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NO PLACE FOR ORAL HEARINGS IN THE APPOINTMENT OF SUPREME COURT JUDGES

Lord Sandhurst QC
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On Monday 24th February 2020 the Society held a meeting in the House of Commons to discuss whether public appointment hearings should be held for the most senior judicial appointments. The meeting was chaired by Sir Oliver Heald QC MP.

The speakers were Lord Sandhurst QC, Oliver Sells QC and Anthony Speaight QC. This publication contains the text of each of their speeches.

A research paper was distributed at the meeting on the practice in other countries. This was researched and written by Louis Flood. It appears as an appendix to this publication.

CONTRIBUTORS

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Louis Flood is the Lyell Scholar 2020 at the Society and has produced the paper entitled Judicial Appointments in Common Law Apex Courts included in the following papers.

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Lord Sandhurst QC

Context
It is important to bear in mind the context for this discussion:

1. The United Kingdom does not have a written constitution. European constitutional courts operate in a different context and perform a different function.
2. the Supreme Court has no different powers from its predecessor, the Appellate Committee of The House of Lords.
3. The Human Rights Act 1998[1] does not give the Supreme Court power to strike down legislation, only to declare that a piece of legislation is incompatible with the European Convention of human rights. It is then for Parliament to decide what action if any to take.
4. The Supreme Court might just as well have been renamed *The United Kingdom Court of Final Appeal.*
5. The UK Supreme Court is in no way comparable to the US Supreme Court. That court's best-known power is the ability of the Court to declare a Legislative or Executive act in violation of the Constitution.[2]

The USA
The US constitution[3] empowers the president to nominate and, with the confirmation (advice and consent) of the United States Senate, to appoint justices of the Supreme Court. The Senate possesses the plenary power to reject or confirm the nominee.

The Senate Judiciary Committee conducts hearings and votes on whether the nomination should go to the full Senate with a positive, negative or neutral report. We all know from watching on the television what form those hearings and votes can take. Because of what is at stake – justices are appointed for life and have such significant powers - those hearings are now highly political, partisan, demeaning and unpleasant.

United Kingdom selection process
In the UK the current selection process is by a commission chaired by the current president of the court comprising a senior judge who is not a member of the Supreme Court and a member from each of the judicial appointments commission's from the three jurisdictions, at least one of whom has to be a layperson. Its criteria in essence are legal excellence and maintaining a proper balance in the court of experience both in different legal fields and in knowledge and experience of the three legal jurisdictions – England & Wales, Scotland and Northern Ireland.

The Lord Chancellor has power to reject a nominee out right or to ask the commission to reconsider the nomination. This has not happened to date, but it occurred in 2010 under a similar provision concerning the appointment of the senior judiciary. Sir Nicholas Wall was

[1] The Human Rights Act 1998 is an Act of Parliament of the United Kingdom which received Royal Assent on 9 November 1998, and mostly came into force on 2 October 2000.
[2] Interestingly that power is not found within the text of the Constitution itself. The Court established this doctrine in the case of Marbury v. Madison (1803).
[3] Article II, Section 2, Clause 2 of the United States Constitution, known as the Appointments Clause.

nominated to be President of the Family Division by the appointments panel, but the Lord Chancellor, Jack Straw, asked them to reconsider. The panel once again put Sir Nicholas forward, and he was subsequently appointed to the position on 13 April 2010.

What would be the purpose and what form?
What would be the purpose of a judicial hearing here? Would not the nomination of the potential appointee to be considered have first been made on the basis a process akin to the present one? The Lord Chancellor nominating someone for consideration could not simply pluck a name from the air.

- Would this be a committee of the House of Lords or the House of Commons or a joint committee?
- How would it be comprised?
- What would have been its composition during the spring and summer of 2019 (when there was a minority government and the two main parties were internally divided)?
- What questions would the candidate be exposed to? His or her views on assisted dying or abortion?
- Would a nominee's views on Brexit have been considered relevant?
- Would he or she be asked to express his views on assisted dying – a significant matter which to date the Supreme Court has said is a matter for Parliament but on which no one in Parliament whether a private member or the executive has brought forward legislation?

The Judicial Oath
Members of the judiciary or distinguished academics or practitioners inevitably have political views. They take the judicial oath: …*to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill.* Is it seriously suggested that the members of the Supreme Court have broken their judicial oaths?

Conclusions of Parliamentary Select Committees
In 2004 the House of Commons Constitutional Affairs Committee[4] reported at length on the issue of judicial appointments and the creation of a Supreme Court. It heard witnesses and received written evidence. It concluded[5] that it had '*heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges.*'

Seven years later the House of Lords Select Committee on the Constitution reported[6], '*the first question to which none of our witnesses suggested a convincing answer is how would these parliamentarians be chosen and on what basis?* The committee concluded[7] that *parliamentarians acting in that capacity should not sit on selection panels the judicial appointments.*' Finally, it said[8], '*the principle of judicial independence militates against politicians being members of the selection process*'. In short, there was no useful role they could play that could not be played by lay members.

The conclusions of those two committees are soundly based. Nothing has happened to render them less valid.

[4] HC 48-I https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf.
[5] para. 87.
[6] 25th report of session 2010-12 HL paper 272.
https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf para 51.
[7] para 52.
[8] para 145.

No pre-appointment hearings in major common law jurisdictions
The major countries of the common law world do not have public hearings prior to the appointment of their supreme court justices. They have not found it necessary or desirable. The nearest that any come is Canada.

Canada
Canada, which of course does have a written constitution, holds *post-appointment* hearings to present a new appointee to the Supreme Court to the public. But its form, and the questions which may be asked are very constrained. Put simply, Members of Parliament on the panel are not permitted

- to ask questions about past decisions the appointee has given previously on the Bench;
- to ask questions about any judgements he would render as a judge of the Supreme Court;
- to 'cross examine' the appointee;
- to ask him to take a position on controversial issues; or to comment on existing Supreme Court decisions, and whether he supported those decisions or not.

That approach is entirely right because to open up any of those lines opens the door to what we see in the US Senate Judiciary Committee hearings and which I for one deplore. It shows, however, how little there is that may usefully asked.

Conclusion
We may benefit from consideration of how judicial review has developed and now operates. But that is an entirely different question from the appointment of our most senior judges. When I was Chairman of the Bar in 2005, everywhere I went, whether on the continent of Europe, or in the English-speaking common law world I was told how wonderful our judiciary is.

Public hearings will serve no good purpose and can only do damage. They have no merit in this country. We are Conservatives.

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Oliver Sells QC

I want to start by saying that I agree with Guy and adopt his reasons. I will not repeat what he has said. I want to take a slightly different and wider view of the current landscape.

The topic which sparked these three papers and this debate was a seemingly small matter – pre-appointment hearings for potential justices in the Supreme Court. But it forms part of a *much* larger and more complex picture which is coming to be considered, very soon. I want to spend a minute or two on this *broader* canvas.

Recent events have stretched our constitutional arrangements almost to the limit: the role of Parliament, the Speaker, the Supreme Court and the Lord Chancellor – the list is long and paints a sorry saga.

Our constitution is ancient, complex, interwoven and many faceted: not for us a written document but rather the accumulation of centuries of practice and convention to be applied and handled with care. It is also *fragile*. By that I do not mean it is weak or failing. I mean that if you tinker impetuously with a small piece in one part there will be unforeseen and unintended consequences in some other part in years to come.

How many of you know what happened on the evening of 12th June 2003? I recall it very well because as it happens I was in the Lords attending a debate when the announcement was made by the press office at No. 10 that the office of Lord Chancellor was to be abolished. Just like that!!….

With this single stunning act of vandalism began the piecemeal, botched reforms of the Blair government which largely led to the sorry state in which we found ourselves last year, with a Parliament in gridlock, a Speaker about whom it is scarcely possible to speak moderately, and a Supreme Court which declared Orders in Council null and void. What will be struck down next? …the Succession? Parliament *can* and must act now. It is not a question of clipping the wings of the judges, it is about restoring the rightful supremacy of the Queen in Parliament as sovereign as we all thought had been the case for all our lives.

It has been very difficult over the last 15 years for us as Conservative Lawyers to mount a persuasive and effective argument against all these piecemeal reforms (and in this list I include the Fixed Term Parliaments Act!). But no more …. those of us who have been constant critics of the ECHR, the Human Rights Act and the very creation of a court called 'Supreme' have at last their chance to demonstrate the real and present dangers they have created.

As far back as 2003 the Constitutional Committee of the House of Commons made the same point to no avail (at paragraph 101 of its report). They specifically referred to the limited powers of the new court and suggested that the new proposed name is "inaccurate and unhappy".

The current constitutional landscape is the inevitable consequence of these changes: the downgrading of the office of Lord Chancellor: removed from the Lords: removed from judicial oversight and most shockingly of all, no longer required to be a lawyer,

But one of the most pernicious effects has been the gradual, insidious politicisation of the senior judiciary. This has occurred in a number of ways: -

- Their deep involvement in the structural, budgetary and financial, mechanisms of the court service.
- The wide extension of Judicial Review into more and more areas of political sensitivity.
- The endless creation of presiding judges – rarely in court and always doing administration.
- A Supreme Court which has gently but inevitably grasped the offer so unwisely made by Parliament, of activism and their own little empire with all the trappings of power, so resolutely resisted by all judges over the ages in this country. Not just a final Court of Appeal but a court emboldened to take on Orders in Council!

These changes to the role of the senior judges have now in their turn led to this call for some political oversight, some even call for "democratic accountability".

Which brings me full circle: pre-appointment hearings would serve only to cement the judiciary in this political firmament (which is of course just what the soft left and the legal establishment long to do). Apart from all the obvious risks, problems and consequences so well set out by Guy, it is the very principle that is so offensive.

Judges are *not* answerable to Parliament. They must answer to the judicial oath – a most solemn, binding oath: I still recall the day that I took mine as an Assistant Recorder many years ago. Once you travel down the path to hearings such as is proposed, you will end up like the USA (Louis Flood has done excellent research – appended to these papers): no other country common law or civil, has hearings of the type contemplated other than the USA. And the reasons are too obvious to need stating: just look back at the Senate hearings and imagine what a feast of grandstanding and show boating would follow……

In my previous written paper, I called it a *step* in the wrong direction. I think upon reflection that is too moderate a view. Such a proposal is the very negation of judicial independence. We should now be bold …

- We should restore the office of Lord Chancellor in its proper form, with oversight of the judiciary.
- We should consider the abolition of the Ministry of Justice.
- We should dispense with the Supreme Court in its current form in favour of a Final Court of Appeal sitting in each of the four capital cities of the Union. A central part of our comprehensive reforms must be to cement the Union, to make this court part of that process by recognising that there are four capital cities, each of whom plays an integral part in the life, legal and parliamentary, of the country as a whole.
- The Fixed Term Parliament Act should be repealed.
- The role of the Speaker should be re-examined.

Conclusion

We have been very close to the precipice in the last three years: in truth we have been heading that way for years…. we have peered over the edge and it was not a pretty sight.

We now have the chance to use the proposed Commission for a wide ranging and comprehensive constitutional review.

We have a fine majority in the House of Commons, we must seize the moment and install a new post-European Union constitutional settlement for a sovereign United Kingdom. Nothing less will do.

I hope we will all seize this opportunity.

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Anthony Speaight QC

Three distinct motivations can be discerned in those who argue for the introduction of parliamentary scrutiny of appointments of the senior judiciary. I shall look at one individual as exemplifying each approach.

Quentin Letts' motivation: humiliation of the judiciary

One is exemplified by the journalist Quentin Letts. In *The Sun* on 24th September 2019 he argued with evident relish that there would surely be demands for public confirmation hearings for the Supreme Court. He wrote:-

> "From now on their [judges'] political leanings, their family and professional backgrounds, their social media records and all those juicy perks they enjoy at their Inns of Court are going to be fair game for public scrutiny.
>
> Where do these top lawyers live, which clubs do they belong to and what are the political views of their spouses? All these – and more – will in future be legitimate fare."

This first motivation in other words is humiliation of the judiciary. Tabloid journalism may be crude. But I have seen Conservatives writing that the Supreme Court judges should be taken down a peg. I regret such an approach. Tories should be loyal to our institutions of state, not least our judiciary.

Charles Moore's motivation: find conservative judges

The second group's motivation is far more lofty. It is exemplified by Charles Moore who has argued (Daily Telegraph 24th October 2015) that if judges are to,

> "apply slippery concepts like 'proportionality' ... we need to know their politics"

This viewpoint is based on the belief that parliamentary scrutiny would enable the identification of prospective senior judges who would perform their office with proper restraint. This assumes that there exists in Britain, as the United States, a cadre of conservative-minded lawyers and less senior judges who espouse conservative jurisprudence, and who represent a counterpoint to an opposed group which espouse what Americans would call liberal, and we might call soft-left or activist, jurisprudence. But no such two groups exist amongst the ranks of prospective judges in Britain. What has occurred over the last 20 years is a change of legal orthodoxy. I shall return in a moment to what can be done about that.

Baroness Hale's motivation: end appointment on merit

The third motivation is equally political, but coming from the other end of the spectrum.

Baroness Hale in a lecture in Belfast in August 2017 suggested that there be added to the Appointments Commission, which Guy has outlined, a senior politician from the Government and a senior politician from the Opposition, thus, in her words,

> "introducing an element of democratic involvement while preserving party political neutrality"

On first hearing this idea may sound relatively innocuous, or even appealing as reintroducing the Lord Chancellor. But after a little thought one realises that the Government appointee would not necessarily bring the attitude of the former Lord Chancellor's Department, and might not be a lawyer; and the Opposition politician would be just that, a politician with an agenda to make trouble.

Baroness Hale, perhaps, let out a little more of her real thinking in her evidence to the House of Lords Select Committee. She argued for a statutory change to give power to the Lord Chancellor to issue directions to the Judicial Appointments Commission,

> "primarily in pursuance of the aim of increasing diversity"

In other words she wanted to supplant the principle of appointment on merit. The Select Committee rejected her suggestion, saying, rightly in my view,

> "Such a power could lead to political interference and undermine the independence of the appointments process."

It is not hard to imagine how public hearings could rapidly become sounding boards for every current faddish lobby. If Conservatives create such a procedure, they may soon find that it is their own kind who get excluded by the shrill voices of public correctness.

<u>Post-appointment hearings would be no better</u>

So the introduction of pre-appointment confirmation hearings, such as take place in the US Senate, should be an unattractive policy for conservatives. They would be unlikely to achieve Charles Moore's aim, and conservatives will not want the hopes of Letts and Hale to be fulfilled.

It might be thought possible to avoid some of the problems of US-style pre-appointment hearings by holding a parliamentary hearing after the appointment has been made – that is to say, a "getting to know you" hearing such as is held in Canada with strict rules confining what questions can be asked. But such a procedure might well be the worst of all worlds. The Canadian-style rules would preclude questions which could identify the appointee's position on the spectrum between judicial overreach and restraint, while allowing plenty of emphasis on his or her "defined characteristics" and lifestyle.

<u>Addressing the symptom rather than the cause – the Human Rights Act</u>

There is an even greater consideration against the Conservative Government introducing appointment hearings: it would waste effort and dissipate goodwill, when there is a priceless opportunity to do something real to reduce judicial overreach.

I said I would return to the 21st century change in legal orthodoxy. The reason why British judges in the last 20 years have behaved in an increasingly activist manner was succinctly explained at a recent dinner of the Society by Lord Neuberger. It was, he said, because Parliament has asked them to do so. That, at any rate, is how judges have interpreted the Human Rights Act.

Therefore, to hope that greater scrutiny of prospective appointees will supply a solution is to address a symptom rather than the cause. Attacking the cause requires replacing the Human Rights Act by a UK Bill of Rights in which rights will be based, not on a 20th century European treaty, but on our common law heritage of rights and freedoms.

But for a legislative change to foster a change in legal orthodoxy it must be felt to run with the vein of current thinking – just as, in 1998, the Human Rights Act chimed with the era of the expanding grasp of European institutions.

Three factors creating an opportunity for a UK Bill of Rights

I say that there is now a priceless opportunity, not just because of a parliamentary majority, but by reason of three factors on the plane of legal ideas.

The first is the growing interest, as result of the strains seen in recent months, in some element of a written constitution. Every soft-left lawyer to whom I have put the point has acknowledged that any such British document would be likely to contain a statement of constitutional rights. In other words a UK Bill of Rights.

The second is the desire to install a quasi-federal architecture of the UK in which Scotland may feel that it dignity is better recognised. A commission of the most distinguished constitutional lawyers was convened by the Bingham Centre for the Rule of Law in 2015. It included in its recommendations the enactment of a Charter of Union containing a statement that the UK and each of its territories is committed to human rights. It is only one step further for the Charter to list what those rights are.

The third is the disappearance from UK law of the EU Charter of Fundamental Rights. Some of you may, like me, have heard *bien pensant* lawyers bemoaning the loss of rights which it enunciates, but which are not in the European Convention on Human Rights. These include rights of conscientious objection, to conduct a business, to protection of personal data, to scientific research free of constraint, to found educational establishments, and several more. They do not have a ready answer when I say to them that if only they would drop their objection to a UK Bill of Rights such rights could be included.

Conclusion: do not squander a priceless opportunity

Therefore, the opportunity exists for a repeal of the Human Rights Act in a context in which the middle ground of lawyers could accept it as part of a proper response to contemporary issues.

But any such fostering of a new legal orthodoxy depends on mood. If the Government outrages judges and many lawyers by what will be seen as petty actions of mindless hostility, it will squander the opportunity for a fair wind to far more profound and worthwhile change.

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APPENDIX

Judicial Appointments in Common Law Apex Courts

This background paper has been produced by Louis Flood, Lyell Scholar 2020

In most common law countries, there is only a limited involvement of the legislature in the judicial appointment process. Legislatures may be asked to approve a candidate, but it is not common for politicised confirmation hearings to be held.

Supreme Court of Canada

- Appointments to the Supreme Court are made by the Governor General on the advice of the Prime Minister.

- An Independent Advisory Board for Supreme Court of Canada Judicial Appointments considers all applications received through the Office of the Commissioner for Federal Judicial Affairs. The Advisory Board is also tasked with proactively seeking out candidates.[9]

- The Advisory Board consists of representatives from the legal community and lay members. Representatives from the legal community assess candidates' professional qualifications, while lay members help bring a diversity of views to the deliberations.[10]

- Following an assessment, the Advisory Board produces a shortlist of suitable candidates.

- The Minister of Justice reviews each candidate and consults with the Chief Justice; relevant provincial and territorial Attorneys General; Cabinet ministers; the Chair of the House of Commons Standing Committee on Justice and Human Rights; the Chair of the Senate Legal and Constitutional Affairs Committee, and opposition Justice Critics.[11]

- Following the consultations, the Minister of Justice presents recommendations to the Prime Minister who selects the nominee.

- After the appointment is made, the Minister of Justice and the Chair of the Advisory Board appear before the House of Commons Standing Committee on Justice and Human Rights to explain how the chosen nominee meets the statutory requirements and the criteria set by the Government.[12]

[9] House of Commons of Canada, Report of the Standing Committee on Justice and Human Rights, *The New Process for Judicial Appointments to the Supreme Court of Canada* (February 2017), p5

[10] 'Frequently asked questions on the Supreme Court of Canada appointment process' (*Prime Minister of Canada,* November 2017) <https://pm.gc.ca/en/news/backgrounders/2017/11/29/frequently-asked-questions-supreme-court-canada-appointment-process> accessed 12 February 2019

[11] House of Commons of Canada, Report of the Standing Committee on Justice and Human Rights, *The New Process for Judicial Appointments to the Supreme Court of Canada* (February 2017), p6

[12] ibid

- The nominee appears before the House of Commons Standing Committee on Justice and Human Rights, and the Senate Standing Committee on Legal and Constitutional Affairs for a question and answer session.

- Although the nominee's question and answer session is not a confirmation hearing, the Standing Committee on Justice and Human Rights notes that it is of value:

    - 'Aside from the nod to transparency that such a hearing symbolizes, there is a public education benefit. Members of the public watching such a hearing will learn more about the nominee and about the workings of the Supreme Court, one of the lynchpins of Canada's democracy. Appearance before a committee of Parliament also serves as a forum for parliamentary scrutiny.'[13]

Supreme Court of New Zealand

- Appointments to the Supreme Court are made by the Governor-General on the recommendation of the Attorney General.

- As appointments to the Supreme Court are made from serving High Court Judges, potential candidates are known to the Attorney General and no public notices are called for expressions of interest.[14]

- The Attorney General consults with interested parties to seek their views on suitable candidates.

- The Attorney General will then, with the agreement of the Chief Justice, produce a shortlist of up to three possible appointees.

- The Attorney General considers on the shortlist, taking into account the diversity of the bench and the range of experience and expertise of the current judges, before choosing the most suitable candidate.

- By convention, the Attorney General notifies the Cabinet of his/her decision and recommends the appointment to the Governor-General. Appointments are not discussed or approved by Cabinet.[15]

- Section 93 of the Senior Courts Act 2016 requires the Attorney General to explain his/her process for recommending persons for appointment as a Judge.

- It is a strong constitutional convention in New Zealand that, in deciding who is to be appointed, the Attorney General acts independently of party-political considerations.[16]

- There is no parliamentary scrutiny of nominees, whether by pre-appointment consultation or post-appointment public hearing.

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[13] ibid p7

[14] 'Judicial Appointment Protocol' (*Crown Law*, April 2014) p8 available at: <https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf> accessed 13 February 2020

[15] Courts of New Zealand, 'Role of the Judges: Appointments' <https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/appointments> accessed 13 February 2020

[16] Kelly Buchanan, 'The Appointment of the New Chief Justice of New Zealand' (*Law Librarians of Congress*, March 2019) < https://blogs.loc.gov/law/2019/03/the-appointment-of-the-new-chief-justice-of-new-zealand/> accessed 13 February 2019

High Court of Australia

- Section 72 of the Australian Constitution provides for the appointment, tenure and remuneration of federal judges. Section 72(i) states that justices of the High Court shall be appointed by the Governor General in Council.

- In practice, the appointment of judges by the Governor General in Council is a selection by Cabinet on the recommendation of the Attorney General.[17]

- Section 6 of the High Court Act 1979 requires the Federal Attorney General to consult with state Attorneys General before an appointment is made to the vacant office. The Federal Attorney General does not have to act in accordance with this advice.

- Assessment or selection panels/committees are not used for appointments to the High Court, or indeed any federal courts.[18] Appointment to the High Court of Australia is an Executive-dominated process.

- There is no parliamentary scrutiny of nominees, whether by pre-appointment consultation or post-appointment public hearing.

Hong Kong Court of Final Appeal

- The Chief Justice and other Court of Final Appeal (CFA) judges are appointed by the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) on the recommendation of the Judicial Officers Recommendation Commission (JORC).

- The JOCR consists of the Chief Justice, the Secretary for Justice, two judges, one barrister, one solicitor and three lay members appointed by the Law Society Council's and the Bar Council's recommendation.[19]

- Article 90 of the Basic Law of Hong Kong requires the Chief Executive to obtain the endorsement of the Legislative Council for the appointment of judges to the CFA.

- The recommendation of the JORC is considered by the Legislative Council's House Committee (a subcommittee may also be formed). Following this, the Administration gives notice of a motion to seek the endorsement of Legislative Council of the recommended appointment.[20]

- By convention, the Chief Executive appoints every candidate for judicial office recommended by the JOCR, and the Legislative Council endorses these appointments. American-style, politicised confirmation hearings have never occurred in Hong Kong.[21]

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[17] Judicial Conference of Australia, Judicial Appointments: A Comparative Study (April 2015), p1
[18] ibid p2
[19] Judicial Officers Recommendation Commission Ordinance (Cap.92), section 3

[20] Legislative Council Paper Number CB(4)982/17-18(01), Background brief prepared by the Legislative Council Secretariat Subcommittee on Proposed Senior Appointments (April 2018) p3 available at <https://www.legco.gov.hk/yr17-18/english/hc/sub_com/hs101/papers/hs10120180427cb4-982-1-e.pdf> accessed February 18 2020

[21]Eric Ip, Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions (Cambridge University Press 2019) p 112

- The Legislative Council's power to endorse judicial appointments acts as the final gatekeeper to stop a judicial appointment that is contrary to public interest. It is considered that this power should only be exercised in exceptional circumstances.[22]

Supreme Court of Pakistan

- Article 175A of the Constitution of Pakistan governs the appointment of judges to the Supreme Court. The Article provides for the constitution of a Judicial Commission and Parliamentary Committee.

- The Chief Justice of Pakistan chairs the Commission. Other members include the four senior most judges of the Supreme Court; one former Chief Justice or judge of the Supreme Court; the Attorney General; the Federal Law Minister and a senior advocate of the Supreme Court of Pakistan.[23]

- The Judicial Commission nominates an individual for appointment after evaluating their professional competency. This nomination is then sent to the Parliamentary Committee.

- The Parliamentary Committee consists of eight members with equal membership from the Government and Opposition, as well as of National Assembly and Senate.

- The Parliamentary Committee must confirm the nominee by a majority vote within fourteen days, failing which the nominee shall be deemed to have been confirmed. The Committee may block an appointment only if three-quarters of its members vote to do so.[24]

- The super-majority requirement reduces the danger of deadlock occurring during the confirmation process and means that the Parliamentary Committee will only intervene when there is a cross-party consensus that the Judicial Commission's chosen candidate is unsuitable.[25]

Appointments to the German Constitutional Court and French Constitutional Council

- The French and German legislatures have a role in the process for appointing judges to their Constitutional Court/Council. Public hearings are held in France whereas in Germany candidates are often scrutinised in informal working groups.

German Federal Constitutional Court

- The Federal Constitutional Court consists of sixteen judges, who exercise their duties in two senates of eight members each.

- According to article 94 of the German Basic Law, half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat.

- Section 6 of the Act on the Federal Constitutional Court provides that a candidate shall be elected in the Bundestag upon proposal by the Selection Committee. The committee consists of 12 members and the parties are represented proportionally to their seats in the chamber.

[22] ibid
[23] Constitution of Pakistan, Article 175A (2)
[24] Constitution of Pakistan, Article 175A (9) – (15)
[25] J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice [Report of Research Undertaken by Bingham Centre for the Rule of Law] (British Institute of International and Comparative Law 2015) p29

- A candidate must obtain a two-thirds majority of the votes cast in the Selection Committee and at least the majority of votes of members of the Bundestag.

- Members of the Selection Committee are obliged to maintain confidentiality concerning the personal circumstances of the candidates, discussions on this issue and the casting of votes.[26]

- Section 7 of the Act on the Federal Constitutional Court provides that a candidate elected by the Bundesrat needs a two-thirds majority. The Bundesrat elects the judges in plenum and in public session.

- Once a justice is elected, they are formally appointed by the President for a term of 12 years.

- The two-thirds majority threshold makes it difficult for one camp alone to appoint a candidate. However, an informal agreement exists between the Christian Democratic Union (CDU) and Social Democratic Party (SDP) that each party can select four of the judges per senate. The parties set up informal working groups to coordinate the selection of a candidate. In general this means that candidates presented to the Bundestag and the Bundesrat are elected unanimously without any discussion.[27]

French Constitutional Council

- The Constitutional Council consists of nine members who serve nine-year terms. Three members are nominated by the French President and three each by Presidents of the Senate and National Assembly. Former Presidents of the Republic are also ex-officio members.[28]

- Appointments made by the President of the Republic are subject to approval by the Law Committees of both houses of Parliament. Nominations by the President of each chamber are subject to approval by the committee of that chamber only.[29]
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- The respective Law Committees of each house organise hearings to check the qualifications and capacity of proposed council appointments. These hearings are public and open to the press[30]

- The appointment of a candidate presented by the appointing authority may be blocked by a three-fifths majority vote. However, parliamentary arithmetic means that it is difficult to reach this threshold.[31]

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[26] Act on the Federal Constitutional Court, Section 6(4)

[27] Martin Heidebach, 'The election of the German Federal Constitutional Court's Judges – A lack of democracy?' [2014] 31 RLR 153, 155

[28] Sustainable Governance Network 'To what extent does the process of appointing (supreme or constitutional court) justices guarantee the independence of the judiciary?' (2020) <https://www.sgi-network.org/2019/Democracy/Quality_of_Democracy/Rule_of_Law/Appointment_of_Justices> accessed February 19 2020

[29] Constitutional Council, Annual Report (2018) p12, available at: <https://www.conseil-constitutionnel.fr/sites/default/files/2018-10/annual_report_2018.pdf> accessed February 19 2020

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