candidate from this list—it retains a free hand to make appointments at its own initiative.

It also has no role in the appointment of the chief justice or internal promotions (Irish Council for Civil Liberties 2014: 7).

- In contrast, the Judicial Appointments Advisory Committee (JAAC) in Ontario, Canada, puts forward just three names for each vacancy. These are ranked in order of preference. The attorney-general of the province, who has decision-making power for the appointment of judges, is required by law to appoint someone only from this list of three nominees, although he/she can reject the whole list and require that the JAAC make new recommendations.

Administrative, supervisory and advisory functions of judicial councils: In addition to their role in the appointment of judges, judicial councils may have additional administrative, supervisory or advisory roles. For example, judicial councils might have the authority to set, or to advise on, the salaries of judges, may be involved in disciplinary hearings or investigations into judicial misconduct and may have the authority to establish codes of ethics or other general norms of judicial practice.

Composition of judicial councils: Judicial councils typically contain members drawn, in varying mixtures, from up to four categories: (i) judicial members; (ii) practicing members of the legal profession; (iii) law officers, or the government ministers responsible for justice; (iv) lay persons (non-lawyers) chosen to represent the public interest.

The International Bar Association's Minimum Standards on Judicial Independence (1982) recommend that a majority of the members of a judicial council should be judges and that the representation of political members should be minimized. However, both accountability and independence should be considered; it might be advisable to give lay members, who represent wider public interests, a substantial (but not necessarily predominant) voice in judicial appointments. Such inclusivity and breadth of involvement can be important, in particular, if there is a desire to expand judicial recruitment from among marginalized or minority groups.

Constitutional status of judicial councils: Judicial councils may be created on an informal basis by executive decisions (in which case, their independence depends solely on the forbearance and goodwill of the executive), on a statutory basis by the legislature (in which case, they are more protected against arbitrary encroachments but still ultimately dependent on the legislative majority) or entrenched in the constitution (which offers the highest level of protection for the independence of the judicial council from the executive and legislative powers). The trend in recent constitution-building, especially where constitution-building represents a sincere attempt to improve the rule of law, has been toward the constitutional establishment of judicial councils as one of several independent fourth-branch institutions, alongside electoral commissions, public service commissions and so forth. The Constitutions of South Africa (1996) and Kenya (2010), which set forth the composition and powers of judicial councils in detail, are notable examples of this trend.

Special Provisions for Constitutional Courts

In countries that have a specialized constitutional court, it is usual to establish an appointment mechanism for the constitutional court that differs from that used for the ordinary civil, criminal and administrative judicial appointments. In France, to cite one example, a judicial council (the Superior Council of the Magistracy) nominates ordinary judges for appointment by the president of the republic, while the nine members of the Constitutional Council (which performs a constitutional review function, but does not form part of the ordinary judiciary) are appointed on a representative basis, with one-third of the members appointed by the president of the republic, one-third by the president of the Senate, and one-third by the president of the National Assembly. In Spain's 1978 Constitution, likewise, the judicial council (General Council of Judicial Power) nominates all members of the ordinary judiciary, but only two of the twelve members of the Constitutional Tribunal (four are chosen by a three-fifths majority of each house of parliament, two by the government). This different mode of composition, in part, reflects the idea of the Constitutional Court as a hybrid political-legal institution.

Preventing ‘Court Packing’

A supreme or constitutional court typically consists of nine, twelve or fifteen members. The number of members may be prescribed by an ordinary law, but it is good practice to prescribe an upper limit in the constitution in order to prevent those with the power of appointing judges from influencing the court through ‘court packing’, that is, swamping the court with a large influx of new appointees.

Role of Judicial Appointments in the Political System as a Whole

In a democratic constitutional system, there must be checks and balances, such that no one branch of government, person or institution is able to exercise a disproportionate influence over the political system as a whole. For example, if a country has a parliamentary system of government with a politically neutral figurehead presidency, it might be appropriate to allow the president to guard the independence of the judiciary from the executive by appointing certain senior judges or certain members of a judicial council; if, on the other hand, a country has a presidential system, giving such power to the executive president could undermine, rather than strengthen, judicial independence. Likewise, a process of legislative confirmation hearings may be appropriate in a presidential system, where the president does not necessarily have a loyal legislative majority, but this could be insufficient in a parliamentary system, where the government usually leads the parliamentary majority.

Qualifications and Criteria for Appointment

Professional and Personal Qualifications

Many constitutions contain explicit selection criteria that narrow the pool of potential judges. These typically include age limits, legal qualifications and experience.

Criteria for Judicial Appointments in New Zealand

‘(1) Legal ability (professional qualifications and experience; outstanding knowledge of the law and its application; extensive practice of law before the courts or wide applied knowledge of the law in other branches of legal practice; overall excellence as a lawyer);

‘(2) Qualities of character (personal honesty and integrity; impartiality, open mindedness and good judgment; patience, social sensitivity and common sense; the ability to work hard);

‘(3) Personal technical skills (oral communication skills with lay people as well as lawyers; the ability to absorb and analyse complex and competing factual and legal material; listening and communication skills; mental agility; management and leadership skills; acceptance of public scrutiny);

‘(4) Reflection of society (awareness and sensitivity to the diversity of the community; knowledge of cultural and gender issues).’

Source: Judicial Appointment Protocol 2013, issued by the Attorney-General, Crown Law Office, New Zealand.

It is common for constitutions to include general clauses requiring judges to be of ‘well-known morality and competence’ (El Salvador) or of ‘high moral character and proven integrity’ (Ghana).

Alternatively, in some jurisdictions, judicial nominating bodies may have a constitutional duty to give due consideration to such criteria. For example, the Constitution of Kenya requires the Judicial Service Commission to be guided by ‘competitiveness and transparent processes of appointment’

and ‘the promotion of gender equality’. Even without a constitutional or statutory mandate, the bodies responsible for making or advising on judicial appointments may (with varying degrees of institutionalization, publicity and formality) prescribe additional criteria for judicial appointments that go beyond constitutional or statutory requirements. In New Zealand, as shown in the text box above, the Crown Law Office has issued a protocol that formally, but not prescriptively, describes the attorney-general’s criteria for making judicial appointments.

In many jurisdictions, judges are forbidden from holding other offices in the legislative or executive branches of government. They may also be forbidden from active membership of a political party and from private occupations and business activities that might undermine their impartiality.

Additional Criteria: Representation and Inclusiveness

Regional and cultural inclusiveness: As noted above, divided societies might rely on judiciaries as part of an overall scheme of consociational government, characterised by power-sharing arrangements, the depoliticization of disputes and mutual restraint through the recognition of minority rights. It is therefore especially important for judiciaries in such countries to have an inclusive composition from various social groups to enhance their legitimacy.

In some countries, there is a requirement for regional balance that helps ensure diversity of legal experience on the bench. For example, three of the nine members of Canada’s Supreme Court must be appointed from among ‘the judges of the Court of Appeal or of the Superior Court of Quebec or from among the advocates of Quebec’ (Supreme Court Act, 1985), ensuring that the Court has knowledge of the civil-law system applied in that province.

The inclusion of judges from Quebec in the Canadian Supreme Court can be seen as a form of co-operative appointment, since an appointment requires the joint and consecutive approval of both the Government of Quebec or Quebec’s bar association, on the one hand, and the Canadian federal government on the other: the former selects the pool of candidates, while the latter the candidate selected from that pool. (If, however, these three members of the Supreme Court were to be appointed by the Government of Quebec, and not by the federal government, then the arrangement would reflect a representative model.)

Gender and racial balance: Some constitutions specify a commitment to gender and racial balance in the judiciary. The South African Constitution, for example, states that: ‘The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’ A judicial council can be constitutionally required to take a proactive role in the achievement of gender balance in judicial office (Irving 2008: 136–141).

Even without a specific mandate, judicial councils may take it upon themselves to correct gender and racial imbalance on the bench. For example, one of the first acts of Ontario’s Judicial Appointments Advisory Committee, following its establishment in 1988, was to write a letter to all 1,200 senior female lawyers in the province, asking them to consider applying to become a judge—a course of action that resulted in 40 per cent of the judges appointed between 1990 and 1992 being women (Bocker and Groot van Leeuwen 2007: 26).

Inclusive Transformation of the Judiciary: South Africa

‘In an open constitutional democracy based on the values of equality, freedom and human dignity, with a bill of fundamental human rights as the cornerstone clearly the judicial appointments procedure which operated throughout the apartheid era was wholly inadequate. The first step was to establish the Judicial Service Commission as an independent mechanism which not only makes recommendations regarding judicial appointments but would have the broad constitutional mandate of judicial transformation, which in my view includes the reconfiguration of the Bench in a manner that would restore judicial independence and instill public trust and confidence in the

judiciary and legitimacy for the justice system. Central to this role and function would be to realign the race and gender balance within the judiciary in a manner that would maximize the competence of the Bench and efficiency of the courts.'

Justice Yvonne Mokgoro, former judge of the Constitutional Court, South Africa (Mokgoro 2010)

It is necessary to consider the indirect effect of constitutional provisions on the gender balance of the judiciary (Irving 2008: 135). For example, in civil law countries where judges are recruited at the beginning of their careers, the participation of women in the judiciary can increase much more quickly than in common law countries, where many years of legal experience are required (Bocker and de Groot van Leeuwen 2007: 7). '[R]ecruitment on the basis of seniority in the legal community or in the judiciary is likely to disadvantage women as long as there are fewer women already in senior legal positions. In India, where seniority among serving High Court judges is a central qualification for appointment to the Supreme Court, no women have been appointed' (Irving 2008: 140).

Judges applying religious law. In some states, a distinction is made between ordinary courts and religious courts, the latter typically having jurisdiction over matters such as personal status, marriage, divorce and inheritance among people belonging to a particular religion. Judges appointed to such courts will typically have to possess learning in the religious law of the community that they have jurisdiction over. For example, Article 66 of Kenya's 2010 Constitution requires Kadhis to 'profess the Muslim religion' and to possess knowledge of Islamic law.

In such states, a further important consideration applies to the qualifications of members of the Supreme or Constitutional Court, where questions such as the reconciliation of religious law with human rights are likely to be resolved. If religious judges are qualified for appointment to this court, then it is likely that they will influence jurisprudence in a more religious direction, whereas if the judges of the Supreme or Constitutional Court are required to be trained in secular (common or civil) law, then it is likely that they will influence jurisprudence in a more secular direction.

Transitional Justice and Vetting of Appointees

The question of vetting or lustration arises following the collapse of an authoritarian regime. The judges in office under an authoritarian regime will have been selected by, or at least complicit in, that regime, and are likely to have been trained and socialized into authoritarian ways of thinking that are incompatible with the self-perception and professional ethics of a judiciary in a liberal-democratic system. The new democratic institutions might well wish to clean house, sweeping away these authoritarian judges and replacing them with judges who adhere to democratic principles.

This course of action, however, encounters three obstacles. First, the retention of existing judicial (and military, diplomatic, administrative etc.) office holders might be part of the 'pact' arrived at during a negotiated transition. Reformist elements of the authoritarian regime may make self-protection an essential condition of their willingness to work constructively with democratic movements. An insistence on the removal of judges could incite fear of loss of livelihood and prestige, increase divisions and stir up old resentments.

Second, the removal of judges sets a precedent that new political leaders can change judges to their own liking. This undermines the development of the judiciary as an independent institution with its own professional ethos that protects it from partisan manipulation. The long-term effect could be corrosive of public trust in the judiciary, while seeing judges appointed by the old regime learning to work within liberal-democratic institutions could help reinforce public trust in judicial independence.

The Kenyan Constitution of 2010 proclaims certain principles of democracy, integrity and good governance (Articles 10 and 159) that are binding on the judiciary. To enforce and implement these principles, and to overcome a legacy of corrupt and lethargic judicial practice, the Constitution (schedule Six, section 23) required judges to undergo a process of vetting to review their conduct and to ensure their compliance with these principles. An independent Vetting Board was established by law (Vetting of Judges and Magistrates Act, 2011). The composition of the Board was unusual in that it included some prominent legal personalities from other African democracies, including Albie Sachs, former justice of South Africa’s Constitutional Court, and Georgina Wood, chief justice of Ghana, as they were deemed impartial to Kenyan political disputes and personal grudges. In the Board’s first determination concerning nine judges of the Court of Appeal, four were found unfit to hold office.

Third, and most immediately, there could be a lack of suitable alternative candidates. All in-country people with experience of high office will be tainted by association with the old regime, but the alternative is to rely either on in-country inexperience (newly trained judges or inexperienced lawyers, who might be very poorly equipped to do the job) or out-of-country experience (recruited from returning émigrés, who might not fully understand the recent changes that have taken place in their country, or from foreign experts who might lack understanding of the national culture and even of the language).

Coarse approaches are unlikely to be successful. In Iraq, in 2003, all former Ba’ath party members above a certain rank were summarily dismissed, regardless of their personal conduct and despite the fact that party membership was a virtual prerequisite for career advancement under the old system. As a result, critical state institutions—not only the judiciary—were understaffed, and many of the dismissed people had to be rehired in a hurry, without time or resources needed for more thorough vetting. A more nuanced approach was adopted in Kenya, where a Vetting Board was set up to review the suitability and conduct of each judge, with those refusing to submit to vetting being dismissed.

Examples

	Appointment of Supreme or Constitutional Court, or other most senior judges	Appointment of other judges	Membership of judicial council
France Democracy since 1875 (Constitution of 1958) Unitary semi-presidential republic Civil law	Nine members: three appointed by president of the republic, three by president of Senate, three by president of National Assembly. Former presidents of the Republic are members <i>ex officio</i> (rarely take seats).	Career judiciary by competitive process, through National School for the Judiciary. Formal appointment by president of the republic upon the nomination of the Superior Council of the Magistracy.	Superior Council of the Magistracy (Judicial Division): a) Chief president of the Court of Cassation. b) Five judges and one public prosecutor, one councillor of state, and one barrister. c) Six lay citizens: two chosen by each of the president of the Republic, the president of the National Assembly and the president of the Senate.
India Democracy since 1947 (Constitution of 1950) Federal parliamentary republic Common law	Appointed by president (on advice of the Council of Ministers) on the basis of a nomination by a panel of senior judges. In effect, consent of both the senior judiciary and Council of Ministers is necessary.	As for Supreme Court: in the case of state courts, the governor of the state must also be consulted.	None: informal panel of senior judges, including chief justice.

<p>South Africa Democracy since 1994 (Constitution of 1996) Federal parliamentary republic Mixed civil and common law</p>	<p>The president, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the chief justice and the deputy chief justice. Other Constitutional Court judges are appointed by the president after consulting the chief justice and the leaders of parties represented in the National Assembly, from a list of nominees presented by the Judicial Service Commission.</p>	<p>The president and deputy president of the Supreme Court of Appeal appointed by the president after consulting the Judicial Service Commission Other judges appointed by president on binding advice of the Judicial Service Commission.</p>	<p>a) Chief justice (presiding); b) President of the Supreme Court of Appeal; c) One judge president designated by the judges president; d) The minister of justice; e) Two practicing advocates and two practicing attorneys appointed by the president; f) One teacher of law designated by teachers of law at South African universities; g) Six individuals designated by the National Assembly from among its members, at least three of whom must be members of opposition parties; h) Four members of the upper house appointed with the consent of at least six provinces; i) Four individuals designated by the president after consulting the leaders of all the parties in the National Assembly.</p>
<p>Poland Democracy since 1991 (Constitution of 1997) Unitary semi-presidential republic Civil law</p>	<p>Constitutional Tribunal: 15 judges chosen individually by the <i>Sejm</i> (lower house of parliament) for a non-renewable term of nine years 'from among persons distinguished by their knowledge of the law'.</p>	<p>Appointed by the president of the republic on the motion of the National Council of the Judiciary.</p>	<p>a) The first president of the Supreme Court; b) The minister of justice; c) The president of the Supreme Administrative Court; d) An individual appointed by the president of the republic; e) 15 judges chosen from among the judges of the Supreme Court, common courts, administrative courts and military courts; f) Four members chosen by the lower house from among its members; g) Two members chosen by the Senate from among its members.</p>
<p>Kenya Democracy from 1992 (Constitution of 2010). Decentralized presidential republic Common law</p>	<p>Chief justice and deputy chief justice appointed by the president in accordance with the recommendation of the Judicial Service Commission, subject to the approval of the National Assembly Other supreme court judges appointed by the president in accordance with the recommendation of the Judicial Service Commission.</p>	<p>Appointed by the president in accordance with the recommendation of the Judicial Service Commission.</p>	<p>a) The chief justice (chairperson); b) Four judges elected by the judiciary at various levels; c) The attorney-general; d) Two advocates: one woman and one man; e) One person nominated by the Public Service Commission; f) Two lay representatives, one woman and one man, appointed by the president with the approval of the National Assembly.</p>
<p>Mongolia Democracy from 1992 Unitary parliamentary republic Civil law</p>	<p>Constitutional Court: nine members appointed for staggered six-year terms; one-third appointed by the (mostly non-executive) president, one-third by the senior judiciary, one-third by the legislature. The Court elects its own president.</p>	<p>The president appoints judges to the Supreme Court (which is distinct from the Constitutional Court and does not have constitutional judicial review functions) 'upon their presentation to the legislature by the General Council of Courts'. Other judges are appointed by the president on the proposal of the General Council of Courts.</p>	<p>General Council of the Courts (14 members): a) two appointed by the legislature; b) two appointed by the president; c) Chief justice of the Supreme Court; d) a government member in charge of legal affairs; e) the prosecutor-general; f) Eight judges representing courts of all levels and elected by the General Council of Courts; g) one judge from the City Appellate Court appoints a nine-member Judicial Qualifications Committee to examine candidates for judicial positions on their legal qualifications and personal and professional skills.</p>

Decision-making Questions

- (1) Is this a civil-law or common-law jurisdiction? (It may be a hybrid that does not fit neatly into neither category but that has elements of both; it may be based on civil or common law but have major influences from other—e.g. Islamic, customary—legal systems.) What is the traditional career path for judges? How does this influence the range and viability of possible appointment mechanisms?
- (2) Is there a separate Constitutional Court? If so, should its members be selected in a more politically accountable manner than the ordinary judiciary? If consideration is being given to election by the legislature, what is the prospective balance of the political parties, and is it possible to devise an electoral mechanism that prevents any one party from being able to dominate the process? If consideration is being given to a co-operative or representative model of appointment, how are the various branches of government chosen, what is their partisan competition and are the checks and balances implied likely to be effective in reality?
- (3) What is the problem that the new system is intended to solve? Is the judiciary too dependent—and therefore in need of an appointment mechanism that will strengthen its independence? Or is it too unaccountable—and therefore in need of an appointment mechanism that will make it more responsive to public interests? Are there low standards of professionalism and integrity and therefore a need to concentrate on increasing the qualifications and standards of judges?
- (4) How inclusive and representative is the judiciary of the wider society? What ethnic/national/cultural/linguistic considerations need to be borne in mind? Is it necessary to ensure that specific minorities are included in the higher judiciary? Is there scope for increasing the participation of women in the judiciary—e.g. by placing an obligation to that effect on nominating institutions?
- (5) Is it necessary to institute a system for the vetting of judges? How can this be done in ways that enable transition to, and consolidation of, a democratic system, without alienating key stakeholders?
- (6) If there is to be a judicial council of some sort, how are its members to be chosen? Consider how the various single-body, professional, co-operative and representative mechanisms of appointment might apply, equally, to the appointment of members of the judicial council. Would it be better for the judicial council to be a nominating/shortlisting body only, with the final appointment being made by other actors, or should a judicial council have the power to actually make appointments?

References, Resources and Further Reading

- American Judicature Society, 'Judicial Selection in the States: Texas', 2013, available at <http://www.judicialselection.us/judicial_selection/index.cfm?state=TX>, accessed 12 December 2013
- Bartholomew, Paul Charles, *The Irish Judiciary* (Notre Dame, IN: University of Notre Dame Press, 1972)
- Bocker, A. and de Groot van Leeuwen, L., 'Ethnic minority representation in the judiciary: diversity among judges in old and new countries of immigration', (Raad van Rechtspraak, Den Haag, Netherlands, 2007)
- Ginsburg, Thomas, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003)

- Irish Council for Civil Liberties, *Submission on Review of Procedures for Appointment as a Judge*, (2014)
- Irving, Helen, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008)
- Khosla, Madhav, *The Indian Constitution* (New Delhi: Oxford University Press, 2012)
- Malleson, K., 'Introduction', in K. Malleson and P. H. Russell (eds.), *Appointing Judges in an Age of Judicial Power – Critical Perspectives from Around the World* (Toronto, Buffalo, London: University of Toronto Press, 2006)
- Mokgoro, Y., 'Judicial Appointments', *Advocate* (Journal of the General Council of the Bar of South Africa), 23/3 (December 2010), pp. 44–48
- Mueller, D. C., 'Fundamental Issues in Constitutional Reform: With special references to Latin America and the United States', *Constitutional Political Economy*, 10/2 (1999), pp. 119–148
- Plank, T. E., 'The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia', *William & Mary Bill of Rights Journal*, 5/1 (Winter, 1996), pp. 1-74
- Post, Robert C. and Siegel, Reva B., 'Popular Constitutionalism, Departmentalism and Judicial Supremacy', *California Law Review*, 92 (2004), pp. 1027–1044
- Roth, Lenny, 'Judicial Appointments', New South Wales Parliamentary Library Research Service Briefing Paper, No. 3/2012, April 2012
- Stacy, Richard and Choudhry, Sujit, *International Standards for the Independence of the Judiciary* (The Centre for Constitutional Transitions and Democracy Reporting International, Briefing Paper No. 41, 2013)
- Ten Kate, Jan and van Koppen, Peter J., 'The Netherlands: Toward a Form of Judicial Review', in C. Neal Tate and Torbjorn Vallinder (eds.) *The Global Expansion of Judicial Power* (New York: New York University Press, 1995)
- Thale, Geoff, 'Tensions Rise between El Salvador's National Assembly and the Supreme Court: Understanding (and Misunderstanding) the Salvadoran Constitutional Crisis', Washington Office on Latin America, 18 July 2012, available at <http://www.wola.org/commentary/tensions_rise_between_el_salvador_s_national_assembly_and_the_supreme_court_understanding>
- Tyler, David W., 'Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy', *William and Mary Law Review*, 50/6 (March 2009), pp. 2215–2264
- Wildhaber, L., 'Judicial Impartiality Under the European Convention on Human Rights', 2001, available at <<http://www.concourt.am/hr/ccl/vestnik/2.12-2001/wildhaber-eng.htm>>, accessed 11 December 2013