The appointment of judges in England

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The chairman of the General Council of the Bar mentions in his report in 2000 (3) *Advocate* 19 "... A troubling matter remains the domination of the Judicial Service Commission (JSC) by political representatives or political appointees: 17 out of 23. This is in embarrassing conflict with the Latimer House guidelines, the principles adopted by the Commonwealth to reduce political influence in the appointment of judges."

In March 1999 the Lord Chancellor distributed a booklet providing general information about his policies for judicial appointments and the necessary qualifications for each post. In the foreword he stated that he wanted every vacancy on the Bench to be filled by the best person available but that he could obviously only appoint to the judiciary those who are ready and willing to do the job. He wanted all eligible practitioners to have the confidence to apply, and stated as a firm principle that appointments must and will be made on merit, irrespective of ethnic origin, gender, marital status, political affiliation, sexual orientation, religion or disability. These ought not to be regarded as mere words but as firm principles, and he would not tolerate any form of discrimination. He also stated that a modern judicial appointment system needed to draw on the best recruitment practices available. I propose to give a reasonably brief outline of the Lord Chancellor's policies and procedures as contained in this booklet in as much as such apply to the appointment of the more senior judges in England. By way of introduction it appears that the Lord Chancellor regards the confidence of both the public and the legal profession in an independent judiciary to be of the first importance. He accordingly accords great importance to maintaining the quality and integrity of the judiciary.

The administration of appointments

The administration is carried out on the Lord Chancellor's behalf by the staff of the judicial group in the Lord Chancellor's department. The principal function of this group is to supply all the information and advice which the Lord Chancellor requires to enable him to fulfil his responsibilities in this field, and to provide him with the material on which to make a fair and informed judgment about the appointment. This includes corresponding with, informing and interviewing those who are, or may become, candidates for appointment: consulting judges, senior members of the professions and filing and recording the results. Certain statutory qualifications of course are required in terms of the Courts and Legal Services Act of 1990, which must of course be met.

Fundamental principles

1. Appointment strictly on merit. The Lord Chancellor appoints those who appeared to him to be the best qualified.
2. Part-time service is normally a prerequisite of appointment to full time office. The period must be long enough to establish a candidate's competence and suitability for full-time appointment.
3. Significant weight is attached to the independent use of members of the professional community (and others) as suitability for judicial appointment. The Lord Chancellor regards the knowledge, experience and judgment of the professional community (judges and members of the legal profession) as the best available source of informed opinion on the relative merits of applicants for judicial appointment. Before and during judicial service, views and opinions about applicants and their work are collected on a structured and systematic basis, in terms of the criteria for appointment, from a wide range of judges, senior practitioners from both branches of the profession and others who are in a position to assess the candidate's work and abilities. The Lord Chancellor regards that as an important principle that no one person's view about a candidate, whether negative or positive, and however eminent that person, is decisive in itself.

Appointments selection procedure

There are three parts to this procedure: application, consultation and interview (depending on the level of appointment, the interview will have different formats).

Applications

For all judicial appointments up to and including the level of circuit judge (except for recordership, which is achieved on promotion from assistant recordership) it is necessary to apply in writing to be considered for appointment. Judicial posts are advertised.

Appointments to posts above the High Court are by invitation only. Applications are invited for appointment to the High Court although the Lord Chancellor reserves the right to appoint those who have not made an application. As for all other posts, information about senior appointments and the timing of applications to the High Court is available from the judicial group.

Consultation with the professional community

It is a central feature of the appointment system that views and opinions about the qualities and work of applicants and part-time office holders are collected from a wide range of judges, senior practitioners from both branches of the profession and others, as appropriate, by officials from the judicial group on behalf of the Lord Chancellor. These comments are mainly collected in writing and sometimes at face-to-face meetings.

Purpose of consultation

The aim is to collect comment systematically from the mentioned persons who have knowledge of individuals and their work over a number of years and who are thus in a position to assess their suitability for appointment. The comments are collected on a basis of confidentiality, save that the Lord Chancellor requires that any allegation of professional misconduct made in the course of consultation about a candidate for judicial appointment, must be specific and subject to disclosure to the candidate concerned.

Senior appointments

The Lord Chancellor consults senior members of the judiciary before recommending individuals for appointment to the Court of Appeal or the House of Lords. All Supreme Court judges and law lords are consulted about those who have applied for the High Court Bench, and on other leading practitioners and circuit judges. The Lord Chancellor consults the four heads of divisions, together with the senior presiding judge, when considering candidates for appointment to specific posts on the High Court Bench.

Access to information

Any factual information held on candidates is available to the individuals concerned on request to check and, if necessary, correct. To enable the Lord Chancellor to receive the frank advice he must have in the public

interest, comments from third parties on the candidate's professional and personal suitability for judicial appointment are sought on a confidential basis and that confidentiality is respected.

Senior judicial appointments

Lords of Appeal in Ordinary are appointed by the Queen on the recommendation of the Prime Minister, who receives advice from the Lord Chancellor. Before tendering advice the Lord Chancellor customarily consults serving Lords of Appeal in Ordinary and other senior members of the judiciary. In practice, Lords of Appeal in Ordinary are generally appointed from among the experienced judges of the Court of Appeal in England and Wales, the Court of Cession in Scotland, and the Court of Appeal in Northern Ireland. These appointment call for lawyers of great distinction who have proved themselves capable of handling the most important in complex issues which arise in appeals.

Heads of divisions

The heads of divisions (the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor) are also appointed by the Queen on the recommendation of the Prime Minister, who receives advice from the Lord Chancellor. Before tendering such advice the Lord Chancellor customarily consults senior members of the judiciary.

Lord Justices of Appeal

The same consultative process as above is followed.

The High Court judges

High Court judges are appointed by the Queen on the recommendation of the Lord Chancellor. Before making recommendations the Lord Chancellor customarily consults senior members of the judiciary about these appointments. The statutory qualification is a ten year High Court qualification or to have been a circuit judge for at least two years.

Additional qualifications and experience

Appointments to the High Court, if not on promotion from another full time office (usually the circuit Bench), have in practice generally been made from members of the bar of high standing who have been in practice for perhaps 20 to 30 years and hold the rank of Queen's Counsel. However, the Courts and Legal Services Act 1990 has made it possible for suitably qualified solicitors to be appointed to the High Court bench. Practitioners who are appointed to the High Court bench will normally have had a substantial and successful practice, often having developed areas of specialization, and be held in high regard by the profession. They will normally have sat previously as deputy high court judges and/or recorders.

Appointment process

Appointments are made to fill particular vacancies as they arise. Applications are invited, annually, from suitably qualified practitioners and circuit judges for appointment to the High Court. The Lord Chancellor reserves the right to appoint those who have not made an application. All supreme court judges are consulted on those who have applied and on other leading practitioners and circuit judges. A continuing programme of consultation with all judges of the supreme court and above assists the Lord Chancellor to identify and assess potential candidates from among leading practitioners and circuit judges.

When a vacancy in the High Court or Court of Appeal arises, the Lord Chancellor personally reviews suitable candidates at a meeting with the heads of divisions, (and, in the case of the high court, the senior presiding judge), taking into account the nature of the expertise and experience required.

The Peach Report of 2000

This report was invited by the Lord Chancellor with the following terms of reference:

1 To advise on the appropriateness and effectiveness of the criteria and the procedures for selecting the best candidates for judicial appointments;
2 the extent to which candidates are assessed objectively against the criteria for appointment;
3 the existence of safeguards in the procedures against discrimination on the grounds of race and gender, and where appropriate to make recommendations accordingly.

I have already referred to the symmetry of approach to the appointments process. The report states that senior judicial appointments, that is those of the Lords of Appeal in Ordinary, the heads of division, the Lord Justices of Appeal and the high court judges, are handled somewhat differently. There are about 150 posts under this heading, of which 99 are those of high court judges. For the latter a recent innovation has been the introduction of advertising appointments to the High Court. The process of consultation takes place with various senior members of the judiciary depending on the nature of the appointment. Since at this level, it is argued, the candidates are well known with proved records, there are no interviews. For example, when a vacancy in the high court or Court of Appeal arises the Lord Chancellor personally reviews suitable candidates at a meeting with various other senior members of the judiciary, taking into account the nature of the expertise and experience required.

Succession planning for senior judicial appointments

The processes which the Lord Chancellor follows in filling senior judicial appointments have parallels in large private sector companies which set out to plan senior manpower. He meets with senior judges and reviews the forecast needs of the High Court and the Court of Appeal over the next one or two years, and discusses the qualities of those who are regarded as having the capacity or potential to reach this level. He should be considering at each meeting candidates whether currently ready or shortly ready for appointment. Peach states that although a systematic process for succession planning is already in existence, it requires more formalization. Succession plans for projected vacancies in the High Court and Court of Appeal should be drawn up and immediate and longer term successes identified. The ideal number of identified candidates suitable for each post is about three "ready now" and two to three likely to be in the category within the next two to three years. This would provide a full opportunity to review those candidates, including women and ethnic minorities, who are considered to be of the potential but perhaps need more experience or proving time.

The views of judges

Peach stated that there was general agreement of use amongst the judges whom he met that the most important part of the selection process remains the "soundings" or consultation exercise. Some concern was expressed that this had become overweighed in that a number of instances were referred to where candidates, although well qualified, have not succeeded because of poor performance at the interview stage.

Views of others

The report states that there was general agreement that the most difficult decision was that of the transition from professional barrister or solicitor to part-time judge, requiring skills not yet fully demonstrated and the view that better methods should be developed and applied to selecting individuals for the first part-time judicial office.

The candidates

Peach had little opportunity of meeting disappointed candidates to discover at first hand their views of their experience. Some judges however referred to individuals who have not been successful and who, in the case of silk, had been bitterly disappointed and "scarred".

The feedback system

The department provides feedback on request to disappointed candidates -sometimes face-to-face, sometimes by telephone – a remarkable feature of the system and one which continues to grow in use. In the last year more than 500 individuals have taken advantage of that opportunity.

Peach also describes the short listing process for circuit judges which in itself is an interesting topic of which the Judicial Service Commission in South Africa should take note. Apart from the interviews, which would test the legal knowledge and experience of candidates, the consultation process required that each candidate nominate three consultees who would be automatically contacted to provide information. It was also required that each applicant state his own view as to his suitability for the post applied for and should produce his own assessment of his experience, knowledge, skills and characteristics. Job descriptions exist in this context (I am referring to appointments below the level of senior appointments). A number of them of course apply to every appointment in my view such as the requirement of "courtesy", "fairness", "open-mindedness", "commitment", "consciousness and diligence", etc. Court management and management capabilities should also be assessed, it was suggested. Lastly, the Peach Report recommended a commission whose role should be to audit the processes and policies for making and renewing judicial appointments, for handling grievances and appeals resulting from the application of processes and policies and for recommending improvements and changes to the Lord Chancellor.

Certain processes for silk candidates are also discussed which are extremely interesting, but which fall beyond the scope of this particular article. I may just mention one significant comment: Silk candidates should be assessed on professional achievements and not on their potential to fill judicial appointments.

The Judicial Service Commission in South Africa

I have mentioned the General Bar Council's criticism of the political appointees to the JSC and I agree therewith.

Recommendations

I want to make the following recommendations in the light of all of the above, and the criticism that has to my knowledge been levelled against the present system. When I speak of "my own knowledge" I speak of my few attendances during the interviews, press comments and the comments of colleagues. The English process, especially the one that emphasizes appointment on merit, is the ideal one. This process can of course not be simply copied in South Africa. As long as section 174 of the present Constitution exists, it will be inevitable that not all appointments are made on merit. Appointments to the judiciary must reflect broadly the racial and gender composition of South Africa. It is simply a tragic fact that thousands of lawyers belonging to the so-called previously disadvantaged group in South Africa have not had the opportunity, be it at school level, university level or at practice level, to establish themselves to such an extent as for instance I have had. It would therefore be a prolongation of the previous unjust system to require such persons to compete with me on an equal level and, if we are both candidates for appointment to the judiciary, to prefer me simply because I would then have been appointed "on merit". Were this process to be followed, the injustices of the past would simply continue. The present process, however, has its flaws, and serious ones at that. There should be no place for political appointees to the JSC. Secondly, the word "merit" has a number of connotations, and what may be merited today may not be merited tomorrow. In the particular context, however, I believe it would be a wise decision if some of the processes presently followed in England are adopted here, and I have the following in mind:

1. The nomination system should be changed. At present my beloved grandmother, my niece or my messengers could nominate me. Such nominations are then forwarded to the Judicial Service Commission and a short list is drawn up. Candidates on such short list are then invited for an interview. At present the Pretoria Bar Council nominates **all** silks who wish to be nominated and has no selection process in place.
2. A more informed approach should be followed. The Judge President together with a committee of senior counsel and senior attorneys should also meet once a year to draw up a list of candidates in the light of expected vacancies over a period of say two years. A candidate should then be classified according to this committee as either being "ready now" or ready say within two to three years. Candidates should then be approached by this committee to establish whether they are interested in an appointment either then, or in the future. If any candidate is willing to accept an appointment, the required information that I have referred to should be collected from the professions, the senior judges, and of course from the candidate himself. A critical self appraisal should be required together with specific details relevant to such candidates practice and experience. Candidates should provide a list of say three consultees who should be approached confidentially. All the mentioned information should be then critically assessed by the particular Judicial Service Commission (as I have said without the political appointees), and the candidate should then be informed that he is regarded as being ready then or, on certain conditions, that he would be regarded as being suitable say within two years. A feedback system should apply which would enable each candidate, upon request, to be informed about the Service Commission's views as to his suitability either at the time or in the future. The Commission's views should be published in some detail as to enable the public to be informed as to an appointee's suitability, qualifications and experience. Until a proper balance has been established, where there are two candidates of generally equal merit, a candidate from the previously disadvantaged group or gender should be appointed. This should be done for a period of say five to seven years. Thereafter appointments should be made strictly on merit following the same process.
3. The present system, has inherent inadequacies and many unsuitable candidates have been appointed as a result. Having however regard to the constitutional requirements some of these appointments were however unavoidable. The unfortunate result for the courts as an institution, however, is that much merit has been disregarded.
4. By suggesting the above, it must not be understood that I am in favour of the undue reverence that is accorded to High Court judges. The process is just as important if not more so, in the case of appointments to the so-called lower courts. As far as I am concerned, and I have mentioned this before to the Hoexter Commission some years ago, the difference in status between a magistrate's court, the regional court and the High Court should in any event be abolished. An experienced regional court magistrate, by way of example only, will know more about the law of procedure, the law of evidence and criminal law, than a judge who mostly hears unopposed applications, divorces, criminal

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It is in the public interest

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- He seems to suggest the "independence" of advocates is based largely on the fact that they take instructions only on referral from attorneys, and alleges that the Bill will abolish the referral system because "it requires all lawyers to take work directly from the public".
- Finally, the judiciary's independence does not depend upon its members being drawn from the Bar. The continuance of the advocate's profession depends upon the expertise they offer, not upon petty job reservation.

Confusion: working off Third Draft Bill

In his reply to the Minister's letter Jeremy Gauntlett wrote as follows on 4 February 2001:

"The letter from Minister Penuell Maduna, 'Aim of the lawyers' Bill is to protect the public interest,' dismisses the Bar's critique of the Legal Practice Bill as based on 'factual inaccuracies,' and a call for 'petty job reservation.'

On January 11, the minister accepted the Bar's proposal (first made in October) that we meet to discuss our differences. We welcome that step forward and would not want to pre-empt the matter here. We are sure the minister does not intend that either. But one matter requires immediate correction: the attempt to characterise our critique as riddled with errors.

What the minister's letter does not disclose is that he is working off a different text to ours. The confusion is unsurprising, because what he appears now to use is, in fact, the third draft of the Bill.

This draft, moreover, was posted on a departmental web-page two days before Christmas and without notice to all those bodies the Policy Unit affects to consult.

To add to the muddle, the draft was rendered inaccessible without use of an appropriately-named 'Acrobat Reader.' In these circumstances, the head of the Policy Unit went on leave, setting a unilateral deadline of January 31 for responses.

The new draft removes some of the inanities in its predecessor to which the professional associations had to draw attention. But major structural flows remain; it is these which, at the level of basic policy, we shall be glad to raise with the minister.

Chief among these is the inspiration, now disclosed, for the attempt to impose a statutory council of ministerial nominees on lawyers. It includes, we are now told, the statutory council for quantity surveyors.

To resist this has little to do with 'petty job reservation'."

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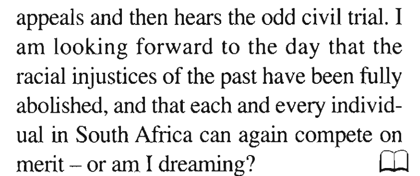
appeals and then hears the odd civil trial. I am looking forward to the day that the racial injustices of the past have been fully abolished, and that each and every individual in South Africa can again compete on merit – or am I dreaming?

Serving the public interest

Writing in *Counsel* April 2000 Jonathan Hirst QC, the (then) chairman of the Bar of England & Wales is sharply critical of the English Access to Justice Act 1999 which provides for the establishment of the Criminal Defence Service (CDS). It allows the new service to "employ persons to provide representation" to defendants in criminal proceedings.

Hirst raises the following points:

- "He who pays the piper …?"

We are also entitled to ask why a partial nationalisation of the provision of defence advocacy services is a desirable objective in its own right, given this (the British) Government's general move away from the state sector. Defendants are always bound to suspect that a state employed defender is not fully independent of the prosecution being brought by the State. The lessons from the US bear this out.

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