*Bede Harris**

APPOINTMENTS TO THE BENCH - THE ROLE OF A JUDICIAL SERVICES COMMISSION

INTRODUCTION

THIS article arises out of the debate that has taken place in New Zealand over the past year on the issue of judicial selection. Neither the issue itself, nor the remedy proposed, are new. The merits of moving to judicial selection by means of a Judicial Services Commission has recently become an issue in Australia.[1] What this article seeks to do is to place judicial selection on an appropriate conceptual basis and to use an empirical analysis, to the limited extent that this is possible, to examine what effect changing the method of judicial selection is likely to have on the composition of the bench. The ongoing reforms in this area advocated by Britain's Institute for Public Policy in its draft Constitution for the United Kingdom are also examined, and the article concludes by noting that increased receptiveness on the part of some members of the judiciary in New Zealand gives hope that reform may meet a more positive response than it has up until now.

RECENT CONTROVERSY

In 1992 a report entitled *Domestic Violence and the Justice System - A Study of Breaches of Protection Orders*, commissioned by the Victims' Task Force of the Department of Justice and drafted by members of the University of Waikato Domestic Protection Team, was released.[2] The focus of the report was the extent to which the justice system of New Zealand provided effective protection for victims of domestic violence. Among the issues raised in the report was the attitude of the judiciary

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1 See Meagher, "Appointment of Judges" (1992) 2 *J of Judicial Administration* 190 and Masterman, "Political Influences In The Legal Process - Who's Influencing Whom" (1993) 1 *NZ Law Conference Papers* 311 (New Zealand Law Society, Wellington).

2 Busch, Robertson & Lapsley, *Domestic Violence and the Justice System - A Study of Breaches of Protection Orders* (University of Waikato, Hamilton 1992).

towards domestic violence, and in particular the degree to which family and criminal court judges appreciated the dangers which victims of such violence face. Among statements contained in the report were the following:

> [W]e concluded that certain judges share myths about domestic violence commonly held by society at large. Certain judges have clearly adopted what might be termed a "two to tango" analysis of domestic violence. ... Some judges seem to lack the understanding that a spousal victim has a high risk of being victimised again and that, therefore, victims' fears about future violence are realistic. ... The belief that violence is caused by the couples' communication problems leads some judges to ignore or trivialise the victim's need for protection.[3]

Later on the report states:

> We interviewed a number of Family Court and District Court judges for our study and on occasion the attitudes of certain judges appeared to reveal a lack of knowledge about the dynamics of domestic violence. This should not be surprising as judges are subject to the same myths about domestic violence as the general public. Specifically there seemed to be a lack of understanding on the part of some judges that a spousal victim has a high risk of being victimised again.[4]

These findings were based on case studies in which court decisions were given detailed analysis, leading to several recommendations, one of which was as follows:

> As judicial attitudes convey powerful messages to victims and abusers alike about the judicial system's commitment to stopping domestic violence, it is essential that judges convey unambiguous messages that the existence of violence in a relationship is, in fact, a real problem of that relationship. To some judges, however, domestic violence appears not to be seen as a real problem but only as a symptom of a

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3 Busch, Robertson & Lapsley, *Domestic Violence and the Justice System - A Study of Breaches of Protection Orders* p xi.

4 At p182.

> dysfunction in the relationship for which both parties may be responsible.[5]

This elicited a statement from the Leader of the Opposition, Mr Mike Moore, who said:

> Judges are victims of their upbringings too. They reflect their class and their generation. Most are white, male, wealthy and middle class. They live a protected safe lifestyle. Many are aged and are like state relics in the museums. ... There is an important need for judges to understand and be taught about what happens in the community. ... If judges were in touch with society they would realise that the victim is not responsible for abuse. ... Because many judges come from privileged backgrounds they don't know the real daily fear many people and their children live with.[6]

Responding to government criticism of his statement, Mr Moore referred to a speech made in Parliament in 1989 by Mr Jim Bolger, who had then said:

> [M]embers of the judiciary have tenure for life, or until they are retired at some venerable age. The Bill [the New Zealand Bill of Rights Bill] transfers the rights to a body that is unrepresentative of New Zealand - made up of middle-aged to ageing gentlemen who are well paid and remote.[7]

The statements reproduced above typify a view that our judges are unrepresentative of the society they serve, or are at least out of touch with it.

PRE- AND POST APPOINTMENT REMEDIES

The relationship between judges' backgrounds and the decisions they make is difficult to establish. As is argued by Lee, no causal link has been demonstrated to exist, at least in Britain, between the background of *individual* judges and the decisions they have made.[8] Clearly, conclusions about the relationship between personal background and performance on the

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5 Busch, Robertson & Lapsley, *Domestic Violence and the Justice System - A Study of Breaches of Protection Orders* pp xx, 198.

6 Mr Mike Moore, Press Statement, 21 August 1992.

7 NZ, Parl, *Debates* (1989) Vol 502 at 13046.

8 Lee, *Judging Judges* (Faber & Faber, London 1989) pp36-39.

bench could be drawn only after a comprehensive statistical analysis of decisions made by a number of judges over a substantial period.[9] Yet it is equally clear from the debate that occurred in New Zealand following publication of the report on domestic violence that there is a *perception* that judges are unaware of their social surroundings. Given that perceptions are as important as realities where it comes to doing justice, the importance of maintaining public confidence points to the necessity of making the selection process more open. The aim of this article is to propose a reform measure which is most likely to lead to a judiciary which has a broad understanding of the society in which it operates and which is therefore likely to retain public confidence.

The first issue to be addressed in any discussion on judicial reform is the most appropriate stage in the judicial process for intervention. One possible strategy would be to establish an education programme which judges would enter once appointed to the bench. This proposal was discussed by Downey who, in responding to the remarks of opposition leader Mike Moore quoted above, rejected post-appointment training courses, arguing that practice at the bar gives judges the intellectual training they require, and that training courses could become the vehicle for pressure groups to influence the judiciary.[10] Post-appointment training courses have been used in Canada,[11] and have been mooted for Australia, most recently in the wake of widely criticized remarks made by male judges in rape cases.[12] But the argument that post-appointment education is open to abuse is not without substance.[13] It would be difficult to decide who should be responsible for

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9 Much work of this nature has been done in South Africa where judicial attitudes to an unjust legal order have attracted research interest. See Corder, *Judges At Work* (Juta & Co, Cape Town 1984); Forsyth, *In Danger For Their Talents* (Juta & Co, Cape Town 1985); van Blerk, *Judge and Be Judged* (Juta & Co, Cape Town 1988).

10 Downey, "Judges, Independence and Accountability" [1992] *NZLJ* 409.

11 Morton (ed), *Law, Politics and The Judicial Process in Canada* (University of Calgary Press, Calgary, 2nd ed 1992) pp82-83.

12 Reuters news service reported on 1 June 1993 that the Australian Federal Government was to spend A$100,000 over the next three years on judicial education. This followed remarks made in August 1992 by South Australia Supreme Court judge Mr Justice Bollen that husbands might be expected to use "rougher than usual handling" when their wives refused sex, by Mr Justice O'Bryan of the Victoria Supreme Court that the trauma suffered by a rape victim was diminished because she had been comatose during the attack, and by Judge Bland of the Victorian County Court who said that women who say 'no' to sexual intercourse sometimes mean 'yes'.

13 On the controversy arising out of this issue in Canada see Morton (ed), *Law, Politics and The Judicial Process In Canada* pp82-83.

providing judicial education. If the task was given to a government department, might it not be argued that judicial independence was at risk of being compromised? Would it be appropriate for the executive arm of government to be responsible for both criminal prosecutions and the education of judges on issues such as sentencing? Difficult questions are also raised by the suggestion that the responsibility should be given to non-governmental agencies. Which of the variety of groups representing commerce, consumers, trade unions, women, Aboriginals, criminal rehabilitation societies and victims of crime, to mention only a few, would be given the undoubted advantage of the judiciary being required to listen to their ideas? Is there also not an obvious risk that this process might tempt such groups to cross the fine line between lobbying and teaching? Of course, this is not to say that it is impossible to devise an education programme suitable for the judicial role; in Europe University training for a judicial career which is separate from that of a legal practitioner is the norm.[14] But in countries following the Anglo-American model of progression from private practice to the bench, advocates of post-appointment educative measures have a heavy burden to discharge in showing how to construct a process that does not compromise judicial independence. Furthermore, I submit that post-appointment measures come too late. Surely it would be preferable to select the right candidates to begin with, rather than to apply remedial measures after selection? This is the proposition that forms the basis of this article: that if reform is to be effected it should be prior to appointment, at the selection stage. It may indeed be possible to devise post-appointment education courses that meet the objections outlined above, but I would argue that these are of secondary importance in comparison with what would be a more fundamental reform of the selection process.

A 'REPRESENTATIVE' JUDICIARY?

To say that the judiciary does not reflect the concerns or composition of society to some extent says more about the legal profession than it does about the judiciary. In New Zealand, s6 of the *Judicature Act* 1908 (NZ) requires that appointees to the bench be legal practitioners of at least seven years service. Given that membership of the profession is a precondition for being chosen as a judge, it is clear that the unrepresentative nature of the

14 See Griffith, *The Politics of the Judiciary* (Fontana, London, 3rd ed 1985) p226 where the point is made that the judiciary in Italy, France and Spain is politically far more heterogenous than in Britain because judges are appointed on the basis of a University examination and are therefore drawn from a wider class of people than is represented by senior barristers in Britain.

judiciary really means that the profession is unrepresentative. Fundamental reform of the judiciary will in the long term therefore depend on how successful law schools and the profession are in attracting a wider range of students and practitioners than they have up until now. But broadening the composition of the profession is a long-term remedy which will take many years before it impacts upon the composition of the bench. Furthermore, there is no guarantee that once the profession has been broadened that change will automatically be reflected in judicial appointments.

Who is appointed to the bench and by whom is an issue of major importance in any legal system. In discussing this topic one is to some extent limited by the nature of the judicial function. To begin with, the obvious response to the claim that the judiciary is "unrepresentative" is that given the central importance of judicial independence, the judiciary is not, nor can ever be, a "representative" institution in the literal sense of that word. The independence of the judiciary is founded on the requirement that in exercising their function judges must act free from both external pressure and internal prejudice; in other words, with objectivity. It follows that if a judge were to sit in a "representative" capacity - as the delegate of their particular gender, race or class - they would undermine the independence which is the very basis of the profession. It would place a judge fundamentally at odds with the requirements of the office were they to decide a case from a Protestant, Catholic, male, female, Maori or European perspective, or that of any of the particular social groups to which the judge happened to belong. It is precisely this type of background factor from which a judge must strive to free him or herself. I am not here saying that it will always be possible for all judges to detach themselves from the values which upbringing, intellect and experience have produced. The issue of the extent to which objectivity is attainable is a debate in itself.[15] But it is quite a different thing from saying that complete objectivity is not always achieved to say that because of this, objectivity should be discouraged, and that judges should be appointed in the hope that they will *not* detach themselves from their personal prejudices, but will instead bring them to bear in the decision making process.

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15 On the question of judicial objectivity and impartiality see Griffith, *The Politics of the Judiciary* pp193-197; Cranston, "Disqualification of Judges for Inteterest, Association or Opinion" [1979] *Public Law* 237; Greene, "The Doctrine Of Judicial Independence Developed By the Supreme Court of Canada" (1988) 26 *Osgood Hall LJ* 177; Colvin, "The Executive and Independence of the Judiciary" (1986) 51 *Saskatchewan L Rev* 229; Nemetz, "The Concept of An Independent Judiciary" (1986) 20 *U of British Columbia L Rev* 285.

Furthermore, appointment by gender, race or any other type of affirmative action quota, tempting as it may be as a means of having an immediate and visible effect on the composition of the bench, would do a different kind of harm to the reputation of the judiciary than is being caused by the perception that it is out of touch with society. Appointees who did not match the traditional race, age and gender profile of the judiciary would be thought to have been appointed on the basis of tokenism rather than ability, and will also be thought to have been appointed in order to bring their own biases to bear, as if in compensation for the biases of the unrepresentative sector of the bench.[16] For these reasons it is submitted that if the judiciary is thought to be out of touch with society and that it is the gender, race and age of its members that make it so, it would nevertheless not be appropriate to make judicial appointments on the basis of quotas designed to reflect the demography of society as a whole.

In any event, is it not the judge's appreciation of social realities rather than their social background that is the real issue? Of course an individual's intellect is affected by their upbringing and experiences, and these factors are themselves influenced by gender, race, religion etc. But unless one takes a completely deterministic view of humanity, one must acknowledge the possibility that judges are able, to some extent at least, to discard whatever prejudices to which their backgrounds may have predisposed them, and to develop the intellectual qualities appropriate to their role. Precisely what these qualities are become apparent when one considers the types of decisions judges are called upon to make. Most decisions, particularly in the fields of criminal law, tort and family law require familiarity with the general experience of life of the wider community. Furthermore, many legal decisions turn on concepts such as "reasonableness" which depend on what might be called the legal convictions of the community. Thus judges ought to possess knowledge and experience which equips them with an understanding of life in the community and its legal convictions. In other words, it is necessary that they have what one might call the quality of social perceptiveness which gives them a broad understanding of society as a whole. Thus while a judge's gender, race, religion or political views should not be relevant to their process of decision making - and therefore their suitability for selection to the bench - their experience and understanding of life in general *are* relevant, and ought to be taken into account in the selection process. Of

16 For a discussion of how "affirmative action" policies can work to the detriment of those whose interests they purport to advance see Goldstein, "Reverse Discrimination - Reflections of a Jurist" (1985) 15 *Israel Yearbook on Human Rights* 28 at 35.

course it is likely that judicial selection by religious, ethnic, age or gender quota on the one hand, and selection according to breadth of knowledge and overall social perceptiveness on the other would, in time, result in a bench of similar composition. Conversely, it is unlikely that the age, gender and ethnic composition of the bench would remain the same as at present if the criterion of social perceptiveness was taken into account in appointing judges. But the important difference between appointment by quota and appointment taking into account social perceptiveness is that while they would both be expected to lead to similar results, the former links selection to the inappropriate criterion of group membership, while the latter ties it to the appropriate criterion of intellectual quality.

This difference can be illustrated by taking gender as an example. Although it is likely that by taking social perceptiveness into account one will arrive at a bench that is more balanced than at present (subject to the limitations imposed by the composition of the pool of practitioners from which one is drawing judges), a woman appointed under the new selection procedure would be appointed not because she is a woman but because as a woman her perception of society is different from that of a man, and it is necessary that the bench reflects that perception. But it is also possible that there may be women who are not and ought not to be appointed because they bring no new perception to the bench, and men who may be appointed because they are found to have a wider perception of issues affecting women than do other candidates.[17] This illustrates the difference in conceptual basis between appointing judges for who they are (as would be the case under a quota system) and appointing them on the basis of what they know and perceive.[18] In short, judges should be appointed on merit, but with "merit" redefined to include criteria which are obviously not given sufficient consideration at the moment. The example given above of the possibility of a man being appointed because of his perception of gender issues also illustrates that the correlation between the composition of the bench and the social perceptiveness of its members is not an absolute one. Nevertheless it is submitted that the former is sufficiently indicative of the latter to enable one to say that a judiciary that does not mirror the composition of the population or, at the very least, that of the profession, does not encompass within its ranks a sufficiently broad range of perceptions of society. The

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17 This point is well made in Morton (ed), *Law, Politics and the Judicial Process In Canada* pp81-82.

18 It must with respect be noted that this distinction was missed in Wilson, "Will Women Judges Really Make A Difference?" (1990) 28 *Osgood Hall LJ* 507. This article does however contain an eloquent argument in favour of having female perspectives included on the bench.

important objective then is to identify which judicial selection method is most likely to produce a judiciary which has the quality of social perceptiveness identified above.

Methods of judicial appointment in jurisdictions falling within the broad Anglo-American family can be divided into two categories: appointment by the executive (either acting on its own or while subject to the requirement of subsequent legislative confirmation), and appointment by a judicial services commission. The policy underlying judicial selection is rarely if ever articulated by those responsible for this task, and it is therefore difficult to say what weight if any is given to candidates' breadth of social experience and understanding. Thus in determining which selection method is best able to produce a socially perceptive bench, one can only examine outcomes, and assume that a bench that is diverse in its composition exhibits that quality because those responsible for choosing judges have taken breadth of social perceptiveness into account, or have at least taken into consideration a wider range of factors than is usually the case. Bearing this assumption in mind, the following paragraphs analyse the composition of the bench in various jurisdictions in an attempt to discover which method of appointment is likely to produce the most balanced bench.

APPOINTMENT BY THE EXECUTIVE

The Executive Acting On Its Own

Appointment by the executive branch acting on its own[19] is the standard method of appointment to the bench[20] in countries following the traditional model still adhered to in the United Kingdom, and used in Canada,[21] Australia[22] and South Africa,[23] to name but a few. In New Zealand s4(2) of the *Judicature Act* 1908 (NZ) provides that judges are appointed by the Governor-General, which by convention means the Governor-General acting upon the recommendation of the Attorney-General.

Uncontrolled executive appointment has not been successful in producing a bench with a balanced composition. Taking gender as an indicator, a

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19 Usually the head of state acting, by convention, on the advice of the government of the day.

20 In referring to the bench I mean the superior courts, which excludes district courts in New Zealand, magistrates' courts in Britain and South Africa and provincial courts (that is, s92 courts) in Canada.

21 *Constitution Act* 1867 (Can) s96.

22 *Commonwealth Constitution* s72.

23 *Supreme Court Act* 1959 (Sth Afr) s10(1)(a).

survey of lists of superior court judges[24] appearing in the law reports from various jurisdictions reveals the following: In New Zealand there are no women in the ranks of the six Court of Appeal judges and and one among 32 High Court judges.[25] In Britain none out of eleven Law Lords are women, while women provide one out of 27 judges in the Court of Appeal, one out of 55 Queen's Bench judges, none of the fourteen Chancery judges and two of the sixteen judges of the Family Court.[26] In South Africa one of the 23 Appellate Division judges is a woman.[27] In Australia one out of seven High Court judges, one out of 33 Federal Court judges and seven out of 52 Family Court judges is female.[28] In Canada two out of 24 judges of the Federal Court are women, as are two of the nine Supreme Court judges.[29] Women make up 10% of the superior (that is, federally appointed) judiciary as a whole.[30]

Leaving the issue of composition aside for a moment, there is yet another reason why appointment by the executive alone is not ideal. This is the temptation the system provides for selection on the basis of political favouritism, which becomes particularly strong in jurisdictions that have a bill of rights conferring a testing power on the judiciary. While there is no evidence that political considerations play a part in the selection of judges in New Zealand, there is also no guarantee that they do not. Indeed the fact that the selection procedure is informal, unregulated and to some extent mysterious no doubt contributes greatly to the perception that the judiciary is out of touch with society.

Executive Appointment Followed By Legislative Confirmation

With its system of separation of powers and checks and balances, the United States Constitution requires that appointments by the executive to federal judgeships have to receive the approval of the Senate.[31] Does the American experience indicate that the addition of legislative approval would improve the judicial selection process? The answer is in the negative, at least in so far as achieving a balanced bench is concerned. The interposition of legislative approval between nomination by the executive and appointment to the bench has produced a Supreme Court judiciary little

24 Acting judges have been included in these figures.
25 [1993] 2 NZLR.
26 [1992] 3 All ER.
27 [1992] (3) SALR.
28 (1992) 108 ALR.
29 [1992] 2 FC; [1992] 2 SCR.
30 Morton (ed), *Law, Politics and the Judicial Process in Canada* p80.
31 Article II section 2.

different in composition from that of countries where the executive alone has control over appointments. Of the 107 Justices who have sat in the Supreme Court to date, there have been only four who have not been white males (Thurgood Marshall, Sandra Day O'Connor, Clarence Thomas and Ruth Ginsburg).

But apart from conferring no discernible benefit as regards the composition of the bench, legislative confirmation imports a high degree of political controversy into the judicial selection process, which constitutes an additional reason for not adopting this system. The frequency with which the United States Supreme Court has been called upon to decide controversial issues during the past thirty years has focussed increasing attention on the confirmation process. More particularly it has caused the process to change from one in which the Senate investigates the probity of Supreme Court nominees to one in which it investigates their philosophical convictions. Confirmation hearings have on occasion degenerated into open ideological conflict in which members of the legislature ask nominees their opinion on existing case law and then seek to draw conclusions on how they might decide cases in future.[32] What this amounts to is an indirect attempt to get nominees to give opinions on hypothetical cases, something which no judge can or should be asked to do.[33] To be fair, the attitude of Congress is to some extent a response to a policy by respective Presidents of both parties to stamp their mark on the Supreme Court by selecting philosophical soulmates as nominees. But the real defect clearly lies in the process itself. The legislative confirmation system should be rejected not only because it does not produce a more balanced bench than does appointment by the executive alone, but because it has the added disadvantage of making nominees pawns in an ideological war between the executive and the legislature.[34]

APPOINTMENT BY JUDICIAL SERVICES COMMISSION

The final method of appointing judges considered in this article is appointment by Judicial Services Commission. The most recent examples

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32 Lee, *Judging Judges* pp182-194. See also Bronner, *Battle for Justice - How the Bork Nomination Shook America* (WW Norton, New York 1989).

33 In this regard see Hunter, "Confirmation Hearings for Judges would Lower Quality of Court" in Morton (ed), *Law, Politics and The Judicial Process in Canada* pp120-122.

34 For arguments in favour of this system see Morton (ed), *Law, Politics and The Judicial Process in Canada* pp117-119; Masterman, "Political Influences In The Legal Process - Who's Influencing Whom" (1993) 1 *NZ Law Conference Papers* 311 (New Zealand Law Society, Wellington) at 323.

of where this has been done are Zimbabwe and Namibia, the two newest members of the Commonwealth.[35] Both of these countries have sought to overcome a legacy of racial discrimination and to reform the judiciary so that it more closely reflects the population it serves. Yet neither country has resorted to quotas or reverse discrimination in furtherance of the aim of ensuring that a greater range of interests are reflected in appointments to the bench. It is instructive to examine how the selection process works in these jurisdictions and to see to what extent it has changed the composition of the bench. The idea of a Commission has also been adopted by Britain's Institute of Public Policy Research, and it is therefore interesting to examine the composition of its proposed Judicial Services Commission.

Zimbabwe

Section 84(1) of the *Constitution of Zimbabwe* stipulates that Judges of the Supreme and High Courts are to be appointed by the President "after consultation" with the Judicial Service Commission.[36] The use of the word "consultation" indicates that the opinion of the Commission is not binding. Indeed appointments not in accordance with the Commission's advice are contemplated by s84(2), which requires the President to bring to the attention of Parliament any appointments they make which are not consistent with Commission recommendations. The composition of Zimbabwe's Judicial Service Commission is prescribed by s90, which states that it shall consist of the Chief Justice, the Chairman of the Public Service Commission (which performs a similar job to the Judicial Service Commission but in relation to senior appointments in the civil service), the Attorney General, plus at least two but no more than three additional members appointed by the President, at least one of whom is a judge, a legal practitioner, or a person with such legal qualifications as the President

35 It should be noted that although bodies similar to the Zimbabwean and Namibian Judicial Services Commissions are used in Canada, this is true only of appointments to provincial courts, which are inferior courts similar to District Courts in New Zealand. Appointments at the disposal of the federal government (which includes appointment to provincial superior trial and appeal courts as well as federal courts) are made in the same way as in New Zealand, the only difference being that the minister of justice refers names of potential appointees to a committee of the Canadian Bar Association for comment before making a recommendation to the cabinet. The Association's role is however non-statutory and informal. See Russel, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson, Toronto 1987) pp107-130.

36 References to the Zimbabwean and Namibian Constitutions are from Blaustein & Flanz (eds), *Constitutions of the Countries of the World* (Oceana Publications, Dobbs Ferry, NY 1990) Supplementary Volume and Volume XI respectively.

considers adequate for appointment to the Commission. It will be noted that the Commission is a relatively weak institution - its opinion is non-binding, and apart from the Chief Justice it is composed entirely of government appointees. The Commission has however led to a change in the composition of the judiciary. Whereas at independence in 1980 all of the twelve judges on the bench were white and none female,[37] now twelve out of eighteen judges are black and of these one is female.[38]

Namibia

The Judicial Services Commission in Namibia has a more significant role than its Zimbabwean equivalent. In terms of the *Constitution of the Republic of Namibia*, article 82(1) states that all judicial appointments shall be made by the President "on the recommendation of" the Judicial Services Commission. The phraseology here indicates that the President confers formal endorsement on a decision effectively made by the Commission. Furthermore, article 85(1) states that the Commission shall consist of the Chief Justice, a serving judge appointed to the Commission by the President, the Attorney General, and two practitioners nominated by the legal profession. Here the balance in the composition of the Commission is clearly in favour of non-governmental representatives. As Namibia became independent only in 1990, the new judicial appointment system has not had time to make a significant impact on the composition of the bench, but whereas none of the six judges at independence were black,[39] two of an expanded bench of twelve now are.[40]

The Institute for Public Policy Research

The most radical proposal for judicial reform emanates from Britain, where among academic lawyers appeals have begun to be made for an overhaul of the selection process,[41] and where the Institute for Public Policy Research recommended the creation of such a body in its recently proposed Constitution for the United Kingdom.[42] The Institute's proposals

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37 1980 (1) SALR.
38 1992 (3) SALR.
39 1990 (1) SALR.
40 1992 (3) SALR.
41 See, for example, Pannick, *Judges* (Oxford University Press, Oxford 1987) pp67-69.
42 Cornford (ed), *The Constitution of the United Kingdom* (Institute for Public Policy Research, London 1991). Section numbers refer to those in the Institute's proposed Constitution. The issue of judicial appointments is

contemplate a Judicial Services Commission for each of England and Wales, Scotland and Northern Ireland to fill vacancies on the bench in these regions,[43] and a separate United Kingdom Judicial Appointments Commission, staffed by persons elected from and by the regional Commissions, to fill vacancies on the Supreme Court, which would be the ultimate court of appeal.[44] The proposed Judicial Services Commission for England and Wales would consist of eight lay persons (that is, persons who have never qualified as legal practitioners) five judges and two legal practitioners. In other words there would be a non-professional majority and the government would have no representation at all.[45] The composition of the United Kingdom Commission would no doubt reflect that of the regional Commissions, as the latter would elect the former from among their own membership. Whenever a vacancy arose, the executive would be bound to appoint one of two persons nominated by the relevant Commission,[46] which would be required to select candidates for judicial office in such a way as to ensure "that adequate numbers of candidates of both sexes and from diverse racial, religious and social backgrounds are considered for appointment".[47]

This mandate, which directs the Commissions to have regard to the social groups to which judicial candidates belong, is one which for reasons given earlier in this article, I do not advocate, yet it indicates how drastic a reform some commentators believe the judicial selection process requires. It is also interesting to note that the Institute proposes that the process for dismissal of judges be formalised. Commissions would have the power to refer an allegation of judicial misconduct to a Judicial Conduct Tribunal[48] which, after hearing the matter, would have the power to make a binding recommendation to Parliament that it consider a resolution that the judge be removed from office.[49]

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discussed at pp18-19 of the Introduction and pp80-81, 83, 87 and 93-97 of the Commentary.

43 Sections 103 and 104.

44 Section 102.

45 Schedule 5.

46 Section 96.4 and Schedule 4 s3.1.2.

47 Section 104.2.

48 Sectionss 104.3 and 110.2. The Tribunal would consist of three judges and two lay people (s109.2).

49 Sections 111.2 and 112.1. This body would be similar to the Standing Conduct Division established by the *Judicial Officers Act* 1986 (NSW) which acts as an investigatory arm of the Standing Judicial Commission for the State, and which must refer to Parliament any complaints of judicial misconduct which it finds to be justified.

SUPERIORITY OF THE COMMISSION MODEL

The data examined above suggests that appointment by a Judicial Services Commission produces a more broadly composed bench than does executive appointment, whether subject to legislative confirmation or not. Why is this so? One obvious reason is that where selection is by the executive alone, that usually means that the decision rests in the hands of a single member of the cabinet who holds the portfolio under which judicial selection falls. Whatever contribution to the decision there may be from other interested parties is confined to a narrow groups, such as existing members of the bench and senior members of the legal profession, who are unlikely to make recommendations that would change the *status quo*. Furthermore, such consultations are entirely informal and cannot be counted as an effective restraint on the cabinet member's power of selection. The failure of legislative confirmation to improve matters is explicable on the basis that the power of legislative confirmation is a purely negative one; the legislature can only reject a choice made by the executive, it cannot make a choice of its own.

By contrast, use of a Commission means that a number of people are involved in the selection process. This in itself increases the likelihood that a more diverse group of judges will be chosen than is the case when the choice rests in the hands of an individual. Clearly the key issue in such a system is who is appointed to the Commission. The experience of Zimbabwe and Namibia suggests that the mere fact that judges and legal practitioners were formally included in the process - hardly a radical step - had a fairly dramatic effect on the composition of the bench. It can therefore be assumed that the broader the range of interest groups from which members of the Commission were drawn, the broader the resulting composition of the judiciary. Who then ought to be represented on such a Commission? The advantage of using a Commission is that it is an infinitely flexible institution, the composition of which can be tailored to suit the needs of the country concerned.[50] One would therefore expect the profile of the Commission to differ according to the interest groups that the particular society felt ought to be represented on it. The government, legal practitioners and serving members of the judiciary are obvious categories, but it would be through the inclusion of interest groups representing the public as a whole that the greatest impact would likely be made on the composition of the bench. It may be difficult to decide which interest

50 For a discussion of the way in which Germany and France balance the composition of their judicial selection bodies see Bell, *Policy Arguments in Judicial Decisions* (Clarendon, Oxford 1983) pp258-264.

groups should have the opportunity to nominate Commission members. This adds strength to the argument that at least some seats on the Commission should be directly elected by the voting population as a whole.

So far as the powers and procedures of a Commission are concerned, it is submitted that the advantage of having a Commission would be negated unless its recommendations were binding on the head of state or whichever Cabinet member had responsibility for judicial appointments. It would subvert the purpose of having a Commission if its recommendations could be overridden by the executive. One would expect that in choosing judges the Commission would be restricted to selecting from among practitioners of several years standing, but in deciding on their suitability for appointment it should have regard to a wide range of factors, such as their academic background (and in particular any non-legal disciplines they may have studied), their professional reputation, and their involvement in the wider community.[51] It would of course be crucial to the success of this reform that the Commission developed appropriate techniques, which might include interviewing prospective judges, to determine which of the candidates displayed the required qualities. Finally, it would also be necessary to publicise whatever selection criteria the Commission used, so that the public was aware that judges appointed under the new system were being chosen on the basis of merit rather than tokenism and because their background and experience enabled them to bring the quality of social perceptiveness to the bench.

PROSPECTS FOR REFORM

There is clearly a trend away from appointment by the executive on its own and towards consideration of a wider range of opinion in the selection of judges.[52] The idea of a Judicial Services Commission has previously been mooted in New Zealand,[53] but on the last occasion, although supported by practitioners, it reportedly encountered resistance from the judiciary.[54]

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51 It is heartening to note that the government is now prepared to appoint able lawyers even if they have not been recently active in court work, see McGrath, "Judicial Appointments" [1992] *NZLJ* 269.

52 The Canadian Bar Association and the Association of Canadian Law Teachers issued separate reports in 1985 calling for the reform of the federal appointment process and the creation of bodies almost identical to the Commissions operating in Southern Africa. See Russell, *The Judiciary in Canada: The Third Branch of Government* pp130-135.

53 Hodder, "Judicial Appointments in New Zealand" [1974] *NZLJ* 80 at 86-87.

54 Rt Hon Sir Thomas Eichelbaum, "Judicial Independence - Fact Or Fiction ?" (1993) 2 *NZ Law Conference Papers* 120 (New Zealand Law Society,

Lately however interest has come from the judiciary itself, most notably from Sir Robin Cooke, President of the Court of Appeal, who said:

> Where there may be room for relevant institutional improvement is in systems for appointment of judges, to ensure the optimum combination of capacity and impartiality. Appointments by the executive are invariably political to a greater or lesser degree. Among candidates of roughly equal standing a Government must naturally be disposed to select one whose sympathies are thought to be congenial to its policies. ...With all the reluctance of a traditionalist I am coming increasingly to see the force of the argument for a judicial appointments commission. ... Perhaps the best chance of approaching the impossible goal of complete impartiality is either to limit political input in key judicial appointments or to devise a system under which political input is itself balanced.[55]

It would be interesting to receive the opinions of the legal community, and in particular those of members of the bench who have had the opportunity of meeting judges from Commonwealth countries which have such Commissions, on the success or otherwise of Judicial Services Commissions, and what their composition and powers should be.

Reform of judicial selection in the manner suggested would make the process more open and, provided that appropriate criteria were developed by the Judicial Services Commission, would meet the criticism that persons obtaining appointment to the bench lack an appreciation of their social environment. The prestige of the judiciary could only be enhanced were such a system to be adopted.

Wellington, 1993) at 122-123. I am grateful to Sir Thomas Eichelbaum for having sent me a copy of his paper prior to its publication.

55 Rt Hon Sir Robin Cooke, "Empowerment and Accountability - the Quest for Administrative Justice" (Paper presented at the Judicial Colloquium, Balliol College, Oxford, September 1992). I am grateful to Sir Robin Cooke for sending me a copy of his paper.