



The Commonwealth

# The Appointment, Tenure and Removal of Judges under Commonwealth Principles

A Compendium and Analysis  
of Best Practice

**BINGHAM  
CENTRE FOR  
THE  
RULE  
OF  
LAW**



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**British Institute of  
International and  
Comparative Law**

Published and Distributed by  
The British Institute of International and Comparative Law  
Charles Clore House, 17 Russell Square, London WC1B 5JP

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This work is to be cited as 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 Library Cataloguing in Publication Data  
A Catalogue record of this book is available from the British Library

ISBN 978-1-905221-57-8

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Typeset by Cambrian Typesetters  
Camberley, Surrey  
Printed in Great Britain by Polestar Wheatons Ltd  
Cover design by Nick Clarke

# CONTENTS

<b>FOREWORD BY COMMONWEALTH SECRETARY-GENERAL</b>	<b>ix</b>
<b>ACKNOWLEDGEMENTS</b>	<b>xi</b>
<b>ABOUT THE BINGHAM CENTRE</b>	<b>xiii</b>
<b>SUMMARY OF FINDINGS AND BEST PRACTICE</b>	<b>xv</b>
1    Appointments	xv
2    Tenure	xviii
3    Removal from office	xx
<b>INTRODUCTION</b>	<b>xxv</b>
0.1    Overview and scope of study	xxv
0.2    Commonwealth principles, their development and international context	xxix
<b>1    APPOINTMENTS</b>	<b>1</b>
1.1    The appointment of judges and the rule of law	1
1.2    Criteria for judicial office	2
1.3    Appointment mechanisms	10
1.4    The role of the executive	12
1.5    The role of the legislature	25
1.6    Composition and structure of judicial appointments commissions	30
1.7    The role of judicial appointments commissions	44
<b>2    TENURE</b>	<b>57</b>
2.1    Judicial tenure and the rule of law	57
2.2    Duration of judicial appointments	58
2.3    Protection of judicial remuneration	73
<b>3    REMOVAL FROM OFFICE</b>	<b>79</b>
3.1    The removal of judges and the rule of law	79
3.2    Substantive grounds of removal	81
3.3    Removal mechanisms	88

## CONTENTS

3.4	Removal via an <i>ad hoc</i> tribunal	92
3.5	Removal by disciplinary councils	102
3.6	Parliamentary removal	105
<b>APPENDIX 1</b>		<b>113</b>
	Commonwealth Latimer House Principles (2003) On the Accountability of and the Relationship between the Three Branches of Government	113
	Annex – Latimer House Guidelines for the Commonwealth (1998)	117
<b>APPENDIX 2</b>		<b>129</b>
	Note about terminology	129
	Australia	130
	Bahamas	132
	Bangladesh	134
	Barbados	135
	Belize	136
	Botswana	138
	Brunei Darussalam	140
	Cameroon	140
	Canada	142
	Cyprus	144
	Fiji	145
	Ghana	147
	Guyana	149
	India	151
	Jamaica	154
	Kenya	155
	Kiribati	158
	Lesotho	159
	Malawi	161
	Malaysia	163
	Maldives	165
	Malta	167
	Mauritius	168
	Mozambique	170
	Namibia	171
	Nauru	172
	New Zealand	173
	Nigeria	175
	Organisation of Eastern Caribbean States	177



## *CONTENTS*

Pakistan	179
Papua New Guinea	181
Rwanda	183
Samoa	185
Seychelles	186
Sierra Leone	188
Singapore	189
Solomon Islands	191
South Africa	192
Sri Lanka	194
Swaziland	196
Tanzania	197
Tonga	199
Trinidad and Tobago	200
Tuvalu	201
Uganda	203
United Kingdom	205
Vanuatu	209
Zambia	210



## FOREWORD BY COMMONWEALTH SECRETARY-GENERAL

When Commonwealth Heads of Government at their meeting in Abuja in 2003 adopted the *Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government*, they demonstrated continuing Commonwealth commitment to advancing respect for the separation of powers including judicial independence, and a collective determination to raise levels of practical observance.

The Commonwealth can be justifiably proud of being the only international organisation with a consolidated set of principles governing the relation between the three branches of government. Covering subjects such as the harmonious balancing of power between the three branches, and how they should interact in the kind of democratic societies which the Commonwealth seeks to uphold, the *Principles* stipulate that there should be restraint in the exercise of power within each respective sphere in order not to encroach upon the legitimate discharge of constitutional functions by others.

This *Compendium* on the appointment, tenure and removal of judges in the Commonwealth outlines the various constitutional arrangements in Commonwealth member states, and makes recommendations. It also indicates best practice in the appointment, security of tenure, and removal of judges in light of the *Latimer House Principles*. It analyses statistics, soft law instruments, commentaries, and recent developments, as well as the composition and workings of judicial appointments commissions in Commonwealth member states.

Our hope is that the best practices shared in this publication, and other agreed Commonwealth values and principles, will assist member states in formulating legislative and institutional policy, and with strengthening independence and accountability in the relationships between the three branches of government.

This *Compendium* makes clear that legal frameworks are not the only factors determining the extent to which judges in the Commonwealth are

## FOREWORD

able to act effectively and independently in discharging their functions. Other influences include the extent to which a culture of the rule of law pervades branches of the state and the wider public; the competence and independence of the wider legal profession; the provision of legal education and judicial training; efforts to ensure equality of opportunity and a pool of applicants for judicial office that broadly reflects the society; the resourcing of the justice system and settled understandings about the appropriate interaction between judges, elected politicians and the media; appropriate legal immunities for judges when performing their judicial functions; and, a balance between institutional autonomy and the protection of the independence of individual judges. A truly democratic spirit also has to inform the letter of the rules.

Our Commonwealth Charter states:

We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

Accordingly, the *Compendium* stresses the importance of judiciaries that are independent, impartial and efficient. If the rule of law is to be respected, it is necessary to have fair and impartial processes for resolving disputes; for correct and clear interpretation and application of the law; and, for holding governments, institutions, and private individuals accountable.

As a values-based organisation, the Commonwealth works to advocate and uphold collectively agreed values and principles. We recognise the need for each of the three branches of government to inspire the confidence and trust of the people they serve in terms of accountability, efficiency and transparency. With this in mind we offer this *Compendium* as a valuable guide and practical resource, together with the *Latimer House Principles*, for strengthening the rule of law and administration of justice and for promoting good governance in the service of the citizens of the Commonwealth.

**Mr Kamalesh Sharma**  
**Commonwealth Secretary-General**

May 2015

## ACKNOWLEDGEMENTS

The Bingham Centre for the Rule of Law is pleased to acknowledge the funding that was provided by the Commonwealth Secretariat to undertake this study. The Centre is grateful to Katalaina Sapolu, Director of the Secretariat's Rule of Law Division, for commissioning the study. Particular thanks are due to Jarvis Matiya, Legal Adviser and Head of the Justice Section, for reviewing the manuscript and co-ordinating the process with great patience, thoughtfulness and understanding.

This study has been authored by Dr Jan van Zyl Smit, Associate Senior Research Fellow in the Rule of Law, Bingham Centre for the Rule of Law. The author thanks colleagues for their constructive suggestions and valuable comments on the draft manuscript, particularly Professor Sir Jeffrey Jowell QC, Director of the Centre. Thanks go also to John Adenitire, Sam Barnes and Alistair Henwood for their tireless and outstanding research assistance and to interns Paula Atienza, Nerea Goyoaga and Celia Rooney for valuable contributions which they made to the research.

The author expresses his gratitude to Anna Riddell, Publications Editor of the British Institute of International and Comparative Law, for reviewing the manuscript and for her generous advice and guidance on the publication process, and to Viv Williams of Cambrian Typesetters, cover designer Nick Clarke, and Jason Wood of printers Polestar Wheatons for their helpfulness, flexibility and efficiency in the production of this volume.



# **ABOUT THE BINGHAM CENTRE**

The Bingham Centre was launched in December 2010. The Centre is named after Lord Bingham of Cornhill KG, a great judge and passionate advocate of the rule of law. It is dedicated to the study and promotion of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept; promoting high-quality studies and training; and supporting capacity-building on the rule of law which enhances economic development, political stability and human dignity.

The Centre is part of the British Institute of International and Comparative Law.





# SUMMARY OF FINDINGS AND BEST PRACTICE

This study examines the legal frameworks for the appointment, tenure and removal of judges in the superior courts of independent Commonwealth member states. Its aims are:

- to provide an overview of the various approaches taken by member states to these matters; and
- to identify best practice, from a rule of law perspective, in the light of the *Commonwealth Latimer House Principles*, the *Latimer House Guidelines* and other relevant international norms.

## Chapter 1 – Appointments

### 1.1 The appointment of judges and the rule of law

The *Commonwealth Latimer House Principles* recognise that in order to uphold the rule of law and dispense justice, the judiciary must be ‘independent, impartial, honest and competent’. The aim of judicial appointment processes should be to provide a reliable means of identifying persons who possess these qualities, and to do so in a manner that is legitimate, in order to sustain public confidence in the judiciary.

### 1.2 Criteria for judicial office

The requirement of the *Commonwealth Latimer House Principles* that judges should be appointed ‘on the basis of clearly defined criteria and by a publicly declared process’ conveys a fundamental commitment to transparency. At a minimum, the public must be informed of the characteristics that qualify persons for judicial office and the procedures that are followed when an individual applies, or is considered for appointment.

The *Principles* further make clear that the criteria for judicial office should be informed by the fundamental objectives of equality of opportunity, appointment on merit and the need to address gender inequity and other historic factors of discrimination in the context of their particular society.

## SUMMARY OF FINDINGS AND BEST PRACTICE

While there is considerable agreement among Commonwealth member states that intellectual abilities, moral qualities and practical skills are all relevant to the determination of merit, there are significant differences in how states have sought to address gender inequity and other historic factors of discrimination. The causes of these problems are often complex and specific to particular societies. Although some states have modified the criteria for judicial office in an attempt to enhance judicial diversity, it is not clear whether this is always an effective or desirable approach. Alternative or additional measures may be needed to address wider causes of the problem, such as outreach programmes to attract a more diverse pool of candidates, improvements in the areas of legal education and judicial training, and changes to the working practices of the organised legal profession and the judiciary itself.

### **1.3 Appointment mechanisms**

The *Commonwealth Latimer House Principles* do not specify the mechanism by which judges should be appointed. However, the *Latimer House Guidelines* indicate that an 'independent process' should be used, and recommend that a judicial appointments commission be established where no such mechanism exists.

### **1.4 The role of the executive**

It is now relatively uncommon for judicial appointments to be in the hands of the executive alone, without the involvement of any other public body in selecting or shortlisting candidates. Only 19% of Commonwealth jurisdictions have executive-only appointment systems in this sense (appointments to the highest court are reserved for the executive in another 8% of jurisdictions, and the appointment of the Chief Justice in a further 23% of jurisdictions).

Executive-only appointment systems require a combination of legal safeguards and settled political conventions in order to be a reliable and legitimate means of appointing judges. The precise mix may differ between jurisdictions, but should include at least transparency regarding the criteria for appointment and the procedures followed, a requirement of consultation with senior judges and others, and ideally the existence of an independent body to provide oversight and deal with complaints.

### **1.5 The role of the legislature**

In 21% of Commonwealth jurisdictions there is some legislative involvement in the appointment of judges, usually by way of confirmation of candidates selected by a judicial appointments commission.

## *SUMMARY OF FINDINGS AND BEST PRACTICE*

While legislative confirmation proceedings offer the possibility of enhancing the legitimacy of the courts, which is particularly relevant at the highest level, good practice requires that the dangers of politicisation and deadlock be managed through a combination of carefully designed legislative procedures and a respectful and constructive attitude on the part of politicians to the constitutional role of the judiciary.

### **1.6 The composition and structure of judicial appointments commissions**

In 81% of Commonwealth jurisdictions there is a judicial appointments commission which plays some role in the selection or shortlisting of candidates for judicial appointment.

It is important to ensure that judicial appointment commissions are genuinely independent and that their members have among them sufficient expertise and experience to assess the quality of candidates. An emerging standard of best practice is that judges and representatives of the legal profession (academic and practising) should constitute at least half the members of the commission, which is the case in 63% of Commonwealth jurisdictions.

It may also be valuable for a commission to include 'lay' members who offer a civil society perspective on the court system, or contribute expertise in other relevant disciplines such as human resources. The legal framework should ensure that the selection of lay members does not fall under political control. The need for gender balance and the representation of minorities on the commission should also be considered.

Other structural features that may affect the independence of a commission include who chairs the commission (in 72% of jurisdictions it is the Chief Justice), how long its members serve and with what security of tenure, and the extent to which the funding and staffing arrangements of the commission enable it to operate with autonomy.

### **1.7 The role of a judicial appointments commission**

In order to ensure general transparency with regard to the appointment of judges, judicial appointments commissions should advertise judicial vacancies and conduct an open application process. The commission may consider various forms of evidence when evaluating a candidate, including application forms, references, background checks and, in some cases, written tests. It is generally desirable that a commission should interview a shortlist of candidates prior to making its selection. In a small number

## *SUMMARY OF FINDINGS AND BEST PRACTICE*

of jurisdictions, such interviews are held in public. Individual transparency of this kind exposes both the candidates and the commission to public scrutiny, which may be particularly beneficial in transitional societies. Other jurisdictions have established different means of holding commissions to account for their individual decisions, including ombudsman mechanisms and judicial review.

The executive remains responsible for the formal act of appointing a judge in almost all jurisdictions. Legal frameworks should clearly set out the relationship between the prior selection process conducted by the commission and role of the executive at this final stage. Best practice would require that the commission be empowered to present the executive with a single, binding recommendation for each vacancy. Alternatively, if the executive has a legal power to reject the commission's recommendation, then it should be required to provide reasons for doing so. Where the commission is required to present the executive with a shortlist of recommended candidates, the executive should be guided by the safeguarding principles applicable to executive-only systems when making its final selection (set out under 1.4 above).

## **Chapter 2 – Tenure**

### **2.1 Judicial tenure and the rule of law**

The *Commonwealth Latimer House Principles* declare that 'appropriate security of tenure and protection of levels of remuneration must be in place' in relation to the judiciary. Such guarantees serve to shield judges from external pressures and conflicts of interest when they hold powerful individuals or government bodies legally to account, and thereby contribute to sustaining an independent judiciary, which is an essential element of the rule of law.

### **2.2 Duration of judicial appointments**

It is a long established principle that judges should not serve at the pleasure of the executive, or be subject to loss of office as a result of changes of government or legal measures that are ostensibly intended to serve other objectives. Most Commonwealth jurisdictions protect this principle implicitly by stating that their removal mechanisms are the only valid means by which a judge may be deprived of office, and some explicitly prohibit the abolition of the office of a judge while there is a substantive holder thereof.

## SUMMARY OF FINDINGS AND BEST PRACTICE

States which are undergoing a constitutional transition may find themselves in a somewhat different situation. In exceptional cases in which there is evidence of widespread judicial malfeasance, for example systemic corruption, pervasive bias or collusion in human rights abuses, it may be appropriate to require incumbent judges to undergo some form of individual review before their tenure under the new constitution is confirmed. The process of individual review is sometimes known as 'vetting' and must be conducted by an independent body of manifest integrity and impartiality and in accordance with appropriate safeguards to ensure fairness.

Apart from acting or temporary appointments, Commonwealth jurisdictions currently appoint judges either permanently, to serve until a mandatory age of retirement, or for a fixed period of time. Permanent appointments are generally preferable, although some smaller jurisdictions have no alternative but to seek judges who are prepared to serve in the higher and appellate courts on a fixed-term basis. Fixed-term appointments to a constitutional court are acceptable if they are for a long period and not renewable. There is also an argument to be made for the moderate use of fixed-term appointments in the ordinary courts to provide flexibility in numbers and perhaps also to enable prospective candidates to gain judicial experience before applying for permanent judicial office.

Where appointments are permanent until a prescribed age of retirement, it is a violation of judicial independence for that age to be lowered with retroactive effect. While a retirement age of at least 60 is currently the minimum standard among Commonwealth states, best practice in modern conditions would probably require the mandatory retirement age to be set at, or closer to, 70 years. This would guard against the risk of conflicts of interest arising in relation to post-retirement employment for which a judge may be eligible. A discretion for the executive to extend the tenure of an individual judge beyond the mandatory retirement age is particularly problematic. Cases of physical or mental incapacity can be dealt with by way of specialised procedures for removing a judge from office on such grounds.

### **2.3 Protection of judicial remuneration**

The *Latimer House Guidelines* recommend that 'judicial salaries and benefits should be set by an independent body and their value should be maintained'. This is a clear indication that the level of judicial remuneration, broadly understood as including benefits such as pensions, must be

## *SUMMARY OF FINDINGS AND BEST PRACTICE*

protected. Judicial remuneration should reflect the professional skill and responsibilities of a judge and should guard against financial inducements or conflicts of interest that might lead a judge to compromise his or her independence. Establishing independent bodies to review judicial remuneration at regular intervals, as a number of Commonwealth jurisdictions have done, represents best practice. Ideally such bodies should be established within a constitutional and statutory framework and all three branches of government should approach matters of judicial remuneration in a co-operative rather than a confrontational manner.

The stability of judicial remuneration is traditionally ensured by a rigid prohibition on the reduction of judicial salaries. Such provisions exist in 90% of Commonwealth jurisdictions. However, it is also possible to protect judicial remuneration in ways that leave states with greater flexibility to respond to economic crises. The minimum requirement is that if the holders of public offices are to have their salaries cut, judges should not be singled out for disproportionate reductions.

### **Chapter 3 – Removal from office**

#### **3.1 The removal of judges and the rule of law**

States need a mechanism to enable judges to be removed from office. However, the challenge is for legal frameworks to ensure that the removal process cannot be used to penalise or intimidate judges. The *Commonwealth Latimer House Principles* declare that judges ‘should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties’. Removal from office is a very serious form of judicial accountability. In most cases, judicial accountability is satisfied by judges providing reasons for their decisions, which may be subject to review or appeal without any consequential sanctions if the judge acted in good faith.

#### **3.2 Substantive grounds of removal**

The grounds on which judges may be removed from office should be clearly discernible from the legal or constitutional framework under which they serve. The *Commonwealth Latimer House Principles* require these to be restricted to misconduct or incapacity.

In jurisdictions where additional grounds of removal are listed, for example incompetence, it is preferable to view such grounds as being particular instances of misconduct or incapacity. Wider interpretations risk

## SUMMARY OF FINDINGS AND BEST PRACTICE

leaving judges vulnerable to removal for errors which are not of their own making but may be caused by systemic factors such as excessive case-loads or inadequate administrative support. The same considerations apply in jurisdictions where judges are liable to be removed for breach of a judicial code of ethics. While such codes provide helpful guidance to judges on the standards of conduct that are expected of them, both within and outside the courtroom, not every breach of a code will be sufficiently serious to warrant removing a judge from office.

As the Privy Council stated in *Re Chief Justice of Gibraltar* (2009), removal 'can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function'. This statement shows that the bar for removal is set fairly high. The Privy Council also indicated that whereas the international standards set out in the *Bangalore Principles of Judicial Conduct* are relevant to evaluating the behaviour of judges, conduct falling short of those standards does not automatically constitute grounds for removal.

### 3.3 Removal mechanisms

According to the *Commonwealth Latimer House Principles*, proceedings to determine whether a judge should be removed from office 'should include appropriate safeguards to ensure fairness'. The *Latimer House Guidelines* further indicate that a judge facing removal 'must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal'. The common law principles of administrative law require, in addition: a presumption of innocence in questions of wrongdoing; sufficient time to prepare a defence; the opportunity to present evidence and where relevant to cross-examine witnesses; a right to legal or other representation; a right to reasons, particularly in matters such as these in which there is great public interest; and the possibility of judicial review to ensure that all the legal requirements of the removal process are adhered to in practice, and, where appropriate, also an appeal which may consider both questions of law and fact.

As far as the institutions and public bodies responsible for removal decisions are concerned, several different approaches exist. In 42% of Commonwealth jurisdictions, once an initial investigation establishes that a question of removal has arisen, an *ad hoc* tribunal is formed to determine the issue. In another 21% of jurisdictions a permanent disciplinary council is established for that purpose. A parliamentary removal mechanism is found in 34% of jurisdictions. In the remaining 4% of jurisdictions,

## SUMMARY OF FINDINGS AND BEST PRACTICE

some judges are removed by a parliamentary process and others by a disciplinary council.

### **3.4 Removal via an *ad hoc* tribunal**

An important part of the removal process under this mechanism is the initial investigation to determine whether an *ad hoc* tribunal should be formed. In a majority of Commonwealth jurisdictions, such investigations are conducted by the Chief Justice or a judicial service commission, which constitutes best practice. In a minority of jurisdictions it is left to the executive to investigate any allegations against a judge. Fairness generally requires that the judges should be given an opportunity to respond to the allegations informally before the investigation is concluded, since a decision to commence tribunal proceedings is likely to damage the reputation of a judge and affect his or her ability to command the confidence of litigants. This was established by the Privy Council in *Rees v Crane* (1994).

If the investigation does result in a recommendation that a tribunal be formed, then the investigating body usually advises the head of state that a tribunal be formed, and also proposes its members. Tribunal members must usually be serving or retired judges, either from the jurisdiction itself or from other Commonwealth states, which helps ensure the manifest impartiality of the tribunal by making it possible to avoid local conflicts of interest. It is common for judges to be automatically suspended from office while tribunal proceedings are pending. (This highlights the need for removal proceedings to be completed without delay, as a suspension lasting for years may amount to a *de facto* removal from office.)

Once tribunal proceedings commence, they should follow the best practice standards of fairness set out under 3.3 above. In some jurisdictions tribunal decisions are subject to confirmation by the Privy Council, while in others provision has been made for appeals to the highest court. This provides an important additional safeguard alongside judicial review.

### **3.5 Removal by disciplinary councils**

The category of disciplinary councils includes judicial service commissions, judicial councils and other permanent bodies which are authorised in some Commonwealth jurisdictions to determine whether a judge should be removed from office. International norms stipulate that these should be judicial bodies, although in half of the Commonwealth states which follow this model only a minority of members are required to be judges.



## SUMMARY OF FINDINGS AND BEST PRACTICE

One advantage of entrusting removal decisions to disciplinary councils rather than *ad hoc* tribunals is that their members are not chosen for the purpose of an inquiry relating to a particular judge, which makes it more difficult to manipulate the composition of the body. In proceedings before disciplinary councils, the safeguards set out under 3.3 above should be observed in order to ensure fairness.

### **3.6 Parliamentary removal**

The system of parliamentary removal has a long history. It was developed in 18<sup>th</sup> century England to ensure that the King could only dismiss a judge if both Houses of Parliament passed a resolution, or 'address', calling for the removal of the judge, and this has not occurred since the early 19<sup>th</sup> century. Although parliamentary removal procedures are in place in 38% of Commonwealth jurisdictions, the mechanism has been described as an 'accident of history', which could lead to serious constitutional conflict if put into action.

In particular, it is difficult for parliamentary bodies themselves to provide judges with a hearing before an 'independent and impartial tribunal', as required by the *Latimer House Guidelines*. For this reason, most parliamentary removal systems have been modified by the involvement of an independent, external body in initial investigations, fact-finding and assessment of the allegations against a judge. This represents good practice. Such a body would be required to observe the safeguards set out under 3.3 above in order to ensure fairness.

If legislators are able to decide questions of removal by simple majority vote, there is a danger that that the executive may be able to muster sufficient votes to dismiss a judge without requiring any support from opposition parties. However, a majority of Commonwealth jurisdictions have adopted some form of higher legislative hurdle, whether it be the involvement of both legislative chambers in a bicameral system or setting a higher threshold for removal by requiring the support of a qualified majority, for example two-thirds of legislators. Such measures should now be considered best practice in jurisdictions which follow the parliamentary removal model.



# INTRODUCTION

## 0.1 Overview and scope of study

0.1.1 An independent, impartial, competent and ethical judiciary is essential to the rule of law. It is necessary for the fair and impartial resolution of disputes, for the interpretation of a written constitution and the clear, just and predictable application of the law, and for holding governments and private interests to account. Ensuring that the judiciary is fit to perform these tasks – often in situations of considerable pressure – requires a sound institutional structure to support the courage and integrity of individual judges.

0.1.2 The legal framework for that structure, in any jurisdiction, must include: (a) the system by which judges are chosen and appointed; (b) the terms of their tenure; and (c) the mechanism for deciding whether a judge should be removed from office. Important questions arise in each of these areas:

- who should appoint judges and by what process?
- what should be the duration of judicial tenure and how should judges' remuneration be determined?
- what grounds justify the removal of a judge and who should carry out the necessary investigation and inquiries?

0.1.3 This study investigates such questions with two aims in mind: first, to provide an **overview** of the legal frameworks of judicial appointment, tenure and removal that are currently in use in the 53 member states of the Commonwealth; and, secondly, to identify **best practice** under the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (Commonwealth Latimer House Principles)*.<sup>1</sup>

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<sup>1</sup> The *Commonwealth Latimer House Principles* were adopted by the Commonwealth Heads of Government in Abuja in 2003 and are available at <http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>.

## *INTRODUCTION*

0.1.4 The analysis of best practice is undertaken from a rule of law perspective, since the judiciary has such a vital role to play in upholding the rule of law, one of the fundamental values of the Commonwealth. Other branches of government and public institutions also have a responsibility to foster and support a judiciary that will uphold the rule of law. Accordingly many of the recommendations in this study concern the roles that should be given to parliaments, executive governments or to the independent commissions and councils, which are playing an increasingly prominent part in judicial affairs in many Commonwealth states.

0.1.5 This study does not overlook the fact that besides the legal framework for appointment, tenure and removal of judges there are many other factors that influence the extent to which judges are likely to succeed in upholding the rule of law. The rule of law is greatly strengthened if there is a well-resourced legal system under which persons can be confident of access to a court in which their disputes will be fairly and speedily resolved. The manner in which individual judges discharge their duty depends on their legal skills, moral character and professional ethics, which may be shaped to varying degrees by law schools and by further training offered to practitioners and serving judges, and also by the norms and standards of conduct in the wider legal community. More broadly still, the task of the judge is greatly facilitated if there is a rule of law culture, characterised by understanding and respect for judicial independence, particularly on the part of governments, the media and commercial bodies or other powerful groups in society. These matters lie beyond the scope of the present study.

### *Judges and jurisdictions examined*

0.1.6 The focus of this study is on legal provisions relating to judges who are full members of the 'superior courts' in independent Commonwealth member states. This definition calls for some clarification, both as regards types of courts and levels of judicial seniority, and also as regards the jurisdictions that are being considered, particularly in view of the sharing of courts by some smaller Commonwealth member states.

0.1.7 The term 'superior courts' is used in many jurisdictions to identify a level of the court system which is roughly equivalent to the High Court of England and Wales and above.<sup>2</sup> Judges serving in the superior courts carry a particular responsibility for upholding the rule of law in relation to

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<sup>2</sup> A full list of the superior courts of each jurisdiction is found in Appendix 2.

other branches of government, as they may be called upon to rule on challenges to legislation and the legality of administrative action. This study only includes full members of these courts, and not temporary or acting judges.<sup>3</sup> Full membership in this sense is often denoted by the title of 'puisne judge', except in the case of judges who are appointed to an appellate court or a leadership position.

0.1.8 The study thus excludes lower court judges or magistrates (as they are known in many jurisdictions). Although these judicial officers are the first and often the only point of contact with the court system for large numbers of people, in many countries they are appointed by different processes and on different terms to their counterparts in the higher judiciary.<sup>4</sup> The study also excludes judges who serve in military, religious or traditional courts, as such judges may be subject to external discipline or authority in ways that judges in secular courts of general jurisdiction are not. Judges serving on specialist constitutional courts are considered in view of their responsibility for upholding the rule of law and the provisions of a national constitution in cases which often go to the heart of the *Commonwealth Latimer House Principles*.<sup>5</sup>

0.1.9 The 53 independent member states of the Commonwealth form the geographical focus of the study.<sup>6</sup> However, there are in fact fewer independent Commonwealth jurisdictions than member states.<sup>7</sup> Six of the

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<sup>3</sup> There is a brief discussion of fixed-term appointments as an alternative to the use of temporary and acting judges in Chapter 2 at para 2.2.19–2.2.21.

<sup>4</sup> The Commonwealth Magistrates' and Judges' Association has published a study on the judicial independence concerns raised by distinctions of this kind in its report *The Status of Magistrates in the Commonwealth* [2013], available at <http://www.cmja.org/downloads/Status%20of%20Magistrates%20-FINAL%20REPORT0213.pdf>.

<sup>5</sup> However, supranational courts such as the European Court of Human Rights are not discussed.

<sup>6</sup> The legal frameworks of dependent territories such as the British Overseas Territories and Crown dependencies are not included, although the recent Privy Council decisions *Re Chief Justice of Gibraltar* [2009] UKPC 43 and *Re Levers (Judge of Grand Court of the Cayman Islands)* [2010] UKPC 24 on the removal of judges from such jurisdictions are considered in view of their relevance to broader questions of legal principle. For a more general discussion see Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart 2011) chapter 6.

<sup>7</sup> Some member states contain multiple jurisdictions each with their own judiciary serving under a distinct legal framework, for example the United Kingdom and federal states such as Australia or Nigeria. This study does examine the arrangements that are in place in these distinct jurisdictions. However, when a single classification is needed for comparison with other Commonwealth member states, reference is usually made to the federal judiciary or, in the case of the UK the judiciary of England and Wales, which serves more than 80% of the UK population.

## INTRODUCTION

Commonwealth Caribbean states have pooled their superior courts and fall under the jurisdiction of the Eastern Caribbean Supreme Court, which comprises a High Court and a Court of Appeal.<sup>8</sup> For statistical purposes, the study therefore deals with a data set of 48 jurisdictions.

0.1.10 Statistics provide an interesting overview of how many Commonwealth jurisdictions approach certain legal issues in a particular way. Yet such figures only tell part of the story and do not necessarily reflect the number of people that are affected. Due regard must be paid to differences of population size between Commonwealth jurisdictions, which range from India with a population of more than 1.2 billion to Nauru with approximately 10,000 people. These differences of size also have implications for the solutions that are adopted. For example, some smaller jurisdictions have found it necessary to recruit judges on a fixed-term basis because of the difficulty in finding candidates who are qualified and willing to serve in permanent roles.

0.1.11 Many countries do not revisit the legal frameworks surrounding their judiciary very often, particularly in the case of provisions that are seldom used, such as the mechanism for removing a judge from office. Historical explanations are therefore relevant to the extent that they shed light on contemporary arrangements. On the other hand, those countries that have changed their legal frameworks recently are of particular interest both because they reflect current approaches and because member states are likely to have engaged with international norms, including the *Commonwealth Latimer House Principles*. An attempt has been made to state the law in each of the jurisdictions studied as it was in January 2015, as could best be ascertained from the published legal sources that were available.

### *Outline of structure*

0.1.12 This study takes a topical rather than a country-by-country approach. Each topic is examined from the perspective of Commonwealth and other international norms, and then the approach of Commonwealth member states is considered in order to identify best practice.

0.1.13 The topics considered are as follows:

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<sup>8</sup> The six states are Antigua and Barbuda, Dominica, Grenada, St Kitts and Nevis, St Lucia, and St Vincent and the Grenadines. The ECSC also has jurisdiction over the three British Overseas Territories of Anguilla, the British Virgin Islands and Montserrat.

## INTRODUCTION

- The remainder of this Introduction explains how the *Commonwealth Latimer House Principles* were developed, and places the *Principles* in the context of other international norms discussed in this study.
- Chapter I discusses the appointment of judges and considers questions that arise with regard to the criteria for judicial office, the institution or body which selects judges and the process of selection and appointment.
- Chapter II deals with the subject of tenure, which includes the duration of judicial appointments and the protection of judicial salaries and other benefits.
- Chapter III examines the mechanisms that are used to determine whether a judge should be removed from office, and considers both the substantive grounds that warrant removal and the procedural safeguards necessary to ensure fairness.
- The Conclusion provides a summary of the findings and recommendations of this study.

0.1.14 Background information is provided in two appendices:

- Appendix 1 sets out the text of the *Commonwealth Latimer House Principles* in full, including the *Latimer House Guidelines* that preceded their development.
- Appendix 2 contains summaries of the legal frameworks for the appointment, tenure and removal of judges in each Commonwealth member state, including references to relevant constitutional and statutory provisions and leading cases. Readers may wish to consult these summaries for further information on countries discussed in the main text.

## **0.2 Commonwealth principles, their development and international context**

0.2.1 The governments of Commonwealth member states have long recognised the importance of the rule of law and an independent judiciary. The fullest expression of this is found in the *Commonwealth Latimer House Principles*, adopted in 2003, but the *Principles* are best understood as part of a sustained engagement with these issues of fundamental principle over a number of years.

0.2.2 The modern approach of Commonwealth member states can be traced at least as far back as the *Harare Commonwealth Declaration*,

## INTRODUCTION

which was adopted by the Commonwealth Heads of Government in 1991. The *Declaration* recognises the rule of law as part of the 'shared inheritance' of the Commonwealth that constitutes its 'special strength'.<sup>9</sup> The *Declaration* also affirms that the rule of law and the independence of the judiciary are among the 'fundamental political values' of the Commonwealth.<sup>10</sup>

0.2.3 In order to strengthen the implementation of these principles, the Commonwealth Heads of Government went on to adopt the *Millbrook Commonwealth Action Programme on the Harare Declaration* in 1995.<sup>11</sup> The *Programme* had the twofold purpose of enabling the Commonwealth to take action in the event that clear violations occurred in a member state, for example a *coup d'état* or other form of undemocratic change of government, while at the same time paving the way for initiatives to provide more detailed guidance to member states on how they might foster and safeguard those values in their domestic institutional arrangements.

0.2.4 This second strand of the *Millbrook Commonwealth Action Programme* led to the development of the Latimer House *Guidelines* (1998) and then the *Commonwealth Latimer House Principles*, which the member state governments adopted in 2003. The deliberations that produced the *Guidelines* and then the *Principles* are examined in further detail below. More recently, the *Principles* have been incorporated in the *Charter of the Commonwealth*, which was adopted by the Commonwealth Heads of Government in December 2012 and signed by the Queen in March 2013.<sup>12</sup> The *Charter* singles out the rule of law as one of the core values and principles of the Commonwealth, and in this connection it makes a commitment to 'an independent, impartial, honest and competent judiciary'.<sup>13</sup> The need for a judiciary that is willing and able to uphold the rule of law is therefore firmly recognised at intergovernmental level in the Commonwealth.

### *Development of the Latimer House Guidelines and Principles*

0.2.5 The effort to develop Commonwealth-wide norms addressing the responsibilities of the main institutions of government with regard to the

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<sup>9</sup> *Harare Commonwealth Declaration* (1991), available at <http://thecommonwealth.org/history-of-the-commonwealth/harare-commonwealth-declaration>, para 3.

<sup>10</sup> *Ibid*, para 9.

<sup>11</sup> Available at <http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>.

<sup>12</sup> Available at <http://thecommonwealth.org/our-charter>, Preamble.

<sup>13</sup> *Ibid*, Principle VII.



## INTRODUCTION

rule of law and other fundamental values began when the Commonwealth parliamentary, judicial and legal associations met at Latimer House in the United Kingdom in June 1998. At the conclusion of this conference, the Commonwealth associations adopted a set of guidelines on the subject of 'Good practice governing relations between the executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles'.<sup>14</sup> The present study makes substantial reference to these '*Latimer House Guidelines*', since they represent the legal learning and practical experience that inspired the further process of intergovernmental discussions from which the *Commonwealth Latimer House Principles* would later emerge.

0.2.6 Over the next several years, discussions took place at ministerial and intergovernmental level with the aim of securing agreement on a document that would deal with the most important questions of principle.<sup>15</sup> The Commonwealth Heads of Government eventually adopted the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (Commonwealth Latimer House Principles)* by consensus at their meeting in Abuja in December 2003. The Preamble records that they did so 'in the spirit of' the *Latimer House Guidelines*. The *Guidelines* are annexed to the *Commonwealth Latimer House Principles* and so provide an important indication of how the *Principles* are to be interpreted as well as a set of more concrete recommendations for their implementation in practice.

0.2.7 The Commonwealth parliamentary, judicial and legal associations, having been responsible for the drafting of the *Latimer House Guidelines*, have since taken up the challenge of supporting the implementation of the *Commonwealth Latimer House Principles*. To that end the associations adopted the *Edinburgh Plan of Action* in July 2008, which incorporates the earlier *Nairobi Plan of Action for Africa* and affirms its relevance to the

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<sup>14</sup> The *Guidelines* were adopted by the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association. They are reproduced as an annex to the *Commonwealth Latimer House Principles* (n1). The proceedings of the conference at Latimer House are documented in John Hatchard and Peter Stinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish 1999).

<sup>15</sup> This process is described in the *Foreword to the Commonwealth Latimer House Principles* (n1), 5-7.

## INTRODUCTION

whole of the Commonwealth.<sup>16</sup> In a recent initiative that is particularly relevant to this study, the Commonwealth legal and judicial associations have published a report proposing a model constitutional clause for judicial appointments commissions, which is discussed at some length in Chapter II of this volume.<sup>17</sup>

### *The Commonwealth Latimer House Principles and the role of the judiciary*

0.2.8 The *Commonwealth Latimer House Principles* remain the most detailed expression, at intergovernmental level, of shared understandings with regard to the rule of law and its implications for each of the main branches of state. *Principle IV – Independence of the Judiciary* starts by setting out the role of the judiciary and also sets out a general approach to judicial appointments, tenure and removal that is designed to support this role:

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

- (a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:
  - equality of opportunity for all who are eligible for judicial office;
  - appointment on merit; and
  - that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;
- (b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

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<sup>16</sup> Available at <http://www.cmja.org/downloads/latimerhouse/edinburghpoafinal10808.pdf>.

<sup>17</sup> Karen Brewer, James Dingemans and Peter Slinn, *Judicial Appointments Commissions: A Model Clause For Constitutions* (report on behalf of the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association, 2013) (hereafter *Model Clause*) available at <http://www.cmja.org/downloads/latimerhouse/Judicial%20Appointments%20Commissions-%20CLA-CLEA-CMJA%20Report.pdf>.

## INTRODUCTION

- (c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;
- (d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

... .

0.2.9 The first paragraph of *Principle IV* shows that guaranteeing the independence of the judiciary is not seen as an end in itself. Instead, the aim is to secure an independent judiciary that will discharge its fundamental responsibilities, which include a crucial role in upholding the rule of law. The paragraphs that follow briefly address the appointment, tenure and removal of judges, as it is evident that these matters have a bearing on the independence of the judiciary and the ability of judges to perform their functions. However, the paragraphs do not specify a particular set of institutional arrangements to achieve these ends. Some additional guidance is provided by other *Principles* which are quoted and discussed in the main chapters of this volume. These include: *Principle II – Parliament and the Judiciary*, which requires mutual respect and constructive engagement between these institutions; *Principle VI – Ethical Governance*, requiring the judiciary to establish standards of conduct for its members; and *Principle VIII(b) – Judicial Accountability*, which addresses both the purpose of mechanisms for removal and other forms of judicial discipline and the need for safeguards to ensure fairness.

### *The relevance of international norms and statements*

0.2.10 Because the *Commonwealth Latimer House Principles* address the responsibilities and interaction of state institutions at quite a general level it is often helpful to turn to other international norms and statements that also deal with these matters.

0.2.11 International norms can assist with the understanding and interpretation of the values that are reflected in the *Commonwealth Latimer House Principles*, since they form part of the backdrop against which the *Principles* were adopted and intended to function. Furthermore, international materials are a source of ideas that may provide answers to some practical questions not specifically addressed or resolved by the *Commonwealth Latimer House Principles*. When such questions are

## INTRODUCTION

discussed in this study, the *Latimer House Guidelines* provide a first port of call. In some cases the *Guidelines* offer a more detailed treatment than the *Principles*, but in others they explicitly refer to an issue as being controversial, as for instance the use of independent judicial appointments commissions was in 1998, when the *Guidelines* were framed. On such points especially, the *Guidelines* seem to anticipate that new standards might emerge. There is therefore no bar to considering more recent international documents when analysing the current practice of Commonwealth member states.

0.2.12 The relevant international materials include both global and regional documents. At a global level, the *International Covenant on Civil and Political Rights* recognises a right to a fair trial which must take place before 'a competent, independent and impartial tribunal established by law'.<sup>18</sup> The *UN Basic Principles on the Independence of the Judiciary*, which are of seminal importance to this study, were issued in 1985 and received the endorsement of the UN General Assembly in the same year.<sup>19</sup> International bodies frequently issue guidance on the practical requirements of these norms as well as opinions on the compliance of states. In this regard the work of the UN Special Rapporteur on the Independence of Judges and Lawyers is of particular importance.<sup>20</sup> Other international associations, albeit not representing national governments, have issued influential declarations of norms and standards relating to the judiciary. Two of the most significant are the *Minimum Standards of Judicial Independence of the International Bar Association* (1982),<sup>21</sup> and the *Bangalore Principles of Judicial Conduct* (2002).<sup>22</sup> The *Bangalore Principles* are the product of a series of summits attended by high-level judicial delegations from around the

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<sup>18</sup> Article 14(1). An authoritative interpretation of this clause is provided by the UN Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007). At the time of writing 41 of the 53 Commonwealth member states are parties to the Covenant.

<sup>19</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>20</sup> The reports of the UN Special Rapporteur are available from <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>.

<sup>21</sup> Available from [www.ibanet.org](http://www.ibanet.org).

<sup>22</sup> *Bangalore Principles of Judicial Conduct*, as revised at the Round Table Meeting of Chief Justices in The Hague (26 November 2002), available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

world, and have been extensively cited by domestic courts, including the Privy Council in its most recent decisions on misconduct warranting the removal of a judge from office.<sup>23</sup>

0.2.13 The statements of regional organisations and institutions are also considered in this study, in part because they shed light on obligations that some Commonwealth member states have assumed under regional treaties, but mainly because, like other international materials, they offer helpful guidance on particular institutional arrangements that could be used to enhance the ability of the judiciary to uphold the rule of law. One such statement is the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2005 by the African Commission on Human and Peoples' Rights.<sup>24</sup> In the Asia-Pacific region, the 1998 *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region* contains minimum standards endorsed by Chief Justices from across the region.<sup>25</sup> There has been considerable engagement with questions of judicial appointment, tenure and removal in Europe, particularly by the institutions of the Council of Europe, which brings together all the states that are party to the European Convention of Human Rights.<sup>26</sup> The current guidance of the Committee of Ministers of the Council of Europe is contained in the *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities* (2010).<sup>27</sup> This intergovernmental statement is complemented by expert analysis undertaken by the Council of Europe's Commission for Democracy through Law (the 'Venice Commission'), which has produced a number of relevant reports on this subject.<sup>28</sup> The present study also draws on the work of other European bodies that have produced specific guidance on

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<sup>23</sup> *Re Chief Justice of Gibraltar* [2009] UKPC 43 and *Re Levers (Judge of Grand Court of the Cayman Islands)* [2010] UKPC 24.

<sup>24</sup> Available at <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>. The Commission is established under the African Charter on Human and Peoples' Rights, a treaty to which all the African states who are members of the Commonwealth are party.

<sup>25</sup> Available at <http://lawasia.asn.au/beijing-statement.htm>. The *Beijing Statement* was signed by Chief Justices representing all the Commonwealth member states in the region, with the exception of the Maldives.

<sup>26</sup> The United Kingdom, Malta and Cyprus are all members of the Council of Europe.

<sup>27</sup> CM/Rec (2010) 12 (adopted 17 November 2010).

<sup>28</sup> These include the Venice Commission reports *Judicial Appointments*, CDL-AD(2007)028 (adopted 17 March 2007) and *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD(2010)004 (adopted 16 March 2010), available from the Commission's website [www.venice.coe.int](http://www.venice.coe.int).

## INTRODUCTION

issues of judicial independence in societies in transition to democracy,<sup>29</sup> and on the selection and appointment of judges from the perspective of a network of judicial councils.<sup>30</sup>

0.2.14 The purpose of this study is not to consider whether these global or regional instruments and statements are binding in international law, and if so, which Commonwealth member states they might bind. Instead, international materials of this kind are considered as a guide to how best to give effect to the *Commonwealth Latimer House Principles* from the perspective of strengthening the rule of law. As already mentioned, these documents are of assistance to the extent that they offer possible solutions to practical questions regarding the appointment, tenure and removal of judges that are actually encountered in Commonwealth member states. For example, some international bodies have discussed the particular challenges that arise when designing a system of judicial appointments and tenure in countries that are returning to constitutional democracy after a period of conflict or authoritarian rule.<sup>31</sup> International materials are therefore considered alongside domestic legal frameworks, court decisions and the opinion of legal scholars in an attempt to identify and provide a reasoned account of best practice.

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<sup>29</sup> Organisation for Security and Co-operation in Europe, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, (adopted 25 June 2010), available from [www.osce.org](http://www.osce.org). Although the *Kyiv Recommendations* are not addressed to any states that are members of the Commonwealth, they represent an important set of norms for states in transition to constitutional democracy.

<sup>30</sup> European Network of Councils of the Judiciary, *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* (adopted 11 May 2012), available at [http://www.encj.eu/images/stories/pdf/GA/Dublin/encj\\_dublin\\_declaration\\_def\\_dclaration\\_de\\_dublin\\_recj\\_def.pdf](http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_recj_def.pdf).

<sup>31</sup> For example the *Kyiv Recommendations* (n29).

# CHAPTER 1 – APPOINTMENTS

## 1.1 The appointment of judges and the rule of law

1.1.1 Like those who are chosen to serve in any other state office, it is vital that persons appointed to be judges should be suitable for the role they are to perform. Their responsibility for upholding the rule of law means that multiple qualities are required, as the *Commonwealth Latimer House Principles* recognise in the opening sentence of *Principle IV – Independence of the Judiciary*:

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.

1.1.2 The qualities of independence, impartiality, honesty and competence are directly related to the ability of judges to uphold the rule of law and dispense justice by performing their daily tasks of controlling court proceedings, determining questions of fact and law and holding other branches of government to account. It is particularly important that the selection criteria and processes that are in place should be a **reliable** means of identifying candidates who have these characteristics, because it should be difficult for a judge to be removed once in office.<sup>1</sup>

1.1.3 In addition, the process of appointment must also be **legitimate** in the eyes of the public, if the courts are to build and retain trust and secure the voluntary co-operation of the public in sufficient numbers to ensure the orderly administration of justice. In this sense, the responsibility of judges for 'engendering public confidence', as it is expressed in the *Commonwealth Latimer House Principles*, is inextricably bound up with their responsibility for upholding the rule of law. A legitimate process may be achieved in part through the demonstrable quality of those who are appointed, but it will also be influenced by other factors, including who the

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<sup>1</sup> The reasons for judicial security of tenure are discussed in Chapters 2 and 3 below.

## APPOINTMENTS

decision-makers are, how transparent the selection process is and what provision is made for scrutiny and review in individual cases.

### *Main issues discussed in this chapter*

1.1.4 The aim of this chapter is not to provide a one-size-fits-all blueprint for the appointment of judges in Commonwealth jurisdictions. While there is a significant amount of common ground as regards the criteria for judicial office, there is no single mechanism of appointment that is universally accepted. Although some general principles can be discerned, the responsibility for selecting and appointing judges is entrusted in various ways, either singly or in combination, to different branches of government or to other public bodies, especially judicial appointments commissions. This calls for separate consideration of the roles that may be assigned to these institutional actors, with a view to identifying best practice for each actor within the various mechanisms in which they operate. In the case of judicial appointments commissions, it is necessary to consider the composition and structure of these bodies first, as this is a subject of considerable debate and variation between member states, before turning to their role in the process of selection and appointment.

1.1.5 The issues considered in this chapter therefore fall under the following headings:

- criteria for judicial office;
- appointment mechanisms;
- the role of the executive;
- the role of the legislature;
- composition and structure of judicial appointments commissions; and
- the role of judicial appointments commissions.

1.1.6 Each of these issues is discussed first from the perspective of the *Commonwealth Latimer House Principles*, the *Latimer House Guidelines* and other international principles, and then the legal frameworks of Commonwealth jurisdictions are considered in order to identify the most common approaches and extract elements of best practice.

## **1.2 Criteria for judicial office**

1.2.1 Although the *Commonwealth Latimer House Principles* address judicial appointments only briefly, in *Principle IV(a)*, that clause makes a



## APPOINTMENTS

number of important points about the nature and aims of the judicial appointment process:

Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

equality of opportunity for all who are eligible for judicial office;

appointment on merit; and

that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.<sup>2</sup>

1.2.2 The requirement that judges should be appointed 'on the basis of clearly defined criteria and by a publicly declared process' **conveys a fundamental commitment to transparency**.<sup>3</sup> This means that, **at a minimum, the public must be informed of the characteristics that qualify persons for judicial office and the procedures that are followed when an individual applies or is considered for appointment.**

1.2.3 The passage quoted above does not seek to lay down a specific set of criteria or procedures which member states must follow, but does shed light on these matters by identifying three things which the process as a whole 'should ensure'. It is made very clear that Commonwealth states have adopted **equality of opportunity, appointment on merit and consideration of the need to address gender inequity and other historic factors of discrimination** as fundamental objectives of their judicial appointments systems. These objectives are expressed in relatively abstract and general terms, however, and it is left to member states to develop more concrete measures by which the objectives may be given effect, including by specifying criteria for judicial office.

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<sup>2</sup> *Principle IV(a)*.

<sup>3</sup> The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2005 by the African Commission on Human and Peoples' Rights, declare that '[t]he process for appointments to judicial bodies shall be transparent and accountable' (art A.4(h)). The Committee of Ministers of the Council of Europe, *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, CM Rec (2010) 12, states that '[d]ecisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities' (para 44) and that 'procedures should be transparent' (para 48). See also the Council of Europe's Commission for Democracy Through Law (the Venice Commission), *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD(2010)004, para 23–25.

## APPOINTMENTS

### 'Merit' and the judicial role

1.2.4 The principle that judges should be appointed on merit is central to many international declarations and statements on the judiciary. Some simply state that it is the basis on which judges are appointed, while others go some way towards defining the qualities that constitute merit in this context. In the *IBA Minimum Standards of Judicial Independence*, for example, it is simply declared that '[s]election of judges shall be based on merit'.<sup>4</sup> The Committee of Ministers of the Council of Europe, in its *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, provides the outline of a definition by requiring that appointments 'should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.'<sup>5</sup> Similarly, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, issued by the African Commission on Human and Peoples' Rights, state that 'integrity, appropriate training or learning and ability' should be the 'sole criteria' for appointment.<sup>6</sup> The *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region* makes the link between the criteria for judicial office and the functions to be performed explicit:

To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.<sup>7</sup>

1.2.5 These formulations confirm that 'merit' is to be understood in relation to the role which a judge has to perform. This is implicit even in those declarations that do not contain a definition of merit. For example the reference to 'appointment on merit' in the *Commonwealth Latimer House Principles* must clearly be understood against the background of the judicial responsibility to uphold the rule of law, and the recognition that an 'independent, impartial, honest and competent'<sup>8</sup> judiciary is required for this purpose.

1.2.6 At the level of individual Commonwealth jurisdictions, legal frameworks commonly supply a more detailed definition of merit in the form of

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<sup>4</sup> art 26.

<sup>5</sup> para 44.

<sup>6</sup> art A.4(i).

<sup>7</sup> art 11. The *Beijing Statement* was issued by Chief Justices in the Asia-Pacific Region in 1998.

<sup>8</sup> *Principle IV*, quoted in para 1.1.1 above.

## APPOINTMENTS

criteria which are applied during the selection process. In a 2013 report, the Commonwealth judicial and legal associations found that among member states there is 'a remarkable uniformity of view about what criteria make a person fit for judicial office'.<sup>9</sup> The report sets out a *Model Clause* for judicial appointments commissions which includes the following list of criteria based on the current practice of Commonwealth states:

intellectual capacity; integrity and independence; judgement; objectivity; an ability to understand and deal fairly with all persons and communities served by the Courts; authority and communication skills; and efficiency.<sup>10</sup>

1.2.7 Although these criteria are recommended for use by judicial appointments commissions, they are based on the current approaches of Commonwealth states generally, irrespective of the selection bodies that are established. The *Model Clause* does not claim to provide an exhaustive list of criteria, but it does indicate that **a candidate's intellectual abilities, moral qualities and practical skills are all relevant to the determination of merit**. Selection bodies will need to form an overall assessment of each candidate, and **there can be no prescribed formula for weighing these very different attributes in doing so, save that a candidate who is seriously wanting in any of these respects is likely to be unfit for judicial office**. The challenge of comparing candidates whose strengths lie in different areas means that hard cases are bound to arise. Professor Kate Malleson, a leading scholar on judicial appointments, has observed that the needs of a particular jurisdiction may determine how it approaches such dilemmas:

[I]n some common law systems there is evidence of growing tension between the desirability of traditional legalistic technical skills and more communication, practical, and 'people' skills. On the other hand, in the emerging liberal democracies legal expertise and lack of corruptibility are valued more highly than ever in the struggle to build judiciaries with integrity and competence.<sup>11</sup>

1.2.8 Professor Peter Russell, another leading scholar, has similarly noted that in developed countries 'a broadening and deepening of the

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<sup>9</sup> Karen Brewer, James Dingemans and Peter Slinn, *Judicial Appointments Commissions: A Model Clause For Constitutions* (report on behalf of the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association, 2013) (hereafter *Model Clause*), 12.

<sup>10</sup> *Ibid.*

<sup>11</sup> 'Introduction' in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, 2006), 8–9.

## APPOINTMENTS

qualities considered desirable for judicial office has been occurring'.<sup>12</sup> **A flexible approach to the weighing of criteria is further justified by the fact that their relevance may vary depending on the judicial vacancy that has to be filled.** For example, whereas oral communication and courtroom management skills may be particularly valuable in a first-instance court, in the case of appellate courts there is generally a premium on written communication skills and the intellectual qualities needed to develop the law. There may also be a need for additional criteria when filling the position of Chief Justice or other senior positions with significant leadership responsibilities.<sup>13</sup>

1.2.9 It is not uncommon for jurisdictions to have multiple sources dealing with the criteria for judicial office. While the most fundamental attributes are usually specified in the constitution or in other legal frameworks, further details may be left to be determined as a matter of policy by the bodies responsible for selection. Since the focus of this study is on legal frameworks, it is not possible to analyse the impact of such selection policies as they are adapted from time to time.

### *Non-discrimination and judicial diversity*

1.2.10 With regard to matters of equality, the *Commonwealth Latimer House Principles* are helpfully complemented by the *UN Basic Principles on the Independence of the Judiciary*, which declare that judicial appointments may not be based on discrimination on the grounds of 'race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status'.<sup>14</sup>

1.2.11 Discrimination of these kinds would be diametrically opposed to equality of opportunity in judicial appointments, which is one of the three objectives which the *Commonwealth Latimer House Principles* requires appointment systems to 'ensure'. However, this does not mean that selection and appointment processes need only conform to a formal or 'blind' notion of equality. The UN Special Rapporteur on the Independence of

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<sup>12</sup> 'Conclusion' in Malleson and Russell (n11) 432.

<sup>13</sup> See para 1.4.24 below.

<sup>14</sup> art 10. See also the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, art A.4.(j), the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*, art 13 and the Committee of Ministers of the Council of Europe, *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, para 45.

## APPOINTMENTS

Judges and Lawyers has argued that the *Basic Principles* permit the use of 'temporary special measures to achieve greater representation for both women and ethnic minorities until fair balance has been achieved'.<sup>15</sup> In some jurisdictions such measures are described as promoting 'judicial diversity', a term which means more than the literal diversity which would be achieved by the inclusion of a few members of previously excluded groups. Properly understood, efforts to achieve judicial diversity thus respond to the 'need for the progressive attainment of gender equity and the removal of other historic factors of discrimination' which is recognised in the *Commonwealth Latimer House Principles*.<sup>16</sup>

1.2.12 The Council of Europe's Commission for Democracy Through Law (the Venice Commission) has also expressed its support for pursuing judicial diversity, in part because greater diversity should have the effect of enhancing the legitimacy of the courts:

[M]erit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society.<sup>17</sup>

1.2.13 In this passage the Venice Commission sets out a particular view of the relationship between merit and the promotion of judicial diversity, arguing that merit should be 'the primary criterion'.<sup>18</sup> The *Commonwealth Latimer House Principles* implicitly endorse a similar approach, as the requirement that the process of appointment 'should ensure ... appointment on merit' is direct and unqualified, in contrast to the further objective 'that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination'.<sup>19</sup>

**1.2.14 In practice, the selection criteria employed by Commonwealth jurisdictions reveal a variety of approaches to the question of how to**

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<sup>15</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc A/HRC/11/41 (2009) (hereafter *Annual Report 2009*), para 34.

<sup>16</sup> *Principle IV(a)*, quoted in para 1.2.1. above.

<sup>17</sup> *Report on the Independence of the Judicial System – Part One: The Independence of Judges* (n3), para 26. See also Malleon and Russell (n11), 434.

<sup>18</sup> A similar view is expressed by the European Network of Councils of the Judiciary, *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* (adopted 11 May 2012), para 1.8.

<sup>19</sup> *Principle IV(a)*, quoted in para 1.2.1. above.

## APPOINTMENTS

**reconcile appointment on merit with the need to overcome existing patterns of discrimination and disadvantage in a particular society.** The contrasting examples of South Africa and England and Wales illustrate this. In South Africa, the 1996 Constitution provides that '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.<sup>20</sup> This provision does not prescribe how a judiciary more reflective of society is to be achieved. The flexibility which it offers appears to have been intended to allow the approach to judicial selection to evolve over time, as in the immediate aftermath of apartheid there was a need to rebalance the almost entirely white and male composition of the South African judiciary.<sup>21</sup> The flexible approach at constitutional level means that a considerable amount of discretion is entrusted to the Judicial Service Commission, the body responsible for most judicial appointments, which is discussed below.<sup>22</sup> By contrast, in England and Wales the Judicial Appointments Commission has a narrower and more precisely defined power, in cases in which two or more candidates are found to be 'of equal merit', to choose a candidate whose selection would increase the diversity of the court in which the vacancy has arisen.<sup>23</sup> This provision is best understood against the background of a wider range of initiatives designed to increase the proportion of women and members of ethnic minorities in the pool of candidates available for selection, as there are still disproportionately few members of these groups being elevated to the ranks of the higher judiciary.<sup>24</sup>

1.2.15 Adjusting the criteria for selection of judges is not the only means by which judicial diversity may be improved, and such measures represent at best a partial and temporary solution to problems of inequality which often have much deeper roots.<sup>25</sup> At the most general level, the ability of members of different groups to secure judicial appointment is influenced

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<sup>20</sup> s 174(2).

<sup>21</sup> See chapters 5 and 6 in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014).

<sup>22</sup> See para 1.6.19 below.

<sup>23</sup> Constitutional Reform Act 2005, s 63(4) (inserted in 2013). The basic criterion is that judges are selected 'strictly on merit' (s 63(2)).

<sup>24</sup> Simon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2014), 125–135. Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015), 182.

<sup>25</sup> See Lizzie Barmes and Kate Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' (2011) 74 *Modern Law Review* 245.

by the distribution of wealth, education and other resources in society. The conditions for advancement in the legal profession are also relevant, particularly in common law jurisdictions which typically do not have a career judiciary and where judges are expected to have extensive prior experience of the law, most often as legal practitioners. The working conditions for new judges and the availability of training may also have an impact on the ability of candidates with child-rearing and caring responsibilities, still disproportionately women, to apply for judicial office.

1.2.16 Addressing the obstacles to judicial diversity requires a co-ordinated effort by various institutions and private professional bodies to change their policies and practices. These matters fall well beyond the scope of the present study, with its focus on legal frameworks. However, it should be noted that there have been important recommendations at Commonwealth level which relate to some of the institutional changes required to support a more diverse judiciary. The *Latimer House Guidelines* declare that a 'culture of judicial training should be developed'.<sup>26</sup> Training in judicial skills should also be made available to practising lawyers who are interested applying for judicial appointments.<sup>27</sup> In their *Edinburgh Plan of Action* for the implementation of the *Commonwealth Latimer House Principles*, the Commonwealth parliamentary, judicial and legal associations call for 'broad advertising of judicial vacancies' and for 'adapting judicial working conditions where appropriate', in order to encourage more applications from women and those with diverse backgrounds.<sup>28</sup>

1.2.17 Against this background, it would not be appropriate for the present study to recommend any single approach to the use of legal criteria as a means of addressing gender inequity and other historic factors of discrimination in a particular society. **Besides varying widely between jurisdictions, the underlying causes of failure to achieve judicial diversity are often complex and may require co-ordinated changes of policy and practice. The need for adaptation of the legal criteria for judicial selection must be determined in this broader context.**

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<sup>26</sup> *Guideline II.2.* The *Guidelines* recommend that training programmes should be under the control of a judicial body, which ensures that the independence of the judiciary is protected.

<sup>27</sup> *Ibid.*

<sup>28</sup> Commonwealth Lawyers' Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association and Commonwealth Parliamentary Association, *Edinburgh Plan of Action* (2008), available at <http://www.cmja.org/downloads/latimerhouse/edinburghpoafinal10808.pdf>, para 1.4.1.

## APPOINTMENTS

### 1.3 Appointment mechanisms

1.3.1 The *Commonwealth Latimer House Principles* do not purport to specify the mechanism by which judges should be appointed. The *Principles* stipulate only that there must be a 'publicly declared process', using clearly defined criteria, and it should ensure equality of opportunity, appointment on merit and consideration of the need to promote judicial diversity in the sense discussed above.<sup>29</sup> These objectives **implicitly rule out certain modes of appointment. For example, the executive cannot be permitted to appoint judges on the basis of corrupt patronage or out of prejudice against candidates better suited for appointment.** The *UN Basic Principles on the Independence of the Judiciary* provide that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives',<sup>30</sup> but likewise do not specify what mechanism should be used to achieve this.

1.3.2 The *Latimer House Guidelines* provide a more positive indication of the nature of the mechanisms that might be required. The *Guidelines* declare that states 'should have an appropriate independent process in place for judicial appointments'.<sup>31</sup> It is further recommended that where existing appointment mechanisms do not satisfy this standard, states should entrust the appointment of judges to a commission, either directly or via recommendations made by the commission to another officer of state:

Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.<sup>32</sup>

1.3.3 Despite this preference for the establishment of judicial appointments commissions, it is clear that mechanisms in which other branches of government remained responsible for the selection of judges were not ruled out completely.<sup>33</sup> At the time when the *Latimer House Guidelines*

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<sup>29</sup> *Principle IV(a)*, quoted in para 1.2.1. above.

<sup>30</sup> art 10.

<sup>31</sup> *Guideline II.1.*

<sup>32</sup> *Guideline II.1.*

<sup>33</sup> In the edited proceedings of the Latimer House conference, John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish 1999), it is observed that the recommendation was qualified 'to meet the concerns of those jurisdictions having satisfactory existing procedures which do not involve a formally constituted commission' (at 15).



## APPOINTMENTS

were drawn up in 1998, the power to select judges in the United Kingdom was still entrusted to the Lord Chancellor, a cabinet member, and systems of executive selection and in some cases parliamentary confirmation of judges were in place in a number of other Commonwealth states. Some jurisdictions continue to use such mechanisms, and these are examined below.<sup>34</sup>

1.3.4 The *Latimer House Guidelines* do not define an 'independent process', or explain how a judicial appointments commission may help to achieve it. It may be assumed that independence requires an exclusion of politically motivated appointments, in order to ensure that judges are chosen strictly in accordance with the prescribed criteria for judicial office. Independence in this sense should make a judicial appointments mechanism more reliable as a means of identifying judges who will themselves be independent and willing to uphold the rule of law. Manifest independence may also increase the legitimacy of the appointment system if it is known not to be subject to abuse for political ends.

1.3.5 In the specific case of a judicial appointments commission, its independence depends largely on the composition and internal structure of the commission.<sup>35</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers observes that '[t]he composition of this body matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges',<sup>36</sup> and points out the danger of a commission that is effectively under political control:

... if the body is composed primarily of political representatives there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the government exerts its influence indirectly.<sup>37</sup>

1.3.6 The *IBA Minimum Standards of Judicial Independence*, adopted in 1982, already included a recommendation that the power to appoint judges should be 'vested in a judicial body in which members of the judiciary and the legal profession form a majority'.<sup>38</sup> This is subject to a proviso similar to the qualification contained in the *Latimer House*

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<sup>34</sup> See section 1.4 of this chapter.

<sup>35</sup> See section 1.6 of this chapter.

<sup>36</sup> *Annual Report 2009* (n15), para 28.

<sup>37</sup> *Ibid*, para 28.

<sup>38</sup> art 3.

## APPOINTMENTS

*Guidelines*, which exempts jurisdictions ‘where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily’.<sup>39</sup> By contrast, in the case of states undergoing a transition to constitutional democracy, the UN Special Rapporteur recommends the establishment of an independent judicial appointments body, both to guard against the actual risk of political manipulation and to strengthen the legitimacy of the courts by helping to ensure that the public ‘gain confidence in a court system administering justice in an independent and impartial manner, free from political considerations’.<sup>40</sup> The Special Rapporteur also recommends that in many cases such bodies should have a judicial majority in order to guard against political interference.<sup>41</sup>

1.3.7 Debates about how a judicial appointments commission should be composed indicate that states do not face a simple choice between using a commission or one of the more traditional appointment mechanisms, as many variations exist within each category. Moreover, it is possible for several bodies to play a part in the process of selection and appointment, for instance if an appointments commission is required to present the executive with a shortlist of names for a judicial vacancy.<sup>42</sup> In what follows, the role of each of the main actors – the executive, the legislature and judicial appointments commissions – is discussed in the context of the Commonwealth jurisdictions where they have responsibility for the selection and appointment of judges. This discussion includes the legal frameworks within which these bodies carry out their selection and appointment processes, and which may affect their ability to produce a judiciary that is willing and able to uphold the rule of law.

### 1.4 The role of the executive

1.4.1 The idea that a member of the executive may be responsible for the selection and appointment of judges has a long history in the Commonwealth. It can be traced to the former Westminster system of judicial appointments, as it existed in the United Kingdom until the Constitutional Reform Act 2005. It is therefore appropriate to examine this system, and more particularly the process by which judges were appointed in England and Wales, before considering those

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<sup>39</sup> Ibid.

<sup>40</sup> *Annual Report 2009* (n15), para 25; see also para 24–26.

<sup>41</sup> Ibid, para 28.

<sup>42</sup> See para 1.7.24 below.

Commonwealth jurisdictions where judicial appointments are still currently in the hands of the executive.

### *The former Westminster system*

1.4.2 At the centre of the former Westminster process for appointment of judges in England and Wales was the Lord Chancellor, a cabinet minister and member of the House of Lords who also served as head of the judiciary and occasionally sat in appeals not involving the government. The Lord Chancellor was responsible for selecting candidates for formal appointment by the Queen.<sup>43</sup> Lord Chancellors were expected to have significant experience and standing as lawyers, and there was a strong convention that they should select judges from among senior barristers on the basis of merit and without regard for their political views or sympathies. Although this convention, like many other rules of the uncodified British constitution, was not enshrined in law, it was regarded as binding and there is wide agreement that in the latter part of the twentieth century Lord Chancellors serving in governments of differing ideologies consistently adhered to it.<sup>44</sup>

1.4.3 To identify lawyers who might be suitable for judicial appointment and obtain an opinion about their merit, Lord Chancellors would usually consult with senior members of the judiciary and sometimes with other senior lawyers.<sup>45</sup> Such consultations were known as 'secret soundings', since they took place in private and generally without the knowledge of the person being considered for appointment. If the Lord Chancellor formed a favourable view about a particular individual, a direct offer of appointment could be made to that person by way of the proverbial 'tap on the shoulder'. The process as a whole was therefore far from transparent, although the weight which Lord Chancellors attached to the views of senior judges and lawyers meant that it was not an arbitrary exercise of discretion.

1.4.4 While maintaining the tradition of political neutrality, successive governments from the 1990s onwards also began to take steps to make the process of appointment more transparent. These included publishing the criteria for judicial office and introducing an application system while

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<sup>43</sup> At appellate level the Prime Minister was responsible for making recommendations to the Queen.

<sup>44</sup> See for example Sir Sydney Kentridge QC, 'The Highest Court: Selecting the Judges' (2003) 62 Cambridge Law Journal 55, Gee et al (n24) 161.

<sup>45</sup> Gee et al (n24) 160–161.

## APPOINTMENTS

phasing out the practice of the ‘tap on the shoulder’.<sup>46</sup> In addition, an independent Commission for Judicial Appointments was established to review the appointment practices of the Lord Chancellor on a regular basis and adjudicate complaints arising from the application process. This important innovation provided a form of accountability and was designed to help ensure that the Lord Chancellor adhered to the published criteria and process of appointment.

1.4.5 Proponents of reform argued that these changes to the judicial selection process were not enough, as it was felt that, in addition, the authority to make selection decisions should be entrusted to a body that was independent of the executive.<sup>47</sup> This led to government proposals in 2003 for the establishment of an appointments commission, composed of judges, lawyers and lay people not actively involved in party politics. In proposing the establishment of such a commission, the government also argued that a manifestly independent body would be better placed to attract applications from women and members of ethnic minorities.<sup>48</sup> The Constitutional Reform Act 2005 eventually established a Judicial Appointments Commission with responsibility for selecting a single candidate in respect of any vacancy, and the Lord Chancellor was left with very limited power to refer selections back to the Commission in certain circumstances.<sup>49</sup> At the same time, a UK Supreme Court was established to replace the Judicial Committee of the House of Lords as the final court of appeal. Its members are chosen by an *ad hoc* commission, on which the Judicial Appointments Commission of England and Wales and equivalent bodies in Scotland and Northern Ireland are represented alongside two current members of the Supreme Court.<sup>50</sup> The power of the Lord Chancellor in respect of Supreme Court vacancies is similarly limited and the former Westminster system has thus been effectively replaced by a mechanism in which selection decisions are largely entrusted to a commission rather than the executive.

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<sup>46</sup> See Shetreet and Turenne (n24) 106–108, and the timeline of judicial reform initiatives by Professor Cheryl Thomas, Annex iii to the Report of the Advisory Panel on Judicial Diversity 2010, [www.judiciary.gov.uk/publications/advisory-panel-recommendations/](http://www.judiciary.gov.uk/publications/advisory-panel-recommendations/).

<sup>47</sup> Shetreet and Turenne (n24) 108–109, Gee et al (n24) 162–163. There were some concerns that the involvement of the Lord Chancellor, while straddling the judicial, legislative and executive branches of government, might be incompatible with the guarantee of an independent and impartial tribunal in Article 6 of the European Convention on Human Rights.

<sup>48</sup> Department for Constitutional Affairs, ‘Constitutional reform: a new way of appointing judges’ (2003): [webarchive.nationalarchives.gov.uk/20100512160448/dca.gov.uk/consult/jacommission/judges.pdf](http://webarchive.nationalarchives.gov.uk/20100512160448/dca.gov.uk/consult/jacommission/judges.pdf), para 24.

<sup>49</sup> See para 1.7.21–1.7.23 below.

<sup>50</sup> Supreme Court Appointment Regulations 2013.

### *Current extent of executive-only appointments in the Commonwealth*

1.4.6 Even during the heyday of the Lord Chancellor's responsibility for judicial appointments at Westminster, there was scepticism about whether this system was suitable for use in jurisdictions without the safeguards inherent in the Lord Chancellor's multiplicity of roles as a senior lawyer and judge as well as a politician, and the conventions of appointment on merit and political neutrality. The leading scholar of Commonwealth constitutions, Sir Kenneth Roberts-Wray, writing in 1966, argued that the mechanism of judicial appointments 'should, so far as possible, insulate the choice of candidates from political motives – an ideal which is far from universally observed', and suggested that the functions of the Lord Chancellor could not readily be replicated in other jurisdictions.<sup>51</sup> Commonwealth states might entrust responsibility for judicial selection to the Prime Minister, Minister of Justice or Attorney-General, but none was subject to the same combination of legal duties and conventional responsibilities that the Lord Chancellor had gradually acquired over the centuries.

1.4.7 Only a minority of Commonwealth states adopted executive systems of judicial appointment on becoming independent, as in many cases a judicial appointments commission was established instead.<sup>52</sup> The number of executive appointment systems has been further reduced by jurisdictions that have established such commissions subsequently, for example South Africa and Namibia in the post-apartheid era, and more recently also Malaysia and Pakistan.

1.4.8 Figure 1 indicates the extent to which the executive is currently sole decision-maker in respect of appointments to the higher courts (or some subset of those courts) in Commonwealth jurisdictions. These are appointments in respect of which no other institution or body established by law has any binding power, although as we will see some of these states require certain designated senior judges and other office holders to be consulted,<sup>53</sup> and the executive may delegate some parts of the process to other bodies, for example an advisory committee which is tasked with interviewing candidates.<sup>54</sup>

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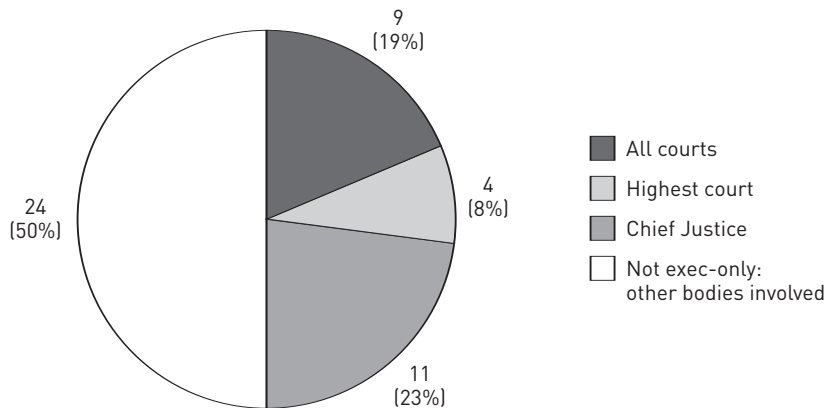
<sup>51</sup> *Commonwealth and Colonial Law* (Stevens 1966) 478.

<sup>52</sup> See para 1.6.2 below.

<sup>53</sup> See para 1.4.16 below.

<sup>54</sup> See para 1.4.14 below.

## APPOINTMENTS



**Figure 1** Executive-only appointments

1.4.9 The breakdown of executive-only decision-making powers at various levels of the court system shown in Figure 1 indicates that where executive-only appointments are currently found, it is most likely that they will only be in respect of the most senior positions (particularly that of Chief Justice):

- **In 18.7% of Commonwealth jurisdictions** (9 out of the total of 48 independent jurisdictions<sup>55</sup>), the executive has sole responsibility for **appointments to all the courts of status equivalent to the High Court or above** (the courts on which this study focuses).<sup>56</sup>
- **In another 8.3% of jurisdictions** (4 jurisdictions), the executive has sole responsibility for **appointing the members of the highest court**.<sup>57</sup>
- **In a further 22.9%** (11 jurisdictions), the executive is solely responsible for the **appointment of the Chief Justice**.<sup>58</sup>

<sup>55</sup> Although the Commonwealth has 53 member states, as explained in the Introduction in para 0.1.9, there are only 48 independent jurisdictions because six member states belonging to the Organisation of Eastern Caribbean States share the jurisdiction of the Eastern Caribbean Supreme Court.

<sup>56</sup> The jurisdictions are Australia, Bangladesh, Barbados, Brunei Darussalam, Canada, Nauru, New Zealand, Singapore and Tuvalu. The process by which the executive appoints judges in these jurisdictions is discussed in para 1.4.11–1.4.17 below.

<sup>57</sup> These are the Bahamas, Belize, Sri Lanka and Tanzania. The process by which members of the highest court are appointed in these jurisdictions is discussed in para 1.4.18–1.4.20 below.

<sup>58</sup> These are Botswana, Fiji, Guyana, Jamaica, Lesotho, Mauritius, the Organisation of Eastern Caribbean States, Papua New Guinea, Samoa, Trinidad and Tobago, and Vanuatu. The process by which the Chief Justice is appointed in these and other jurisdictions is discussed in 1.4.21–1.4.24 below.

- In the remaining 50% of jurisdictions there are **no positions** in respect of which a judicial appointments commission or legislature does not also have a say.<sup>59</sup>

1.4.10 In the context of the Commonwealth as a whole, it is clear that **sole executive responsibility for appointments is now uncommon**. In what follows, the practice of jurisdictions with executive-only systems in each of the categories outlined above is considered, before turning briefly to the role of the executive where it does not have exclusive appointment powers.

*Executive-only appointments to all courts*

1.4.11 It is not a straightforward matter for an executive-only appointment mechanism to satisfy the requirements of Commonwealth principles. It is particularly difficult to ensure that the process is an 'independent' one, as contemplated by the *Latimer House Guidelines*.<sup>60</sup> The discussion above of the former Westminster system as it operated in England and Wales illustrates that long-established conventions of political neutrality were essential to that system, although it was later found to be necessary to introduce additional safeguards in the form of criteria for judicial office, an open application process and an independent watchdog body to monitor the process and adjudicate complaints.<sup>61</sup>

1.4.12 Measures similar to those adopted in the final years of the former Westminster system may assist other jurisdictions with executive-only appointment systems to ensure that appointments are made 'on the basis of clearly defined criteria and by a publicly declared process', as required by the *Commonwealth Latimer House Principles*.<sup>62</sup> The same fundamental principle of transparency is specifically restated in this context by the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*:

... in the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.<sup>63</sup>

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<sup>59</sup> For a discussion of some of the other roles of the executive, see para 1.4.25–1.4.27 below.

<sup>60</sup> See para 1.3.2 above.

<sup>61</sup> See para 1.4.2–1.4.5 above.

<sup>62</sup> *Principle IV(a)*, quoted in para 1.2.1. above.

<sup>63</sup> art 16.

## APPOINTMENTS

1.4.13 This statement is particularly relevant because it is addressed to jurisdictions that do not have a judicial appointments commission, and because it was made by the Chief Justices of the Asia-Pacific region, where the majority of Commonwealth jurisdictions with an executive-only appointment systems are located.<sup>64</sup>

1.4.14 In addition to transparency, executive-only appointment systems should also be designed in such a way as to give effect to the three objectives of the *Commonwealth Latimer House Principles* discussed above, namely equality of opportunity, appointment on merit and consideration of the need to address gender inequity and other historic factors of discrimination.<sup>65</sup> The Canadian system of using advisory committees to assess candidates for the federally appointed first-instance courts is perhaps the most elaborate example of this. By law, Canada has a Federal Office of Commissioner for Judicial Affairs, whose responsibilities include advising the executive on judicial appointments.<sup>66</sup> The Commissioner is advised in turn by advisory committees consisting of lawyers, judges and lay members, who receive applications when judicial vacancies are published and assess applicants against the prescribed criteria.<sup>67</sup> The advisory committees grade candidates as 'recommended' and 'not recommended'. This process resembles that of a judicial appointments commission to a degree, but the size and membership of the advisory committees is subject to change by the executive. The lack of a supporting legal framework means that there is little to prevent the executive from abolishing advisory committees all together, as indeed occurred in Australia when a similar system of advisory committees was discontinued.<sup>68</sup>

1.4.15 In principle, the executive can conduct a similar process itself without establishing any external bodies along the lines of the Canadian advisory committees. In New Zealand, the Attorney-General, as the cabinet member responsible for appointments, follows a 'Judicial

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<sup>64</sup> Australia, Bangladesh, Brunei Darussalam, Nauru, New Zealand, Singapore and Tuvalu. The only other jurisdictions in this category are Barbados and Canada.

<sup>65</sup> See para 1.2.2–1.2.17 above.

<sup>66</sup> Judges Act 1985, s 3.

<sup>67</sup> The advisory committee mechanism is not statutorily regulated but is object of policy documents, available at <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.

<sup>68</sup> See Andrew Lynch 'Judicial Appointments in Australia: Reform in Retreat', UK Constitutional Law Association blog [26 May 2014], <http://ukconstitutionallaw.org/2014/05/26/andrew-lynch-judicial-appointments-in-australia-reform-in-retreat/>.



## APPOINTMENTS

Appointments Protocol'.<sup>69</sup> Although there is no formal application process, the Protocol makes clear that there will be regular opportunities for qualified candidates to register expressions of interest in future vacancies at first-instance level. The Protocol envisages substantial consultations with senior judges and the shortlisting of candidates by agreement with the Chief Justice, prior to interviews which the Attorney-General may decide to conduct. The Protocol also specifies the criteria under which applications will be assessed and requires the need for judicial diversity to be considered when final selections are made. While this approach has a number of virtues it is even more vulnerable than the advisory system in use in Canada, with the danger being that an executive with ulterior motives might simply exercise its discretion not to consult with senior judges, or ignore their advice, and appoint judges without regard for the published criteria.

1.4.16 Conversely, if the executive is legally required to consult specified office holders before making a judicial appointment, this may strengthen the reliability and the legitimacy of the appointment process, although consultation alone cannot substitute for a transparent set of criteria and process of appointment. In Bangladesh the President, acting on the advice of the Prime Minister, must consult the Chief Justice on all appointments other than that of the next Chief Justice, which allows some judicial input on the suitability of candidates.<sup>70</sup> It is beyond doubt that there is considerable value in consulting the senior judiciary, who are likely to be well placed to comment on the judicial potential of a candidate, and the executive would be well advised to do so even in jurisdictions where this is not their legal obligation. Some jurisdictions also require certain political figures to be consulted. In Barbados the Prime Minister selects candidates for appointment after consulting the Leader of the Opposition, and this at least provides an opportunity for concerns about politicised selections to be aired.<sup>71</sup> In Australia, the federal Attorney-General is obliged to consult with Attorneys-General of the various states before making appointments to the High Court of Australia, which provides a similar check to the extent that different political parties may be in office across the country.<sup>72</sup>

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<sup>69</sup> 'Judicial Appointments Protocol' (May 2014), available at [http://www.crownlaw.govt.nz/uploads/judicial\\_protocol.pdf](http://www.crownlaw.govt.nz/uploads/judicial_protocol.pdf).

<sup>70</sup> Constitution, art 95(1).

<sup>71</sup> Constitution, s 81(1).

<sup>72</sup> High Court of Australia Act 1979, s 6.

## APPOINTMENTS

1.4.17 Probably the most comprehensive way of ensuring a reliable and legitimate system of executive appointments would be to subject the process to the scrutiny of an independent watchdog, as was the case in England and Wales in recent years in which the Lord Chancellor was fully responsible for the selection of judges. As noted above, the Commission for Judicial Appointments was tasked both with auditing the selection process in general and with adjudicating complaints received with regard to individual cases. There is no evidence of any dedicated judicial appointments watchdog of this kind among the jurisdictions which currently have executive-only systems of judicial appointment.

### *Executive-only appointments to the highest court*

1.4.18 The nine Commonwealth jurisdictions with executive-only appointments to all courts are joined by four more in which the executive has sole responsibility for appointment to the highest courts.<sup>73</sup> This raises the twin questions of why states should distinguish between court levels in this way, and what additional safeguards may be required in respect of appointments to the highest court.

1.4.19 It is often observed that the highest court in a jurisdiction may be called upon to render final decisions on questions that evoke political passions, such as human rights and the division of powers in federal structures. One way of attempting to ensure that the power exercised by such courts is legitimate may be to entrust the appointment of their members to a government which is democratically accountable to the electorate. However, as this study goes on to consider, greater numbers of Commonwealth states have opted for other ways in which states have sought to strengthen the legitimacy of appointments at this level, including by requiring parliamentary confirmation of selected candidates,<sup>74</sup> or by relying on a judicial appointments commission with a broad and inclusive membership.<sup>75</sup> Such mechanisms may be better able than an executive-only system to guard against appointments made for political ends. In a leading contemporary study, *Appointing Judges in an Age of Judicial Power*,<sup>76</sup> the competing concerns of legitimacy and reliability are framed as follows:

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<sup>73</sup> The executive-only appointment systems in Australia, Bangladesh, Barbados, Brunei Darussalam, Canada, Nauru, New Zealand, Singapore and Tuvalu are joined by Bahamas, Belize, Sri Lanka and Tanzania in respect of appointments to the highest court.

<sup>74</sup> See section 1.5 of this chapter.

<sup>75</sup> See sections 1.6 and 1.7 of this chapter.

<sup>76</sup> Malleson and Russell (n11), 6.

The justification for the participation in some form of the elected branches of government in the appointments process of the highest ranks of the judiciary is, therefore, clear. Yet it is precisely at this level of court that the highest calibre of judges is needed, and great damage will be done to the legal system if the selection of candidates on the basis of partisan political affiliation rather than skills and ability undermines the quality of the bench. The challenge that all appointments processes for top review courts face is to ensure that the democratic legitimacy of the judiciary is maintained without introducing a form of politicisation that reduces the quality of the judges appointed and transforms judges into politicians in wigs.

1.4.20 Since the candidates for appointment to the highest court are often judges, international guidance on judicial promotions is also relevant. The *UN Basic Principles on the Independence of the Judiciary* state that the promotion of judges ‘should be based on objective factors, in particular ability, integrity and experience’,<sup>77</sup> and this is underscored by regional declarations.<sup>78</sup> There is a clear danger of conflict of interest if the executive is the sole judge of a judicial track record at this level, and for that reason it is particularly important that states in which the executive is responsible for appointments to the highest court should have safeguards in place, either in the form of a tradition of political neutrality as seen under the former Westminster system, or in the form of legal requirements to consult senior judicial figures or the official opposition.<sup>79</sup> In Canada, where there are no consultation requirements in respect of appointments to appellate courts, the Supreme Court has been prepared to rule on whether an executive nominee was eligible to join that Court.<sup>80</sup> Whether any particular combination of safeguards is sufficient will depend on the political and legal traditions of a jurisdiction as well as its legal frameworks.

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<sup>77</sup> art 13.

<sup>78</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, art A.4(o) and *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*, art 17: ‘Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.’ See also European Network of Councils of the Judiciary, *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* (2012), para I.12.

<sup>79</sup> The consultation requirements in states where all judges are appointed by the executive are discussed in para 1.4.16 above. Among member states with executive-only systems of appointment at the level of the highest court, Tanzania requires the President to consult the Chief Justice before appointing members of the Court of Appeal, and in the Bahamas and Belize the Leader of the Opposition must be consulted.

<sup>80</sup> *Reference re Supreme Court Act, ss. 5 and 6* 2014 SCC 21, [2014] 1 SCR 433.

## APPOINTMENTS

### *Executive-only appointment of the Chief Justice*

1.4.21 One of the striking findings displayed in Figure 1 is that in addition to the 13 Commonwealth jurisdictions in which appointments to the highest court are executive-only, there are 11 further jurisdictions in which the appointment of the Chief Justice or equivalent is entrusted solely to the executive.<sup>81</sup> As in the previous section, this gives rise to the twin questions of why these Commonwealth jurisdictions treat the position of Chief Justice differently, and what safeguards should form part of the process by which the executive chooses a Chief Justice.

1.4.22 The historical explanation for many of the jurisdictions which single out the Chief Justice for executive appointment concerns an obstacle that was encountered at the time when Judicial Service Commissions were established in a number of independence constitutions. In many countries it was considered inappropriate for this decision to be made by a body some of whose members were senior judges who might themselves be candidates for the position.<sup>82</sup> However, this is hardly a conclusive argument against the use of appointments commissions to fill this position, as a number of other jurisdictions have chosen to do so.<sup>83</sup>

1.4.23 Indeed, the practice of Commonwealth states suggests that many consider it necessary to have a more elaborate appointment process in place for the most important leadership position in the judiciary. Figure 2 displays the range of different methods by which Chief Justices are appointed in Commonwealth jurisdictions. Among the 50% which do not entrust this decision to the executive, the process of selection and appointment is quite strictly circumscribed in some cases. Besides those jurisdictions where judicial appointments commissions are used, the position of Chief Justice is subject to parliamentary confirmation in more Commonwealth jurisdictions than any other judicial position.<sup>84</sup> In five jurisdictions, both a judicial appointments commission and the legislature

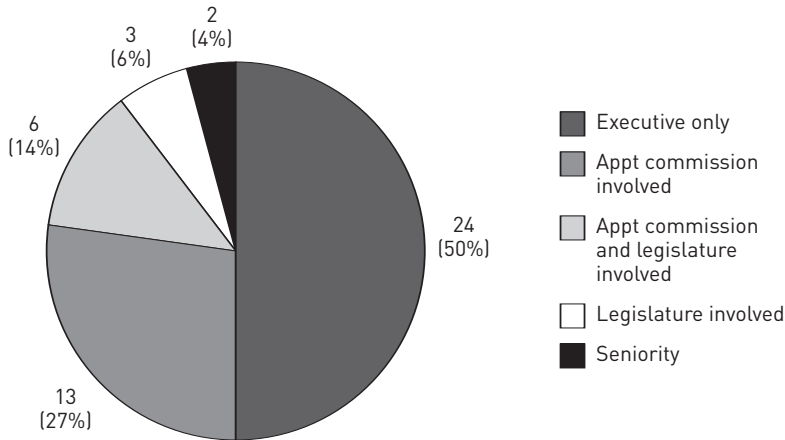
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<sup>81</sup> Australia, Bahamas, Bangladesh, Barbados, Belize, Brunei Darussalam, Canada, Nauru, New Zealand, Singapore, Sri Lanka, Tanzania, Tuvalu are joined in this regard by Botswana, Fiji, Guyana, Jamaica, Lesotho, Mauritius, the Organisation of Eastern Caribbean States, Papua New Guinea, Samoa, Trinidad and Tobago, and Vanuatu.

<sup>82</sup> Roberts-Wray [n51] 482.

<sup>83</sup> Cameroon, Cyprus, Kenya, Kiribati, Malaysia, Maldives, Malta, Mozambique, Namibia, Nigeria, Seychelles, Sierra Leone, Solomon Islands, South Africa, Swaziland, Tonga, Uganda, and the UK.

<sup>84</sup> This is the case in Ghana, Kenya, Malawi, Maldives, Nigeria, Rwanda, Sierra Leone, Uganda and Zambia



**Figure 2** Appointment of chief justice

have a role to play.<sup>85</sup> India and Pakistan employ an alternative rule of requiring the Chief Justice to be appointed from among the members of the Supreme Court on the basis of seniority.<sup>86</sup>

1.4.24 Despite the evidence that a number of Commonwealth countries consider the appointment of the Chief Justice to require special safeguards, it is possible to argue that there are countervailing reasons why the executive should not be restricted by the views of other actors. In many jurisdictions the Chief Justice has a large degree of responsibility for the administration of the judiciary and the court system. Unlike other judges, the Chief Justice may therefore have relatively frequent interactions with government ministers and officials, for example over matters such as budgets and staffing of the courts. From the point of view of the executive it is important to find a Chief Justice who will be able to establish a good working relationship with civil servants and, where appropriate, the government minister responsible for the justice system. Nonetheless it is not uncommon for consultation requirements to be in place to ensure that an informed choice is made. In six states the executive must consult the Leader of the Opposition before selecting a Chief

<sup>85</sup> These are Kenya, Maldives, Nigeria, Sierra Leone, Uganda.

<sup>86</sup> In India, the National Judicial Appointments Commission Act 2014, s 5 requires the Commission to recommend the most senior member of the Supreme Court of India for appointment of Chief Justice of India, if the Commission is satisfied that the judge is fit for that office. In Pakistan, strict seniority is the rule under s 175A(3) of the Constitution.

## APPOINTMENTS

Justice,<sup>87</sup> while in Guyana the two most senior judicial offices may be filled only on the advice of the Prime Minister 'after obtaining the agreement of the Leader of the Opposition'.<sup>88</sup> The last of these provisions in particular suggests a desire to allow figures from both the current government and also possible future governments to have a say in selecting the leadership of the judiciary.

### *Executive participation in judicial appointments more generally*

1.4.25 The discussion so far has dealt with executive-only appointment systems at various levels of the court system. At this stage, it is appropriate to take stock of best practice in situations of this kind, and then to introduce other appointment mechanisms in which the executive plays a part alongside the legislature or a judicial appointments commission.

1.4.26 Executive-only appointment systems, in summary, require a **combination of legal safeguards and settled political conventions** in order to be a reliable and legitimate means of appointing judges. The precise mix may differ between jurisdictions, but should include at least **transparency regarding the criteria for appointment and the procedures followed, a requirement of consultation with senior judges and possibly also opposition politicians, and ideally the existence of an independent body to provide oversight and deal with complaints.** There are distinct arguments to be made for entrusting the appointment of **the members of the highest court and especially the Chief Justice to the executive**, but this is by no means the only method by which legitimacy may be achieved for appointments to those positions, which carry great responsibility. **The constitutional role of the highest court and the leadership and administrative responsibilities of the Chief Justice make it particularly important to ensure political neutrality in the process by which they are selected.**

1.4.27 There are many ways in which the executive can play a part in the selection and appointment of judges without having sole responsibility as in the case of the systems discussed so far. In fact, the executive plays at least some part in the appointment of judges in every Commonwealth jurisdiction, since **the formal appointment of a person to judicial office is usually an executive act**, commonly performed by, or in the name of, the

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<sup>87</sup> Bahamas, Belize, Barbados, Jamaica, Trinidad and Tobago and Vanuatu.

<sup>88</sup> Constitution, art 127(1).

Head of State.<sup>89</sup> However, this formal responsibility does not necessarily mean that the executive will have any say in who is appointed. The following sections of this chapter will discuss the actual influence of the executive in jurisdictions where there is also some decision-making responsibility given to the legislature,<sup>90</sup> or a judicial appointments commission.<sup>91</sup>

## 1.5 The role of the legislature

1.5.1 The idea that a parliamentary chamber or committee may have a role to play in judicial appointments is a familiar one in the common law world as a result of the requirement for Presidential nominees to the US Supreme Court to be confirmed by the Senate, which is one of the famous ‘checks and balances’ on Presidential power.<sup>92</sup> But because legislatures are very often the main theatre in which party politics are played out, their involvement in individual judicial appointments raises many of the same difficulties as that of the executive. In certain respects it is even more difficult to reconcile with the *Commonwealth Latimer House Principles*, and this may be the reason why legislatures tend to play only a limited role in the minority of Commonwealth member states where they are involved at all.

1.5.2 While it is hard enough to ensure that executive decision-makers select candidates ‘on the basis of clearly defined criteria’, as the *Commonwealth Latimer House Principles* require,<sup>93</sup> it is even harder to ensure that a parliamentary chamber or committee can be relied upon to do so. There is a standing temptation for legislators to act strategically and treat confirmation votes as part of a larger political contest or bargain, rather than concentrating only on whether a particular candidate is suitable for judicial office. Although the appointment or confirmation proceedings could be structured in such a way as to encourage members to focus on the prescribed criteria for judicial office, the risk of legislators casting their votes for other reasons cannot be eliminated, as the Venice Commission has pointed out:

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<sup>89</sup> Papua New Guinea and the Maldives are partial exceptions to this pattern, as discussed in para 1.7.16 below.

<sup>90</sup> See section 1.5 of this chapter.

<sup>91</sup> See para 1.7.16–1.7.25 below.

<sup>92</sup> See Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (Rowman & Littlefield, 2009).

<sup>93</sup> See para 1.4.11 above.

## APPOINTMENTS

Appointments of ordinary judges are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.<sup>94</sup>

1.5.3 There are various 'political considerations' that legislators may be tempted to act upon, and these go beyond the crude case of a majority party wishing to bestow patronage on candidates assumed to share its views. Members of opposition parties may be reluctant to support even the best-qualified of government nominees and may vote against them in the hope of embarrassing the majority. These problems are exacerbated if there is a practice of summoning candidates to testify in public. Confirmation proceedings before the US Senate in recent decades have increasingly seen Supreme Court nominees subjected to intrusive questioning about their personal lives and placed under intense pressure to reveal their views on substantive legal issues.<sup>95</sup> The motives for such questioning vary. At worst, legislators may threaten to withhold their support in an attempt to extract undertakings about how the candidate would decide specific legal questions if appointed. But even when there is little doubt that a candidate will be confirmed, hostile questions may be asked by any member wishing to cast doubt on the policies of the nominating executive, and so the candidate's personal character and career history may become the terrain of partisan cross-fire or infighting within a political party. This gruelling prospect will almost certainly deter some candidates from accepting a nomination, and those that do may go to great lengths to appear as bland as possible. These developments caused the eminent constitutional theorist Ronald Dworkin to lament that Senate confirmation hearings had become 'a waste of everyone's time, a parade of missed opportunities'.<sup>96</sup>

1.5.4 The *Commonwealth Latimer House Principles* provide general guidance on relations between legislators and judges and this is also relevant to the questioning of candidates for judicial office, many of whom will already be judges in the case of senior appointments. The fundamental principle at stake, which is also an aspect of the rule of law, is that the judiciary is responsible for the interpretation of the law and its application to the cases that come before them, as *Principle II* recognises:

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<sup>94</sup> *Judicial Appointments*, CDL-AD(2007)028 para 12.

<sup>95</sup> *Confirmation Wars* (n92).

<sup>96</sup> 'The Temptation of Elena Kagan', *New York Review of Books* (19 August 2010).



## II. Parliament and the Judiciary

- (a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.
- (b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

1.5.5 In reality it is very difficult to ensure that legislators will conduct confirmation proceedings in a way that is truly 'complementary and constructive' towards the judiciary, as this statement requires. Jurisdictions face a choice between excluding the legislature from their appointment processes to ensure that legislators do not undermine this principle, or relying on legislators to exercise self-restraint if they are given a say. Whether this is possible depends on the political traditions of a jurisdiction, which usually take time to establish. The UN Special Rapporteur has argued that transitional societies and new constitutional democracies should not entrust the appointment of judges to political institutions, and for this reason advises against the use of parliamentary mechanisms.<sup>97</sup>

1.5.6 The case for requiring parliamentary confirmation is strongest in circumstances where, despite these risks, there appears to be a significant benefit to be gained in terms of legitimacy of judges serving on a court which has final responsibility for deciding legal questions that are also the subject of political controversy. The Venice Commission draws a distinction in this regard between the appointment of 'ordinary judges' and specialist constitutional courts or councils, in respect of which it may be possible to justify a role for the legislature.<sup>98</sup> In the civil law countries of Europe, with which the Commission is mainly concerned, such bodies are usually separate from the rest of the court system and some are best understood as being part of the legislative process. It is not uncommon for their members to be appointed directly by the legislature or by a subgroup of legislators. Mozambique, one of a handful of Commonwealth countries with a civil law heritage, has a Constitutional Council most of whose members are appointed by government and opposition parties according to the principle of proportional representation.<sup>99</sup> This appointment

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<sup>97</sup> *Annual Report 2009* (n15), para 28.

<sup>98</sup> *Judicial Appointments* (n94), para 9–12, 47.

<sup>99</sup> Constitution, art 241. The tenure of members of the Constitutional Council is discussed in Chapter 2 below at para 2.2.24.

## APPOINTMENTS

formula reflects the hybrid politico-legal functions of the Council and would not be appropriate in a common law court.

1.5.7 There are **10 Commonwealth jurisdictions (20.8% of the total)** where there is parliamentary involvement in the appointment of judges to the ordinary courts.<sup>100</sup> In all of these jurisdictions the role of the legislative body is confined to confirmation of candidates and does not extend to initial selection. Six jurisdictions require confirmation only for members of the highest court or the judges appointed to leadership positions.<sup>101</sup> As discussed, the justification for parliamentary involvement is probably strongest at this level.

1.5.8 In the remaining four states, all judicial appointments are subject to parliamentary confirmation.<sup>102</sup> The question arises whether this degree of political involvement in appointments is excessive. At least two dangers exist. First, politicians have a greater opportunity to extract undertakings from judges if they have to appear for repeated confirmation hearings, both at the time of their initial appointment and again if seeking promotion to an appellate court.<sup>103</sup> Secondly, there is the danger of political deadlock as the effect of withholding confirmation may be to leave judicial vacancies open and, in the worst case, deprive a court of the quorum it requires to be validly constituted.

1.5.9 Commonwealth states have developed a number of safeguards to ensure that parliamentary confirmation does not undermine the principle that judges should be appointed on the basis of published criteria and without political interference. In all the Commonwealth jurisdictions with parliamentary confirmation mechanisms, an independent judicial appointments commission is also established, and with very few exceptions **the candidates who are presented for confirmation by the legislature will have previously been selected and recommended by the**

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<sup>100</sup> Ghana, Kenya, Malawi, Maldives, Nigeria, Pakistan, Rwanda, Sierra Leone, Uganda and Zambia.

<sup>101</sup> Ghana, Nigeria, Rwanda and Maldives require confirmation only of appointments to the highest court. In Nigeria, the federal Senate must confirm appointments to the Supreme Court, while the heads of other federal and state courts must be confirmed by federal and state legislatures respectively. In Kenya, the appointment of the Chief Justice and Deputy Chief Justice requires the approval of the National Assembly, and the same requirement applies in respect of the office of Chief Justice in Malawi.

<sup>102</sup> Pakistan, Sierra Leone, Uganda and Zambia.

<sup>103</sup> Malleson and Russell (n11), 5.

**commission.**<sup>104</sup> This reduces the danger that judicial confirmation proceedings will become a site of confrontation between government and opposition, although there remains a risk that legislators could pursue their own agendas in partial or total disregard of how the commission has assessed the suitability of a candidate against the criteria prescribed for judicial office.<sup>105</sup> Measures are in place in several of these jurisdictions to promote a more structured form of deliberation on the merit of candidates, which may be undertaken by a parliamentary committee which then tables its report before the whole house. For example, in Uganda, once a favourable committee report is received Parliament as a whole does not normally debate the question of confirmation.<sup>106</sup>

1.5.10 Specific measures have also been adopted to reduce the dangers of political deadlock. In Pakistan, the parliamentary committee responsible for confirmation of candidates selected by the independent Judicial Commission consists of equal numbers of legislators from the government side and from the opposition. The committee may block an appointment only if three-quarters of its members vote to do so.<sup>107</sup> This suggests that the true purpose of the committee procedure is to oversee the work of the Judicial Commission and to intervene when there is cross-party consensus that the Commission's chosen candidate is unsuitable. Another means of preventing deadlock is to enable the nominating body to override parliamentary objections by reaffirming its nomination a specified number of times; judicial appointments in Zambia take effect in this way following a second re-nomination by the President.<sup>108</sup>

1.5.11 In summary, **while parliamentary confirmation proceedings offer the possibility of enhancing the legitimacy of the courts, which is**

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<sup>104</sup> The exceptions are the members of the Supreme Court in Zambia (nominated by the President and subject to confirmation by the National Assembly), the Chief Justice of Malawi (nominated by the President and subject to confirmation by the National Assembly), and the Chief Justice of Ghana (nominated by the President in consultation with the Council of State, and subject to confirmation by Parliament).

<sup>105</sup> *Judicial Appointments* (n94), para 10. The UN Special Rapporteur has argued that legislative bodies should confirm a commission's decision in all but exceptional cases (*Annual Report 2009* (n15), para 33).

<sup>106</sup> The Parliamentary Rules of Procedure 2012 requires the membership of the Committee to be representative of the political-party composition of Parliament (rule 151). The Committee may also summon candidates to appear before it to gather more information (rule 156 (7)–(8)). Importantly, once the Committee reaches a decision, Parliament as a whole does not debate it (rule 158).

<sup>107</sup> Constitution, art 175A(9)–(15).

<sup>108</sup> Constitution, art 44.

## APPOINTMENTS

particularly relevant at the highest level, good practice requires that the dangers of politicisation and deadlock be managed through a combination of carefully designed parliamentary procedures and a respectful and constructive attitude on the part of politicians to the constitutional role of the judiciary.

### 1.6 Composition and structure of judicial appointments commissions

*The prevalence of judicial appointments commissions in the Commonwealth*

1.6.1 In 39 of the 48 independent Commonwealth jurisdictions (81.3%) there is a judicial appointments commission, established by the constitution or other law, which plays some role in the selection and appointment of judges.<sup>109</sup> The name, composition and powers of this body (or in some cases several bodies operating together or at different levels of the court system) may vary considerably. 'Judicial Service Commission' is a popular title, particularly in jurisdictions where the Commission has other responsibilities besides appointments, for example with regard to judicial discipline.<sup>110</sup> The present study uses the term 'judicial appointments commission', which is also used in *Judicial Appointments Commissions: A Model Clause for Constitutions*, a 2013 report published by the Commonwealth legal and judicial associations, which contains recommendations for the establishment, composition and powers of such commissions in the Commonwealth.<sup>111</sup>

1.6.2 The independent appointments commissions established in Commonwealth states have been the product of several periods or 'waves' of law reform. The first occurred as part of the negotiation and promulgation of constitutions under which a number of Commonwealth states gained their independence.<sup>112</sup> Many of these constitutions made

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<sup>109</sup> Bahamas, Belize, Botswana, Cameroon, Cyprus, Fiji, Ghana, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nigeria, Organisation of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, the UK, Vanuatu and Zambia

<sup>110</sup> The *Latimer House Guidelines* refer to 'judicial services commissions' (*Guideline II.1*) a term which is also widely used. The title and composition of each appointments commission that is currently operating in a Commonwealth state may be found in Appendix 2.

<sup>111</sup> See n9.

<sup>112</sup> See Roberts-Wray (n51) 479–482 and TO Elias, *Judicial Process in the Newer Commonwealth* (University of Lagos Press 1990), 173–178.

provision for a small Judicial Service Commission, which typically consisted of the Chief Justice and one or two other members of the judiciary, and sometimes also the chairman of the Public Service Commission or the Attorney-General.<sup>113</sup> The intention in including a majority of judges was to ensure political neutrality. Not all post-independence governments approved of this mechanism, particularly in West Africa, where a number of states soon replaced it with an executive appointment system. But the change did not always prove satisfactory, as the leading Nigerian jurist T.O. Elias recounts, for within a short period of years pressure from the local bar and other political actors led to the re-introduction in Nigeria and Ghana of a 'judicial body', headed by the Chief Justice, with responsibility for recommending candidates for appointment.<sup>114</sup> There was thus a second wave of judicial appointments commissions after independence, and on an extended view of this period the Judicial Service Commissions established in Namibia and South Africa after the end of apartheid also fall within this category.

1.6.3 A third wave of judicial appointments commissions has been seen among member states since the adoption of the *Commonwealth Latimer House Principles* in 2003. At least eight member states form part of this group. The United Kingdom, the Maldives, Malaysia, Pakistan and India have all established judicial appointments commissions in relatively quick succession. In addition, Fiji, Kenya and Swaziland have substantially reconstituted their judicial appointment bodies when adopting new constitutions during this period. Similar bodies were established for a time in Sri Lanka and Bangladesh, but were respectively repealed and allowed to lapse.<sup>115</sup> In the British Overseas Territories, it has become popular to have dedicated commissions responsible for the appointment of judges; four such commissions have been established since 2006.<sup>116</sup> This suggests that even in small communities there is value seen in entrusting judicial appointments to a manifestly independent body. The

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<sup>113</sup> Roberts-Wray (n50), 481; Elias (n112), 157, 172.

<sup>114</sup> Elias (n112), 173–174.

<sup>115</sup> In 2008 an Ordinance of the interim government of Bangladesh established a Supreme Judicial Commission headed by the Chief Justice. The Commission was to recommend two candidates to the President in respect of each vacancy in the Supreme Court. However, the Ordinance became ineffective as it was not placed before Parliament within the stipulated time. In Sri Lanka, the 17th Amendment to the Constitution provided for a Constitutional Council in whose membership both government and opposition parties were to have a say. These constitutional provisions were repealed by the 18th Amendment.

<sup>116</sup> Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart 2011), 111–113.

## APPOINTMENTS

sheer scale of activity over a relatively short period of time represents a clear trend in favour of judicial appointments commissions.

1.6.4 There has been considerable variation in the composition, structure and processes of the commissions which have been established, and also in their interaction with the executive and the legislature. In part, this variety may account for the rapid spread of judicial appointments commissions. Professor Malleson has remarked that '[t]heir great strength is their adaptability, which allows them to be shaped to meet the particular requirements of each system.'<sup>117</sup> She also observed that there is a need to research the impact of these bodies on the judicial appointments process:

To date, very little comparative analysis of the forms, functions, and effectiveness of commissions has been undertaken. Important questions are thrown up by the move to commissions: Do they enhance the legitimacy of the selection process? Do they increase its transparency? Do they affect the composition of the judiciary, and if so how? Are they liable to be captured by certain interest groups? If so, can this be avoided?<sup>118</sup>

1.6.5 The remainder of this chapter pursues some of these suggested inquiries by examining the legal frameworks by which appointments commissions are established in the Commonwealth and under which they function. The present section examines questions of composition and structure, while the next turns to consider the selection process of commissions, including questions of transparency and accountability and the nature of the interaction between appointments commissions and the executive.

### *The relationship between composition and independence*

1.6.6 The need for judicial appointments commissions that are independent of the government of the day is underscored by many international statements and norms. Besides the *Latimer House Guidelines*, which recommend the introduction of such bodies to assure 'an appropriate independent process ... for judicial appointments', the establishment of independent appointment bodies is also recommended for instance by the Venice Commission.<sup>119</sup> But in practice many further questions remain, including how the composition and internal structure of

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<sup>117</sup> Malleson and Russell (n11), 6–7.

<sup>118</sup> Ibid.

<sup>119</sup> *Judicial Appointments* (n93) para 47 (with the possible exception of constitutional court judges).

commissions should be designed to achieve genuine independence, and what should be done to ensure that a commission also possesses the experience, expertise and resources which are required for the task of selecting judges.

1.6.7 The composition of judicial appointments bodies had been the subject of considerable debate during much of the 1990s, and when the *Latimer House Guidelines* were drafted in 1998, the Commonwealth associations did not feel able to recommend one particular approach over another:

[S]uch commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general.<sup>120</sup>

1.6.8 Since then, the general tenor of international statements on this subject suggests that support for the inclusion of judicial and legal members has continued to grow, while at the same time, despite the recognition that there is some value in having commission members from outside the legal community, it has also become apparent that the inclusion of politicians in those roles may be problematic.

### *Judicial members and representatives of the legal profession*

1.6.9 In the international documents that address the question of composition, two main models are most commonly proposed. The first is that judges and representatives of the legal profession should, between them, constitute a majority on any appointments commission. This was the standard set in the *IBA Minimum Standards* in 1982, as mentioned at the outset of this chapter.<sup>121</sup> It has also now been adopted by the Commonwealth legal and judicial associations in their 2013 *Model Clause*; the draft constitutional provision they propose sets out the possible composition of a full 13-member commission and provides a five-member alternative for smaller jurisdictions.<sup>122</sup>

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<sup>120</sup> Official endnote to *Guideline II.1*.

<sup>121</sup> art 3[a].

<sup>122</sup> *Model Clause* (n9), 6. The Clause proposes a 13-member Judicial Appointments Commission which would have five judicial members from different tiers of the court system (including the Chief Justice as chair), and two practising lawyers selected by the relevant professional bodies; the remaining six members would be five lay persons and one legal academic. The remaining six positions would be filled by one legal academic and five lay persons, the latter chosen initially by the Public Service Commission but with replacements thereafter selected by the Commission itself.

## APPOINTMENTS

1.6.10 The second model that enjoys support is the more demanding idea that judges should constitute a majority, or at least half, of the members.<sup>123</sup> That is the position taken by the Committee of Ministers of the Council of Europe, which recommends that to ensure the independence of an appointments body at least 50% of its members 'should be judges chosen by their peers'.<sup>124</sup> The UN Special Rapporteur argued in 2009 that while it was desirable for a commission to include members with a range of backgrounds, including legal practice, academia and the legislature, in many circumstances it might be necessary to have a majority of judges in order to prevent political manipulation:

While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference.<sup>125</sup>

1.6.11 The UN Special Rapporteur did not go so far as to prescribe a judicial majority for judicial appointment bodies in all jurisdictions, but his approach clearly suggests that this is the preferred approach if there are serious concerns about the influence that politicians may otherwise bring to bear.

1.6.12 It is interesting to examine the extent to which Commonwealth states have embraced either of these models. Figure 3 provides a breakdown of appointment bodies using the threefold classification of members as either judges, 'legal profession', or others. Only legal practitioners or academics who are nominated or chosen directly or indirectly by the members of their profession are counted in the second category.<sup>126</sup> Commissioners chosen in this way should be distinguished from those who are required to have legal qualifications but are chosen by the executive or legislature; such commissioners risk becoming *de facto* political representatives and are treated as 'others' for purposes of this analysis.

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<sup>123</sup> *Judicial Appointments* (n94), para 29.

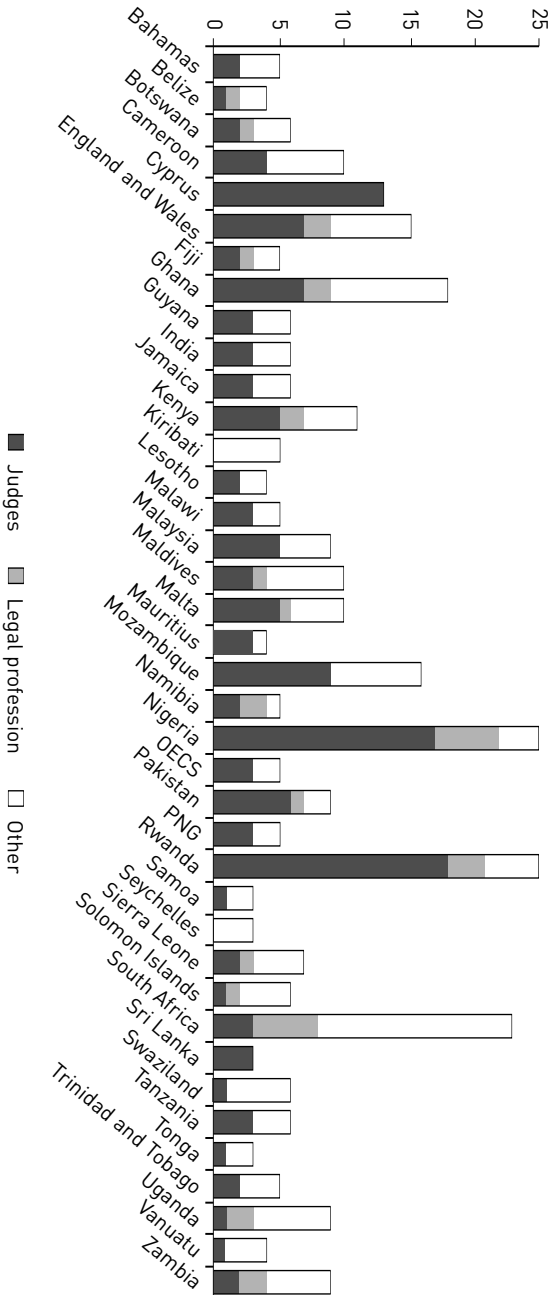
<sup>124</sup> *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, para 46. Cf *Judicial Appointments* (n93), in which the Venice Commission proposes that 'a substantial element or a majority ... should be elected by the judiciary itself' (para 29).

<sup>125</sup> *Annual Report 2009* (n15), para 28.

<sup>126</sup> This category includes, in the case of Fiji, a legal practitioner who is appointed to the commission on the advice of the Chief Justice after consultation with the Attorney-General. This member does not represent the legal profession as such but selection by the Chief Justice provides a safeguard against political interference. In the case of Papua New Guinea the Chief Ombudsman is treated as a judicial member.



Figure 3 Membership of judicial appointments commissions



## APPOINTMENTS

No distinction is drawn, however, between different methods of choosing the members of a commission who are judges. Although there is considerable support for the view that it would be best practice for judges to be elected by their peers,<sup>127</sup> the basic fact of judicial tenure should be enough to give a certain degree of independence from government interests.

1.6.13 The breakdown that is captured by Figure 3 shows that among the 39 Commonwealth jurisdictions where judicial appointments commissions are established, there are 17 jurisdictions (43.6%) in which judicial members constitute at least half of the total.<sup>128</sup> This is a sizeable number of Commonwealth member states, but the proportion is perhaps not sufficient to indicate the emergence of a new standard. By contrast, if representatives of the legal profession are added, **there are 24 of the 39 states (61.5%) in which these two groups together constitute at least half of the members of the commission.**<sup>129</sup> Moreover, in 11 of the remaining 15 jurisdictions, judges and lawyers make up at least one third of commission members.<sup>130</sup> It is clear that there is widespread support for a strong judicial-legal presence. The view that such members should comprise at least half the membership of the commission gains further credence from the fact that six of the eight jurisdictions that have established a new commission since 2003, when the *Commonwealth Latimer House Principles* were adopted.<sup>131</sup> Only three of these commissions achieve this level through judicial members alone, which suggests that a principle of good practice has emerged that **although judicial members need not constitute a majority, the judiciary and the legal profession together should supply at least half the members.**

1.6.14 Ensuring that at least half the members of the commission are judges or representatives of the legal profession helps to promote its independence, and to the extent that this is recognised by the legal community and the wider public there may be further benefits in terms of legitimacy

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<sup>127</sup> Venice Commission, *Report on the Independence of the Judicial System – Part One: The Independence of Judges* (n3), para 32.

<sup>128</sup> Cyprus, Guyana, India, Jamaica, Lesotho, Malawi, Malaysia, Malta, Mauritius, Mozambique, Nigeria, the Organisation of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Sri Lanka, Tanzania.

<sup>129</sup> In addition to jurisdictions listed in n128, these are Belize, Botswana, Fiji, Ghana, Kenya, Namibia and the UK.

<sup>130</sup> Bahamas, Cameroon, Maldives, Samoa, Sierra Leone, Solomon Islands, South Africa, Tonga, Trinidad and Tobago, Uganda and Zambia.

<sup>131</sup> The appointments commissions of Fiji, India, Kenya, Malaysia, Pakistan and the UK all meet this standard. The exceptions are the Maldives and Swaziland.

of the commission and the judges appointed by it. The *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, issued by the European Network of Councils of the Judiciary, calls for a 'relevant number of members of the judiciary' to be included, as part of an overall requirement for 'a majority of individuals independent of government influence',<sup>132</sup> and it has already been observed that a judicial-legal majority is the approach preferred by both the *IBA Minimum Standards* and the *Model Clause* proposed by the Commonwealth legal and judicial associations. If the composition of the commission manages to inspire widespread belief in its independence, then the added legitimacy this confers may be helpful both in attracting a broad range of applicants from within the legal community and in strengthening public confidence that judges are being selected in a fair and impartial way. This may also translate into confidence in the ability of judges selected by the commission to dispense justice and uphold the rule of law, although such confidence is of course subject to the actual performance of judges appointed by a new commission.

1.6.15 The idea that the quality of judicial appointments may be enhanced gains further support from the functional advantages of a strong presence of judges and lawyers. Judicial members bring an awareness of the demands of judging and the qualities required of successful candidates. Representatives of the practising legal profession have experience of good and bad judges in the courtroom as well as a strong interest in ensuring that those before whom they will appear in future should satisfy the highest standards of competency, independence and impartiality. Legal academics may be particularly well placed to analyse the judgments of candidates vying for appointment to a higher court.<sup>133</sup>

### *Lay members*

1.6.16 At the same time, the participation of lay members can also be valuable. The Venice Commission recommends that not all members of the body responsible for judicial appointments should be judges in order to avoid a situation of 'corporatism', in which the existing judiciary may make appointments that further its own interests or develop an unduly

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<sup>132</sup> para II.1.

<sup>133</sup> The *Model Clause* (n9) proposes that judicial appointments commission should have a legal academic among their number and this is currently required in Rwanda, South Africa and Zambia.

## APPOINTMENTS

narrow view of the qualities that are desirable in a judge.<sup>134</sup> Although members who are legal practitioners might be able to prevent this from occurring, **it may be valuable for the commission to include ‘lay’ members who stand outside the dynamics of the legal community and are able to offer a civil society perspective, or to contribute specific expertise in other relevant disciplines such as human resources.**<sup>135</sup> These members could be chosen in a variety of ways. According to the *Model Clause* proposed by the Commonwealth legal and judicial associations, the four seats allocated to lay members would be filled through a public application process initially administered by the Public Service Commission, when the first members are chosen, and thereafter by the commission itself.<sup>136</sup> This proposal is designed to ensure the selection of lay commissioners does not fall under political control.

1.6.17 There are also other ways of reducing the risk that lay members will be chosen in an excessively politicised manner. Six of the 15 members of the Judicial Appointments Commission in England and Wales, including the Chairman, must be persons who are not legally qualified and who, like the other commissioners, may not be MPs or civil servants. The lay positions are openly advertised and appointments are made by an independent selection panel jointly assembled by the Lord Chancellor, the Chairman of the Commission and the Lord Chief Justice, which must consider the applicant’s past and present political activity.<sup>137</sup> In India, a National Judicial Appointments Commission is to be established following a constitutional amendment passed in 2014.<sup>138</sup> The six members of the Commission will include the Minister of Justice and two ‘eminent persons’ chosen by a committee of the Prime Minister, the Chief Justice and the Leader of the Opposition, which means that the head of the judiciary holds the casting vote in the event that political leaders disagree. The Commission replaces a *collegium* consisting entirely of senior judges which the Supreme Court had determined should be responsible for judicial appointments.<sup>139</sup> It is

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<sup>134</sup> Venice Commission, *Judicial Appointments* (n94), para 27–30. The *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, para 11.2, notes the view in some countries that even a majority of judges creates this danger.

<sup>135</sup> *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, para 11.5.

<sup>136</sup> *Model Clause* (n9), 6.

<sup>137</sup> Constitutional Reform Act 2005, Schedule 12 and Judicial Appointments Commission Regulations 2013.

<sup>138</sup> Constitution, art 124A (pending implementation).

<sup>139</sup> *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441; AIR 1994 SC 268 and *In re Special Reference No 1 of 1998* (1998) 7 SCC 739; AIR 1999 SC 1.

significant that despite the change in approach, half the membership of the new appointments body will nonetheless be judges.

*Politicians*

1.6.18 Some countries expressly reserve seats on their appointment bodies for legislators or members of the executive, or representatives freely chosen by either body. The involvement of such members raises more difficult questions. On the one hand, the inclusion of a small number of politicians in the commission may be thought to provide a valuable link to democratic politics. But on the other hand there is a danger that even a handful of such members may approach their task in a way that undermines a fair and evidence-based selection process and sets a poor example for others. The authors of the *Model Clause*, writing on behalf of the Commonwealth legal and judicial associations, report serious concerns from states which include politicians in their judicial appointments commissions, including anecdotal evidence that commissioners nominated on this basis 'have turned up to meetings with lists of names of judges to be selected and unopened material about the candidates'.<sup>140</sup> The *Model Clause* does not assign any seats to the executive and Parliament and neither does it give these branches of state a direct say in appointing any of the members of the commission. As a more modest safeguard against the intrusion of party politics, the Venice Commission recommends that commissioners who are members of the legislature should not be 'active' politicians and proposes that they be chosen by a supermajority of votes, which would favour candidates with cross-party support.<sup>141</sup>

1.6.19 In some Commonwealth states, efforts have been made to counter-balance the ability of a governing party to nominate members of a judicial appointments commission by allocating a certain number of seats to opposition parties. South Africa provides the leading example of this approach, and it is also reflected in the composition of appointment bodies in Malta<sup>142</sup> and the Seychelles.<sup>143</sup> The South African Judicial

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These decisions were based on an interpretation of the wording of Article 124(2) of the Constitution which required the President to make appointments to the Supreme Court 'after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose'.

<sup>140</sup> *Model Clause* (n9), 10.

<sup>141</sup> *Judicial Appointments* (n93), para 32.

<sup>142</sup> Constitution, art 101A(1)(e).

<sup>143</sup> Constitution, art 139(1)(a).

## APPOINTMENTS

Service Commission consists of a minimum of 23 members and includes the Minister of Justice, 10 legislators (at least three of whom must be from opposition parties) and four persons designated by the executive after consulting the leaders of all the parties represented in Parliament.<sup>144</sup> The Commission's public interviews with judicial candidates have occasionally been acrimonious, and its decisions have increasingly been challenged in court, including a decision not to fill several vacancies when qualified candidates had applied and been interviewed.<sup>145</sup> When politicians are represented in such numbers on an appointment body the issues become quite similar to those discussed above in relation to legislative confirmation, and there is a need for politicians and judges or candidates for judicial office to have mutual respect and an understanding of their respective institutional roles as envisaged by the *Commonwealth Latimer House Principles*.<sup>146</sup>

### *Gender and minority representation*

1.6.20 Institutional and political affiliations are not the only aspects of the composition of judicial appointments commissions that are relevant to its legitimacy and effectiveness. Questions of **gender balance and the representation of minorities** are increasingly receiving attention, in part because of the recognition that women or minority candidates may be more willing to put themselves forward or accept a nomination if they know they are likely to share a background with at least some members of the selecting or interviewing body. There are various ways in which commission membership provisions could be framed to promote this. For example, the *Model Clause* suggests that the lay members should be chosen in a way that accords with the principle that as a group they 'should broadly reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance'.<sup>147</sup> This is an aspect that has largely been considered only in those Commonwealth states that have recently established or reconstituted their judicial appointments commissions. In Kenya there is a constitutional requirement that the two seats for members of the public should be held by persons of opposite gender, and the same requirement applies to the two seats allocated to legal practitioners and to two of the judicial seats.<sup>148</sup> At least one

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<sup>144</sup> Constitution, s 178(1).

<sup>145</sup> See Hoexter and Olivier (n21) 144–148 and 172–188.

<sup>146</sup> *Principle II*, discussed in para 1.5.4–1.5.5 above.

<sup>147</sup> *Model Clause* (n9), 6.

<sup>148</sup> Constitution, art 171(2)(d),(f),(h).

of the two 'eminent persons' serving on the National Judicial Appointments Commission of India must be a woman or a member of certain designated minority groups.<sup>149</sup>

### *Questions of structure*

1.6.21 Whether a commission will be able to provide an independent appointment process, as the *Latimer House Guidelines* require, depends not only on its composition but also on a host of other structural questions. These include **who chairs the commission, how long its members serve and with what security of tenure, and how the operations of the commission are staffed and funded.** Only brief consideration can be given to these matters here.

### *Chair of commission*

1.6.22 The Chief Justice or equivalent head of court serves as chair of the judicial appointments commission in 28 of the 39 jurisdictions (71.8%) in which such bodies exist.<sup>150</sup> This is also the proposal made in the *Model Clause*, on the ground that 'the Chief Justice is responsible for the smooth running of the courts and should therefore be responsible for the appointment process'.<sup>151</sup> The administrative logic of this argument is clear, and in jurisdictions where there are real concerns about political interference in judicial appointments it may be best to ensure that responsibility for scheduling meetings and ensuring that vacancies are timeously filled is in the hands of the judiciary. Where this is not the primary concern, different considerations may support the introduction of a lay chair; such a person could bring experience of management and human resources to the operations of the commission. The Venice Commission recommends the election of a chair from among the non-judicial members of the appointments body to 'bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council'.<sup>152</sup> Both the Judicial Appointments Commission in England and Wales and the Judicial Appointments Board in Scotland are chaired by lay persons, whereas the corresponding position in Northern Ireland is filled

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<sup>149</sup> Constitution, art 124A(1)(d).

<sup>150</sup> Bahamas, Belize, Botswana, Cyprus, Fiji, Ghana, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Mauritius, Mozambique, Namibia, Nigeria, Organisation of Eastern Caribbean States, Pakistan, Rwanda, Samoa, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, and Trinidad and Tobago.

<sup>151</sup> *Model Clause* (n9), 8.

<sup>152</sup> *Judicial Appointments* (n94), para 35

## APPOINTMENTS

by the Chief Justice, an arrangement which may reflect the difficulty of designing a procedure to select a politically neutral lay chair in a post-conflict society.<sup>153</sup> It is clear that different contexts may call for different chairing arrangements.

### *Tenure of commissioners*

1.6.23 The tenure of commissioners raises the question of the period for which they should be appointed, which should strike a balance between allowing the commission to develop experience and introducing new perspectives from time to time; there is also the question of whether it should be possible to remove a commissioner from office mid-term. The authors of the *Model Clause* propose a maximum tenure of four years, which lies in the middle of the range observed in Commonwealth jurisdictions; they argue that this period is 'sufficient time to become a very useful Commissioner, but not so long that the Commission itself becomes rigid and inflexible in approach'.<sup>154</sup> This limit would of course not apply to any members, such as the Chief Justice, who might hold their positions *ex officio*. In England and Wales, members of the Judicial Appointments Commission may be appointed for up to five years at a time, which are renewable subject to a maximum individual service of ten years. The renewable appointment of commissioners does not raise concerns about independence to nearly the same extent as renewable appointments of judges themselves; serving on a judicial appointments commission is usually a part-time role and not career-defining, whereas for judges, as is discussed in the next chapter, the wish to prolong a career on the bench may present a serious conflict of interest.<sup>155</sup> However, it does not follow that members of a judicial appointments commission should be subject to removal at will before they have completed their term of membership. This issue is addressed by several of the countries that have established new judicial appointment bodies since the *Commonwealth Latimer House Principles*: England and Wales, Fiji, Kenya and Swaziland all provide disciplinary tribunals to inquire into whether a commissioner should be removed for misconduct or incapacity, with safeguards in place to enable commissioners to challenge allegations against them and ensure fairness. By contrast, in the Maldives and Malaysia those responsible for filling specific seats on the commission can replace a commissioner at any time by revoking their nomination. The former approach is preferable

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<sup>153</sup> Gee et al [n24] 163–166, 240–246.

<sup>154</sup> *Model Clause* (n9), 10.

<sup>155</sup> See Chapter 2 below at para 2.2.30–2.2.32.



because it serves to underscore that commissioners are required to deliberate independently on the merits of candidates and not as delegates of the particular political institution, legal professional body or other entity which nominated them to serve on the commission.

### *Resources and operational independence*

1.6.24 The ability of an appointments commission to perform its functions does not depend only on the independence and good judgement of individual commissioners. The commission as a whole also has administrative and operational needs that must be reliably met if it is to function effectively. As the next part of this chapter goes on to discuss, the selection process conducted by a commission may involve a number of stages from the advertisement of vacancies, evaluation and sifting of applications, to interviewing and final deliberations. Depending on the number of judicial vacancies, a considerable staff may be required. The *Model Clause* recommends that a commission should have its own permanent secretariat, with the aim being that 'the executive does not have control over the resources (human or financial) so that independence can be maintained'.<sup>156</sup> Similarly, the *Dublin Declaration* of the European Network of Councils for the Judiciary recommends that an appointments commission:

... must be provided with the adequate resources to a level commensurate with the programme of work it is expected to undertake each year and must have independent control over its own budget, subject to the usual requirements as to audit.<sup>157</sup>

1.6.25 The operating budget of an appointments commission should be seen as an integral part of the costs of a judicial system which is independent and maintains the confidence of the public. The *Commonwealth Latimer House Principles* specifically address the funding of this system, declaring that '[a]dequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought'.<sup>158</sup> As the authors of the *Model Clause* point out, this principle clearly applies to judicial appointments commissions.<sup>159</sup> The *Model Clause* recommends that the funding of a commission

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<sup>156</sup> *Model Clause* (n9), 10.

<sup>157</sup> para II.7.

<sup>158</sup> *Principle IV(B)*. *Guideline II.2* of the *Latimer House Guidelines* declares that 'The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary'.

<sup>159</sup> *Model Clause* (n9), 11.

## APPOINTMENTS

should be assured by making its budget subject to a vote in the legislature, either separately or as part of the budget of the judiciary.<sup>160</sup> In this way, direct executive influence is minimised. At the same time, it remains important for judicial appointments commissions to account for the money they spend, which could form part of an annual report that is tabled in the legislature.<sup>161</sup> This form of accountability is not problematic so long as it is confined to the commission's operations in general and not its evaluation or selection of individual candidates.

### 1.7 The role of judicial appointments commissions

#### *Selection processes conducted by appointments commissions*

1.7.1 There is no single correct answer to the question of how judicial appointments commissions should identify, evaluate and select candidates to appoint, or recommend for appointment, with a view to achieving the objectives laid down in the *Commonwealth Latimer House Principles* of equality of opportunity, appointment on merit and consideration of the need to address gender inequity and the historic factors of discrimination in a particular society. This is perhaps unsurprising in view of the sheer complexity of the challenge. As noted at the beginning of this chapter when discussing strategies for dealing with a lack of judicial diversity, many of the relevant factors may be aspects of the particular society or legal system that are beyond the control of an appointments body.<sup>162</sup>

1.7.2 The *Commonwealth Latimer House Principles* declare that appointments 'should be made on the basis of clearly defined criteria and by a publicly declared process'.<sup>163</sup> It was observed above that this brief but important provision sets a minimum standard of transparency regarding both the characteristics that qualify persons for judicial appointment and the steps that are followed when an individual is considered for selection. The criteria for judicial office will usually be determined to a greater or lesser extent by the constitution or by statute, although there may be some scope for commissioners to bring to bear their experience and expertise if the commission is authorised to elaborate the criteria for particular judicial posts, or develop guidelines or

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<sup>160</sup> Recent examples include Kenya, the Maldives and Fiji.

<sup>161</sup> *Model Clause* (n9), 12.

<sup>162</sup> See para 1.2.15–1.2.17 above.

<sup>163</sup> *Principle IV(a)*, quoted in para 1.2.1. above.

## APPOINTMENTS

tools for use when evaluating individual candidates.<sup>164</sup> Transparency requires that such specific criteria or approaches to evaluation should also be published, alongside the basic constitutional and statutory criteria, so that both those interested in judicial office and the wider public may be aware of the qualities that are sought in a judge.

1.7.3 The second aspect of transparency, which is much more the responsibility of the commission, is to ensure that judicial selection occurs by way of a 'publicly declared process'. There is a close link with the criteria for judicial office, as the very purpose of having criteria would be undermined if they were not applied throughout the process of selection. As the *Dublin Declaration* of the European Network of Councils for the Judiciary affirms, there should be:

... a clearly-defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process.<sup>165</sup>

1.7.4 It is worth examining the stages of the selection process from start to finish in order to determine what legal frameworks will best ensure that an appointments commission acts in accordance with the pre-announced process and applies the criteria for judicial office.

### *Advertisement of vacancies*

1.7.5 It is highly desirable that the process should begin with **the public advertisement of judicial vacancies, followed by an open competition in which duly qualified individuals may apply for the position**. The *Latimer House Guidelines* declare that 'Judicial vacancies should be advertised.'<sup>166</sup> Some jurisdictions also permit the appointments commission to encourage candidates to apply, or allow third-party nominations (which should be with the candidate's consent). This is not necessarily problematic provided that all applicants and nominees are considered on an equal footing. If instead the commission is left to decide for itself who should be

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<sup>164</sup> The Committee of Ministers of the Council of Europe, *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities* requires that '[d]ecisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities' (para 44).

<sup>165</sup> para I.1.

<sup>166</sup> *Guideline II.1*. See also Organisation for Security and Co-operation in Europe, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 21.

## APPOINTMENTS

considered for appointment, then the process begins to resemble the ‘tap on the shoulder’ in the former Westminster system before it was reformed. Some of the Judicial Service Commissions established in Commonwealth states at the time of independence were designed to operate in this way.<sup>167</sup> Such arrangements do not provide a high degree of transparency. Depending on the circumstances in a particular jurisdiction, it may be difficult to convince prospective candidates and the public at large that there is indeed equality of opportunity, and that the published criteria are applied fairly to all who might be eligible for appointment, when all they have are the commission’s assurances to that effect. A lack of open applications could thus hamper both the legitimacy of the commission and its ability to attract applicants from a wide range of backgrounds.

### *Assessment and interviews*

1.7.6 Once applications have been received, it is usually necessary to establish that each applicant who might plausibly be shortlisted for the position is of good character. This includes verifying that the applicant does not have a history of criminal offences or disciplinary misconduct that would make them unsuitable for appointment as a judge. **The commission’s independent oversight is helpful if background checks are carried out** on those applying for judicial office. In addition, the Organisation for Security and Co-operation in Europe cautions against the involvement of state security in any background checks beyond a standard examination of criminal records lest this provide an opportunity for the executive or vested interests to undermine particular agencies.<sup>168</sup> Applicants should be informed of any potentially disqualifying findings and be given a fair opportunity to challenge them.<sup>169</sup>

1.7.7 **If written tests are used to evaluate the skills and aptitudes of candidates, it is also a distinct advantage for these to be administered by the judicial appointments commission, an independent body.** The *Model Clause* calls for ‘an established, public system for the assessment of qualifications of candidates’,<sup>170</sup> and the *Dublin Declaration* underscores

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<sup>167</sup> Elias (n111), 172.

<sup>168</sup> *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 23.

<sup>169</sup> *Ibid*, para 23.

<sup>170</sup> *Model Clause* (n9), 13. See also the *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, para II.5.

that although experts such as psychologists may be involved in the process, an appointments commission should make its final decision 'free from any influences other than the serious and in-depth examination of the candidate's competencies against which the candidate is to be assessed'.<sup>171</sup> This includes **interviews, which are often the best way for the commission to evaluate individuals it has shortlisted as being the most promising candidates for a particular vacancy.**<sup>172</sup> As previously discussed, the value of judicial independence requires the interviewing body to be particularly sensitive when considering the decisions given by candidates who are already judges.<sup>173</sup> After the interview, the commission should deliberate on the candidates who are in contention for selection, taking into account all relevant information including referees' reports and the views of other persons such as senior judges whose opinion the commission may be obliged to seek. The outcome of the process is usually that, depending on the jurisdiction, the commission will recommend either a single candidate or a list of candidates to the branch of government that has the power to make formal appointments.<sup>174</sup>

#### *Transparency and accountability*

1.7.8 There should be little difficulty in making the successive stages of the selection process transparent, at least in the general sense of publishing the procedures that are followed, the institutions and public office holders that are involved and their respective roles, and any criteria, standards or time periods that may be applicable. In the words of the *Dublin Declaration*, 'the public has a right to know how its judges are selected'.<sup>175</sup> But general transparency of this kind may no longer be sufficient to constitute best practice. There is increasing support for the view that **individual transparency is also needed, not only for the sake of disappointed applicants who are not appointed, but for the broader purpose of enabling interested parties and members of the public to scrutinise the way in which the commission discharges its mandate.** The legitimacy of the appointments process should be enhanced if it is possible in an individual case to hold the commission and other actors in the appointment process accountable for their application of the 'publicly

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<sup>171</sup> para II.3–4.

<sup>172</sup> *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 21.

<sup>173</sup> See para 1.4.20 above.

<sup>174</sup> See para 1.7.16–1.7.25 below.

<sup>175</sup> para II.9.

## APPOINTMENTS

declared process' required by the *Commonwealth Latimer House Principles*.

1.7.9 The Committee of Ministers of the Council of Europe is of the view that both general and individual transparency are required in a judicial appointments process, and argues that the latter is best assured by providing unsuccessful applicants with reasons on request and an opportunity to challenge the decision:

... procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.<sup>176</sup>

1.7.10 In the *Model Clause* proposed by the Commonwealth associations, it is also envisaged that there should be some means of challenging appointment decisions. The authors recommend that the judicial appointments commission and other actors should keep accurate records of the decisions and proceedings, so that 'any complaints about the procedures can be easily dealt with by the Appointments Ombudsman or through an appeal system'.<sup>177</sup> This recommendation touches on the central challenge posed by individual transparency, which concerns the need to strike a balance between concerns about confidentiality, on the one hand, and the need for any relevant evidence about the process to be available to a review body, on the other.<sup>178</sup>

1.7.11 **One way of addressing this challenge is to establish an ombudsman with responsibility for judicial appointments.** The ombudsman should be given access to otherwise confidential material relating to individual candidates. In England and Wales, the Constitutional Reform Act 2005 establishes a Judicial Appointments and Conduct Ombudsman.<sup>179</sup> The jurisdiction of this body includes the actions of the Judicial Appointments Commission and also those of the Lord Chancellor, who receives the Commission's recommendations for appointment.<sup>180</sup> The Ombudsman has access to material that is otherwise confidential and not

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<sup>176</sup> *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, para 48.

<sup>177</sup> *Model Clause* (n9), 13.

<sup>178</sup> See also the *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, para II.9–10.

<sup>179</sup> Constitutional Reform Act 2005, Schedule 13 para 1.

<sup>180</sup> Constitutional Reform Act 2005, ss 100–101.

available to the candidate, such as references and the views of senior judges who were consulted, as well as the Commission's confidential supporting reasons that accompany the recommendation of a selected candidate to the Lord Chancellor and reasons that the Lord Chancellor is required to provide in response if invoking the limited statutory power not to accept the Commission's recommendation.<sup>181</sup> In practice, it appears that the Ombudsman has not been asked to consider confidential exchanges of this kind but has mainly been occupied with a small number of complaints relating to initial sifting of applications for positions in the lower courts.<sup>182</sup> In the event that an irregularity is established the Ombudsman only has power to make recommendations,<sup>183</sup> but there is also the possibility of judicial review as a last resort.<sup>184</sup> In most other jurisdictions judicial review would appear to be the only recourse that is available, although it is possible that a national ombudsman with wider responsibilities for holding public bodies to account might be called upon to adjudicate a dispute about the appointment process.

**1.7.12 Interviewing all shortlisted candidates in public represents a different and more radical approach to the transparency of a crucial stage in the selection process.** This has been the procedure of the Judicial Service Commission in South Africa since it was established under the first post-apartheid constitution.<sup>185</sup> Kenya adopted the same model when it established a new Judicial Service Commission under the post-conflict Constitution of 2010.<sup>186</sup> Opinion is divided about the merits of public interviews of this kind. The UN Special Rapporteur has observed that, particularly in countries undergoing a constitutional transition, such measures may ensure greater public confidence in the integrity of candidates.<sup>187</sup> By contrast, the authors of the *Model Clause* argue against this approach on the basis that it is likely to deter potential applicants, noting that 'reports

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<sup>181</sup> The *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* also recommends that appointment bodies should maintain a record of proceedings, including external assessments of a candidate, that provides sufficient information for an independent complaints mechanism to determine whether there was any unfairness (para 1.6, 1.10).

<sup>182</sup> Gee et al [n24] 189–190.

<sup>183</sup> Constitutional Reform Act 2005, s 102.

<sup>184</sup> See, in relation to lower court appointments, *R (Dickie) v Judicial Appointments and Conduct Ombudsman* [2013] EWHC 2248 (Admin) and *R (Graham Stuart Jones) v Judicial Appointments Commission* [2014] EWHC 1680 (Admin).

<sup>185</sup> This is currently required by the Procedure of the Judicial Service Commission, Government Notice RR423 [2003], para 2(j) and 3(j).

<sup>186</sup> Judicial Service Act 2011, Schedule 1 s 10.

<sup>187</sup> *Annual Report 2009* (n9), para 31.

## APPOINTMENTS

have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large'.<sup>188</sup>

1.7.13 There may be room for different approaches to this issue, depending on the circumstances in a particular society. In some cases the need to strengthen the legitimacy of a transitional judiciary may justify open interviews, which are after all a standard feature of confirmation proceedings before legislative bodies. This justification relies primarily on the benefits of exposing candidates to public scrutiny, but members of the commission may also be held accountable for their conduct within the confines of the interview. A general picture of the approach of the commission and its interpretation of the selection criteria is likely to emerge over time, and commissioners who ask discriminatory or otherwise inappropriate questions of candidates may face criticism from observers and the wider public. However, the subsequent deliberations within a judicial appointments commission should remain private.<sup>189</sup> The South African courts have decided that the Judicial Service Commission may be required to give reasons for its final decision, at least in circumstances in which judicial vacancies were left unfilled after the Commission had invited and publicly interviewed several apparently well-qualified candidates.<sup>190</sup>

1.7.14 The giving of reasons is a form of accountability, and while there are limits to the extent to which an appointments commission may be expected to discuss the merits of competing candidates, the commission should normally give reasons if a candidate has specifically been ruled out at a particular stage of the selection process. In the South African case previously mentioned this was the implicit decision made about the shortlisted candidates at the final stage of the process when the Judicial Service Commission decided to leave the vacancies open.<sup>191</sup> More common examples may be the exclusion of candidates who are found not to satisfy the requirements of good character or who fall short of a standard set in a particular test or form of assessment. While the

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<sup>188</sup> *Model Clause* (n9)14.

<sup>189</sup> *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, II.9. In the South African context this has been confirmed by the High Court decision in *Helen Suzman Foundation v Judicial Service Commission and Others* [2014] ZAWCHC 136; 2015 (2) SA 498 (WCC).

<sup>190</sup> *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA).

<sup>191</sup> *Cape Bar Council* (n190).



commission's own independence is an important safeguard in these matters, the selection process is further improved if the commission provides reasons for decisions of this kind, which may then be scrutinised by an ombudsman or judicially reviewed in appropriate cases.

*Interaction between appointments commissions and the executive*

1.7.15 The mere existence of an independent judicial appointments commission will not necessarily be sufficient to satisfy the requirement in the *Latimer House Guidelines* that judges should be appointed by an 'independent process'.<sup>192</sup> This is particularly true in countries where other actors also play a part in the process of appointment. For example, the candidate recommended by the commission may have to be confirmed by a legislative body, although as discussed above this is a relatively rare occurrence in the Commonwealth.<sup>193</sup> The present section examines the role of the executive, which is far more widespread, albeit often strictly circumscribed.

1.7.16 As noted above, it is still the case in almost all Commonwealth jurisdictions that the executive, usually in the person of the Head of State, is responsible for the formal act of appointing a new judge.<sup>194</sup> The Maldives<sup>195</sup> and Papua New Guinea<sup>196</sup> are partial exceptions insofar as their judicial appointments commissions are able to make appointments directly to certain courts. At the other end of the spectrum there are jurisdictions in which the executive has a much greater substantive say. These include countries in which appointments commissions exist but appointments to certain positions are reserved entirely to the executive,<sup>197</sup> or in which the executive is given real discretion at one or more stages of the process, the most far-reaching example of this being Malta where the Prime Minister, who makes the final nomination for appointment to a judicial vacancy, may decide on a case to case basis whether to consult the independent appointments commission at all.<sup>198</sup> The more influence the executive has over the selection process, the greater its responsibility to

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<sup>192</sup> *Guideline II.1*, quoted in para 1.3.2 above.

<sup>193</sup> See para 1.5.7 above.

<sup>194</sup> See para 1.4.27 above.

<sup>195</sup> Constitution, art 148(b) (appointments to the High Court).

<sup>196</sup> Constitution, s 170(2) (appointments to the National Court).

<sup>197</sup> See the discussion of jurisdictions in which the executive is solely responsible for appointments to the highest court (para 1.4.18–1.4.20 above) or the appointment of the Chief Justice (para 1.4.21–1.4.24 above).

<sup>198</sup> Constitution, art 101A.

## APPOINTMENTS

adhere to best practice as set out above in relation to executive-only appointments.<sup>199</sup>

1.7.17 The standard order which most processes follow is that the judicial appointments commission carries out the initial recruitment, evaluation and interviewing phases of the selection process, culminating in a recommendation which the commission then makes to the executive. The question then arises **whether the executive is left with any choice**. It is vital that there should be a **clear answer to this question**, both in order to provide a 'publicly declared process' as required by the *Commonwealth Latimer House Principles* and to avoid the risk of disputes which might have to be resolved by a court, as the Indian Supreme Court was required to do on several occasions before the recent establishment of the National Judicial Appointments Commission by constitutional amendment.<sup>200</sup> If the intention is to grant the commission a power to make binding recommendations, then it may be best to employ a phrase such as 'in accordance with', which has an unambiguous meaning which is immediately clear to both legal and lay readers.<sup>201</sup> Otherwise there is the risk that even very common legal terminology may still give rise to disputes, for example the phrase 'on the advice of', which appears to have an established technical meaning in some jurisdictions and not in others.

1.7.18 Precisely because the legal effect of the applicable constitutional formula is uncertain in some Commonwealth jurisdictions, it is difficult to give a breakdown of what the actual relationships between judicial appointments commissions and the executive are in all the different member states. There are at least three distinct models for this relationship. In descending order of control by the commission, these are:

- (a) the commission submits a single name which is binding on the executive;
- (b) the commission submits a single name and the executive has some latitude to disagree; and
- (c) the commission is responsible for producing a shortlist of candidates for final selection and appointment by the executive.

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<sup>199</sup> See the discussion of executive-only appointment systems in para 1.4.11–1.4.17 above.

<sup>200</sup> See cases discussed in n139 above.

<sup>201</sup> For example, in Kenya the President 'shall appoint' judges 'in accordance with the advice of the Judicial Service Commission' (Constitution art 166[1]).

## APPOINTMENTS

1.7.19 In each case there are principles of good practice that can be extracted from international norms and statements and the approach taken by various Commonwealth member states.

### *Commission makes binding recommendation*

1.7.20 The *Model Clause* prepared on behalf of the Commonwealth legal and judicial associations adopts model (a) by stipulating that the executive 'shall accept the recommendation' of the judicial appointments commission to fill a judicial vacancy.<sup>202</sup> The authors do not consider it appropriate for the executive to be able to exercise a choice or simply to refuse to appoint any candidate. It appears that some of the Judicial Service Commissions established in Commonwealth states at the time of independence were intended to have a binding power of this kind.<sup>203</sup> This is also the position advocated by the Committee of Ministers of the Council of Europe, which recommends that independent appointment bodies should have the power to make recommendations which the executive or other institutions responsible for the formal act of appointment 'follows in practice'.<sup>204</sup>

### *Commission recommends single candidate with limited scope for executive to disagree*

1.7.21 Appointment mechanisms based on model (b) need not differ a great deal from those based on model (a) in practical terms. It also sees the commission put forward a single name but then permits the executive to make some response other than acceptance of the selection in certain circumstances. Much depends on the nature of the alternative responses and the circumstances in which they may be given. In England and Wales, for example, the Lord Chancellor is given limited powers to reject a candidate selected by the Judicial Appointments Commission, or to require the Commission to reconsider its selection. Both powers are narrowly defined. The power to reject is only available if, in the Lord Chancellor's opinion, a candidate 'is not suitable for the office concerned' (in other words unappointable), while the grounds for requiring reconsideration are that either 'there is not enough evidence that the person is suitable or that there is evidence that the person 'is not the best candidate on

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<sup>202</sup> *Model Clause* (n9), 7.

<sup>203</sup> Roberts-Wray (n51) 481.

<sup>204</sup> *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, para 47.

## APPOINTMENTS

merit'.<sup>205</sup> The Lord Chancellor may exercise each power only once in respect of each vacancy, and must thereafter accept a candidate selected by the commission.<sup>206</sup> The Lord Chancellor's role is therefore best understood as an evidence-based check on the work of the commission,<sup>207</sup> in fact it has been exercised on only a handful of occasions and may be very difficult to use in relation to a candidate who is already a judge and is seeking promotion.<sup>208</sup>

1.7.22 If the executive has any discretion to reject a candidate recommended by the appointments commission, then best practice would require the exercise of that power to be confined to 'exceptional' cases, according to the UN Special Rapporteur.<sup>209</sup> Two practical measures are suggested to ensure this. First, the executive should not be permitted to appoint an alternative choice who has not been considered and recommended by the commission.<sup>210</sup> Secondly, the executive should provide reasons for any decision to reject a particular recommended candidate. These should relate to 'well established criteria that have been made public in advance',<sup>211</sup> and it has been suggested that the power should be restricted only to procedural failings on the part of the commission.<sup>212</sup> In the view of the Venice Commission, the overall effect of these safeguards should be to ensure that the independent commission has a 'decisive' say in judicial appointments, although in context it does not mean that the commission will invariably be able to secure the appointment of its first choice of candidate.<sup>213</sup>

1.7.23 This two-limbed approach to best practice is well illustrated in most respects by the position in England and Wales outlined above. The Lord Chancellor may twice decline to accept the candidate selected by the Judicial Appointments Commission on certain specified grounds, but must provide the Commission with reasons for doing so and must then

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<sup>205</sup> Judicial Appointment Regulations 2013, regulations 9–10, 15–16, 27–28 and 34–35.

<sup>206</sup> This may include a candidate the Lord Chancellor previously required to be reconsidered.

<sup>207</sup> Shetreet and Turenne (n24), 114.

<sup>208</sup> Gee et al (n24), 186–187, 217–220.

<sup>209</sup> *Annual Report 2009* (n15), para 33. See also the Venice Commission report, *Judicial Appointments* (n94), para 14.

<sup>210</sup> See *Judicial Appointments* (n94), para 14, and the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 23.

<sup>211</sup> *Annual Report 2009* (n15), para 33.

<sup>212</sup> *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 23.

<sup>213</sup> *Judicial Appointments* (n94), para 25.

accept a selected candidate on the third occasion. The UN Special Rapporteur argues that for the sake of transparency the executive should publish its reasons for rejecting a candidate.<sup>214</sup> Whether this is desirable may depend on whether a particular jurisdiction values the privacy and reputation of candidates more highly than the need to ensure that institutional differences of opinion are aired for public scrutiny. Another Commonwealth jurisdiction in which the executive receives a single recommendation but is permitted to disagree is Namibia 'for good cause'; here too the executive must provide reasons for doing so, but there is no explicit restriction as to the grounds for rejection or the number of times the executive may do so in relation to a particular vacancy.<sup>215</sup> In this context, the legal framework alone is not enough to ensure best practice, which must depend, as in executive-only appointment models, on the self-restraint of the executive and its adherence to published criteria for selection.

### *Commission prepares shortlist for decision by executive*

1.7.24 The need for executive self-restraint also arises in countries that follow model (c) by permitting the executive to choose from a shortlist of candidates prepared by the commission. By definition, it can no longer be exceptional for the executive to depart from the commission's recommendations in these situations, since the commission is required to present a list of candidates which is usually not ranked. In effect this model represents a hybrid between commission-centred and executive-based appointment systems. Since the commission is usually responsible for the initial phase of evaluating applications and shortlisting candidates, it retains a significant degree of control, provided that the executive is restricted to choosing from candidates the commission has recommended. This first limb of best practice appears to be respected in most Commonwealth jurisdictions that adopt this model. This is the case even in jurisdictions where the executive is permitted to reject the entire list and require the commission to submit further names, as is the case in Malaysia, and in South Africa when there is a vacancy on the Constitutional Court. The South African system provides safeguards insofar as the President is required to provide reasons for rejecting the list of candidates put forward by the Judicial Service Commission, and is then bound to make an appointment from the second shortlist forwarded by the

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<sup>214</sup> *Annual Report 2009* [n15], para 33. See also the *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*, para II.11.

<sup>215</sup> *Judicial Service Commission Act 1995*, s 5(2).

## APPOINTMENTS

Commission.<sup>216</sup> In Malaysia, by contrast, the process is not closed in the sense that the executive could in principle reject a series of shortlists submitted by the Judicial Appointments Commission.<sup>217</sup> However, a prolonged interaction of this kind would probably represent a serious breakdown of institutional relations. In practice, the executive would therefore probably be expected to choose from the Commission's initial shortlist of selected candidates (a minimum of three per vacancy) or from the first supplementary list (a minimum of two further names).

1.7.25 It is an open question whether using an independent commission to shortlist candidates will deliver the same benefits as entrusting such a body with full decision-making responsibilities. The initial stages of the selection process are broadly the same, and so the commission may be expected to bring its independence and the experience and expertise of its members to bear to ensure that shortlisted candidates are of good character and that their merit reflects the strengths of the applicant pool. This is clearly a safeguard against unqualified appointments and executive patronage. However, there is a risk that the final choice to be made by the executive may be understood in a way that unduly politicises the judiciary. This is because it is easy to portray this as a choice that is entirely within the discretion of the executive, to be exercised without a need to provide reasons; the only current example of a requirement to provide reasons applies when the executive decides to reject an entire shortlist (in the case of Constitutional Court judges in South Africa). This impression is unfortunate and is at odds with what best practice would require in an executive-only system, as discussed above, namely strict adherence to the criteria for judicial office and ideally a culture of political neutrality.<sup>218</sup>

**Where the executive and an independent commission share responsibility for judicial appointments – in some situations also with a legislative body – each of these institutions should be held to a standard of best practice within their own sphere of action and influence.**

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<sup>216</sup> This is the system for the appointment of Constitutional Court judges other than the Chief Justice and Deputy Chief Justice. The Judicial Service Commission will, after conducting interviews, forward to the President a list of selected candidates containing three more names than the number of vacancies, with supporting reasons for each selection. Constitution, s174(4).

<sup>217</sup> Judicial Appointments Commission Act 2009, ss 22–28.

<sup>218</sup> See para 1.4.26.

# CHAPTER 2 – TENURE

## 2.1 Judicial tenure and the rule of law

2.1.1 The tenure of judges is one of the most important areas in which legal frameworks can support the judiciary in upholding the rule of law. Legal guarantees of security of tenure and appropriate remuneration serve to lessen the risks that judges face in holding powerful individuals and government bodies to account. They do so by making it more difficult for external pressure to be brought to bear on judges and reducing their exposure to conflicts of interest. Such guarantees therefore play a direct role in sustaining an independent judiciary, which is one element of the rule of law.

2.1.2 The knowledge that judges are protected in these ways has the potential furthermore to bolster public confidence in their independence, thus improving the likelihood that members of the public will co-operate with the justice system. In this way, judicial tenure can also be of indirect benefit to the rule of law.

2.1.3 The Commonwealth *Latimer House Principles* recognise the need for judicial tenure, which is briefly addressed in *Principle IV – Independence of the Judiciary*:

Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.<sup>1</sup>

2.1.4 This chapter aims to shed light on what constitutes an ‘appropriate’ framework for judicial tenure, including the aspect of judicial remuneration.

### *Main issues discussed in this chapter*

2.1.5 Discussions of judicial tenure often concentrate on the mechanisms used to determine whether a judge should be removed from office, in view

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<sup>1</sup> *Principle IV(b)*.

## TENURE

of the danger that they may be abused to penalise or intimidate judges. However, these mechanisms are only a small part of the overall picture, as proceedings to remove a judge from office tend to be rare in most Commonwealth jurisdictions. The proper approach to removal of a judge, including the need for procedural safeguards when inquiring into their conduct, is considered in the next chapter.

2.1.6 The focus of the present chapter is on issues of a more systemic nature, which are of concern to all judges, and fall under two headings

- Duration of judicial appointments; and
- Protection of judicial remuneration.

2.1.7 Both issues are examined first from the point of view of general principle and then, in more detail, in the context of the arrangements that are in place in independent Commonwealth jurisdictions.

## 2.2 Duration of judicial appointments

2.2.1 The *Commonwealth Latimer House Principles* are silent on the duration of appointments, but the issue is addressed in the *Latimer House Guidelines*:

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.<sup>2</sup>

2.2.2 This brief statement gives rise to three areas of enquiry in relation to the current approach of Commonwealth jurisdictions. The first is to clarify the sense in which judicial appointments are 'permanent', and to establish whether they are affected by changes of government or changes in the legal or constitutional structure under which judges hold office.<sup>3</sup>

2.2.3 Secondly, as the quoted passage also points out, the appointment of judges on fixed-term contracts requires special justification. This chapter accordingly examines the situations in which there is a case to be made for such appointments, for example in small jurisdictions,<sup>4</sup> or states

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<sup>2</sup> *Guideline II.1.*

<sup>3</sup> See para 2.2.6–2.2.13 below.

<sup>4</sup> See para 2.2.15 below.



where there is a specialist constitutional court,<sup>5</sup> and perhaps as an alternative to the use of temporary or acting judges whose tenure is even less secure.<sup>6</sup>

2.2.4 Permanent appointments are also favoured as a general matter by the *IBA Minimum Standards on Judicial Independence*, which set out a somewhat more detailed view of what permanence requires:

Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.<sup>7</sup>

2.2.5 The principle that there should be a mandatory retirement age gives rise to a third area of enquiry. This section examines the practice of Commonwealth states with regard to mandatory retirement ages, including how widely they are used and the ages that different jurisdictions set.<sup>8</sup> Conflicts of interest may arise if judges who reach the prescribed age are able and likely to seek further employment of a lucrative or prestigious kind, including an extension of their judicial tenure which is possible in some jurisdictions.<sup>9</sup> Other judges may become physically or mentally unfit to continue in office, which creates a need for a fair process by which issues of medical incapacity may be determined.<sup>10</sup>

#### *Continuity in the face of changes of government or to the legal framework*

2.2.6 An important early landmark of judicial security of tenure was the Act of Settlement passed by the English Parliament in 1701. In addition to determining the eligibility and order of succession to the throne, this Act put an end to the controversy that had raged during the previous century about whether judges served 'at pleasure' of the King, meaning that it was within the King's discretion to dismiss them.<sup>11</sup> The Act provided that judges would henceforth remain in office 'during good behaviour'. That provision was coupled with a procedure for removing a judge from office which requires an address to the monarch to be passed by both Houses of

<sup>5</sup> See para 2.2.22–2.2.24 below.

<sup>6</sup> See para 2.2.19–2.2.21 below.

<sup>7</sup> art 22.

<sup>8</sup> See para 2.2.27–2.2.28 below.

<sup>9</sup> See para 2.2.28–2.2.32 below.

<sup>10</sup> See para 2.2.33–2.2.34 below.

<sup>11</sup> Simon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2014) 29–31.

## TENURE

Parliament, and this has remained the principal mechanism for removal of English judges ever since.<sup>12</sup>

2.2.7 After the Act of Settlement there remained some uncertainty about the position of judges when a monarch died, as there had been an understanding that it was for the new King or Queen to decide whether to retain judges who had served under their predecessor. This practice was formally abolished in 1760.<sup>13</sup> In modern terms, the importance of this second reform is that it prevented judicial tenure from being affected by changes in government. This would preclude governments from imposing new requirements on current members of the judiciary, as the military government of General Musharraf in Pakistan attempted to do when it demanded that all judges take a new oath of office or be dismissed, a measure which was later reversed.<sup>14</sup>

2.2.8 The general point of principle is that **judges should not be subject to loss of office as a result of changes of government or legal measures that are ostensibly intended to serve other objectives**. The *IBA Minimum Standards* point out that reforms to the structure of the courts should not be used to achieve this result:

In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.<sup>15</sup>

2.2.9 This principle is very widely recognised in Commonwealth states, although there are several different ways of implementing it. In 23 out of the 48 Commonwealth jurisdictions (47.9%) there is a specific constitutional provision which prevents the abolition of the office of a judge.<sup>16</sup> The

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<sup>12</sup> The provision is currently found in the Senior Courts Act 1981, s 11(3).

<sup>13</sup> Shetreet and Turenne (n11) 31.

<sup>14</sup> See *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul – Addendum – Mission to Pakistan*, UN Doc A/HRC/23/43/Add.2 (4 April 2013), para 8–9.

<sup>15</sup> art 20(b). See also the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*, art 29: 'The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.'

<sup>16</sup> Bahamas, Barbados, Belize, Botswana, Ghana, Guyana, Jamaica, Kenya, Lesotho, Malta, Mauritius, Mozambique, the Organisation of Eastern Caribbean States, Papua New Guinea, Seychelles, Sierra Leone, Singapore, Solomon Islands, Swaziland, Tanzania, Trinidad and Tobago, Uganda and Zambia.

provision to this effect in the Constitution of Barbados provides a typical example:

No office of Judge shall be abolished while there is a substantive holder thereof.<sup>17</sup>

2.2.10 It does not follow that jurisdictions without such a constitutional clause should be taken to permit such measures, which could be used to penalise or intimidate the current judiciary. In many jurisdictions a similar prohibition is attached to the procedure for removing a judge from office for misconduct or incapacity, as such clauses often specify that apart from death, retirement or resignation they are the only means by which a judge may cease to hold office. This has the benefit of underscoring the principle that any question of whether an individual judge ought to be removed should be determined via a mechanism which provides adequate safeguards to ensure fairness as discussed in the next chapter. Constitutions also commonly provide protection against the abolition of entire courts, for example by declaring that 'There shall be a High Court' or 'There shall be a Supreme Court', and specifying the number of judges who may be appointed to serve on that court.

#### *Constitutional transitions*

2.2.11 States which are undergoing a constitutional transition may find themselves in a somewhat different situation, particularly if the change is not merely formal but represents an intended break with an era of conflict or authoritarianism and an attempt to lay a proper foundation for constitutional democracy. The new constitution may establish courts under different names or alter their structure, and may introduce a new set of provisions concerning appointment, tenure and removal. **As a matter of principle, states should not treat a constitutional transition as an opportunity to purge their judiciary of members who may have become associated with parties to a conflict or with the previous regime.** However, a different approach may be justified if there is broad consensus that a transitional process is needed to ensure that members of the existing judiciary are only retained if they have sufficient independence and integrity to uphold the new constitution and the rule of law. **In exceptional cases in which there is evidence of widespread judicial malfeasance, for example systemic corruption, pervasive bias or collusion in human rights abuses, it may be appropriate to require incumbent judges**

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<sup>17</sup> Constitution, s 80(3).

## TENURE

**to undergo some form of individual review before their tenure under the new constitution is confirmed.** The UN Special Rapporteur on the Independence of Judges and Lawyers has recognised that such measures may be justified in 'situations of transition from an authoritarian to a democratic system, in which the objective of limitations to the principle of irremovability would be to end impunity and to prevent the reoccurrence of serious human rights violations'.<sup>18</sup>

**2.2.12 The process of individual review is sometimes known as 'vetting' and must be conducted by an independent body of manifest integrity and impartiality and in accordance with appropriate safeguards to ensure fairness.** Kenya is unique among Commonwealth jurisdictions in having established a dedicated transitional body to carry out a judicial vetting process of this kind. The decision to establish such a process was taken after a series of judicial inquiries had found evidence of high levels of corruption, and the transitional provisions of the 2010 Constitution accordingly include a requirement that all members of the existing judiciary should undergo vetting to determine whether they are suitable to continue to serve under the new Constitution.<sup>19</sup> The details of the process were left to be regulated by statute. This led to the establishment of the Judges and Magistrates Vetting Board, which is made up in equal number of Kenyan legal practitioners, members of civil society and serving or retired judges of other Commonwealth jurisdictions.<sup>20</sup> The Board began sitting in 2012 and is due to conclude its work by the end of 2015.<sup>21</sup>

**2.2.13** The Kenyan vetting process is subject to a number of procedural safeguards. The Board is required to provide judges with notice of complaints received against them, and to conduct an interview in which the judge may be assisted by counsel.<sup>22</sup> The decision that a judge is unsuitable to remain in office must be supported by reasons, and such decisions are subject to an internal review at the request of the judge.<sup>23</sup> The entire process takes place under the guiding principles of 'judicial

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<sup>18</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc A/HRC/11/41 (2009) (hereafter *2009 Annual Report*), para 64.

<sup>19</sup> Constitution, Sixth Schedule, para 23.

<sup>20</sup> Vetting of Judges and Magistrates Act 2011, ss 7–9.

<sup>21</sup> The Board's general reports and decisions on the suitability of individual judges are available at [www.jmvp.or.ke](http://www.jmvp.or.ke).

<sup>22</sup> Vetting of Judges and Magistrates Act 2011, s 19; Vetting of Judges and Magistrates (Procedure) Regulations, reg 21.

<sup>23</sup> Vetting of Judges and Magistrates Act 2011, s 21–22.

independence, natural justice and international best practice'.<sup>24</sup> The UN Special Rapporteur has also underscored the need for transitional processes of this kind to be conducted in accordance with the *UN Basic Principles on the Independence of the Judiciary*,<sup>25</sup> which set out procedural safeguards and principles of fairness that are discussed in more detail in the next chapter of this volume.

#### *Different types of judicial appointments with security of tenure*

2.2.14 In the modern Commonwealth, judicial appointments now take the form of certain established types, each offering a different kind of secure tenure. Judges are no longer appointed to full judicial office in the higher courts of any Commonwealth state to serve 'at pleasure' of the appointing authority, as they once were by English monarchs before the Act of Settlement during the historical period discussed above.<sup>26</sup> But there are also no longer any Commonwealth jurisdictions in which judges are automatically appointed for life.<sup>27</sup> This leaves two main types of appointment: those which are **permanent until the judge reaches a mandatory age of retirement**, and those which last **for a fixed period of time**, sometimes described as fixed-term contract appointments, although the position of judge is better described as a public office rather than a private law contractual relationship.

#### *Fixed-term appointments in smaller jurisdictions*

2.2.15 As already noted, the *Latimer House Guidelines* recognise that fixed-term appointments may be 'inevitable', and call for such appointments to be 'subject to appropriate security of tenure'.<sup>28</sup> This represents an acknowledgement that **some smaller jurisdictions, mainly for reasons of population size and geography, have no alternative but to seek judges who are prepared to serve in the higher and appellate courts for a fixed term of years**. There may be a shortage of candidates with the legal skills

<sup>24</sup> Vetting of Judges and Magistrates Act 2011, s 5.

<sup>25</sup> *Annual Report 2009* (n18), para 64.

<sup>26</sup> See para 2.2.6–2.2.7 above.

<sup>27</sup> In Tonga there is a discretion to appoint a judge for life rather than a fixed term (Constitution, s 87), and likewise in Tuvalu (Constitution, s 126(1)). Lifetime appointments were abolished in the United Kingdom by the Judicial Pensions Act 1959. A compulsory retirement age appears to have been in place in most parts of the Commonwealth during the colonial period, and was generally retained on independence: see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens 1966), 504–505.

<sup>28</sup> *Guideline II.1*.

## TENURE

and experience required at this level of the court system, where judges authoritatively determine the law of the jurisdiction and contribute to its development through precedent. Fixed-term appointments may be more attractive to individuals who are not prepared to commit to a life-long judicial career, or to non-nationals who may be prepared to accept a part-time travelling post of a limited period. Indeed, provision is sometimes made for judges to be appointed for a single case.<sup>29</sup> It is not possible within the scope of this study to enquire into the full reasons why certain jurisdictions rely solely, or to a significant extent, on fixed-term judges, and whether this is indeed unavoidable in every case. In two Commonwealth member states judges are only appointed on a fixed-term basis.<sup>30</sup> Several more jurisdictions make special provision for fixed-term appointments to their highest court, perhaps because of greater difficulties encountered in attracting appellate judges and possibly also because there is perceived value in having non-national judges to assist the development of the law in harmony with the jurisprudence of comparable countries.<sup>31</sup>

### *Fixed-term judges serving alongside permanent appointees*

2.2.16 It is more difficult to justify the appointment of judges for a fixed period of years to serve alongside judges holding permanent appointments in the same courts. Here too, however, much depends on the arrangements in place in a particular jurisdiction, including:

- how long the fixed period of appointment is, assuming there is a standard period;
- whether it is renewable;
- which bodies are responsible for deciding on appointments and renewals (if applicable), and what processes they follow; and
- what mechanisms govern the removal of such judges before the expiry of their term.

2.2.17 The latter two of these questions raise issues discussed in the previous and next chapters of this volume respectively, and best practice would require that fixed-term judges should be subject to the same safeguards as permanent judges are, both in appointments and in the determination of questions of removal. The first two questions, regarding length of appointment and renewability, raise concerns that are more

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<sup>29</sup> For example in the Court of Appeal of Tuvalu by the Superior Courts Act, s 8(3).

<sup>30</sup> Kiribati and Papua New Guinea.

<sup>31</sup> These include Botswana, Belize, Fiji, Lesotho and Samoa.

particular to fixed-term appointments. **Renewable fixed-term appointments are particularly problematic**, as they may place the career interest of a judge at odds with the judicial responsibility for upholding the rule of law in cases involving the government or other powerful persons who may have influence over the renewal decision. Such conflicts of interest may pose a risk to both the actual and perceived independence of the judiciary. **The weakest guarantee of judicial independence is provided by a short and renewable term of appointment, which is particularly questionable if the executive is responsible for appointments or renewals or both.** The UN Special Rapporteur has stated that ‘a short term for judges weakens the judiciary, affects their independence and their professional development’ and noted concerns about renewals which take the form of judges submitting to regular review by the executive.<sup>32</sup>

2.2.18 The Venice Commission advises against fixed-term appointments for ordinary judges due to concerns about judicial independence, although the Commission makes an exception for constitutional court judges who are appointed for a fixed term in some European countries.<sup>33</sup> The African Commission on Human and Peoples’ Rights takes a more categorical stance in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, declaring that judicial officers should not be ‘appointed under a contract for a fixed term’.<sup>34</sup> In the Maldives, one of the smaller Commonwealth jurisdictions, the 2008 Constitution provides for contract appointments to become obsolete.<sup>35</sup> Such provisions appear to be designed to address an excessive reliance on fixed-term judges at the expense of permanent appointments.

#### *Fixed-term appointments and the use of acting or temporary judges*

2.2.19 **There is a countervailing argument in favour of allowing fixed-term appointments to be made on a moderate scale as an alternative to the use of temporary or acting judges, whose tenure is even less secure.** This argument will only be outlined briefly here, as it is not the purpose of this study to deal with the strong and conflicting arguments about the circumstances in which it may be appropriate to use temporary or acting judges.

<sup>32</sup> *Annual Report 2009* (n18), para 54.

<sup>33</sup> *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD(2010)004, para 35.

<sup>34</sup> art A.4(n)(3).

<sup>35</sup> Constitution, art 148(d).

## TENURE

2.2.20 The question of acting or temporary judges was left open in the *Latimer House Guidelines*, which recognise that ‘the making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions’.<sup>36</sup> Such practices have long been criticised, for example in the *IBA Minimum Standards of Judicial Independence* adopted in 1982, which recommend that ‘[t]he institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition’.<sup>37</sup> Yet it is striking that a large number of Commonwealth jurisdictions still make provision in their constitutions for temporary or acting judges.<sup>38</sup>

2.2.21 Fixed-term appointments may be a better alternative in these settings because they present fewer drawbacks than the use of acting or temporary judges while benefitting from the same possible justifications. Authorising legally trained persons to serve on the bench temporarily might be justifiable if there is a need for judicial numbers to be flexible in response to a varying case load, and arguably also in order to provide an opportunity for prospective candidates to gain experience before applying for permanent judicial office. If this is the case, then fixed-term appointments should also be considered in those situations, as they would offer better protection for the independence of the judiciary. This compromise would also allow persons interested in applying for permanent judicial office to gain judicial experience, which can be maximised by offering part-time positions tenable for a fairly long fixed period.<sup>39</sup> Both arguments have only limited reach, however, as it is hard to justify allocating a large proportion of judicial work in the higher courts to persons seeking experience of adjudication, or to judges to whom the state chooses not to make a permanent commitment for the sake of maintaining flexibility in judicial numbers.

### *Fixed-term judges in constitutional courts*

2.2.22 Specialist constitutional courts, which are often composed entirely of fixed-term judges, require separate consideration. As mentioned in the previous chapter, such courts are more often found in

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<sup>36</sup> *Guideline II.1* fn 4.

<sup>37</sup> art 23(b).

<sup>38</sup> These include Bangladesh, Botswana, Cyprus, Ghana, India, Lesotho, Malta, Mauritius, Nauru, New Zealand, the Organisation of Eastern Caribbean States, South Africa, Tanzania, Uganda, and Zambia.

<sup>39</sup> See the Venice Commission, *Judicial Appointments*, CDL-AD (2007)028, para 38–43.



civil law countries and there are very few examples in the Commonwealth, with only Malta and South Africa having courts which indisputably belong in that category.

2.2.23 Appointments to the Constitutional Court of Malta are permanent until the age of retirement.<sup>40</sup> In South Africa, Constitutional Court judges are appointed for a single, non-renewable term of between 12 and 15 years depending on whether the judge has held prior judicial office, and are subject to provisions concerning the mandatory age of retirement.<sup>41</sup> **As these appointments are for a long period, not renewable, and typically represent the pinnacle of a judicial career, it is hard to speak of any conflict of interest arising in the event of a judge completing their term before the usual age of retirement.**<sup>42</sup>

2.2.24 In contrast to the South African Constitutional Court, members of the Constitutional Council of Mozambique hold office for renewable terms of five years.<sup>43</sup> The previous chapter noted that most of the members of this Council are appointed by political parties in proportion to the number of seats they hold in the legislature, and that the Council is in reality a hybrid judicial-legislative body.<sup>44</sup> It is best understood in that light as both the appointment formula and the short, renewable term of office create opportunities for political influence that would not meet the Commonwealth standards for appointments and tenure in an ordinary court.

#### *Mandatory ages of retirement*

2.2.25 **Appointing judges until a mandatory age of retirement** serves several purposes. Such security of tenure serves as **a bulwark against external pressure and ensures that judges do not face conflicts of interest**

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<sup>40</sup> Constitution, art 97(1).

<sup>41</sup> Constitution, s 176(1) and Judges' Remuneration and Conditions of Employment Act 2001, s 4. Constitutional Court judges who have not held prior judicial office are appointed for 15 years, and all others are appointed for a period of at least 12 years and any balance of time during which their total period of judicial service remains less than 15 years. Constitutional Court judges retire when they reach 15 years of judicial service or the age of 75, whichever is the earlier.

<sup>42</sup> It is likely to be rare for members of the South African Constitutional Court to reach the end of their term before retirement age, particularly as it is now also the highest appellate court in non-constitutional matters and its members are increasingly likely to be appointed by promotion from other courts.

<sup>43</sup> Constitution, art 242(2).

<sup>44</sup> See Chapter 1 at para 1.5.6.

## TENURE

**arising from a possibility of renewal** as discussed above. To a degree, these advantages are qualified by the setting of a mandatory retirement age. Requiring judges to retire at a suitable age serves other important objectives, however. Judicial office is made more dignified and potentially more attractive if judges know that they will be able to enjoy a comfortable retirement, often under a scheme which sees judges achieving a full pension after a relatively small number of years, reflecting the fact that in many common law systems judges are only appointed to the bench after a long and distinguished career at the bar. There is also the spectre of the judge of advanced years and deteriorating mind who refuses to resign or accept voluntary retirement. In many jurisdictions the removal of a judge on grounds of capacity requires the same onerous procedure to be followed as removal for misconduct. A mandatory retirement age helps avoid such costly and acrimonious proceedings.

2.2.26 The UN Human Rights Committee has observed that the right to a fair trial before an independent tribunal entails that the age of retirement should be 'adequately secured by law'.<sup>45</sup> **It has been recognised as a violation of judicial independence for the age of retirement to be lowered with retroactive effect.**<sup>46</sup> There is a danger that such changes might amount to a backdoor method of removing judges, which would be akin to the court restructuring measures discussed above.<sup>47</sup> Many Commonwealth states fix the age of judicial retirement in their constitutions. In those which do not, perhaps in order to retain flexibility for future changes in life expectancy, it is commonly provided that any change cannot apply to a judge who is already in office without the consent of that judge.<sup>48</sup>

2.2.27 Retirement ages vary between Commonwealth jurisdictions and sometimes between different courts within the same jurisdiction. Figure 4 (overleaf) sets out all the mandatory retirement ages that apply in the various higher courts of Commonwealth states.<sup>49</sup> The range extends from

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<sup>45</sup> *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007), para 19.

<sup>46</sup> See International Association of Judges, *International Charter of the Judge* (adopted 1998), art 8.

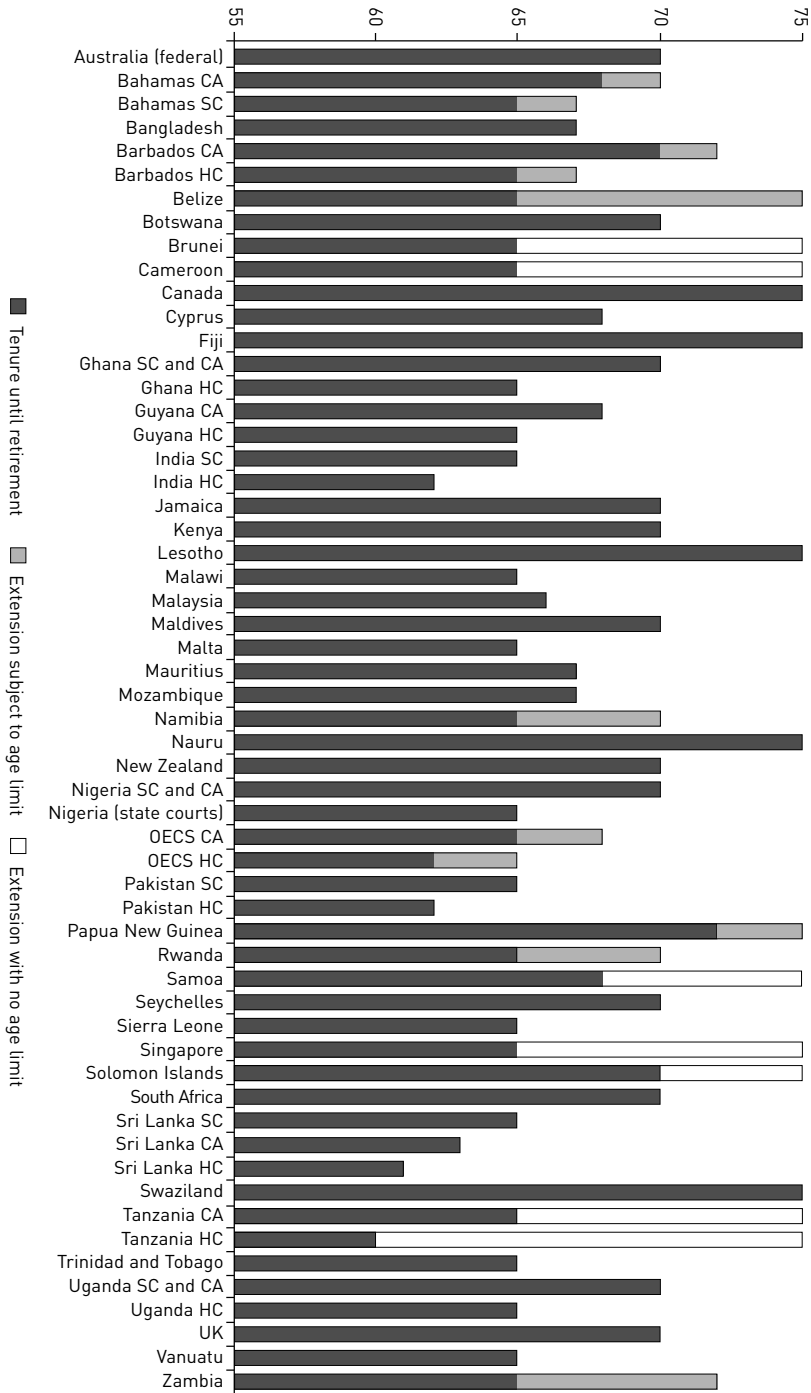
<sup>47</sup> See para 2.2.8–2.2.10 above.

<sup>48</sup> This is guaranteed by the constitutions of Australia, Lesotho and Malawi. The Constitution of Botswana authorizes Parliament to vary the retirement age of judges without explicit restriction (ss 97(1) and 101(1)).

<sup>49</sup> Kiribati, Tonga and Tuvalu are omitted as there is no prescribed retirement age. In the case of Cameroon, the figures given relate to judges of the highest grade and those *hors d'hierarchy*.

TENURE

Figure 4 Mandatory retirement ages and extension of tenure



## TENURE

the age of 75, which applies to Canadian federal judges<sup>50</sup> and members of the higher courts of several smaller jurisdictions,<sup>51</sup> to the age of 60 in the case of High Court judges in Tanzania.<sup>52</sup>

2.2.28 The level at which the age of mandatory retirement is set should be informed by the need to avoid conflicts of interest that may pose a risk to judicial independence. Problems are likely to arise in situations where the retirement age is low and judges may be eligible for lucrative or prestigious post-retirement positions over which the government has a significant influence, for example appointments to chair public inquiries or, in some jurisdictions, to remain on the bench, either through an extension of tenure or as an acting judge. This danger is acutely captured by Geoffrey Robertson QC in a report prepared on behalf of the International Bar Association:

One form of pressure that has gone unnoticed, but which offers a particularly powerful incentive for judges subject to early retirement to favour the government's case, is the prospect of lucrative post-retirement employment on government inquiries or commissions. The most intellectually dishonest judgment I have ever witnessed came from a judge close to retirement, who unconscionably protected the corrupt son of the Prime Minister of a small island nation from having evidence of his guilt collected outside the country by a royal commission. I thought he must have been bribed, but when I later heard that the Prime Minister had appointed him to various commissions, it struck me that judges may turn their coats in the hope of future government favours to supplement their pensions. That is one reason why it is necessary to raise judicial retirement ages, prematurely set in some countries at 60 or 65.<sup>53</sup>

2.2.29 While the data presented in Figure 4 establishes that **a mandatory retirement age of at least 60 is a minimum standard applicable throughout the Commonwealth, best practice in modern conditions would probably require the mandatory age to be set at, or closer to, 70 years.** The argument for setting a relatively high mandatory retirement age does not presuppose that a significant number of judges will in fact succumb to temptation and favour government interests, but rather reflects the need

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<sup>50</sup> Constitution, s 99(2) and Supreme Court Act 1985, s 9(2).

<sup>51</sup> Fiji, Lesotho, Nauru, and Swaziland.

<sup>52</sup> Constitution, art 110(1).

<sup>53</sup> *Judicial Independence: Some Recent Problems* (2014), available from <http://www.ibanet.org/>, 9. See also Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean* (Hart 2014) 200–202.

to avoid any conflict of interest so as to ensure that judges are manifestly seen to be independent.

*Discretions to extend judicial tenure in office*

2.2.30 The existence of discretions to extend the tenure of a judge beyond the mandatory age of retirement calls for particular comment in view of the nature of conflicts of interest that may arise. Some types of extension that are relatively innocuous, for example short extensions to enable a judge to deliver pending judgments or the use of retired judges to sit in an acting capacity, may be justified, as discussed above, at times when there is a need for judicial numbers to be flexible. **A discretion to extend tenured judicial appointments may be more problematic**, however, as this is likely to be a more coveted prize, particularly if it enables members of the highest court in a jurisdiction to remain in office for a significant period of time.

2.2.31 The nature and severity of any conflict of interest is affected by the period of extension that is possible, and by the person or body responsible for making the decision and the process they are required to follow. **The risks are obvious if the decision is entrusted to the executive alone**, but less so if an independent appointments body is involved. Arrangements may vary depending on the judicial position in question. For example, in several Commonwealth Caribbean jurisdictions the decision on extension of tenure is entrusted to the same person or body responsible for the initial appointment, with the result that the greatest risk applies to the position of Chief Justice, which is commonly an appointment made by the executive, while other judges tend to be chosen by independent judicial appointments commissions.<sup>54</sup> The Constitutional Court of South Africa has struck down a provision that allowed the President a discretion to extend the tenure of the Chief Justice, a power which was not subject to statutory criteria and did not apply to other members of the Constitutional Court.<sup>55</sup>

2.2.32 Figure 4 shows the jurisdictions in which it is possible to extend a judge's tenure, and the maximum age until which such extensions may run, where such a limit is specified. When considering this information it is important to remember that it is not simply the age of retirement and

<sup>54</sup> O'Brien (n53), 200–201.

<sup>55</sup> *Justice Alliance of South Africa v President of Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

## TENURE

the length of possible extensions that determine whether there is a serious conflict of interest, but also the person or body which decides on the extension and the process they are required to follow.<sup>56</sup>

### *Physical or mental incapacity*

**2.2.23 The need for a discretion to extend judicial tenure may be reduced if appropriate processes are established to deal with judges who become medically incapable of performing their functions before they reach the mandatory age of retirement (which could then be set higher).** This is a response to the concern that relying on the standard mechanism for removal from office could give rise to costly and confrontational proceedings of an adversarial nature in the case of judges who become mentally or physically incapacitated but are unwilling or unable to resign. Such mechanisms are examined in the next chapter.

**2.2.34 It is possible for removal proceedings to be modified to deal with situations in which the question of a judge's physical or mental capacity has been raised, or even to provide alternative routes to removal in the most serious cases.** The 2013 constitution of Fiji presents an example of the former. If there is an allegation of 'inability to perform the functions of his or her office (whether arising from infirmity of body or mind or any other cause)', the Judicial Services Commission may establish a board of three medical practitioners to inquire into the matter and provide binding advice.<sup>57</sup> An alternative mechanism for dealing with the most serious medical cases exists in the United Kingdom where the Lord Chancellor, acting with the agreement of specified senior judges in leadership positions, has the power to declare the office of a judge to be vacated if a medical practitioner certifies that the judge is 'disabled by permanent infirmity from the performance of the duties of his office' and for the time being incapacitated from resigning.<sup>58</sup> Both provisions reflect the need to distinguish issues raised by medical incapacity from other grounds for removal from office, and to make better use of medical expertise where appropriate.

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<sup>56</sup> See Appendix 2. This list includes only jurisdictions which make provision for the extension of a judge's tenure of his or her pre-retirement position, and does not include the possibility that judges may be appointed to fixed-term positions after reaching retirement age.

<sup>57</sup> Constitution, s 112(3). Where the question concerns the mental or physical capacity of the Chief Justice or President of the Court of Appeal the process is initiated by the Prime Minister (s 111(3)).

<sup>58</sup> Senior Courts Act 1981, s 11(8)–(9); Constitutional Reform Act 2005, s 36.

### 2.3 Protection of judicial remuneration

2.3.1 International instruments do not usually attempt to specify how much judges should be paid, which must depend to some extent on the state resources that are available. The *Latimer House Guidelines* recognise that '[a]ppropriate salaries and benefits ... are essential to the proper functioning of the judiciary'.<sup>59</sup> The *UN Basic Principles on the Independence of the Judiciary* similarly assert, in common with a number of regional declarations, that there should be 'adequate remuneration' for judges.<sup>60</sup> The *Basic Principles* go on to state that such remuneration, as well as conditions of service and pensions, 'shall be adequately secured by law'. This raises twin questions concerning how legal frameworks can protect both the **level** of judicial salaries and benefits and their **stability** in the face of situations in which reductions may be called for.

2.3.2 First, as far as the level of remuneration is concerned, the official commentary to the *Latimer House Guidelines* observes that 'adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice.'<sup>61</sup> While this principle applies to the funding of the court system as a whole, the *Latimer House Guidelines* also recognise that a special mechanism may be required to determine the financial package to which judges are entitled:

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.<sup>62</sup>

2.3.3 The need for an independent body to be responsible for the setting or review of judicial remuneration has become a constitutional issue in some of the Commonwealth jurisdictions discussed below.

2.3.4 Secondly, stability of judicial remuneration has clear implications for the independence of the judiciary. If the government were able to use the threat of salary reductions to bring financial pressure to bear on the

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<sup>59</sup> *Guideline II.2.*

<sup>60</sup> art 11. The same phrase is found in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (art A.4(m)) and the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region* (art 31).

<sup>61</sup> *Guideline II.2*, n5 (commentary by the Commonwealth associations which drafted the *Guidelines*).

<sup>62</sup> *Guideline II.2.*

## TENURE

judiciary, then an actual or perceived conflict of interest could arise when judges are called upon to adjudicate on cases involving the government. As this section shows, there are several ways in which Commonwealth states have used legal frameworks to prevent governments from attempting to influence the judiciary in this way.

### *Level of judicial salaries and benefits*

2.3.5 Since the *Latimer House Guidelines* refer to the need to maintain the value of 'salaries and other benefits' this raises questions concerning both the scope and value of the judicial remuneration package, as well as the method by which it is set and adjusted.

2.3.6 As regards scope, the reference to 'other benefits' alongside judicial salaries should be understood as including at least judicial pensions, which are mentioned specifically in both the *UN Basic Principles* and the *IBA Minimum Standards*, and as discussed above form an important part of the package which may motivate individuals to apply for judicial office.<sup>63</sup> The Committee of Ministers of the Council of Europe, in its *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, sets out various other benefits which good practice would require states to provide:

Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working.<sup>64</sup>

2.3.7 The Committee further recommends that the level of salaries and other benefits should be 'commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions'.<sup>65</sup> This succinctly captures both the reward and risk factors that should determine the range in which judges are paid, with further variations possible depending on available resources and the cost of living in a particular country, the supply and demand of persons with the skills required at higher levels of the court

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<sup>63</sup> *UN Basic Principles on the Independence of the Judiciary*, art 11; *IBA Minimum Standards of Judicial Independence*, art 14. See also the African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, art A.4(m).

<sup>64</sup> CM/Rec (2010) 12, para 54.

<sup>65</sup> *Ibid.*



system or in specialist positions, and the traditions of a legal culture that may result in a sufficient number of senior lawyers accepting a significant drop in income relative to their earnings in private practice.

*The role of independent bodies*

2.3.8 At a more practical level, the question is who should set the value of judicial salaries and other benefits and review these in the light of inflation and general wage rises in times of increasing prosperity: The *IBA Minimum Standards* state that '[j]udicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.'<sup>66</sup> This supports the recommendation in the *Latimer House Guidelines* that judicial salaries and benefits should be determined by an independent body. The Constitution of Malawi provides that the salary of judges 'shall be increased at intervals so as to retain its original value'.<sup>67</sup> In others, the process of independent review is established by statute.<sup>68</sup>

2.3.9 In the absence of such a legal framework, and indeed any explicit constitutional guarantee concerning judicial remuneration, the Supreme Court of Canada gave a decision which led to the establishment of what became the Judicial Compensation and Benefits Commission, an independent body responsible for keeping the level of judges' remuneration under review.<sup>69</sup> The precise powers of this body and the extent to which its financial recommendations are binding on the executive have been the subject of considerable further litigation. This does not represent an ideal picture of the interaction between the judiciary and other branches of government, and may convey damaging messages to the public about the financial motivation of judges, on the one hand, and the value politicians place on judicial work, on the other.

2.3.10 The experience of Canada is put into perspective by that of other jurisdictions where disputes about the operation of an independent salary review process have been used to question the impartiality of the courts, albeit without success.<sup>70</sup> This reinforces the conclusion that legal

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<sup>66</sup> art 14.

<sup>67</sup> s 114.

<sup>68</sup> These include the Bahamas, Jamaica, New Zealand, South Africa and Vanuatu.

<sup>69</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 150 DLR (4th) 577.

<sup>70</sup> See the litigation in the Bahamas discussed in O'Brien (n53) 206.

## TENURE

frameworks alone are not necessarily sufficient to prevent damaging controversies about the level of judicial remuneration. In summary, **the establishment of independent bodies to review judicial salaries and benefits (including pensions) represents best practice. Ideally such bodies should be established within a constitutional and statutory framework and all three branches of government should approach matters of judicial remuneration in a co-operative rather than a confrontational manner.**

### *Stability of judicial remuneration*

2.3.11 The *Commonwealth Latimer House Principles* declare that '[a]rrangements for ... protection of levels of remuneration must be in place'.<sup>71</sup> This leads to the crucial question of how legal frameworks should be designed to ensure that existing levels of remuneration are not subject to manipulation by governments in such a way as to penalise or intimidate judges, and to avoid the conflict of interest that would exist if the government were to have an unfettered power to do so, even if there are no announced plans to exercise that power.

2.3.12 **A large majority of Commonwealth member states have constitutional or statutory provisions in place to protect current judicial remuneration.** Such provisions exist in 43 of 48 Commonwealth jurisdictions (89.6%).<sup>72</sup> The wording of these guarantees varies in several respects, including the scope of remuneration that is protected (although all include salaries), and crucially also the nature of the legal restraint that applies to any proposed reductions.

### *Prohibition of the reduction of judicial salaries*

2.3.13 The most commonly found guarantee is a **rigid rule which provides that judges' salaries may not be varied to their disadvantage after their appointment.** Such prohibitions exist in 37 jurisdictions (77.1%).<sup>73</sup> Their clarity is helpful as a constraint on the executive, and in the case of

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<sup>71</sup> *Principle IV(b).*

<sup>72</sup> The exceptions are Brunei Darussalam, Cameroon, Canada, Mozambique and Tonga. In Tonga the constitutional protection of judicial salaries was removed by Act of Constitution of Tonga (Amendment) (No 2) Act 2010, s 28.

<sup>73</sup> Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Cyprus, Fiji, Ghana, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Namibia, Nauru, New Zealand, Organisation of Eastern Caribbean States, Rwanda, Seychelles, Sierra Leone, Singapore, South Africa, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Tuvalu, Uganda, the UK, Vanuatu, and Zambia.

entrenched constitutions the prohibition may also apply to the legislature, which makes it even more difficult for elected politicians to bring financial pressure to bear on the judiciary. However, such provisions do nothing to ensure that politicians will not permit judicial remuneration to languish and be eroded by inflation, and may even discourage increases that cannot be reversed.

*No reductions disproportionately targeting the judiciary*

2.3.14 Five Commonwealth jurisdictions (10.2%) take a somewhat more flexible approach. Reduction of judicial salaries is not prohibited outright, but in order to prevent the judiciary from being singled out, it is typically stipulated that any reduction must be made as part of a measure applying generally and evenly to all holders of public office.<sup>74</sup> This allows states somewhat more leeway in the event of an economic crisis and may also counteract the reluctance to increase judicial salaries in more prosperous times.

2.3.15 There is some support internationally for this approach. The *IBA Minimum Standards* take the position that judicial salaries ‘cannot be decreased during the judges’ services except as a coherent part of an overall public economic measure’.<sup>75</sup> The *UN Basic Principles* require that ‘adequate remuneration’ and also pensions ‘shall be adequately secured by law’.<sup>76</sup> These international norms suggest that a complete prohibition of salary reductions is not required. It may be sufficient if the legal framework in a jurisdiction contains more flexible provisions that prevent governments from acting to pressurise the judiciary in particular.

**2.3.16 While the most popular approach in the Commonwealth is for judicial salaries to be rigidly protected against reduction, the minimum standard in this regard requires only a legal framework that is sufficient**

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<sup>74</sup> This is the case in Fiji, Kiribati, Papua New Guinea, Samoa and Solomon Islands. In Pakistan, minimum salaries for the judiciary are established (Constitution, Fifth Schedule).

<sup>75</sup> See *IBA Minimum Standards of Judicial Independence*, art 15(b). The *Recommendation to Member States on Judges* of the Council of Europe similarly states (at para 54): ‘Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.’ See also, the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*, art 31: ‘The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.’

<sup>76</sup> art 11.

## *TENURE*

**to ensure that governments do not single out judges for disproportionate reductions in remuneration.** As noted above in relation to the level of remuneration, a constructive and co-operative relationship between the branches of government is required in order to ensure that this more flexible standard of protection remains workable.

# CHAPTER 3 – REMOVAL FROM OFFICE

## 3.1 The removal of judges and the rule of law

3.1.1 The question of when a judge may be removed from office is of vital importance to the rule of law. In general, states need a removal mechanism, though a rigorous judicial selection process and high standards of ethical conduct may help to minimise the need for its use. Besides the risk that a judge may become mentally or physically incapacitated while in office, there is always the danger of the rare judge who engages in serious misconduct and refuses to resign when it becomes clear that his or her position is untenable. On the other hand, there is the threat to judicial independence when the removal process is used to penalise or intimidate judges. The challenge for legal systems is to strike the correct balance between these concerns.

3.1.2 Both sides of the problem are reflected in the *Commonwealth Latimer House Principles*. *Principle IV – Independence of the Judiciary* indicates that there are only very limited circumstances in which a judge may be removed from office:

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

3.1.3 The reasons that may justify removing a judge are set out more fully in *Principle VII(b) – Judicial Accountability*:

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour *that are required to support the principle of independence of the judiciary*, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the

## REMOVAL FROM OFFICE

removal of a judicial officer should include *appropriate safeguards to ensure fairness*.<sup>1</sup>

3.1.4 Removal from office is by no means the only way in which judges are held accountable, and should not be the first demand of those dissatisfied with a judicial decision. The basis of judicial accountability more generally is implicit in the opening sentence of *Principle VII(b)*, which refers to judges being ‘accountable to the Constitution and to the law’. The principal way in which judges are expected to account for the performance of their legal and constitutional duties is by giving reasoned judgments and rulings in open court. Appeal mechanisms serve as a further check in many cases. A judge acting in good faith should incur no personal sanction if his or her decision is overturned on appeal. Indeed, the rule of law would suffer if judges were deterred from applying the law as they saw it, and such a situation would be particularly detrimental to the independence of the judiciary, of which the decision-making autonomy of individual judges is a vital part.

3.1.5 However, *Principle VII(b)* also recognises that there are circumstances in which disciplinary action may be the only way in which judicial accountability can be achieved. Removal from office is the most severe disciplinary sanction, and some jurisdictions also make provision for lesser measures such as a formal reprimand.<sup>2</sup> The focus of this study is only on the disciplinary process to the extent that it can lead to the removal of a judge.<sup>3</sup> The rule of law also enters into this side of the equation, as suggested by the mention of ‘proper procedures for the removal of judges on grounds of incapacity or misbehaviour *that are required to support the principle of independence of the judiciary*’.<sup>4</sup> The challenge is then to distinguish judicial ‘misbehaviour’, in the sense of conduct which in some way undermines the independence or propriety of the judiciary, from good faith errors and differences of judicial opinion for which judges should not face personal sanction. Even if the allegations of misconduct relate to a judge’s actions and behaviour outside

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<sup>1</sup> emphasis added.

<sup>2</sup> See *Guideline VI.1(a)(ii)–(iii)* of the *Latimer House Guidelines*, which recommends that the Chief Justice should be responsible for any disciplinary measures short of removal and that no judge should be reprimanded in public.

<sup>3</sup> For a recent discussion of different models for deciding on disciplinary measures short of removal see Gabrielle Appleby and Le Mire, ‘Judicial Conduct: Crafting a System that Enhances Institutional Integrity’ (2014) 38 *Melbourne University Law Review* 1.

<sup>4</sup> emphasis added.

the court room, there is still a danger that the real aim of proceedings may be to remove a judge whose rulings are considered troublesome by those in authority. Identifying 'misbehaviour' that warrants a judge's removal is therefore likely to be a delicate task in practice, and one which calls for 'appropriate safeguards to ensure fairness', as envisaged by *Principle VII(b)*.

*Main issues discussed in this chapter*

3.1.6 The aim of this chapter is to examine both substantive and procedural aspects of the removal of judges, as the discussion of the *Commonwealth Latimer House Principles* has already shown that these can each give rise to difficult questions with implications for the rule of law. It is possible to discuss substantive grounds as a general matter across jurisdictions, but in the area of process, once the main removal mechanisms and basic principles of fairness have been introduced, it is more appropriate to give separate consideration to the process questions that arise in relation to each removal mechanism.

3.1.7 The issues discussed in this chapter therefore fall under the following headings:

- Substantive grounds of removal;
- Removal mechanisms;
- Removal via an *ad hoc* tribunal;
- Removal by disciplinary councils; and
- Parliamentary removal.

3.1.8 As in previous chapters, these matters are first considered from the point of view of general principle and then in more detail in the light of the practice of Commonwealth member states.

## **3.2 Substantive grounds of removal**

*General principles*

3.2.1 International statements and declarations on the independence of the judiciary have articulated at least three broad principles that pertain to the substantive grounds for removal of judges. The first is that **the grounds of removal must be discernible**. This principle is enshrined in the *UN Basic Principles on the Independence of the Judiciary*:

## REMOVAL FROM OFFICE

All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.<sup>5</sup>

3.2.2 The link with judicial independence is clear. If removal grounds are not specified then judges cannot be said to have security of tenure in any meaningful sense, as they would serve at the whim of whichever person or body is authorised to remove them. Establishing the grounds of removal in advance also has the positive rule of law value of informing judges about the minimum standards of conduct that are expected of them, and provides fair warning to any who may be tempted to transgress those standards.

3.2.3 Secondly, states should not apply grounds of removal that endanger judicial independence. **Incapacity and misconduct are the sole grounds on which removal is justified.** The *UN Basic Principles* state that judges 'shall be subject to removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'.<sup>6</sup> This wording is echoed and amplified by the *Commonwealth Latimer House Principles*, which refer to 'incapacity or misbehaviour that *clearly* renders them unfit to discharge their duties'.<sup>7</sup>

3.2.4 The terms 'incapacity' and 'misbehaviour' are helpfully explained by the *Latimer House Guidelines*, which state:

Grounds for removal of a judge should be limited to:

- (A) inability to perform judicial duties and
- (B) serious misconduct.<sup>8</sup>

3.2.5 This formulation indicates that mental or physical incapacity should only be grounds for removal when the judge is effectively prevented from performing his or her functions. The issue of removal or compulsory retirement of judges on medical grounds was considered in the previous chapter.<sup>9</sup> The present chapter therefore focuses on the removal of judges for misconduct.<sup>10</sup>

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<sup>5</sup> art 19. See also the *IBA Minimum Standards*, art 29(a): 'The grounds for removal of judges shall be fixed by law and shall be clearly defined.'

<sup>6</sup> art 18.

<sup>7</sup> *Principle IV*, emphasis added.

<sup>8</sup> *Guideline VI.1.(a)(i)*.

<sup>9</sup> See Chapter 2 at para 2.2.23–2.2.24.

<sup>10</sup> The word 'misconduct' is used instead of 'misbehaviour' as found in the *UN Basic Principles* and the *Commonwealth Latimer House Principles*. Both terms are common in legal usage, but in ordinary parlance 'misbehaviour' sometimes has more trivial connotations.



3.2.6 It is well established that findings of misconduct should not be based on 'the content of their rulings, verdicts, or judicial opinions, judicial mistakes or criticism of the courts', as the UN Special Rapporteur on the Independence of Judges and Lawyers stated in her 2014 report on the theme of judicial accountability.<sup>11</sup> The underlying principle is that judicial decisions made in good faith should be challenged on appeal, and that mechanisms of appeal and review are the means by which the judiciary is collectively accountable under the law, as noted above.<sup>12</sup> This is affirmed in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, issued by the African Commission on Human and Peoples' Rights in 2005, which state that

Judicial officers shall not be removed from office ... by reason only that their decision has been overturned on appeal or review by a higher judicial body.<sup>13</sup>

3.2.7 Thirdly, international principles also address the **degree or level of misconduct that is considered sufficient to warrant the removal of a judge**. The *Latimer House Guidelines* refer to 'serious misconduct'.<sup>14</sup> In the words of the UN Special Rapporteur, removal processes and other disciplinary proceedings should be confined to 'instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute'.<sup>15</sup> Similarly, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* speak of 'gross misconduct incompatible with judicial office',<sup>16</sup> and the *IBA Minimum Standards of Judicial Independence* refer to a judge who 'by reason of a criminal act or through gross or repeated neglect ... has shown himself/herself manifestly unfit to hold the position of judge'.<sup>17</sup>

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<sup>11</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, UN Doc A/HRC/26/32 (2014) [hereafter *Annual Report 2014*], para 87. See also the Committee of Ministers of the Council of Europe is contained in the *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, CM/Rec (2010) 12, para 70.

<sup>12</sup> See para 3.1.4 above.

<sup>13</sup> art A.4(n)(2).

<sup>14</sup> *Guideline VI.1.(a)(A)*.

<sup>15</sup> *Annual Report 2014* (n11), para 87 (citing the Organisation for Security and Co-operation in Europe, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para 25).

<sup>16</sup> art A.4(p).

<sup>17</sup> art 30.

## REMOVAL FROM OFFICE

### *Established standards of judicial conduct*

3.2.8 Commonwealth states have found a number of ways to ensure, within their constitutional traditions, that the removal of judges is based on 'established standards of judicial conduct',<sup>18</sup> which is the first of the international principles discussed above.

3.2.9 The fundamental importance of this principle is recognised by the standard practice of including the grounds of removal in the constitutional framework under which the judiciary is established.<sup>19</sup> In some jurisdictions, judicial codes of conduct provide further grounds for removal, while in others they are merely a source of guidance or an aid to the interpretation of the constitutional grounds.<sup>20</sup> Whether fair warning is indeed provided to judges will depend on how such codes and provisions are interpreted by the bodies called upon to apply them.

### *Misconduct and incapacity as the sole grounds of removal*

3.2.10 Most Commonwealth states specify in their national constitutions that the only grounds on which a judge may be removed from office are, first, 'incapacity' or 'inability to perform the functions of office', and second, 'misbehaviour' or 'misconduct'. In so doing, they mirror the *Commonwealth Latimer House Principles* and other international norms.<sup>21</sup> This represents

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<sup>18</sup> *UN Basic Principles on the Independence of the Judiciary*, art 19, discussed in para 3.2.1 above.

<sup>19</sup> See constitutional provisions discussed in para 3.2.10–3.2.11 below. For historical reasons, the position in England and Wales is somewhat different. As noted in the last chapter, since the Act of Settlement of 1701, judges have served 'during good behaviour' and are subject to removal on an address to the monarch passed by both Houses of Parliament. However, as a matter of strict law the requirement of 'good behaviour' referred to certain common law writs and the former mechanism of impeachment that have since fallen into disuse. Parliament, while legally at large as to the grounds of removal under the bicameral address procedure, has over several centuries developed a strong political convention of respect for the independence of the judiciary. It is accepted that judges may only be removed in cases of serious moral wrongdoing, and Parliament has only once found it necessary to pass an address to remove a judge (in 1830). See Simon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2014) 313–323, and Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens 1966) 485–490 discussing the position in other Commonwealth states with parliamentary removal systems based on the English model (a current list of such states is found below in n114). All such states have now adopted legal grounds for the removal of judges at the national level (generally incapacity or misconduct), either by constitutional amendment or legislation.

<sup>20</sup> Judicial codes of conduct are discussed in para 3.2.13–3.2.15.

<sup>21</sup> See para 3.2.3 above.

good practice at constitutional level, although it remains necessary for these broadly-worded grounds to be interpreted carefully when they are applied in removal proceedings.<sup>22</sup>

3.2.11 A different issue arises with regard to constitutions which list **additional grounds of removal**. Such grounds would seem to go beyond the two listed in the *Commonwealth Latimer House Principles*, unless they are capable of being **interpreted narrowly as particular instances of incapacity or misconduct**.

3.2.12 Incompetence is specified as an additional ground of removal in several states.<sup>23</sup> Formulations of this ground differ. For instance, in South Africa the test is 'gross incompetence',<sup>24</sup> while in Pakistan it is 'inefficiency'.<sup>25</sup> Removal on grounds of incompetence could be justified in the case of judges who wilfully neglect their professional duties. However, wider interpretations raise concern that individual judges might be unfairly held responsible for delays or errors caused by systemic failings such as an excessive case load or inadequate administrative support.

3.2.13 A similar concern arises in those jurisdictions where judges may be removed for failure to comply with a judicial code of conduct or ethics. There is of course much to be said for developing and promulgating codes which assist judges by clarifying in advance how they are expected to approach certain situations, both inside and outside the courtroom. Indeed, the *Latimer House Guidelines* recommended in 1998 that a code of judicial ethics and conduct should be developed at Commonwealth level and adopted in every jurisdiction.<sup>26</sup> This initiative did not come to fruition as the international *Bangalore Principles of Judicial Conduct*, adopted in 2002 after a series of high-level judicial summits, soon became the leading instrument of its kind.

3.2.14 The potential for difficulty therefore does not arise from the existence of judicial codes as such, but only from the decision of some Commonwealth jurisdictions to specify that transgressing the code renders a judge liable to be removed from office.<sup>27</sup> Where broad principles

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<sup>22</sup> See para 3.2.16–3.2.20 below.

<sup>23</sup> Ghana, Kenya, Malawi, Pakistan, South Africa and Uganda.

<sup>24</sup> Constitution, s 177(1)(a).

<sup>25</sup> The Supreme Judicial Council Procedure of Enquiry 2005 (No P Reg113/2005-SJC), defining the meaning of 'misconduct' in the Pakistan Constitution, art 209(6).

<sup>26</sup> *Guideline V.1(a)–(b)*.

<sup>27</sup> These include Pakistan, Nigeria, Kenya, Malaysia and Tanzania.

## REMOVAL FROM OFFICE

of substantive justice are included in such a code, as is the case for example in Pakistan,<sup>28</sup> there is a danger that judges may be removed if the relevant authorities are dissatisfied with the merits of their decisions, whereas the only recourse should be an appeal.<sup>29</sup> In Malaysia the code of ethics obliges judges to uphold the integrity and independence of the judiciary, avoid impropriety, perform duties fairly and efficiently, avoid conflicts of interest, declare assets on request and comply with administrative orders or directions given by their superiors.<sup>30</sup> Not every instance of breach should lead to a judge being removed from office. Conflicts of interest, for example, are more appropriately dealt with by an application for the judge to withdraw from proceedings, which, if refused, could be raised again before a higher court on appeal.

3.2.15 Institutional safeguards may reduce the risk of judges being removed for behaviour falling short of misconduct, but they are not an ideal solution. An example of such a safeguard is the discretion exercised by the Chief Justice in Malaysia, who may decide to refer minor breaches of the applicable code to a disciplinary body which can only impose lesser sanctions.<sup>31</sup> Although it is much better that this decision is made within the judiciary than by a member of the executive, discretion always creates an element of uncertainty and means that judges' tenure is less secure. **In those states where the judicial code may provide grounds for removal of a judge, a clear distinction in law between breaches that warrant removal and those that do not would certainly be preferable.**

### *Degree of misconduct sufficient to warrant removal*

3.2.16 The issue of whether a particular instance of judicial misconduct is sufficiently 'serious' to warrant removal, which is the standard outlined in the *Latimer House Guidelines*, is capable of arising in any jurisdiction, irrespective of whether the grounds for removal consist of an extensive code or a brief reference to 'misconduct' or 'misbehaviour' in a constitutional provision. As noted above, the *Commonwealth Latimer House Principles* posit that removal may be justified in circumstances where it is

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<sup>28</sup> For example, Article 1 of the Judicial Code of Conduct provides: 'On equiponderance stand the heavens and the earth. By equiponderance, oppression meaning unjust and unequal burdens is removed. The judge's task is to ensure that such equality should prevail in all things.'

<sup>29</sup> See para 3.2.6 above.

<sup>30</sup> Judges' Code of Ethics 2009.

<sup>31</sup> Constitution, art 125(3A).

'required to support the principle of independence of the judiciary'.<sup>32</sup> This raises the question of what harm would be done to an independent judiciary if judges who have engaged in particular forms of misconduct are allowed to remain on the bench.

3.2.17 The most straightforward case is that of judges who commit acts of dishonesty or criminality, for example by accepting a bribe. Setting aside their decisions would be a wholly inadequate response as it is not unlikely that such judges would persist in their behaviour, which is the antithesis of independence and impartiality but is often hard to detect. Even if a judge is not enmeshed in wrongdoing of this magnitude, other forms of misconduct may also damage public trust in the judiciary which is essential to its ability to uphold the rule of law in the long run. An example might be blatant expressions of prejudice that are considered reprehensible in society, albeit not so severe as to incur criminal liability.

3.2.18 In a 2009 decision on whether the Chief Justice of Gibraltar should be removed, the Privy Council underscored the need for an **overall assessment to be made of whether the judge could continue to be trusted to carry out his or her role in the administration of justice:**

While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified *where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function*.<sup>33</sup>

3.2.19 **The test of 'destroying' confidence in a judge indicates that the bar is set fairly high**, akin to the position taken in the *IBA Minimum Standards* that it would have to be shown that a judge was 'manifestly unfit' to remain in office.<sup>34</sup> These formulations indicate that it would not be sufficient if a judge's conduct was merely unpopular with a large section of the public, as the shortcomings would have to be judged to be manifest, a more objective standard. The Privy Council also confirmed that while the *Bangalore Principles of Judicial Conduct* could be used to assess the conduct of a judge, not every breach of those principles would be grounds for removal.<sup>35</sup>

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<sup>32</sup> *Principle VII(b)*, discussed in para 3.1.5 above.

<sup>33</sup> *Re Chief Justice of Gibraltar* [2009] UKPC 43 [31], emphasis added. See also *Re Levers (Judge of Grand Court of the Cayman Islands)* [2010] UKPC 24 [50].

<sup>34</sup> Quoted in text to n17 above.

<sup>35</sup> *Re Chief Justice of Gibraltar* (n33) [28]–[31], [224]; *Re Levers* (n33) [48]–[50].

## REMOVAL FROM OFFICE

3.2.20 Identifying a justification for removal, in the form of public confidence in the judiciary and the administration of justice, does not rule out the need for careful interpretation and application of the removal grounds in individual cases. From this point of view, it is desirable that at least one of the bodies involved in deciding on a question of removal should include serving or retired judges with the relevant legal expertise and judicial experience to interpret the grounds of removal and determine whether they have been made out in a particular case. This is one of the ways in which issues concerning the substantive grounds of removal inevitably become linked with issues of process.

### 3.3 Removal mechanisms

#### *General principles*

3.3.1 The *Commonwealth Latimer House Principles* declare, briefly and succinctly, that **the mechanism for determining whether a judge is to be removed from office 'should include appropriate safeguards to ensure fairness'**.<sup>36</sup> This raises two important questions which need to be addressed in practice:

- Which body, or combination of bodies, should be responsible for the removal process; and
- What safeguards such bodies should adopt to ensure fairness.

3.3.2 The *Latimer House Guidelines* provide an important starting-point in both respects:

In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.<sup>37</sup>

3.3.3 **The right to be 'judged by an independent and impartial tribunal'** is very significant as regards the question of which body should determine the removal of a judge. For a start, **it is now generally accepted as a minimum standard that the executive should not be the principal decision-maker with regard to judicial removals.** The UN Human Rights Committee has characterised an executive power to dismiss judges as a threat to

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<sup>36</sup> *Principle VII(b)*, quoted in para 3.1.3 above.

<sup>37</sup> *Guideline VI.1(a)(i)*.

judicial independence which undermines the right to a fair trial before an independent court.<sup>38</sup>

3.3.4 Because the entire removal process need not be in the hands of a single body, it may still be possible to justify a role for the executive at the initial stage of proceedings. The *IBA Minimum Standards of Judicial Independence* envisage such a role in the investigation of allegations against a judge and the initiation of formal disciplinary proceedings.

The executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters.<sup>39</sup>

3.3.5 However, the wisdom of involving the executive at the outset of disciplinary proceedings must be considered in the light of the damage that may be done to judicial reputations, and to the ability of a judge to command the confidence of the public or litigants. These issues are considered below in relation to Commonwealth jurisdictions where they arise.<sup>40</sup> The risk to the independence of the judiciary becomes more acute where the executive also has a power to suspend a judge from office at this stage.<sup>41</sup>

3.3.6 The *IBA Minimum Standards* go on to recommend that the actual decision on whether to remove a judge should be entrusted to an institution that is independent of the executive, and should 'preferably be vested in a judicial tribunal'.<sup>42</sup> This is also the position of the Venice Commission, which recommends that a permanent body such as a court or judicial council should play a decisive role in the decision.<sup>43</sup> The *IBA Minimum Standards* do countenance removal of judges by the legislature, but take the view that the parliamentary chamber or body in question should preferably be required to act 'upon a recommendation of a judicial commission'.<sup>44</sup> This last point is important when considering the

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<sup>38</sup> UN Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007), para 20.

<sup>39</sup> art 4(a).

<sup>40</sup> See para 3.4.5–3.4.15 below.

<sup>41</sup> See para 3.4.12–3.4.13 below.

<sup>42</sup> art 4(b).

<sup>43</sup> *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD(2010)004, para 33–34, 84.

<sup>44</sup> art 4(c).

## REMOVAL FROM OFFICE

processes that are in place in those Commonwealth jurisdictions that have a parliamentary system of removal.<sup>45</sup>

3.3.7 As regards the process to be followed, the overall requirement as affirmed by the *Commonwealth Latimer House Principles* is that the process should be **fair**. It follows that the specific safeguards listed in the passage from the *Latimer House Guidelines* quoted above should not be regarded as exhaustive.<sup>46</sup> The demands of fairness in disciplinary proceedings potentially leading to dismissal are well established under the common law principles of procedural fairness in administrative law, sometimes also known as 'natural justice'. In general terms these will include:<sup>47</sup>

- an independent and impartial decision-maker;
- a presumption of innocence in questions of wrongdoing;
- proceedings that are conducted fairly (a right to know the opposing case, sufficient time to prepare a defence, the opportunity to present evidence and where relevant to cross-examine witnesses);
- a right to legal or other representation;
- a right to reasons, particularly in matters such as these in which there is great public interest; and
- the possibility of judicial review to ensure that all the legal requirements of the removal process are adhered to in practice, and where appropriate also an appeal which may consider both questions of law and fact.

3.3.8 When examining the practice of Commonwealth states, it is not possible to separate the question of which bodies are responsible for removal proceedings from the procedural safeguards those bodies are required to observe. The approach followed in the remainder of this chapter is therefore to identify the main types of removal mechanism that are used and then to examine the workings of each mechanism in order to identify the most appropriate safeguards to secure fairness.

### *Removal mechanisms in use in the Commonwealth*

3.3.9 The removal mechanisms that have been established in Commonwealth jurisdictions belong to one of several models. Figure 5 provides an overview of how the 48 independent Commonwealth jurisdictions approach these matters, based on the body which is

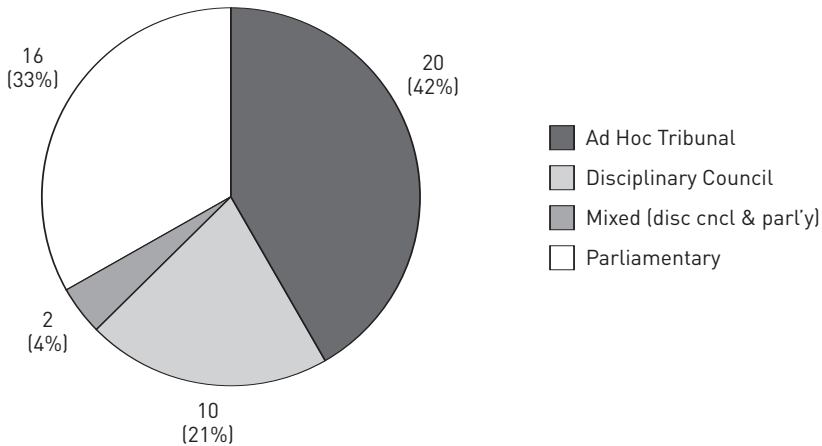
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<sup>45</sup> See section 3.6 of this chapter.

<sup>46</sup> See para 3.3.2 above.

<sup>47</sup> See Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, Ivan Hare and Catherine Donnelly (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2013) Chapters 7 and 10.





**Figure 5** Removal mechanisms

responsible for the main decision on whether a judge should be removed from office. (This body does not always have the final say, for example if there is a right of appeal to a court.)

3.3.10 The most important findings are these:

- **There are no Commonwealth jurisdictions in which the executive has the power to dismiss a judge.**<sup>48</sup>
- The Westminster model of **parliamentary removal**, which was introduced above, **is the standard mechanism of removal in only 16 jurisdictions (34.3% of the total).**<sup>49</sup>
- In 30 jurisdictions (62.5%), a disciplinary body that is separate from both the executive and the legislature decides whether judges should be removed from office. **The most popular model, found in 20 jurisdictions (41.7%) is the *ad hoc* tribunal**, which is formed only when the need arises to consider whether a judge should be removed.<sup>50</sup> **In 10**

<sup>48</sup> It is still common for the executive to be responsible for formally revoking a judge's appointment after another body has determined that the judge should be removed.

<sup>49</sup> Australia (federal), Bangladesh, Canada, India, Kiribati, Malawi, Malta, Maldives, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka, Tuvalu and the United Kingdom. In Nigeria and Rwanda judges who hold certain positions are subject to parliamentary removal, but others are subject to removal by a disciplinary council.

<sup>50</sup> Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organisation of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda and Zambia. The Australian states of Victoria and Queensland, and the Australian Capital Territory, also provide the *ad hoc* tribunals to be formed to consider the removal of a state judge.

## REMOVAL FROM OFFICE

**other jurisdictions (20.8%), the decision is entrusted to a permanent disciplinary council.**<sup>51</sup>

- In two further jurisdictions, judges holding certain senior positions are subject to parliamentary removal, while a permanent disciplinary council is responsible for removal decisions in respect of the rest of the higher judiciary.<sup>52</sup>

3.3.11 It is encouraging that there is no Commonwealth jurisdiction in which the legal framework permits the executive to dismiss judges, although this does not mean that opportunities for abuse do not exist. It is also interesting to note that the Westminster system of parliamentary removal has not proved to be the most popular among Commonwealth jurisdictions. In what follows, the *ad hoc* tribunal, the permanent disciplinary council and parliamentary removal systems are considered in turn. In each case, the overarching question is how Commonwealth jurisdictions can best ensure that proceedings which might result in the removal of a judge include 'appropriate safeguards to ensure fairness', as the *Commonwealth Latimer House Principles* require.<sup>53</sup>

### 3.4 Removal via an *ad hoc* tribunal

#### *A flexible mechanism*

3.4.1 Constitutional provisions authorising the establishment of *ad hoc* tribunals to inquire into specific allegations of judicial misconduct or incapacity are found mostly in Commonwealth jurisdictions which gained their independence from the 1950s onwards.<sup>54</sup> With a few exceptions these are entirely judicial bodies consisting of serving or retired judges, who may sometimes be brought in from other Commonwealth jurisdictions.<sup>55</sup> The function of the tribunal is to inquire into the facts alleged to constitute grounds for dismissal and to make a recommendation which is either immediately binding on the executive or, in some cases, subject to appeal

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<sup>51</sup> Belize, Brunei Darussalam, Cameroon, Cyprus, Mozambique, Namibia, Nigeria, Rwanda, Pakistan, Swaziland, Tonga and Vanuatu.

<sup>52</sup> Nigeria and Rwanda.

<sup>53</sup> *Principle VII(b)*, quoted in para 3.1.3 above.

<sup>54</sup> Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organisation of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda and Zambia.

<sup>55</sup> See para 3.4.12 below, and country summaries in Appendix 2.

or mandatory referral to a court. Once the determination of the *ad hoc* tribunal has become final, the Head of State is then usually responsible for the formal act of removal from office.

3.4.2 A striking feature of the *ad hoc* tribunal system is its flexibility. This can be seen as a strength in several respects. Unlike the members of a permanent disciplinary council, the members of an *ad hoc* tribunal can be chosen in such a way as to exclude individuals with close connections to the judge whose conduct is under scrutiny.<sup>56</sup> Besides offering neutrality, external judges may help to ensure that the tribunal process is benchmarked against good practice in comparable jurisdictions. An *ad hoc* tribunal system should also be relatively cheap, if incidents that warrant formal removal proceedings are as rare as might be expected (either because of the calibre of the judiciary or simply the number of judges in a small jurisdiction). Once formed, the tribunal does not need to find ways to occupy itself in the longer term, and should therefore not present an opportunity for governments that may wish to gain influence over the judiciary.

3.4.3 The countervailing concern is that the *ad hoc* tribunal system may be too flexible. This is a problem particularly if the executive is given power to appoint the tribunal and make various other decisions, which should be subject to procedural safeguards that are laid down in advance. To determine how a tribunal process might operate fairly it is necessary to consider questions which arise at different stages of the process:

- Who is responsible for deciding whether to institute a tribunal inquiry, how any allegations against a judge are investigated and whether the judge is given an opportunity to respond before the decision is made;
- How the members of the tribunal are selected and who selects or approves them;
- If the judge is liable to be suspended while tribunal proceedings are pending, how and by whom that decision is made;
- How tribunal proceedings are conducted, including both procedural and evidential aspects and the provision of reasons for the tribunal's decision; and

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<sup>56</sup> As Sir Kenneth Roberts-Wray (n19) put it in the gendered language of 1966, 'particularly in a country with a comparatively small bench, judges might find it embarrassing to be called upon to adjudicate on charges against a brother judge' (at 500). It may be slightly easier for tribunal members who are retired judges.

## REMOVAL FROM OFFICE

- Whether tribunal decisions are subject to review, appeal or confirmation by a court.

3.4.4 These aspects are considered in turn below. They have a cumulative effect on the fairness of proceedings, and so should be considered together when analysing a particular jurisdiction.

### *The decision to initiate tribunal proceedings*

3.4.5 **The decision to institute tribunal proceedings against a judge should not be taken lightly.** The mere fact that tribunal proceedings have been commenced will generally be understood as signalling that the judge faces credible allegations of misconduct which are serious enough that, if proved, would warrant the removal of the judge from office. The impact is usually immediate and may not be fully undone even if the judge is subsequently cleared. It follows that the initial phase which precedes the making of such a decision is a particularly sensitive one, as the *UN Basic Principles of the Judiciary* recognise by requiring that, when a charge or complaint is made against a judge, '[t]he examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge'.<sup>57</sup>

3.4.6 The *UN Basic Principles* clearly envisage that prior to any official commencement of removal proceedings there should be some form of investigation of the allegations. This is also recommended by the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*:

... there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.<sup>58</sup>

3.4.7 Preliminary investigations may require both (a) a factual assessment of whether the allegations are credible, and (b) a legal assessment of whether, if proved, they would meet the standard of serious misconduct required to justify removal. Even if constitutional provisions do not expressly require such an assessment, they may do so implicitly, as the

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<sup>57</sup> art 17.

<sup>58</sup> art 25.

Supreme Court of Ghana decided when it held that the President was required to form the view that there was a *prima facie* case against the Chief Justice before forming a tribunal to inquire into his conduct.<sup>59</sup>

**3.4.8 A fair decision-making process at the preliminary stage should provide the judge who is suspected of misconduct with an opportunity to respond informally to the allegations against him or her, before any decision is made to institute tribunal proceedings.** The Privy Council laid down this principle in the important 1994 case of *Rees v Crane*,<sup>60</sup> which confirmed that a judge was entitled to due process, also known as natural justice, during the preliminary phase in which allegations were under consideration before any tribunal had been established. This approach is justified by the risk of damage which any official action on allegations against a judge may do to the ability of that judge to command the confidence of litigants and continue on the bench. This is an institutional interest which goes beyond the personal interest in preserving their reputation which judges have in common with all persons facing disciplinary action. *Rees v Crane* has been applied by a number of Commonwealth courts in different jurisdictions.<sup>61</sup> It has been observed, however, that natural justice does not always require a formal hearing. In *President of the Court of Appeal v Prime Minister*,<sup>62</sup> the Court of Appeal of Lesotho held that the Prime Minister's decision to form a tribunal was not unfair in circumstances in which the allegations against the judge were largely in the public domain, and the judge's response had been aired in litigation on substantially the same issues. The judge's reputation was found not to have been damaged further by the formation of the tribunal, and the court considered that it was in the interests of both the judge and public confidence in the judiciary that the tribunal inquiry be allowed to take place.

**3.4.9 The nature of this preliminary decision suggests that it should ideally be made by a person or body with the capacity to carry out both the factual and legal assessments that are necessary.** In 12 out of 20 jurisdictions, the Chief Justice or the Judicial Service Commission or equivalent body is entrusted with responsibility for deciding whether

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<sup>59</sup> *Agyei Twum v Attorney-General and Bright Akwetey* [2005–2006] SCGLR 732.

<sup>60</sup> [1994] 2 AC 173.

<sup>61</sup> See *Republic v Chief Justice of Kenya and Others, ex p Ole Keiwua* [2010] eKLR (High Court of Kenya), *President of the Court of Appeal v Prime Minister* [2014] LSCA 1 (Lesotho Court of Appeal).

<sup>62</sup> [2014] LSCA 1.

## REMOVAL FROM OFFICE

allegations against a judge warrant establishing an *ad hoc* tribunal.<sup>63</sup> There is much to be said for this approach from the point of view of the independence of the judiciary, as Chief Justices or independent bodies with a responsibility for judicial appointments and other aspects of judicial affairs have good reason to be vigilant against the risk of politically motivated removals.

3.4.10 In the remaining jurisdictions (8 out of the 20), the executive is able to initiate tribunal proceedings. In some of these systems there is also scope for the Chief Justice, or a body such as the Judicial Service Commission, either to carry out investigations and make recommendations to the executive, or to be an alternative decision-maker alongside the executive with both having the power to initiate tribunal proceedings.<sup>64</sup> The danger of executive abuse is somewhat reduced by the fact that in all the jurisdictions concerned the executive is required to appoint an *ad hoc* tribunal which contains a majority of judges.

3.4.11 Even within these constraints, **vesting the power to initiate removal proceedings in the executive carries a risk of abuse.** The repeated use of this power can have the effect of overwhelming the ability of the judiciary to adjudicate on disputed issues in the removal process, to the detriment of the rule of law and judicial independence. This was seen during the Malaysian judicial crisis of 1988. In Malaysia, the executive is responsible both for initiating the formal process of inquiry into whether a judge should be removed from office and selecting the members of the *ad hoc* tribunal, consisting of five serving or retired judges from Malaysia or any Commonwealth jurisdiction, to conduct that inquiry.<sup>65</sup> Justice Tun Salleh Abas, the Lord President of the Supreme Court of Malaysia, had been summoned before a tribunal formed to inquire into his conduct. When a court found that it was necessary to stay the tribunal proceedings on a point of procedural law, the Malaysian government responded by initiating removal proceedings against the five judges who delivered that ruling, two

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<sup>63</sup> Barbados, Bahamas, Fiji, Ghana, Guyana, Jamaica, Kenya, Mauritius, the Organisation of Eastern Caribbean States, Papua New Guinea, Seychelles and Trinidad and Tobago. An exception applies to the Chief Justice and in some cases the President of the Court of Appeal, whose removal is generally initiated by the executive (save in Kenya). In the Seychelles, the Constitutional Appointments Authority, which is responsible for both judicial appointments and the decision to initiate removal proceedings, need not contain any judges.

<sup>64</sup> Botswana, Lesotho, Malaysia, Singapore, Solomon Islands, Tanzania, Uganda and Zambia.

<sup>65</sup> Constitution, art 125. The tribunal consists of five serving or retired judges from Malaysia or any other Commonwealth jurisdiction.

of whom were eventually removed.<sup>66</sup> This reaction to judicial scrutiny made it very difficult to verify whether the original removal proceedings against the Lord President were conducted in accordance with the rule of law. This experience suggests that even though entrusting the main decision on removal to a tribunal consisting entirely of judges is an important safeguard for the independence of the judiciary, it may not be enough, particularly if judges from within the jurisdiction may have been subject to intimidation.

### *Suspension*

3.4.12 The decision whether to institute tribunal proceedings is closely associated with that of whether the judge should be suspended from the duties of his or her office. Like permanent removal, suspension raises important issues for the rule of law. On the one hand, there are understandable reasons why it may be appropriate that a judge who faces credible allegations of serious misconduct should take no part in the administration of justice until those allegations are resolved. Such action may be necessary, depending on the nature of the alleged misconduct, in order to maintain public confidence in the courts. On the other hand, there is the risk that the power to suspend a judge may be abused in order to penalise or intimidate independent-minded judges and to prevent them from deciding cases. The *UN Basic Principles on the Independence of the Judiciary* highlight the need for proceedings to be completed without undue delay:

A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure.<sup>67</sup>

3.4.13 The longer the suspension lasts, the worse its effect in this regard. In extreme cases, a suspension lasting for years may amount to *de facto* removal from office.

3.4.14 Provision is made for suspension in all 20 Commonwealth jurisdictions with *ad hoc* tribunal systems. In most cases, the power to suspend a judge vests in the same decision-maker who is responsible for the institution of tribunal proceedings, either as a discretion or as an

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<sup>66</sup> See Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart 2012), 213–214.

<sup>67</sup> art 17.

## REMOVAL FROM OFFICE

automatic consequence of the decision to form a tribunal. It has been said by a member of the UK Supreme Court that this gives the executive 'the whip hand' over the judiciary in cases where it is the decision-maker.<sup>68</sup>

3.4.15 While this concentration of decision-making power presents a clear risk of abuse, it can be somewhat ameliorated by procedural safeguards. In the case of *President of the Court of Appeal v Prime Minister* which was discussed above,<sup>69</sup> the Lesotho Court of Appeal noted that when the Prime Minister took the initiative to institute tribunal proceedings in respect of a dispute that had already been extensively aired, the judge was rightly still offered a specific, further opportunity to make representations as to why he should not be suspended from office and therefore the procedure did not violate natural justice.<sup>70</sup>

### *Conduct of tribunal proceedings*

3.4.16 In many of the Commonwealth jurisdictions which adopt this removal system, there is little provision made for the procedures to be followed by an *ad hoc* tribunal, either in the constitution or in subsequent legislation. This may be because it is thought sufficient for any *ad hoc* tribunal consisting of experienced judges to regulate its own procedure. However, advance regulation would be preferable from the point of view of legal certainty and to guard against pressure to craft rules of procedure in response to a particular set of alleged facts.

3.4.17 Some procedural safeguards do exist in national constitutions, although these are seldom comprehensive. The constitutions of a number of Commonwealth member states in the Caribbean do provide for some aspects of *ad hoc* tribunal procedure, including **guaranteeing the right of the judge appearing before the tribunal to be represented by counsel and providing for the powers of the tribunal to compel witnesses and the production of documentary evidence.**<sup>71</sup> The latter powers are usually conferred by stipulating that the tribunal has certain powers under legislation which provides for a public commission of inquiry. The essentially

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<sup>68</sup> Lord Carnwath, 'Discipline and Removal of Senior Judges', lecture delivered at the Commonwealth Magistrates' and Judges' Conference Zambia (9 September 2014), available at <https://www.supremecourt.uk/docs/speech-140909.pdf>.

<sup>69</sup> See n61.

<sup>70</sup> Ibid [21].

<sup>71</sup> Bahamas, Barbados, Guyana, Jamaica and the Organisation of Eastern Caribbean States.



inquisitorial nature of tribunal proceedings still presents sufficient flexibility to ensure fairness, even when the allegations before the tribunal are potentially of a criminal nature. This was one of the conclusions of the *ad hoc* tribunal formed to inquire into the conduct of the Chief Justice of Trinidad and Tobago, which was chaired by Lord Mustill, a former judge of the House of Lords and Privy Council.<sup>72</sup> The tribunal noted that it had given the Chief Justice ample indication of the charges he had to answer, and had allowed his legal counsel to examine the witnesses against him at length and to address the tribunal in closing submissions last, after all the other parties represented before the tribunal.<sup>73</sup>

3.4.18 The approach of Commonwealth states provides sufficient indication, despite the brevity of most constitutional provisions and the silence of others, that judges facing a tribunal retain their right under general administrative law principles to be informed of the case against them, permitted to have legal representation and to call and cross-examine witnesses. A legal framework giving more detailed effect to these principles is found in the 2010 Constitution of Kenya and legislation adopted under its provisions, which together represent a much more detailed formulation of an *ad hoc* tribunal system than that contained in older legal frameworks.<sup>74</sup> A judge who is summoned to appear before an *ad hoc* tribunal under these provisions must be served at least 14 days before the hearing with a notice containing the allegations and a summary of the existing evidence in support. The judge also has the right to be present during the proceedings, to be legally represented, to call and cross-examine witnesses and to make final submissions at the close of the hearing. While the tribunal is not bound by the strict rules of evidence it is bound by the rules of natural justice and relevancy, and must provide written reasons for its decision.

3.4.19 The Kenyan framework for tribunal proceedings is an example of good practice for its detailed treatment of procedural issues. Within it, the requirement for a tribunal to give reasons is especially noteworthy. It enables scrutiny of the grounds on which the removal of a judge was recommended, and thereby serves the public interest that the mechanism should not be abused. The *Beijing Statement on the Independence of the*

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<sup>72</sup> 'In the Matter of an Enquiry under Section 137 of the Constitution of Trinidad and Tobago – Report of Tribunal', dated December 2007, available at [http://www.newsday.co.tt/mustill\\_report/](http://www.newsday.co.tt/mustill_report/).

<sup>73</sup> *Ibid*, para 68–70.

<sup>74</sup> Constitution, art 168 and Judicial Service Act 2011, Second Schedule.

## REMOVAL FROM OFFICE

*Judiciary in the LAWASIA Region* recommends that '[j]udgements in disciplinary proceedings ... should be published.'<sup>75</sup> The 2013 Constitution of Fiji similarly requires that any *ad hoc* tribunal which is convened to inquire into the alleged misconduct of a judge must make its report and recommendations public.<sup>76</sup> Although the constitutions of other jurisdictions are generally silent, this does not imply that a duty to provide reasons has been excluded; indeed the provision of reasons is strongly supported by both the public interest in being able to verify that removal decisions are properly made and the interest of the judge in being able to bring judicial review or appeal proceedings where appropriate.<sup>77</sup> It follows that **best practice would require the provision of reasons for *ad hoc* tribunal decisions, particularly if the recommendation is that a judge is to be removed from office.**

### *Appeal and review*

3.4.20 The gravity of what is at stake in the removal process, both for the judge concerned and for the public interested in an independent judiciary, requires that the decision of an *ad hoc* tribunal should not be immunised from independent scrutiny. This safeguard is strongly recommended by the *UN Basic Principles on the Independence of the Judiciary*:

Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.<sup>78</sup>

3.4.21 **At a minimum, the rule of law requires that decisions of *ad hoc* tribunals should be subject to judicial review** in the same way as the decisions of any other public body. This serves to ensure that the tribunal has acted consistently with the applicable constitutional and legal provisions and general principles of administrative law. **In addition, best practice would require provision for appeal or referral to court or other independent body, with wider competence to consider both factual**

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<sup>75</sup> art 28. Cf *IBA Minimum Standards*, art 28: 'Judgements in disciplinary proceedings, whether held in camera or in public, may be published.'

<sup>76</sup> Constitution, ss 111(5) and 112(5).

<sup>77</sup> See the Organisation for Security and Co-operation in Europe, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 26: 'The decisions regarding judicial discipline shall provide reasons. Final decisions on disciplinary measures shall be published.'

<sup>78</sup> art 20.

**and legal findings made by the tribunal.**<sup>79</sup> Such scrutiny by a permanent, external body would serve to counteract the risks of abuse arising from the flexible nature of the *ad hoc* tribunal process, particularly when its preliminary phase is largely in the hands of the executive.

3.4.22 The provision of external scrutiny has not been constant in Commonwealth jurisdictions since independence, but there is recent evidence of it being restored or strengthened. At the time of independence, it was standard practice for new Commonwealth member states which adopted the *ad hoc* tribunal system to provide that any tribunal decision which recommended the removal of a judge should automatically be referred to the Privy Council for confirmation.<sup>80</sup> As these states withdrew from the appellate jurisdiction of the Privy Council, they also abolished this referral procedure.<sup>81</sup> Five independent Commonwealth jurisdictions still retain this referral jurisdiction,<sup>82</sup> which the Privy Council also exercises in relation to British Overseas Territories, as it did in two recent cases discussed above.<sup>83</sup> A sixth state, Barbados, has transferred the referral jurisdiction of the Privy Council to the Caribbean Court of Justice.<sup>84</sup> In all other jurisdictions the *ad hoc* tribunal effectively became the final decision-maker. Although the cutting of ties with the Privy Council explains why that court no longer has a role in those jurisdictions, it does not justify the decision to abandon any appellate check. The example of Barbados illustrates one alternative, but there are also domestic possibilities. In Kenya, the new

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<sup>79</sup> See the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 26, referring to 'right to present a defence and also the right to appeal to a competent court'. See also the Venice Commission, *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD[2010]004, para 43.

<sup>80</sup> Roberts-Wray (n19) 499–500. This jurisdiction is exercised by the Privy Council under the Judicial Committee Act 1833, s 4. On the history of the exercise of this jurisdiction in an earlier colonial period see Roberts-Wray (n19) 491–498 and John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (University of Toronto Press 2011).

<sup>81</sup> Roberts-Wray (n19) 500–501.

<sup>82</sup> Bahamas, Jamaica, Mauritius, the Organisation of Eastern Caribbean States and Trinidad and Tobago.

<sup>83</sup> *Re Chief Justice of Gibraltar* [n33] [12]–[14], *Re Levers* [n33] [44]–[45] their Lordships were content to treat the matter as an appeal since it was argued on this footing and in both cases an *ad hoc* tribunal had made extensive findings of fact in support of their recommendations for removal. The Privy Council does not lightly depart from factual findings below but did so in these two determinations, although in both cases it still confirmed the tribunal's recommendation that the judge be removed. For a general discussion of this Privy Council jurisdiction in relation to British Overseas Territories more generally, see Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart 2011), 117–121.

<sup>84</sup> Constitution, s 84(4).

## REMOVAL FROM OFFICE

*ad hoc* tribunal system established by the 2010 Constitution grants any judge the right to appeal to the Supreme Court of Kenya against a tribunal decision recommending his or her removal.<sup>85</sup> This option represents good practice and is open in principle to any jurisdiction, whereas not all states have access to an external appellate court which is prepared to have judicial removal decisions referred to it.

### 3.5 Removal by disciplinary councils

3.5.1 An alternative to the process of removal by the *ad hoc* tribunal system is to entrust this function to permanent bodies, which this study will refer to collectively as 'disciplinary councils'. Disciplinary councils are presented as the preferred removal mechanism in a number of international statements on judicial independence, with the proviso that certain features are required. For example, this is the removal mechanism recommended by the *IBA Minimum Standards*:

... the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.<sup>86</sup>

3.5.2 Similarly, the Venice Commission recommends that removal decisions be entrusted to a court or a judicial council, which should contain either a judicial majority or at least a substantial number of judges.<sup>87</sup> The Venice Commission and the Organisation for Security and Co-operation in Europe have also developed recommendations for the procedures to be followed by disciplinary councils. According to these, **the judge should be granted 'the rights of the defence' (commonly including a clear statement of the allegations, an opportunity to challenge them, to lead evidence and to call and cross-examine witnesses),<sup>88</sup> and a right to reasons for the council's decision,<sup>89</sup> and to appeal to a court.<sup>90</sup>**

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<sup>85</sup> Constitution, art 168(8).

<sup>86</sup> art 31.

<sup>87</sup> *Report on the Independence of the Judicial System – Part One: The Independence of Judges* (n43), para 43. See also the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 5.

<sup>88</sup> *Ibid* para 40.

<sup>89</sup> *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 26. See also the *Beijing Statement on the Independence of the Judiciary in the LAWASIA Region*, art 28.

<sup>90</sup> See the Venice Commission, *Report on the Independence of the Judicial System – Part One: The Independence of Judges* (n43), para 25, and the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, para 26.

3.5.3 The disciplinary councils in the 12 Commonwealth jurisdictions<sup>91</sup> that have such bodies do not all possess these characteristics. Apart from the common feature of permanence, there are many differences among these bodies. In six jurisdictions only a minority of council members are required to be judges,<sup>92</sup> and in some instances there are worrying elements of executive control, for example in Swaziland, where two-thirds of the members of the body responsible for removal decisions are appointed by the King.<sup>93</sup>

3.5.4 Two of the six bodies with a majority judicial composition are courts, which are well placed to offer a full panoply of procedural protections.<sup>94</sup> In the case of Cyprus the members of the Supreme Court, sitting as the Supreme Council of Judicature, are responsible for determining questions of removal.<sup>95</sup> An investigating judge is designated to inquire into allegations of misconduct and to produce a report on the basis of which the Council determines whether to proceed to a full hearing.<sup>96</sup> The other example of a court-based removal process is that of Brunei Darussalam. The Privy Council is still responsible for determining questions of removal by carrying out an inquiry into the conduct of a judge at the request of the Sultan.<sup>97</sup> If this provision were to be invoked it might give rise to some difficulties in practice. It is a form of original jurisdiction as opposed to the referral jurisdiction described above, and in view of the difficulties facing an external court in making primary findings of fact the Privy Council has long expressed a preference for the latter.<sup>98</sup>

3.5.5 The remaining jurisdictions offer various procedural safeguards in their legal frameworks. These include, variously, the right to be notified of the allegations subject to inquiry and given a period of time to prepare a response,<sup>99</sup> to call and cross-examine witnesses,<sup>100</sup> and to be represented

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<sup>91</sup> Belize, Brunei Darussalam, Cameroon, Cyprus, Mozambique, Namibia, Nigeria, Pakistan, Rwanda, Swaziland, Tonga and Vanuatu.

<sup>92</sup> Belize, Cameroon, Namibia, Swaziland, Tonga, and Vanuatu.

<sup>93</sup> Constitution, s 159(2).

<sup>94</sup> The six jurisdictions are Brunei Darussalam, Cyprus, Mozambique, Nigeria, Pakistan and Rwanda.

<sup>95</sup> Constitution, arts 133(8)(4) and 153(8)(4).

<sup>96</sup> Procedural Rules concerning the Exercise of the Disciplinary Authority of the Supreme Council of Judicature of 2000, Rules 3–10.

<sup>97</sup> Supreme Court Act, s 8(3).

<sup>98</sup> See Roberts-Wray (n19) 492–493 and *Chief Justice of the Cayman Islands v Governor* [2012] UKPC 39, [33]–[35].

<sup>99</sup> Mozambique, Judicial Magistrates Law No 10/91 of 30 July 1991, arts 110–125.

<sup>100</sup> *Ibid.*

## REMOVAL FROM OFFICE

by counsel.<sup>101</sup> As noted above in relation to *ad hoc* tribunals, the fact that some legal frameworks do not mention procedural safeguards which are well established in general administrative law does not necessarily imply an intention to exclude those safeguards.<sup>102</sup> However, there are significant concerns with regard to rights of appeal and review in these jurisdictions. Nigeria is a rare example of a Commonwealth jurisdiction which allows appeals to be brought against certain decisions of a disciplinary council.<sup>103</sup> In Belize, the Constitution has been amended to exclude decisions of the Belize Advisory Council from judicial review.<sup>104</sup> Attempts to oust judicial review present a serious challenge to the rule of law, and in this instance the exclusion would appear to be unnecessary in view of the Privy Council decision in *Meerabux v Attorney-General*,<sup>105</sup> which upheld the fairness of proceedings by which a judge had been removed from office.

3.5.6 It is still common practice for disciplinary bodies, like *ad hoc* tribunals, to submit their recommendation that a judge should be removed to the Head of State, who is responsible for the formal act of revocation. This should not be seen as a general discretion to retain judges contrary to the recommendations of the disciplinary body, as appears to have occurred on a number of occasions in Cameroon.<sup>106</sup> It is perhaps not inconceivable that a Head of State could refuse to act on such a recommendation, in the absence of a viable review or appeal mechanism, if there is clear evidence of illegality or irregularity in the disciplinary process. To assert a more general discretion would be to reintroduce an element of executive control over the removal of judges which is inconsistent with the independence of the judiciary.

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<sup>101</sup> See for example the system in Cameroon, Status of the Magistracy Order, art 59(1)–(2); HJC Law, art 33, and in Nigeria as described in Justice AN Nwankwo, 'The Role of National Judicial Council (NJC) in the Sustenance of the Judiciary under Nigeria's Democracy' in T Oyeyipo, L Gummi and I Umezulike (eds), *Judicial Integrity, Independence and Reforms* (Snaap Press 2006), 131–132.

<sup>102</sup> See para 3.4.16 above.

<sup>103</sup> There is a right of appeal in respect of decisions of a Code of Conduct Tribunal which would otherwise have the effect of removing a judge from office. See Constitution, Fifth Schedule, Part I, 18(4).

<sup>104</sup> Constitution, s 54(18).

<sup>105</sup> [2005] UKPC 1, [2005] 2 AC 513.

<sup>106</sup> Laura-Stella Enonchong, 'Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship' [2012] *African Journal of Legal Studies* 313, 324.

### 3.6 Parliamentary removal

3.6.1 The system of parliamentary removal has a long history. As mentioned in the previous chapter, it emerged in England as a check on the executive discretion to dismiss judges, which various monarchs had asserted until the passage of the Act of Settlement in 1701.<sup>107</sup> The Act established that this power could no longer be exercised without joint resolution of both Houses, known formally as an 'address', calling upon the monarch to remove the judge in question.

3.6.2 Though the Westminster Parliament has only once passed an address for the removal of a judge, in 1830, the issue has been debated at intervals and there is a well-established recognition of the value of an independent judiciary.<sup>108</sup> Apart from this, the mechanism has not been fully tested in the modern era. Discussing the Westminster removal system and its adoption in other parts of the Commonwealth, Sir Kenneth Roberts-Wray described the parliamentary removal system as 'an accident of history' which could lead to serious constitutional conflict if it was put into action, despite the procedures which were widely regarded by parliamentarians as appropriate.<sup>109</sup>

[T]he judge would be fully informed of the complaints against him; ... if he asked for permission to appear by himself or by counsel in his defence, he would be allowed to do so; and ... witnesses would be examined and liable to cross-examination. *So far so good. But Parliament is master of its own procedure and, in law, the judge would appear to have no rights; any member of either House could presumably exercise his right to speak and, in so doing, testify to the facts, from his own knowledge or even from hearsay; and the judges of fact, law and penalty (if any) would be the House as a whole, though the presence of judges in the House of Lords would, of course, be a valuable safeguard.*<sup>110</sup>

3.6.3 The fundamental difficulty with this procedure is that a judge whose conduct is the subject of an inquiry by a parliamentary chamber would not be 'judged by an independent and impartial tribunal', as required by the *Latimer House Guidelines*.<sup>111</sup> This accounts for the recommendation in the *IBA Minimum Standards* that if the legislature is vested with powers of removal it should do so only 'upon a recommendation of a judicial

<sup>107</sup> See Chapter 2 at para 2.2.6–2.2.7.

<sup>108</sup> Shetreet and Turenne (n19), 312–354.

<sup>109</sup> Roberts-Wray (n19) 491.

<sup>110</sup> Ibid 490–491 (emphasis added).

<sup>111</sup> *Guideline VI.1(a)(i)*, quoted in para 3.3.2 above.

## REMOVAL FROM OFFICE

commission'.<sup>112</sup> Similarly, the UN Special Rapporteur has noted that parliamentary control over the disciplining of judges is a matter of concern, and has argued that an independent body is required in such circumstances in order to ensure that the judge receives a fair trial.<sup>113</sup>

3.6.4 Another fundamental concern from the point of view of judicial independence is that parliamentary removal mechanisms may be abused by the executive government if it enjoys the support of a sufficient number of legislators. The concern expressed by Chief Justices of Asia-Pacific jurisdictions in the *Beijing Statement on the Independence of the Judiciary in the LAWASIA Region* is particularly relevant as the majority of the 18 Commonwealth states with a parliamentary removal mechanism are located in this region.<sup>114</sup>

Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse.<sup>115</sup>

3.6.5 The natural response to this concern is to introduce voting rules which make it more difficult to remove a judge from office. This may have the result that the executive cannot proceed against a judge unless there is cross-party support for such action.

3.6.6 There are thus two very different issues that require discussion in relation to the parliamentary removal procedure:

- The need for an inquiry by a body independent of the legislature; and
- Voting rules as a safeguard against abuse.

### *Inquiry by a body independent of the legislature*

3.6.7 Most of the states in which the legislature decides on the removal of judges do not entrust the task of fact-finding to legislators. Instead, this task

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<sup>112</sup> art 4(c).

<sup>113</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN Doc A/HRC/11/41 (2009) (hereafter *Annual Report 2009*), para 60–61.

<sup>114</sup> Australia, Bangladesh, India, Kiribati, Maldives, Malta, Nauru, New Zealand, Samoa, Sri Lanka and Tuvalu. Parliamentary removal is also the mechanism established in Canada, Malawi, Sierra Leone, South Africa and the UK and it applies to certain judicial positions in Nigeria and Rwanda.

<sup>115</sup> art 23.



is performed by an external body, which is independent of both the legislature and the executive and sufficiently small in number to conduct evidentiary hearings in which questions may be put to the judge and to witnesses. This is currently the position in 14 of the 18 parliamentary removal states.<sup>116</sup> Moreover, by requiring that the external body does not contain any legislators, a state will ensure that this body does not create even an appearance of a lack of impartiality, which is necessary to satisfy the requirement of the *Latimer House Guidelines* that a judge facing removal proceedings has the right 'to be judged by an independent and impartial tribunal'.<sup>117</sup>

3.6.8 The prevalence of such arrangements suggests that **the involvement of an independent, external body in initial investigations, fact-finding and assessment of the allegations against a judge now represents good practice.** As in the case of states that use permanent disciplinary councils or tribunals, **the external body must act with due process to ensure fairness to the accused judge, in respect of notice of the allegations to be answered, the conduct of the hearing including opportunities to lead and cross-examine witnesses in person or through counsel, and written reasons for the findings subsequently made.**

3.6.9 Several states have established a legal framework for independent fact-finding by statute because their constitutions did not make provision for such a process. In Australia, for instance, the federal Constitution simply provides that a judge 'shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.<sup>118</sup> When serious allegations were made against a member of the High Court of Australia in 1986, the federal government took the view that the law should provide for a process of fact-finding by an independent body prior to any vote being held on the question of removal, and hurriedly secured the passage of legislation.<sup>119</sup>

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<sup>116</sup> The exceptions are Bangladesh, Nauru, Samoa and Sri Lanka. In Bangladesh, which adopted a parliamentary removal system in 2014, the Constitution authorises Parliament to legislate on the procedure for the investigation and proof of allegations against a judge (art 96(3)), but at the time of writing no such legislation had been enacted. The first two are small jurisdictions, in which there is no record of proceedings for the removal of a judge being initiated. The removal mechanism in Sri Lanka is discussed below in para 3.6.11.

<sup>117</sup> *Guideline VI.1(a)(i)*.

<sup>118</sup> s 72(ii).

<sup>119</sup> Parliamentary Commission of Inquiry Act 1986, since replaced by the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012. The historical events relating to Justice Lionel Murphy are discussed in HP Lee and E Campbell, *The Australian Judiciary* (2<sup>nd</sup> edn, Cambridge University Press 2013) 117–123.

## REMOVAL FROM OFFICE

Parliament now has the ability to appoint a commission to conduct a public hearing and determine whether grounds for removal exist.<sup>120</sup> The commission consists of three persons, one of whom must be a former Commonwealth judicial officer, or a judge or former judge of a state or territory Supreme Court. The federal parliament votes on the question of removal only after it has received the commission's report.<sup>121</sup>

3.6.10 Similarly, in South Africa, where the parliamentary removal mechanism also requires a finding by the Judicial Service Commission that the judge 'suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct',<sup>122</sup> there was no prescribed procedure for the Commission's inquiries until such a procedure was introduced by statutory amendment in 2008, in the wake of serious allegations against particular judges. Once the Commission has decided that a judge has a case to answer, it must establish a tribunal of two judges and one person who is not a judge or a magistrate.<sup>123</sup> The tribunal conducts a full hearing, of which the accused judge must be given reasonable notice, and at which the judge has the right to be present, to be legally represented and to call or cross-examine witnesses. The tribunal must convey its reasoned findings of fact in a report to the Judicial Service Commission, which makes the final decision whether to refer the matter to the National Assembly.<sup>124</sup>

3.6.11 The consequences of proceeding with removal under a parliamentary mechanism without provision for an independent body were illustrated by events in Sri Lanka in the period between 2012 and early 2015. Parliamentary proceedings were brought against Chief Justice Bandaranayake on allegations of corruption.<sup>125</sup> The fact-finding role was entrusted to a Parliamentary Select Committee under the Standing Orders of Parliament.<sup>126</sup> In the event, the conduct of the fact-finding inquiry was challenged in court, but despite an order staying the process,

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<sup>120</sup> Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012, s 10.

<sup>121</sup> *Ibid*, s 48.

<sup>122</sup> Constitution, s 177[1][a].

<sup>123</sup> Judicial Service Commission Act 1994, s 22[1]. Although the South African Judicial Service Commission includes a number of legislators among its members, in disciplinary matters the Commission must sit without these members (Constitution, s 178[5]).

<sup>124</sup> Judicial Service Commission Act 1994, s 20, 33.

<sup>125</sup> International Bar Association Human Rights Initiative (IBAHRI), *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka* (April 2013).

<sup>126</sup> Standing Order 78A.

legislators proceeded to vote for the removal of the Chief Justice, who was then required to vacate office, only to be reinstated in early 2015 following a change of government.<sup>127</sup> The disputed removal process thus resulted in significant constitutional discord and was widely perceived to have damaged the independence of the judiciary and the rule of law in Sri Lanka. The International Bar Association found that the proceedings took place in secret and that the Chief Justice and her legal team were 'given a 989-page bundle of previously unseen documents, their legal submissions about bias were met with abuse and ... less than 24 hours to rebut an inadequately specified case'.<sup>128</sup> The UN Special Rapporteur found that the process had been 'extremely politicized and characterized by lack of transparency, lack of clarity in the proceedings, as well as lack of respect for the fundamental guarantees of due process and fair trial'.<sup>129</sup> In the view of the Special Rapporteur, the legal framework was partly responsible for this, and she concluded that '[t]o be compatible with both the principle of separation of powers and international human rights law norms, disciplinary proceedings against judges should be conducted by independent commissions and guarantee full respect for due process and fair trial'.<sup>130</sup>

3.6.12 Several other parliamentary removal jurisdictions provide examples of good practice in the structure of their independent fact-finding bodies and the procedural rights accorded to the judge who is under investigation. In Canada, the Canadian Judicial Council, primarily composed of Chief Justices of the senior courts, carries out formal enquiries and investigations.<sup>131</sup> The process can be held either in public or private and the Council is deemed to be a superior court during the process.<sup>132</sup> The affected judge must be given reasonable notice of the subject matter of the inquiry or investigation and of the time and place of any hearing and must be afforded an opportunity, in person or by counsel, to cross-examine witnesses and adduce evidence.<sup>133</sup> In India, once a

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<sup>127</sup> BBC News, 'Sri Lanka reinstates Chief Justice Shirani Bandaranayake' (28 January 2015), <http://www.bbc.com/news/world-asia-31021540>.

<sup>128</sup> IBAHRI (n125), 28, 22–28.

<sup>129</sup> UN Office of the High Commissioner for Human Rights, 'Sri Lanka: Attacks on the independence of the judiciary must stop, warns UN expert' (31 December 2012), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12909&LangID=E#sthash.VpK4npre.dpuf>.

<sup>130</sup> *Ibid.*

<sup>131</sup> Judges Act 1985, ss 59, 63.

<sup>132</sup> *Ibid.*, s 63.

<sup>133</sup> *Ibid.*, s 64.

## REMOVAL FROM OFFICE

motion to impeach has been presented, the presiding officer of each House will initially decide whether the issues raised warrant admitting the motion.<sup>134</sup> If it is admitted, a committee of two senior judges and a distinguished lawyer must decide whether the grounds have been made out, and only if they find that to be the case may the Houses vote on the motion.

### *Voting rules*

**3.6.13 Special voting rules may reduce executive control over the removal process, to the extent that legislators belonging to a political party in government may be required to work with members of other parties.** There are two principal methods of doing so, although a number of combinations and variations exist.

**3.6.14 The first method is for bicameral Commonwealth legislatures to stipulate that both chambers should be involved in any decision to remove a judge.** This serves to ensure that their different qualities and representation are brought to bear. In Canada, India and the United Kingdom both Houses are required to vote separately on the question of removal, while in Australia a joint sitting of the federal Senate and House of Commons is held for this purpose.

**3.6.15 The second and more common method is to require a qualified majority, in most cases two-thirds, to secure the passage of a motion for the removal of a judge.** Such requirements are in place in 10 of the 18 Commonwealth states with parliamentary removal systems.<sup>135</sup>

**3.6.16** These safeguards reduce the danger of executive control, since they ensure that a governing party that does not command a supermajority or a majority in both houses, as the case may be, will have to adopt a cross-party approach rather than being able to target judges whose rulings have displeased only its own supporters. In five of the 18 parliamentary removal jurisdictions, neither safeguard is in place.<sup>136</sup> All five are unicameral systems, but could in principle consider adopting a qualified majority voting rule, as could bicameral systems to strengthen the protection of their judiciary.

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<sup>134</sup> Judges (Inquiry) Act 1968, ss 3, 6.

<sup>135</sup> Bangladesh, India, Maldives, Malta, Nauru, Nigeria, Rwanda, Samoa, Sierra Leone and South Africa.

<sup>136</sup> Kiribati, Malawi, New Zealand, Sri Lanka and Tuvalu follow this approach.

## *REMOVAL FROM OFFICE*

3.6.17 In view of the risk of executive control posed by a simple majority voting rule, **some form of higher legislative hurdle, whether it be the involvement of both legislative chambers in a bicameral system or of a supermajority voting threshold, may now be considered best practice in respecting judicial independence.**



# APPENDIX 1

## **Commonwealth Latimer House Principles (2003) On the Accountability of and the Relationship between the Three Branches of Government**

*As agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003*

Commonwealth Heads of Government warmly welcome the contribution made by the Commonwealth Parliamentary Association and the legal profession of the Commonwealth represented by the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association to further the Commonwealth Harare Principles. They acknowledge the value of the work of these Associations to develop the Latimer House Guidelines and resolve, in the spirit of those Guidelines, to adopt the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government.

### **OBJECTIVE**

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

### **I) The Three Branches of Government**

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

### **II) Parliament and the Judiciary**

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

## APPENDIX 1

(b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

### III) Independence of Parliamentarians

(a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.

(b) Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

### IV) Independence of the Judiciary

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

equality of opportunity for all who are eligible for judicial office;  
appointment on merit; and  
that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.



Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

#### **V) Public Office Holders**

(a) Merit and proven integrity, should be the criteria of eligibility for appointment to public office;

(b) Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

#### **VI) Ethical Governance**

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

#### **VII) Accountability Mechanisms**

##### **(a) Executive Accountability to Parliament**

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.

##### **(b) Judicial Accountability**

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the

## APPENDIX 1

principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

### (c) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

## VIII) The law-making process

In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

There should be adequate parliamentary examination of proposed legislation;

Where appropriate, opportunity should be given for public input into the legislative process;

Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

## IX) Oversight of Government

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process. Steps which may be taken to encourage public sector accountability include:

(a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,

(b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

### **X) Civil Society**

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

## **Annex – Latimer House Guidelines for the Commonwealth (1998)**

*Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles. (1998)*

### **PREAMBLE**

RECALLING the renewed commitment at the 1997 Commonwealth Heads of Government Meeting at Edinburgh to the Harare Principles and the Millbrook Commonwealth Action Programme and, in particular, the pledge in paragraph 9 of the Harare Declaration to work for the protection and promotion of the fundamental political values of the Commonwealth:

- Democracy;
- Democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary;
- Just and honest government;
- Fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief, and
- Equality for women, so that they may exercise their full and equal rights.

Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association

## *APPENDIX 1*

meeting at Latimer House in the United Kingdom from 15 to 19 June 1998:

HAVE RESOLVED to adopt the following Principles and Guidelines and propose them for consideration by the Commonwealth Heads of Government Meeting and for effective implementation by member countries of the Commonwealth.

### **PRINCIPLES**

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.

It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights.<sup>1</sup> Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

### **GUIDELINES**

#### **I) PARLIAMENT AND THE JUDICIARY**

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may<sup>2</sup> be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.

2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere.

Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.

4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.

8. Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.

## **II) PRESERVING JUDICIAL INDEPENDENCE**

### **1. Judicial appointments**

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission

## *APPENDIX 1*

(established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.<sup>3</sup>

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.<sup>4</sup>

Judicial vacancies should be advertised.

### 2. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.<sup>5</sup>

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

### 3. Training<sup>6</sup>

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training.<sup>7</sup>

### III) PRESERVING THE INDEPENDENCE OF PARLIAMENTARIANS<sup>8</sup>

1. Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:

“That the Freedom of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement.”

2. Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:

(a) the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members' independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices<sup>9</sup>;

(b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;

(c) the cessation of membership of a political party of itself should not lead to the loss of a member's seat.

3. In the discharge of their functions, members should be free from improper pressures and accordingly:

(a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;

(b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full public reporting and discussion of public affairs;

(c) the offence of contempt of parliament should be drawn as narrowly as possible.

### IV) WOMEN IN PARLIAMENT<sup>10</sup>

1. To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced,

## *APPENDIX 1*

including the appointment of more women to executive roles within political parties.

2. Pro-active searches for potential candidates should be undertaken by political parties.

3. Political parties in nations with proportional representation should be required to ensure an adequate gender balance on their respective lists of candidates for election. Women, where relevant, should be included in the top part of the candidates lists of political parties. Parties should be called upon publicly to declare the degree of representation of women on their lists and to defend any failure to maintain adequate representation.

4. Where there is no proportional representation, candidate search and/or selection committees of political parties should be gender-balanced as should representation at political conventions and this should be facilitated by political parties by way of amendment to party constitutions; women should be put forward for safe seats.

5. Women should be elected to parliament through regular electoral processes. The provision of reservations for women in national constitutions, whilst useful, tends to be insufficient for securing adequate and long-term representation by women.

6. Men should work in partnership with women to redress constraints on women entering parliament. True gender balance requires the oppositional element of the inclusion of men in the process of dialogue and remedial action to address the necessary inclusion of both genders in all aspects of public life.

## **V) JUDICIAL AND PARLIAMENTARY ETHICS**

### 1. Judicial Ethics

(a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;

(b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development<sup>11</sup>;

(c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.



## 2. Parliamentary Ethics

- (a) Conflict of interest guidelines and codes of conduct should require full disclosure by ministers and members of their financial and business interests;
- (b) members of parliament should have privileged access to advice from statutorily-established Ethics Advisors;
- (c) whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.

## VI) ACCOUNTABILITY MECHANISMS

### 1. Judicial Accountability

#### (a) Discipline:

(i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:

- (A) inability to perform judicial duties and
- (B) serious misconduct.

(ii) In all other matters, the process should be conducted by the chief judge of the courts;

(iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

#### (b) Public Criticism<sup>12</sup>:

(i) Legitimate public criticism of judicial performance is a means of ensuring accountability;

(ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

### 2. Executive Accountability

#### (a) Accountability of the Executive to Parliament

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:

(i) a committee structure appropriate to the size of parliament, adequately resourced and with the power to summon witnesses, including ministers.

## *APPENDIX 1*

Governments should be required to announce publicly, within a defined time period, their responses to committee reports;

(ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;

(iii) the public accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;

(iv) the chair of the Public Accounts Committee should normally be an opposition member;

(v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.

### (b) Judicial Review

Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law.

## **VII) THE LAW-MAKING PROCESS**

1. Women should be involved in the work of national law commissions in the lawmaking process. Ongoing assessment of legislation is essential so as to create a more gender-balanced society. Gender-neutral language should be used in the drafting and use of legislation.

2. Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:

(a) there is public exposure of issues, papers and consultation on major reforms including, where possible, a draft bill;

(b) standing orders provide a delay of some days between introduction and debate to enable public comment unless suspended by consent or a significantly high percentage vote of the chamber, and

(c) major legislation can be referred to a select committee allowing for the detailed examination of such legislation and the taking of evidence from members of the public.

3. Model standing orders protecting members' rights and privileges and permitting the incorporation of variations, to take local circumstances into account, should be drafted and published.

4. Parliament should be serviced by a professional staff independent of the regular public service.

5. Adequate resources to government and non-government backbenchers should be provided to improve parliamentary input and should include provision for:

- (a) training of new members;
- (b) secretarial, office, library and research facilities;
- (c) drafting assistance including private members' bills.

6. An all-party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the executive.

7. Appropriate legislation should incorporate international human rights instruments to assist in interpretation and to ensure that ministers certify compliance with such instruments, on introduction of the legislation.

8. It is recommended that "sunset" legislation (for the expiry of all subordinate legislation not renewed) should be enacted subject to power to extend the life of such legislation.

### **VIII) THE ROLE OF NON-JUDICIAL AND NON-PARLIAMENTARY INSTITUTIONS**

1. The Commonwealth Statement on Freedom of Expression<sup>13</sup> provides essential guarantees to which all Commonwealth countries should subscribe.

2. The Executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising.

3. An independent, organised legal profession is an essential component in the protection of the rule of law.

4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.

5. Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.

6. The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.

## APPENDIX 1

7. Human Rights Commissions, Offices of the Ombudsman and Access to Information Commissioners can play a key role in enhancing public awareness of good governance and rule of law issues, and adequate funding and resources should be made available to enable them to discharge these functions. Parliament should accept responsibility in this regard. Such institutions should be empowered to provide access to alternative dispute resolution mechanisms.

### IX) MEASURES FOR IMPLEMENTATION AND MONITORING COMPLIANCE

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government.<sup>14</sup> If these Guidelines are adopted, an effective monitoring procedure, which might include a Standing Committee, should be devised under which all Commonwealth jurisdictions accept an obligation to report on their compliance with these Guidelines. Consideration of these reports should form a regular part of the Meetings of Law Ministers and of Heads of Government.

#### ***End Notes***

[As published in April 2004 by the Commonwealth Secretariat with the agreement of the bodies responsible for the drafting of the *Latimer House Guidelines*: the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association.]

*1. The final paragraph does not refer expressly to other forms of discrimination, e.g. on ethnic or religious grounds. There are a number of approaches to the redress of existing imbalances, such as selection based on "merit with bias", i.e. where, for example, if two applicants are of equal merit, the bias should be to appoint a woman where there exists gender imbalance.*

*2. It has been suggested that judges "shall" have a duty to adopt a constructive and purposive approach to the interpretation of legislation, particularly in a human rights context, as indicated in paragraph 3.*

*3. The Guidelines clearly recognise that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial service commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and*

*against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general.*

*4. The making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions.*

*5. The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints.*

*Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.*

*6. This is an area where the sponsoring associations can play a cost-effective role in co-operation with the Commonwealth Secretariat. Resources need to be provided in order to support the judiciary in the promotion of the rule of law and good governance.*

*7. The drafters of the Guidelines did not wish by this provision to impinge on either the independence of the judiciary or the independence of the legal profession. However, in many jurisdictions throughout the Commonwealth, magistrates and judges are given no formal training on commencement of their duties. It was felt that appointees to the bench would benefit from some training prior to appointment in order to make them more aware of the duties and obligations of judicial officers and aid their passage to the bench.*

*8. It has been observed that the Guidelines are silent about the elected composition of the popular chamber. In a number of jurisdictions, nominated members may have a decisive influence on the outcome of a vote. If properly used, however, the power of nomination may be used to redress, for example, gender imbalance and to ensure representation of ethnic or religious minorities. The role of non-elected senates or upper chambers must also be considered in this context.*

*9. There remains controversy about the balance to be struck between anti-floor-crossing measures as a barrier against corruption and the potential threat to the independence of MPs.*

*10. The emphasis on gender balance is not intended to imply that there are not other issues of equity in representation which need to be considered.*

## APPENDIX 1

*Parliament should reflect the composition of the community which it represents in terms of ethnicity, social and religious groups and regional balance. Some countries have experimented with regulation of national political parties to ensure, for example, that their support is not confined to one regional or ethnic group, a notion which would be profoundly hostile to the political culture in other jurisdictions.*

*11. Following discussion of the Guidelines, it has been accepted by the Working Group that a "uniform" Model Code of Judicial Conduct is inappropriate. Judicial Officers in each country should develop, adopt and periodically review codes of ethics and conduct appropriate to their jurisdiction. The CMJA will promote that process in its programmes and will serve as a repository for such codes when adopted.*

*12. In certain jurisdictions, the corruption of the judiciary is acknowledged as a real problem. The recommendations contained in the Guidelines are entirely consistent with the Framework for Commonwealth Principles in Promoting Good Governance and Combating Corruption approved by CHOGM in Durban in 1999. There is some support for the creation of a Judicial Ombudsman who may receive complaints from the public regarding the conduct of judges.*

*13. Since the Guidelines were drafted, the draft Statement on Freedom of Expression has been subject to further consideration and the reference should take account of the new developments. The Commonwealth Heads of Government, in the Coolum Declaration of 5 March 2002, included a commitment to freedom of expression: "We stand united in: our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights ... ."*

*14. Under active consideration is the creation of a monitoring procedure outside official Commonwealth processes. This initially may involve an "annual report" on the implementation of the Guidelines in all Commonwealth jurisdictions, noting "good" and "bad" practice.*

# APPENDIX 2 – MEMBER STATE SUMMARIES

## **Note about terminology**

The summaries that follow provide information about the legal frameworks for the appointment, tenure and removal of judges in each independent Commonwealth member state. Some of the terms used call for comment, particularly those intended to convey background information about the structure of other branches of government:

- The distinction drawn between Heads of State and Heads of Government is not intended to imply that all member states delineate these roles in the same way. Although Heads of State are generally identified on the basis of their ceremonial functions, some also have authority over matters of policy to an extent that others do not.
- A ‘Commonwealth realm’ is a state, other than the United Kingdom, in which the Queen is the Head of State. In such jurisdictions the Queen is commonly represented by a Governor-General, a position which by convention is usually held by a citizen of the state nominated through a domestic political process.
- Other forms of government in the Commonwealth include republics and monarchies in which the throne is held by a ruler other than the Queen.
- Some states are identified as federal. The structure of the other states is not generally specified, though these are either unitary or have some other form of devolved or multi-level government short of full federalism. There are only a few jurisdictions in which the appointment of the higher judiciary is entrusted to substate entities, even in federal states.
- The superior courts of a jurisdiction are identified by name. In some states the Supreme Court, contrary to the everyday meaning of the word, may be a first-instance court which is subject to appeals to a court of higher jurisdiction. In a few member states the final court of appeal is an external judicial body such as the Judicial Committee of the UK Privy Council.

## APPENDIX 2

- Where the members of a judicial appointments body are listed, the 'judicial members' consist of judges at any level of the court hierarchy, including lower court judges and lay tribunal members.

### **Australia**

Commonwealth of Australia Constitution Act 1900; Federal Court of Australia Act 1976; High Court of Australia Act 1979; Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012.

#### *Background*

Australia is a federal state and a Commonwealth realm in which the Governor-General is Her Majesty's representative. The federal legislature is bicameral and the Prime Minister is the Head of Government. The superior courts include the High Court of Australia (the highest appellate court), the Federal Court of Australia and the Supreme Courts of the States and Territories (first-instance and appellate courts).

#### *Appointments*

- Federal judges are appointed by the Governor-General in Council (Commonwealth Constitution, s 72(i)). This refers to the Governor-General acting on advice of the federal Cabinet. The responsible Cabinet member is the Attorney-General, who in the case of a vacancy on the High Court of Australia must consult with the Attorney-General of each state prior to recommending a candidate to the Governor-General (High Court of Australia Act 1979, s 6).
- From 2008 to 2013, the federal government had a practice of appointing advisory panels to assist the Attorney-General in selection, but this has been discontinued.
- State judges are appointed by the Governor on the advice of the Attorney-General of their state, with the assistance of advisory panels in some cases which may conduct interviews. See HP Lee, 'Appointment, Discipline and Removal of Judges in Australia' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011), 28–30.



*Tenure*

- Judges of the High Court of Australia and of the other federal courts retire at the age of 70. The federal Parliament may lower the retirement age of federal judges, with the exception of judges of the High Court, but such change cannot affect a judge retrospectively (Commonwealth Constitution, s 72).
- The remuneration of federal judges may not be diminished during their tenure in office (Commonwealth Constitution, s 72(iii)).

*Removal*

- Federal judges may only be removed by the Governor-General in Council 'on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity' (Commonwealth Constitution, s 72(ii)).
- Where there are allegations that concern a federal judge, the Chief Justice (or a judge delegated by the Chief Justice) will carry out preliminary investigations and may refer the matter to a conduct committee of the judiciary (Federal Court of Australia Act 1976, s 15(1AAA)–(1AAB) read with 'Judicial Complaints Procedure' available at <http://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>). If the Chief Justice, assisted by the findings of the conduct committee (if any), considers that there are grounds that might justify removal, the Chief Justice may approach the Attorney-General to initiate the process of Parliamentary removal. Parliament may appoint a commission to conduct a public hearing and determine whether grounds for removal exist (Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012, ss 9–10). The commission consists of three persons, one of whom must be a former Commonwealth judicial officer, or a judge or former judge of a state or territory Supreme Court (s 14), and must act in accordance with natural justice (s 20).
- State judges are removed on an address of both Houses of Parliament in New South Wales, South Australia, Tasmania, Victoria and Western Australia, or an address of the Legislative Assembly in Queensland, the Northern Territory and the Australian Capital Territory (HP Lee and E Campbell, *The Australian Judiciary* (2nd edn, 2013), 117). In Victoria, Queensland and the Australian Capital Territory there are provisions for an *ad hoc* tribunal to be convened to determine whether removal of a judge is warranted on the grounds of misbehaviour or incapacity (Constitution of Queensland

## APPENDIX 2

Act 2001, s 61; Constitution Act 1975, ss 87AAB(2) and 87AAD in Victoria; Judicial Commissions Act 1994, ss 5, 16 and Part IV in the Australian Capital Territory).

### **Bahamas**

Constitution of the Commonwealth of the Bahamas 1973; Commissions of Inquiry Act 1911 (Chapter 185); Judges' Remuneration and Pensions Act 1988 (Chapter 45). All references are to the Constitution unless otherwise stated.

#### *Background*

The Bahamas are a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is bicameral and the Prime Minister is the Head of Government. The superior courts are the Supreme Court and the Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.

#### *Appointments*

- A Judicial and Legal Service Commission (JLSC) is established (art 116). It consists of five members: two judicial members (the Chief Justice, who chairs the Commission and one Justice of the Supreme Court nominated by the Chief Justice); the Chairman of the Public Service Commission and two persons nominated by the Prime Minister after consultation with the Leader of the Opposition.
- All judges are formally appointed by the Governor-General. In the appointment of judges of the Supreme Court the Governor-General acts on the recommendation of the JLSC. In the appointment of the Chief Justice and the members of the Court of Appeal, the Governor-General acts on the recommendation of the Prime Minister after consultation with the Leader of the Opposition. In all cases the Governor-General may ask the person or institution offering the recommendation to reconsider once, and is obliged to do so in cases where the Leader of the Opposition has a right to be consulted and does not concur in the Prime Minister's recommendation (arts 79(2), 79(5), 94(1)-(2) and 99(1)).

*Tenure*

- Judges of the Court of Appeal retire at 68 while judges of the Supreme Court, including the Chief Justice, retire at 65. The Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may extend a retiring judge's term for a maximum period of two years (arts 96(1), 102(1) and 102(11)).
- There is constitutional protection against reduction of the salary and allowances of judges (art 135). The Judges' Remuneration and Pensions Act, s 4, provides for a review of judicial remuneration every three years.
- No office of a judge of the Supreme Court or Court of Appeal shall be abolished while there is a substantive holder thereof (art 93(3) and 98(3)).

*Removal*

- A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (arts 96(4) and 102(4)).
- Proceedings to remove a judge of the Supreme Court are initiated by the Prime Minister, in the case of the Chief Justice, or the Chief Justice after consultation with the Prime Minister, in the case of any other judge (art 96(6)). Proceedings to remove a member of the Court of Appeal are initiated by the Prime Minister, in the case of the President of the Court of Appeal, or the President of the Court of Appeal or the Chief Justice after consultation with the Prime Minister, in the case of any other judge (art 102(6)). The initiating person or body also advises the Governor-General as to whether to suspend the judge while removal proceedings are pending (arts 96(7)–(8) and 102(7)–(8)).
- Once approached by the relevant initiating body, the Governor-General forms an *ad hoc* tribunal. The tribunal is composed of no fewer than three serving or retired judges, who are appointed by the Governor-General acting on the advice of the relevant initiating body. The tribunal must report to the Governor-General on the facts of the matter and make a recommendation, which the Governor-General must act upon, as to whether the question of removal should be referred to the Judicial Committee of the Privy Council (arts 96(6) and 102(6)).

## APPENDIX 2

- The tribunal has the same powers of the Supreme Court in summoning and questioning witnesses and the accused has the right to counsel (Commission of Inquiry Act, ss 10 and 12).
- Judges are ultimately removed by the Governor-General, who shall remove a judge from office when advised to do so by the Judicial Committee of the Privy Council (arts 96(5) and 102(5)).

### **Bangladesh**

Constitution of the People's Republic of Bangladesh 1972.

#### *Background*

Bangladesh is a republic with a unicameral legislature, an indirectly elected President who is the Head of State, and a Prime Minister who is the Head of Government. The superior courts are the High Court Division and the Appellate Division of the Supreme Court.

#### *Appointments*

- The President acts alone in appointing the Chief Justice, and appoints other judges, after consultation with the Chief Justice, on the Prime Minister's advice (arts 48(3) and 95(1)).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 67 years (art 96(1)).
- The 'remuneration, privileges and other terms and conditions of service' of judges may not be varied to their disadvantage (art 147).

#### *Removal*

- A judge may be removed from office only 'on the grounds of proved misbehaviour or incapacity' (art 96(2)).
- Prior to 2014, decisions on removal from office were made by a Supreme Judicial Council consisting of the Chief Justice and the two next most senior judges. This provision was abolished by the Sixteenth Amendment to the Constitution [Act XIII of 2014]. The amendment entrusts Parliament with the decision on removal, which can be effected by a resolution supported by two-thirds of its

- members; the formal act of removal is by an order of the President after such a resolution has been passed [art 96(2)].
- As a judge's misbehaviour or incapacity must be 'proved', the Constitution makes provision for Parliament to legislate on the procedure for investigation and proof of these matters (art 96(3)). At the time of writing no such legislation could be found.

## **Barbados**

Barbados Constitution 1966.

### *Background*

Barbados is a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is bicameral and the Prime Minister is the Head of Government. The Supreme Court of Barbados consists of the High Court and the Court of Appeal. Final appeals on certain matters may be brought to the Caribbean Court of Justice.

### *Appointments*

- All judges are appointed on the recommendation of the Prime Minister after consultation with the Leader of the Opposition (s 81(1)). The Governor-General may ask the Prime Minister to reconsider the recommendation once, and is obliged to do so in cases where the Leader of the Opposition has a right to be consulted and does not concur in the Prime Minister's recommendation (s 32(3) and (6)).

### *Tenure*

- The salaries and allowances of judges shall not be reduced (s 112).
- Appointments to the Supreme Court are permanent until a mandatory retirement age of 65 in the case of judges of the High Court or 70 in the case of the Chief Justice and judges of the Court of Appeal, extendable to a later age not exceeding 67 or 72, respectively, by the Prime Minister after consultation with the Leader of the Opposition (s 84(1)-(1A)).
- It is prohibited to abolish the office of a judge while there is a substantive holder thereof (s 80(3)).

## APPENDIX 2

### *Removal*

- A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (s 84(3)).
- The Prime Minister, in the case of the Chief Justice, or the Chief Justice after consultation with the Prime Minister, in the case of any other judge, initiates the removal process (art 84(5)) and advises the Governor-General as to whether to suspend the judge in question while such proceedings are pending (art 84(7)–(8)).
- Once approached by the relevant initiating body, the Governor-General forms an *ad hoc* tribunal. The tribunal is composed of no fewer than three serving or retired judges, from any Commonwealth jurisdiction, who are appointed by the Governor-General acting on the advice of the relevant initiating body. The tribunal must report to the Governor-General on the facts of the matter and make a recommendation, which the Governor-General must act upon, as to whether the question of removal should be referred to the Caribbean Court of Justice (art 84(5)).
- The tribunal has the same powers of the Supreme Court in summoning and questioning witnesses and compelling the production of documents (Second Schedule, para 6–7). The accused judge has the right to be legally represented before the tribunal (Second Schedule, para 8).
- Judges are ultimately removed by the Governor-General, who must remove a judge from office when advised to do so by the Caribbean Court of Justice (s 84(4)).

### **Belize**

Belize Constitution 1981.

#### *Background*

Belize is a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is bicameral and the Prime Minister is the Head of Government. The superior courts are the Supreme Court and the Court of Appeal. Final appeals are to the Caribbean Court of Justice.

### *Appointments*

- A Judicial and Legal Services Commission (JLSC) was established in 2001 (s 110E). It consists of four members: the Chief Justice, who chairs the Commission; the Chairman of the Public Service Commission; the Solicitor General; and the President of the Bar Association of Belize.
- Judges of the Supreme Court (other than the Chief Justice) 'shall be appointed by the Governor-General, acting in accordance with the advice of the Judicial and Legal Services Commission, and with the concurrence of the Prime Minister given after consultation with the Leader of the Opposition' (s 97(2)).
- The Chief Justice and the judges of the Court of Appeal are appointed by the Governor-General, acting in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition (ss 97(1) and 101(1)).

### *Tenure*

- Appointments to the Supreme Court are permanent until the mandatory retirement age of 65, but this term is extendable by the appointing bodies until an age not exceeding 75. A person who is aged over 65 may be appointed Chief Justice under this provision (s 98(1)).
- Appointments to the Court of Appeal are for the period of time specified in the instrument of appointment. (s 101(1)).
- The salary and pensionable allowances of judges shall not be reduced to their disadvantage after appointment (s 118(3)).
- No office of Justice of the Supreme Court or Court of Appeal shall be abolished while there is a substantive holder thereof (s 95(2), 100(2)).

### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour' (ss 98(3), 102(2)).
- The process of removal is initiated when the JLSC, upon referral of concerns regarding a judge, recommends to the Belize Advisory Council that the question of the judge's removal ought to be investigated. The Belize Advisory Council will then sit as a tribunal to consider the matter (ss 98(5), 102(4)).
- The Belize Advisory Council is a permanent body consisting of seven members, who must be 'persons of integrity and high national

## APPENDIX 2

standing' and must be citizens of Belize or serving or retired judges who are nationals of a Commonwealth country. Two members each are appointed by the Governor-General on the advice of the Prime Minister and the Leader of Opposition respectively, and three by the Governor-General on the advice of the Prime Minister after consultation with the Leader of the Opposition (s 54(2)–(5)).

- If the question of whether a judge should be removed has been referred to the Belize Advisory Council, the Governor-General may suspend the judge in question while Council proceedings are pending (ss 98(6) and 102(5)).
- The Belize Advisory Council has the power to determine its own procedures (ss 54(15)–(16)). The Council must enquire into and report on the facts of the matter and advise the Governor-General as to whether the judge should be removed from office (ss 98(5) and 102(4)).
- The courts are prohibited from enquiring into whether the Council has validly performed its functions (s 54(18)). However, in a case arising prior to the insertion of this provision, the Privy Council considered and dismissed an appeal by a judge who had been removed (*Meerabux v Attorney General of Belize* [2005] UKPC 1, [2005] 2 AC 513). Their Lordships held that the Council's decision to conduct proceedings *in camera* had been lawful and that there was no unfairness to the appellant, who had been legally represented. Although the Bar Association had been a complainant in the matter, that did not require the recusal of the Council Chairman on the mere ground of his membership of the Association.

## Botswana

Constitution of Botswana 1966.

### *Background*

Botswana is a republic with a bicameral legislature and an indirectly elected President who is both Head of State and Head of Government. The superior courts are the High Court and the Court of Appeal.

### *Appointments*

- A Judicial Service Commission (JSC) is established (ss 103–104). It consists of six members: two judicial members (the Chief Justice,



who chairs the Commission, and the President of the Court of Appeal); the Attorney-General; the Chairman of the Public Service Commission; a member of the Law Society chosen by that body; and a layperson chosen by the President.

- The President appoints judges to the High Court and Court of Appeal 'in accordance with the advice' of the JSC (ss 96(2) and 100(2)), except for the Chief Justice and the President of the Court of Appeal who are appointed by the President acting alone (ss 96(1) and 100(1)).

#### *Tenure*

- Judicial appointments are permanent in the High Court and Court of Appeal until the mandatory retirement age, which is set at 70 years, although Parliament may prescribe a different age (ss 97(1) and 101(1)). This is subject to the proviso that appointments to the Court of Appeal may be made for a fixed term of three years in the case of persons who have attained the retirement age or will pass it during the fixed term that is proposed (s 101(1)).
- The salary of serving and retired judges are protected against reduction (ss 122(3)–(5)).
- No office of Justice of the High Court or Court of Appeal shall be abolished while there is a substantive holder thereof (ss 95(2) and 99(3)).

#### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour' (ss 97(2) and 101(2)).
- Proceedings to remove a judge are initiated by the President. If the President considers that the question of removing a judge ought to be investigated, he or she must form an *ad hoc* tribunal to consider that question, consisting of no fewer than three serving or retired judges (ss 97(3) and 101(3)).
- The President may suspend the judge while tribunal proceedings are pending (ss 97(5) and 101(5)).
- If the tribunal appointed by the President so advises, the President shall remove the judge from office (ss 97(4) and 101(4)).

## APPENDIX 2

### **Brunei Darussalam**

Constitution of Brunei Darussalam; Supreme Court Act (Chapter 5). All references are to the Supreme Court Act unless otherwise stated.

#### *Background*

Brunei Darussalam is a sultanate in which the Sultan is the Head of State and Head of Government. The Supreme Court of Brunei consists of a High Court and a Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.

#### *Appointments*

- All judges are appointed by the Sultan (s 7(1)). In the exercise of his functions, the Sultan consults the Council of Ministers but is not bound to act in accordance with their advice (Constitution, arts 18 and 19).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 years (s 8). The tenure of judges who have reached retirement age may be extended by the Sultan (s 8).
- There is no constitutional protection against the reduction of the salaries of judges. The Supreme Court Act provides that judicial salaries are prescribed by the Sultan (s 9).

#### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office or for misbehaviour' (s 8(2)).
- Proceedings to remove a judge are initiated by the Sultan (s 8(3)).
- Ultimately, judges are removed by the Sultan. However, they may only be removed if the Judicial Committee of the Privy Council has advised accordingly (s 8(3)). Pending a decision of the Judicial Committee, a judge may be suspended by the Sultan (s 8(4)).

### **Cameroon**

Constitution of the Republic of Cameroon 1996; Law 82/14 of 26 November 1982 Organising the Higher Judicial Council (HJC Law); Decree 95/048 of

8 March 1995 on the Status of the Magistracy, amended by Decree 2004/080 of 13 April 2004 (Status of Magistracy Decree).

### *Background*

Cameroon is a republic which currently has a unicameral legislature, although provisions exist in the Constitution for a second chamber. The President, who is the Head of State, is directly elected and appoints the Prime Minister who is Head of Government. The superior courts are the High Court, Court of Appeal and the appellate Supreme Court. There is provision in the Constitution for a separate Constitutional Council. The Constitutional Council's functions are currently undertaken by the Supreme Court.

### *Appointments*

- A Higher Judicial Council (HJC) is established (Constitution art 37(3)). The Council is composed of ten members, four of them judges: 'the President of the Republic as chair, the Minister of Justice as deputy chair, three parliamentarians, an independent personality appointed by the President, the President of the Supreme Court and three senior judges' (HJC Law, art 1 as summarised in Laura-Stella Enonchong, 'Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship' (2012) 5 African Journal of Legal Studies 313, 321).
- The 'President of the Republic ... shall appoint members of the bench and the legal department. He shall be assisted in this task by the Higher Judicial Council which shall give him its opinion on all nominations' (Constitution art 37(3)).

### *Tenure*

- The age of retirement is 65 for judges of the fourth grade and those *hors d'hierarchy*, 60 for judges of the third grade, and 58 for judges of the first and second grades (Status of Magistracy Decree, art 71(2)). The President may by decree dispense with the retirement age in particular situations (Status of Magistracy Decree, art 71(4)).
- There is no constitutional guarantee against reduction or erosion of salary. The remuneration and allowances of judges are determined by the executive through decrees.

## APPENDIX 2

### *Removal*

- Conduct that constitutes the basis for disciplinary action includes 'lack of professionalism, lack of integrity, impropriety, failure to adhere to the law, breach of duty to the state and breach of the judicial oath' (Enonchong, *op cit*, 322–323, citing Status of the Magistracy Decree, art 46).
- Upon receipt of a potential disciplinary case, the Minister of Justice transfers the file to the HJC (Status of the Magistracy Decree, art 62(1)–(2)). The President of the Republic, having been informed by the HJC, appoints an *ad hoc* investigatory commission composed of three members of the HJC (Status of the Magistracy Order, art 50(1)(a), HJC Law, art 26(2)).
- After these preliminary investigations, a disciplinary hearing is conducted by the HJC (HJC Law, arts 30–32). That judge must be present and may be represented by a colleague or counsel (Status of the Magistracy Order, art 59(1)–(2); HJC Law, art 33).
- The HJC makes recommendations which are subsequently transmitted to the President of the Republic who decides whether to remove the judge (Status of the Magistracy Order, arts 47, 59 and 60; HJC Law, art 34; Enonchong, *op cit*, 322–323).

### **Canada**

Canadian Constitution Act 1867; Judges Act 1985; Supreme Court Act 1985.

### *Background*

Canada is a federal state and a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is bicameral and the Prime Minister is the Head of Government. The superior courts include provincial 'superior courts' (albeit federally appointed) and their corresponding courts of appeal, the Federal Court and Federal Court of Appeal and the Supreme Court of Canada.

### *Appointments*

- The Office of the Federal Commissioner for Judicial Affairs is established by statute (Judges Act 1985, ss 73–74).
- The Governor-General, acting on the advice of the federal Cabinet, appoints judges of the senior provincial courts and of the federal

courts (Canadian Constitution Act 1867, s 96; Supreme Court Act, s 4(2)). The Minister of Justice is responsible for advising the Governor-General in respect of all judicial appointments save that of the Chief Justice of Canada, who is appointed on the Prime Minister's advice.

- The Office of the Federal Commissioner for Judicial Affairs acts on behalf of the Ministry of Justice. It initially screens applications and nominations for vacancies in the superior courts of the provinces on the basis of statutory criteria (Judges Act 1985, s 3; Supreme Court Act 1985, s 5), and then passes on a list of the eligible candidates for effective screening to judicial advisory committees throughout the provinces and territories. Judges wishing to be promoted to higher courts notify the Office of the Federal Commissioner for Judicial Affairs which then passes on a list of candidates for selection by the Ministry of Justice. This process is not statutorily regulated but is object of policy documents, available at <http://www.fja-cmf.gc.ca/appointments-nominations/process-regime-eng.html>.

#### *Tenure*

- Judges retire on reaching the age of 75 (Constitution Act 1867, s 99(2); Supreme Court Act, s 9(2)).
- There is no constitutional provision that prohibits the reduction of judicial salaries. However, as a result of the decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 150 DLR (4th) 577, there is an independent Judicial Compensation and Benefits Commission which keeps the level of judges' remuneration under review.

#### *Removal*

- Judges 'shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons' (Constitution Act, s 99; Supreme Court Act s 9(1)). This provision is complemented by the Judges Act 1985 which authorises the Canadian Judicial Council, primarily composed of heads of courts, to carry out formal enquiries and to act as a court (Judges Act 1985, s 63).
- The judge who is under investigation has the right of 'being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf' (Judges Act 1985, s. 64).

## APPENDIX 2

- The Council may recommend removal from office on the following statutory grounds:

'(a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of that office, or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office' (Judges Act 1985, s 65).

### **Cyprus**

Constitution of the Republic of Cyprus 1960; The Administration of Justice (Miscellaneous Provisions) Law (Law 33 of 1964, 9 July 1964); Procedural Rules concerning the Exercise of the Disciplinary Authority of the Supreme Council of Judicature of 2000.

#### *Background*

Cyprus is a republic with a unicameral legislature and a directly elected President who is both Head of State and Head of Government. The High Court and the Supreme Constitutional Court established by the Constitution have now been fused into the Supreme Court by Law No 33 of 1964.

#### *Appointments*

- The Supreme Council of Judicature is composed of the 13 judges of the Supreme Court (see [http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLJudiciary\\_en/DMLJudiciary\\_en?OpenDocument](http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLJudiciary_en/DMLJudiciary_en?OpenDocument)).
- Judges of the Supreme Court are appointed by the President of the Republic, in consultation with that court (Law 33 of 1964, art 4).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 68 years (Constitution, arts 133(7)(1) and 153(7)(1)). A judge may also be required to retire early 'on account of such mental or physical incapacity or infirmity as would render him incapable of discharging the duties of his office' (Constitution, arts 133(7)(3) and 153(7)(3)).
- The salary and other conditions of service are not to be altered to a judge's disadvantage after appointment (Constitution, arts 133(12) and 153(12)).

### *Removal*

- A judge may be retired by the Supreme Council of Judicature on the grounds of 'incapacity' or 'infirmity' if they can no longer carry out the functions of their office. Such a judge is 'entitled to all benefits and emoluments' provided for by law (Constitution, arts 133(7)(3) and 153(7)(3); Law 33 of 1964, art 9(b)).
- A judge may also be removed 'on the ground of misconduct' (Constitution, arts 133(7)(4) and 153(7)(4)).
- The Supreme Court initiates the removal process (Procedural Rules concerning the Exercise of the Disciplinary Authority of the Supreme Council of Judicature of 2000, Rule 3). The accused judge is to be notified of, and asked to respond to, the initial complaint by the Supreme Court. An investigating judge is then appointed to make further investigations. On receipt of the investigating judge's report, the Supreme Court then decides whether to make a reference to the Supreme Council of Judicature (Rules 3–10). If it does, the judge is automatically suspended pending the hearing.
- On reference by the Court to the Council, the judge must be notified of the charge, and pending the hearing shall abstain from judicial duties. The judge has the same constitutional rights as a person accused of having committed an offence, being entitled to call witnesses, adduce evidence and cross-examine, in person or through a legal representative (Rules 11–21).
- The decision of the Supreme Council binds the President and Vice-President, who are jointly responsible for the formal act of removal (Constitution, arts 133(8)(4) and 153(8)(4)).

## **Fiji**

Constitution of the Republic of Fiji 2013.

### *Background*

Fiji is a republic with a unicameral Parliament, an indirectly elected President who is the Head of State, and a Prime Minister who is the Head of Government. The superior courts are the High Court, the Court of Appeal and the Supreme Court.

## APPENDIX 2

### *Appointments*

- A Judicial Services Commission (JSC) is established (s 104). It consists of five members: two judicial members (the Chief Justice, who chairs the Commission, and the President of the Court of Appeal); the Permanent Secretary (senior civil servant) responsible for justice; and a legal practitioner and a layperson both 'appointed by the President on the advice of the Chief Justice following consultation by the Chief Justice with the Attorney-General'.
- The President appoints the Chief Justice and the President of the Court of Appeal 'on the advice of the Prime Minister following consultation by the Prime Minister with the Attorney-General' (s 106(1)). The President may only exercise these and other constitutional functions on the advice of the specified person or body (s 82).
- Other judges are appointed by the President 'on the recommendation of the Judicial Services Commission following consultation by it with the Attorney-General' (s 106(2)).

### *Tenure*

- Non-citizens may only be appointed for a fixed period not exceeding three years, but are eligible for re-appointment. The exact length of a judge's term is determined by the JSC at the time of appointment (s 110(1)).
- Fijian citizen judges serve until the mandatory retirement age of 75 in the case of judges of the Supreme Court and the Court of Appeal (s 110(2)).
- Judicial salaries and benefits may not be reduced, 'except as part of an overall austerity reduction similarly applicable to all officers of the State' (s 113(1)).
- The JSC determines the salaries and benefits of judges 'following consultation with the Prime Minister and the Attorney-General', except that the salaries of the Chief Justice and the President of the Court of Appeal, are determined by the President 'on the advice of the Prime Minister following consultation by the Prime Minister with the Attorney-General.'

### *Removal*

- A judge may be removed from office only for 'misbehaviour' or 'inability to perform the functions of his or her office (whether



- arising from infirmity of body or mind or any other cause)' (ss 111(1) and 112(1)).
- In the case of the Chief Justice or the President of the Court of Appeal, proceedings are initiated by the Prime Minister advising the President that a question of removal ought to be investigated, and in the case of any other judge, by the JSC doing likewise (ss 111(3) and 112(3)).
  - The President, acting on the advice of the initiating body, must appoint a medical board consisting of three qualified medical practitioners in the case of alleged inability to perform the functions of office, and in the case of alleged misbehaviour a tribunal consisting of three serving or retired judges of Fiji or any other jurisdiction (ss 111(3) and 112(3)).
  - While proceedings are pending before the medical board or tribunal, as the case may be, the President, acting on the advice of the initiating body, may suspend the judge in question (ss 111(4)–(5) and 112(4)–(5)).
  - The medical board or the tribunal, as the case may be, must enquire into the matter, and provide the President with report of the facts and a binding recommendation, which the President must then act upon (ss 111(3) and 112(3)).
  - The report and recommendations of any tribunal or medical board must be made public (ss 111(5) and 112(5)).

## **Ghana**

Constitution of the Republic of Ghana 1992; Standing Orders of the Parliament of Ghana 2004. All references are to the Constitution unless otherwise stated.

### *Background*

Ghana is a republic with a unicameral legislature and a directly elected President who is both Head of State and Head of Government. The superior courts are the High Court, the Court of Appeal and the Supreme Court.

### *Appointments*

- A Judicial Council (JC) is established (art 153). It consists of 18 members: seven judicial members (the Chief Justice, who chairs

## APPENDIX 2

the Council, the Judge Advocate-General of the Ghana Armed Forces, and further members from various levels of the court system, elected by their peers); the Attorney-General; two representatives of the Ghana Bar Association; the Head of the Legal Directorate of the Police Services; the editor of the Ghana Law Reports; a representative nominated by the Judicial Service Staff Association; a chief chosen by the National House of Chiefs; and four laypersons chosen by the President.

- The President acts 'on the advice of' the JC in all appointments save that of the Chief Justice (art 144). However, it appears that such advice is not regarded as binding.
- In appointing members of the Supreme Court, including the Chief Justice, the President acts 'in consultation with the Council of State' and 'with the approval of Parliament' (art 144(1)-(2)).
- The Council of State (art 89) is an advisory body with the responsibility to 'counsel' the President. It is composed of 26 members who will generally be distinguished public figures, 11 of whom are directly appointed by the President, and 10 through indirect regional elections. At least one former Chief Justice must be among the members.
- When Parliament is required to approve one or more candidates nominated for appointment to the Supreme Court, the Appointments Committee and the Judiciary Committee of Parliament will jointly investigate the nominees and report to Parliament. Members of Parliament then hold a secret ballot and nominees who secure 50% of votes cast stand approved (Standing Orders of Parliament, Order 169).

### *Tenure*

- Judicial appointments are permanent until a mandatory retirement age of 70 in the case of members of the Supreme Court or the Court of Appeal and 65 in the case of High Court judges (art 145(2)).
- The remuneration of serving and retired judges is protected (art 127(5)).
- The office of a Justice of the Superior Court shall not be abolished while there is a substantive holder in office (art 144(7)).

### *Removal*

- A judge may only be removed from office for 'stated misbehaviour', 'incompetence' or 'on ground of inability to perform the functions of his office arising from infirmity of body or mind' (art 146(1)).

- Petitions for the removal of a judge are received by the President, who must forward a petition to the Chief Justice if it concerns a judge other than the Chief Justice.
- The Chief Justice, on receipt of a petition, must decide whether there is a *prima facie* case against the judge. If the Chief Justice so decides he or she then sets up an *ad hoc* committee consisting of three judicial members appointed by the JC and two other persons 'who are not members of the Council of State, nor members of Parliament, nor lawyers', who are appointed by the Chief Justice on the advice of the Council of State (art 146(3)–(4)).
- If the President receives a petition for the removal of the Chief Justice, the President 'shall, acting in consultation with the Council of State, appoint' an *ad hoc* committee (art 146(6)). In *Agyei Twum v Attorney-General and Bright Akwetey* [2005–2006] SCGLR 732, the Supreme Court of Ghana decided that it was implicit in this provision that the President, in consultation with the Council of State, should determine whether there was a *prima facie* case for the Chief Justice to answer. The *ad hoc* committee must consist of two Justices of the Supreme Court and three other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.
- While proceedings are pending before an *ad hoc* committee, the President, 'acting in accordance with the advice' of the Council of State, in the case of the Chief Justice, or of the JC, in the case of any other judge, may suspend the judge in question for any part of the period until proceedings are concluded (art 146(10)–(11)).
- Proceedings before any *ad hoc* committee must take place *in camera* and the accused judge 'is entitled to be heard in his defence by himself or by a lawyer or other expert of his choice' (art 146(8)).
- The President must act in accordance with the recommendation of the committee as to whether or not the judge should be removed from office (art 146(9)).

## Guyana

The Constitution of the Co-operative Republic of Guyana 1980; Commissions of Inquiry Act (Chapter 19:03); Time Limit for Judicial Decisions Act 2009. All references are to the Constitution unless otherwise stated.

## APPENDIX 2

### *Background*

Guyana is a republic with a unicameral legislature and a directly elected President who is the Head of State. The President appoints the Prime Minister who is the Head of Government. The superior courts are the High Court and the Court of Appeal, which together form the Supreme Court of Judicature. The final appellate court is the Caribbean Court of Justice. The Chancellor, not the Chief Justice, is the head of the judiciary. The Chief Justice is the most senior judge of the High Court.

### *Appointments*

- A Judicial Service Commission (JSC) is established (arts 134 and 198). It consists of five or six members: three judicial members (the Chancellor, who chairs the Commission, the Chief Justice and one serving or retired judge chosen by the President after consultation with the Leader of the Opposition); the Chairman of the Public Service Commission; and either one or two persons who must not be active legal practitioners, chosen by the National Assembly after consulting the representative bodies of the legal profession (art 198).
- Judges, except the Chancellor and the Chief Justice, are appointed by the President who 'shall act in accordance with the advice' of the JSC (art 128(1)). However, the President may ask the JSC to reconsider once (arts 111(2)). The Chancellor and the Chief Justice are appointed by the President 'after obtaining the agreement of the Leader of the Opposition' (art 127(1)).

### *Tenure*

- Judges of the High Court retire at 65 and the Chief Justice and judges of the Court of Appeal at 68 (art 197(2A)), unless they were appointed on a part-time basis (art 128A).
- The salary, allowances and other terms of service of a judge are not to be altered to the judge's disadvantage after appointment (art 222).
- The office of a Justice of Appeal or a Puisne Judge shall not be abolished while there is a substantive holder thereof (art 197(1)).

### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office (whether arising from infirmity of mind or

- body or any other cause) or for misbehaviour or for persistently not writing decisions or for continuously failing to give decisions and reasons therefor within such time as may be specified by Parliament' (art 197(3)). The relevant periods are set out in the Time Limit for Judicial Decisions Act 2009.
- The removal process is initiated when the Prime Minister (if the question of removal concerns the Chancellor or the Chief Justice), or the JSC (in the case of any other judge), represents to the President that the question of removal ought to be investigated (art 197(5)). The President then convenes an *ad hoc* tribunal.
  - The President, acting in his own deliberate judgment in the case of the Chancellor or the Chief Justice, and in accordance with the advice of the Chancellor in the case of any other judge, may suspend the judge in question while tribunal proceedings are pending (art 197(7)).
  - The *ad hoc* tribunal consists of at least three serving or retired judges appointed by the President, who acts in his or her own discretion if the question concerns the Chancellor or the Chief Justice and on the advice of the JSC in the case of any other judge (art 197(5)(a)).
  - The tribunal follows the process of a commission of inquiry (art 197(6)) and has all the powers of a High Court in summoning witnesses, calling for documents and examining witnesses and parties on oath. The accused judge has the right to legal representation (Commission of Inquiry Act, ss 10 and 13).
  - Judges are ultimately removed by the President who shall remove a judge if so advised by the *ad hoc* tribunal (art 197(4)).

## India

Constitution of India 1950; Judges (Inquiry) Act 1968; National Judicial Appointments Act 2014. All references are to the Constitution unless otherwise stated.

### *Background*

India is a federal republic with a bicameral legislature, an indirectly elected President who is the Head of State, and a Prime Minister who is Head of Government. The superior courts are the High Courts of the states and the Supreme Court of India.

## APPENDIX 2

### *Appointments*

- The appointment of judges has been significantly altered by the Constitution (99th Amendment Act) 2014 and the National Judicial Appointments Commission Act 2014 (both given Presidential assent on 31 December 2014 and pending implementation). Previously, the Supreme Court interpreted the then existing provision that the President would appoint Supreme Court judges 'after consultation with such of the Judges of the Supreme Court and of the High Courts in the states as the President may deem necessary for the purpose' as subjecting the President to the authority of a judicial *collegium* constituted by the Chief Justice of India and his four most senior Supreme Court colleagues; a similar interpretation governed appointments to state High Courts (*Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441; AIR 1994 SC 268 and *In re Special Reference No 1 of 1998* (1998) 7 SCC 739; AIR 1999 SC 1).
- A National Judicial Appointment Commission (NJAC) is to be established (art 124A). It will consist of six members: three judicial members (the Chief Justice of India, who will chair the Commission, and the two next most senior judges from the Supreme Court); the national Minister in charge of Law and Justice; and two eminent persons to be appointed by a committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition, at least one of whom must be a woman or a member of 'the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities'.
- The NJAC is responsible for making recommendations to the President in respect of all Supreme Court and state High Court vacancies (art 124B). The NJAC must recommend the senior most judge in the Supreme Court to fill a vacancy in the position of Chief Justice of India, if it finds the judge in question to be fit for that office (NJAC Act 2014, s 5(1)). When considering vacancies in a state High Court, the NJAC must consult the Chief Justice of that High Court (NJAC Act 2014, s 6). Seniority is among the statutory factors to be considered in respect of all candidates who are already judges.
- The recommendation of a candidate for any position other than Chief Justice of India may be blocked by the objection of two of the six NJAC members (NJAC Act 2014, ss 5(2) and 6(6)).
- Upon receiving a recommendation of the NJAC, the President may require the NJAC to reconsider its recommendation once, but is required to make any appointment recommended by the NJAC after reconsideration (s 7 NJAC Act 2014).

*Tenure*

- Appointments are permanent until the mandatory retirement age is reached. High Court judges retire on reaching the age of 62 (art 217(1)) while judges of the Supreme Court retire on reaching the age of 65 (art 124(2)).
- 'Neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment' (arts 125(2) and 221(2)).

*Removal*

- Judges may be removed on the grounds of 'proved misbehaviour or incapacity' (arts 124(4) and 218).
- The process of removal is initiated by the presentation in either House of Parliament of a notice of a motion for removal. In the Lok Sabha (Lower House), such a notice must be signed by at least 100 of its 545 members. In the Rajya Sabha (Upper House) the notice must be signed by at least 50 of its 250 members.
- Once a motion to impeach a judge has been presented, the presiding officer of the House will decide whether the issue raised warrants admitting the motion. If the issue is considered serious enough, then the presiding officer must constitute an *ad hoc* investigating committee (Judges (Inquiry) Act 1968, s 3(1)-(2)).
- The committee, composed of a Supreme Court judge, a High Court Chief Justice and a distinguished jurist (Judges (Inquiry) Act 1968, s 3(2)) is responsible for verifying the misbehaviour or the incapacity of the judge. The judge is given the opportunity to submit an initial written statement, to respond to the charges and then has the right to cross-examine witnesses, adduce evidence and to be heard in his defence (Judges (Inquiry) Act 1968, ss 3(4) and 4(1)).
- Only if the Committee concludes that the judge is guilty of any misbehaviour or suffers from any incapacity may the Houses of Parliament vote on a motion for the judge's removal (Judges (Inquiry) Act 1968, s. 6(2)). If the motion is passed by an absolute majority of the members of each House, and by at least two-thirds of those present and voting, the President may remove the judge from office (arts 124(4) and 218).

## APPENDIX 2

### **Jamaica**

Constitution of Jamaica 1962; Judiciary Act 1973; Commissions of Enquiry Act 1978; Judicial Service Act 2011. All references are to the Constitution unless otherwise stated.

#### *Background*

Jamaica is a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is bicameral and the Prime Minister is the Head of Government. The superior courts are the Supreme Court and the Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.

#### *Appointments*

- A Judicial Service Commission (JSC) is established (s 111). It consists of six members: three judicial members (the Chief Justice, who chairs the Commission; the President of the Court of Appeal; and one serving or retired judge of any Commonwealth jurisdiction, chosen by the Prime Minister after consultation with the Leader of the Opposition); the Chairman of the Public Service Commission; and two persons chosen by the Prime Minister after consultation with the Leader of the Opposition from a list prepared by the General Legal Council of six persons, none of whom is engaged in active legal practice.
- The Governor-General appoints all judges 'acting on the advice of' the JSC, save that in the case of the Chief Justice and the President of the Court of Appeal the Governor-General acts 'on the recommendation of the Prime Minister after consultation with the Leader of the Opposition' (ss 98(1)-(2) and 104(1)-(2)).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 70 years (ss 100(1) and 106(1)).
- The salaries and pensionable benefits of judges are protected (ss 101 and 107). Salaries and benefits of judges are to be reviewed by an *ad hoc* commission every three years (Judiciary Act 1973, s 4A).
- No office of Judge of the Court of Appeal or Supreme Court shall be abolished while there is a substantive holder thereof (ss 97(3) and 103(4)).



*Removal*

- A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (ss 100(4) and 106(4)).
- The process to remove a member of the Supreme Court is initiated by the Prime Minister, in the case of the Chief Justice, or the Chief Justice after consultation with the Prime Minister, in the case of any other judge (s 100(6)). The process to remove a member of the Court of Appeal is initiated by the Prime Minister, in the case of the President of the Court of Appeal, or the President of the Court of Appeal or the Chief Justice after consultation with the Prime Minister, in the case of any other judge (s 106(6)).
- Once approached by the relevant initiating body, the Governor-General forms an *ad hoc* tribunal. The tribunal is composed of no fewer than three serving or retired judges of Jamaica or any other Commonwealth jurisdiction, who are appointed by the Governor-General acting on the advice of the relevant initiating body. The tribunal must report to the Governor-General on the facts of the matter and make a recommendation, which the Governor-General must act upon, as to whether the question of removal should be referred to the Judicial Committee of the Privy Council (ss 100(6) and 106(6)).
- The Governor-General, acting in accordance with the advice of the initiating body, may suspend the judge in question while tribunal proceedings are pending or for any part of that period (ss 100(7)–(8) and 106(7)–(8)).
- The tribunal has the same powers of the Supreme Court in summoning and examining witnesses. The witnesses have the same rights or privileges as in a court of law (ss 100(7) and 106(7) and Third Schedule; Commission of Enquiry Act, ss 10 and 11).
- Judges are ultimately removed by the Governor-General, who shall remove a judge from office when advised to do so by the Judicial Committee of the Privy Council (ss 100(5) and 106(5)).

**Kenya**

Constitution of Kenya 2010; Judicial Service Act 2011; Judicial Service Code of Conduct and Ethics LN 50/2003; Vetting of Judges and Magistrates Act 2011 (transitional period only). All references are to the Constitution unless otherwise stated.

## *APPENDIX 2*

### *Background*

Kenya is a republic with a bicameral legislature and a directly elected President who is both Head of State and Head of Government. The superior courts are the High Court, the Court of Appeal and the Supreme Court.

### *Appointments*

- A Judicial Service Commission (JSC) is established (art 171). It consists of 11 members: five judicial members (the Chief Justice, who chairs the Commission; and one judge from each of the Supreme Court, Court of Appeal, High Court and magistrates' court, elected by their peers); the Attorney-General; one person nominated by the Public Service Commission; two advocates chosen by the legal profession, one a woman and one a man; two lay persons, one a woman and one a man, nominated by the President and approved by the National Assembly.
- The President shall appoint judges 'in accordance with the recommendation' of the JSC, save that the approval of the National Assembly is also required in the case of the Chief Justice and the Deputy Chief Justice (art 166(1)).
- The JSC's procedures in matters of appointment are further set out in the Judicial Service Act 2011, First Schedule.

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 70 years (art 167(1)).
- The office of Chief Justice may be held for a maximum of 10 years, but a former Chief Justice may continue as a member of the Supreme Court on the expiry of this term (art 167(2)).
- The remuneration of serving and retired judges is protected, save that a judge will be suspended on half-pay if it has been decided to convene a tribunal to determine whether the judge should be removed from office (arts 160(4) and 168(6)).
- The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office (art 160(2)).

### *Removal*

- A judge may be removed from office only on the grounds of '(a) inability to perform the functions of office arising from mental or

- physical incapacity; (b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; (c) bankruptcy; (d) incompetence; or (e) gross misconduct or misbehaviour (art 168(1), Judicial Service Code of Conduct and Ethics, LN 50/2003).
- Proceedings to remove a judge are initiated by the JSC petitioning the President, either of its own motion or following a petition received from any person (art 168(2)–(4)).
  - After receiving a petition for removal, the President must within 14 days suspend the judge on half-pay and, ‘acting in accordance with the recommendation’ of the JSC, must form an *ad hoc* tribunal to consider the question whether a judge should be removed (art 168(5)).
  - The President must appoint tribunal members on the recommendation of the Commission (art 168(5)–(6)). A tribunal to consider the removal of the Chief Justice consists of the Speaker of the National Assembly as chairperson, three superior court judges from common-law jurisdictions, one advocate of fifteen years standing, and two other persons with experience in public affairs. In the case of any other judge the tribunal consists of a chairperson and three other members from among persons who hold, have held or are qualified to hold office as a judge of a superior court (art 168(5)).
  - The proceedings of the tribunal, including safeguards for the accused judge, are governed by Judicial Service Act 2011, Second Schedule. The tribunal must serve the accused judge at least 14 days before the hearing with a notice containing the allegations and a summary of the existing evidence in support. Although the default position is for the hearing to be held in private, the accused judge has the right to have the hearing in public. The judge also has the right to be present during the proceedings, to be legally represented, to call and cross-examine witnesses and to make final submissions at the close of the hearing. While the tribunal is not bound by the strict rules of evidence it is bound by the rules of natural justice and relevancy, and must provide written reasons for its decision.
  - A judge is entitled to appeal to the Supreme Court against an adverse decision of the tribunal (art 168(8)).
  - If appeal rights have lapsed or have been exhausted, and subject to any decision made on appeal, the President ‘shall act in accordance with the recommendations made by the tribunal’ (art 168(9)).

## *APPENDIX 2*

### **Kiribati**

Constitution of Kiribati 1979; Code of Conduct for Judicial Officers of the Republic of Kiribati 2011. All references are to the Constitution unless otherwise stated.

#### *Background*

Kiribati is a republic with a unicameral legislature and a directly elected President who is both Head of State and Head of Government. The superior courts are the High Court and the Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.

#### *Appointments*

- The Public Service Commission (PSC) is established (s 98). It is composed of five members: a Chairman and four other Commissioners appointed and removed by the President in accordance with the advice of the Speaker and Chief Justice acting jointly. The Chief Justice sits as a member of the PSC to make various decisions concerning the judiciary.
- The President of Kiribati appoints the Chief Justice and the President of the Court of Appeal 'acting in accordance with the advice of the Cabinet tendered after consultation with the Public Service Commission' (ss 81(1) and 91(3)). Other judges are appointed by the President of Kiribati 'acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission' (ss 81(2) and 91(1)(b)). In the case of any judicial appointment the President of Kiribati may once refer back a candidate for reconsideration by the nominating body (s 46(2)).

#### *Tenure*

- There is no prescribed retirement age since all judges hold office until the end of the individually fixed period for which they were appointed (ss 83(1) and 93(1)).
- The salary and pensionable benefits of judges are not to be reduced except as part of a measure applicable generally to public servants (s 113(3)).

### *Removal*

- A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (ss 83(2) and 93(2)).
- The Code of Conduct for Judicial Officers of the Republic of Kiribati 2011 has clarified standards of judicial conduct and enables the Chief Justice to form a Judicial Ethics Committee to investigate complaints against judges. A judge who is the subject of a complaint is entitled to be heard by this committee, but this procedure does not form part of the constitutionally prescribed proceedings to determine whether a judge is to be removed.
- Proceedings to remove a judge are initiated by the President of Kiribati, if he or she considers that the question ought to be investigated, or by a resolution of the legislative assembly (ss 83(4) and 93(4)).
- The President of Kiribati then appoints an *ad hoc* tribunal consisting of no fewer than three members, one of whom must be a serving or retired judge. After conducting an inquiry into the matter, the tribunal must report to the legislative assembly on the facts and provide advice as to whether the judge should be removed (ss 83(4) and 93(4)).
- While tribunal proceedings are pending, the President may suspend the judge in question for any part of the period until proceedings are concluded (ss 83(5) and 93(5)).
- If the advice of the tribunal is that the judge should be removed, and the legislative assembly passes a resolution to the same effect, the President of Kiribati may remove the judge from office (ss 83(3) and 93(3)).

### **Lesotho**

Constitution of Lesotho 1993.

#### *Background*

Lesotho is a constitutional monarchy with a bicameral legislature and a Prime Minister as Head of Government. The superior courts are the High Court and the Court of Appeal.

## APPENDIX 2

### *Appointments*

- A Judicial Service Commission (JSC) is established (s 132). It consists of four members: two judicial members (the Chief Justice, who chairs the Commission, and a serving or retired judge appointed by the King acting in accordance with the advice of the Chief Justice); the Chairman of the Public Service Commission or a delegate and the Attorney-General.
- The King appoints the Chief Justice 'acting in accordance with the advice of the Prime Minister' (s 120(1)) and the President of the Court of Appeal 'on the advice of the Prime Minister' (s 124(1)). Other judges of the High Court are appointed by the King 'acting in accordance with the advice' of the JSC (s 120(2)), and other judges of the Court of Appeal by the King acting in accordance with the advice of the JSC after consultation with the President of the Court of Appeal (s 124(2)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 75 years. An Act of Parliament may prescribe a different age of retirement, but if it alters the prescribed age after the appointment of a judge the change shall not have effect in relation to that judge unless the judge consents (ss 121(1),(8) and 125(1),(8)). This is subject to the proviso that appointments to the Court of Appeal may be made for a fixed term of three years in the case of persons who have attained the retirement age or will pass it during the fixed term that is proposed (s 125(8)).
- The remuneration of serving and retired judges is protected (s 115(3)–(5)).
- The office of a puisne judge or Justice of Appeal shall not be abolished while there is a substantive holder thereof (ss 119(2) and 123(3)).

### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (ss 121(3) and 125(3)).
- The Prime Minister may initiate proceedings to remove any judge by representing to the King that a question of removal ought to be investigated, and the Chief Justice or the President of the Court of

- Appeal may do the same in the case of judges of the High Court and the Court of Appeal respectively (ss 121(5) and 125(5)).
- The King then appoints an *ad hoc* tribunal consisting of no fewer than three serving or retired judges, who are selected by the relevant initiating body (ss 121(6) and 125(6)).
  - While tribunal proceedings are pending, the King, acting in accordance with the advice of the initiating body, may suspend the judge in question (ss 121(7) and 125(7)).
  - The tribunal conducts an inquiry into the matter and furnishes the King with a report on the facts and a recommendation as to whether the judge should be removed, which the King must follow (ss 121(4)–(5) and 125(4)–(5)).
  - In *President of the Court of Appeal v Prime Minister* [2014] LSCA 1, the Court of Appeal of Lesotho considered what was required by the demands of procedural fairness at the initial stage of proceedings, as recognised by the Privy Council in *Rees v Crane* [1994] 2 AC 173, being in this case the stage when the Prime Minister decided that a tribunal should be established to inquire into the conduct of the President of the Court of Appeal. The Court decided that in the particular circumstances the Prime Minister did not have to give the judge a hearing on the allegations against him before moving to establish the tribunal. The risk that doing so would damage the reputation of the judge was mitigated by the fact that the allegations against him were largely in the public domain and were already substantially being aired in separate litigation between the parties. It was thus in the interests of both the judge and public confidence in the judiciary that tribunal proceedings should be permitted to resolve the question of misconduct as swiftly as possible. Although the establishment of the tribunal gave rise to a power to suspend the judge, the Prime Minister had offered to hear him on the question of suspension.

## Malawi

Constitution of the Republic of Malawi 1995.

### *Background*

Malawi is a republic with a unicameral legislature and a directly elected President who is the Head of State and the Head of Government. The superior courts are the High Court and the Supreme Court of Appeal.

## APPENDIX 2

### *Appointments*

- A Judicial Service Commission (JSC) is established (ss 116–118). It consists of five members: three judicial members (the Chief Justice, who chairs the Commission, and a judge and magistrate, both appointed by the President after consultation with the Chief Justice); the Chairman of the Civil Service Commission (or his nominee); and a legal practitioner appointed by the President after consultation with the Chief Justice (s 117).
- Judges other than the Chief Justice are appointed by the President 'on the recommendation' of the JSC (s 111(2)). The Chief Justice is nominated by the President and must be confirmed by the National Assembly with the support of a two-thirds majority of the members present and voting (s 111(1)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 years. The Constitution authorises the legislature to change the retirement age but this cannot apply to judges already in office without their consent (s 119(1) and(6)).
- Reduction of the salary or allowances of a judge during his or her period in office are prohibited, unless the judge consents, and judicial remuneration 'shall be increased at intervals so as to retain its original value' (s 114).

### *Removal*

- A judge may be removed from office 'only for incompetence in the performance of the duties of his office or for misbehaviour' (s 119(2)).
- The JSC has disciplinary powers over judges and has the power to recommend that a judge be removed from office (s 118(c)).
- Where the Speaker of the National Assembly has received formal notice of an intention to bring a motion for the removal of a judge, the President, after consultation with the JSC, may suspend the judge in question for any part of the period until proceedings are concluded (s 119(4)–(5)).
- Judges are ultimately removed by the President 'in consultation with' the JSC after the National Assembly has debated and passed a motion to that effect, for which a simple majority of all the members of the Assembly is required (s 119(3)).



- The procedure by which a judge is removed from office 'shall be in accordance with the principles of natural justice' (s 119(3)).

## Malaysia

Constitution of Malaysia 1963; Judicial Appointments Commission Act 2009; Judges' Ethics Committee Act 2009; Judges' Code of Ethics 2009. All references are to the Constitution unless otherwise stated.

### *Background*

Malaysia is a constitutional monarchy with a bicameral legislature and a federal structure. The King (Yang di-Pertuan Agong), elected by the Conference of Rulers for a five year term, is the Head of State and the Prime Minister the Head of Government. The superior courts are the High Court, the Court of Appeal and the Federal Court, which is the final appellate court.

### *Appointments*

- Judges are appointed by the King, 'acting on the advice of the Prime Minister, after consulting the Conference of Rulers' (art 122B(1)).
- The Court of Appeal has held that the King is not bound by opinions expressed by the Conference of Rulers in matters concerning judicial appointments (*Re Application by Dato' Seri Anwar Ibrahim to Disqualify a Judge of the Court of Appeal* [2000] 2 MLJ 481, 484). However, it was also held that the King is bound to follow the advice of the Prime Minister in accordance with art 40(1A).
- The Prime Minister is obliged to consult the Chief Justice on all judicial appointments other than the Chief Justiceship (art 122B(2)). In addition, the Prime Minister's choice of candidates is now circumscribed by the Judicial Appointments Commission Act 2009, which establishes a Judicial Appointments Commission (JAC).
- The Judicial Appointments Commission is composed of nine members: five judicial members (the Chief Justice of the Federal Court, who chairs the Commission, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and of Sabah and Sarawak, and a Federal Court judge appointed by the Prime Minister); and four eminent persons who are not members of the executive or other public service to be appointed by the Prime Minister in consultation with various (listed) legal associations and the Attorney General (Judicial Appointments Commission Act 2009, s 5).

## APPENDIX 2

- After sifting the applications and nominations for judicial office it receives, the JAC forwards to the Prime Minister a minimum of three names of selected candidates for each vacancy in the High Court and a minimum of two candidates for each vacancy in the other superior courts. The selection must be set out in a report which provides reasons for the JAC's recommendations. The Prime Minister may ask the Commission to submit two more names in respect of any vacancy. Once the Prime Minister has made a choice from among these candidates, the Prime Minister then advises the King accordingly (Judicial Appointments Commission Act, ss 22–28).

### *Tenure*

- Judicial appointments are permanent until the prescribed retirement age of 66, subject to an extension of up to six months. (This provision is made by art 125(1) in respect of Federal Court judges and extended to other judges by art 125(9), which operates generally to extend the application of Federal Court security of tenure to other courts.)
- Judges' remuneration and other terms of office (including pension rights) are not to be altered to their disadvantage after their appointment (art 125(7)).

### *Removal*

- Judges may be removed from office 'on the ground of any breach of any provision of the code of ethics prescribed under clause (3B) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office' (art 125(3)).
- The Code that has been prescribed obliges judges to uphold the integrity and independence of the judiciary, avoid impropriety, perform duties fairly and efficiently, avoid conflicts of interest, declare their assets on request and comply with administrative orders or directions (Judges' Code of Ethics 2009). If in the opinion of the Chief Justice an alleged breach of this Code is sufficiently minor not to warrant proceedings to determine whether the judge ought to be removed, the Chief Justice may refer the matter to a disciplinary body with the power to impose lesser sanctions (art 125(3A)).
- Either the Prime Minister alone or the Chief Justice, after consultation with the Prime Minister, may initiate the removal process by petitioning the King to appoint an *ad hoc* tribunal (art 125(4)).

- The King then appoints a tribunal consisting of no fewer than five serving or retired judges of Malaysia or any other Commonwealth state (art 125(4)).
- The King, on recommendation of the Prime Minister and after consulting with the Chief Justice, may suspend a judge who is being investigated for removal for any part of the period until proceedings are concluded (art 125(5)).
- If the tribunal makes a recommendation to that effect, the King may remove the judge from office (art 125(3)).

## **Maldives**

The Constitution of the Republic of Maldives 2008; Judicial Service Commission Act 2008. All references are to the Constitution unless otherwise stated.

### *Background*

Maldives is a republic with a unicameral legislature and a directly elected President who is the Head of State and the Head of Government. The superior courts are the High Court and the Supreme Court.

### *Appointments*

- A Judicial Service Commission (JSC) is established (arts 157–166). It consists of 10 individuals: three judicial members (a judge of the Supreme Court, other than the Chief Justice, and one judge each from the High Court and Trial Court, elected by their peers); the Speaker of the people's Majlis, and another member of the People's Majlis and a member of the public, both elected by that body; the Chair of the Civil Service Commission; the Attorney-General; a qualified lawyer elected by the members of the practising legal profession; and a person appointed by the President (art 158; s 3 Judicial Service Commission Act 2008). The JSC elects its own chairman.
- Judges of the High Court are directly appointed by the JSC (art 148(b)). The Chief Justice and the judges of the Supreme Court are appointed by the President, 'after consulting the Judicial Service Commission and confirmation of the appointee by a majority of the members of the People's Majlis present and voting' (arts 147 and 148(a)).

## APPENDIX 2

### *Tenure*

- Judges 'shall be appointed without term but shall retire at the age of seventy years' (art 148(c)). However, for the first 15 years of the Constitution, judges may be appointed for an individually specified fixed term of not more than five years (art 148(d)).
- The reduction of a judge's salary is not prohibited but the legislature is to determine the salary and allowances of judges 'in keeping with the stature of their office' (art 152).

### *Removal*

- Judges may only be removed from office if they are found to be grossly incompetent or guilty of gross misconduct (art 154).
- The process of removal is initiated by the JSC (art 154(b)). The JSC may conduct the investigation itself or may appoint an *ad hoc* Investigation Committee, up to half of whose members may be drawn from outside the JSC (Judicial Service Commission Act, art 23). The judge is entitled to 'the following information and opportunities: (a) Details of the complaint which has been submitted, the scheduled date of the hearing of the complaint, date and time; (b) In the hearing, the opportunity for self-representation or to get the assistance of a lawyer to present the defence, questioning witnesses, and presenting witnesses' (Judicial Service Commission Act 2008, art 26). If an Investigating Committee has been established, the Committee must submit written report(s) to the Commission, and allow the judge an opportunity to respond by way of written submissions or orally, in person or through counsel (Judicial Service Commission Act 2008, arts 28–32). The JSC then submits to the relevant Committee of the People's Majlis a full report of 'information acquired by the Commission related to the case', a finding on whether the complaint has any basis and any advice it may choose to offer on the action to be taken, including dismissal (Judicial Service Commission Act 2008, art 33).
- For the removal process to proceed, the JSC must submit to the People's Majlis a draft resolution that the judge be removed from office (Constitution, art 154(b)).
- If the People's Majlis passes such a resolution, which requires the support of a two-thirds majority of its members present and voting, the judge is thereby removed from office (art 154(b)).

## Malta

Constitution of Malta 1964; Commission for the Administration of Justice Act 1994; Code of Ethics for the Members of the Judiciary 2004. All references are to the Constitution unless otherwise stated.

### *Background*

Malta is a republic with a unicameral legislature, a Prime Minister as Head of Government and an indirectly elected President as Head of State. The superior courts are the Civil Court, the Criminal Court and the Courts of Criminal and Civil Appeal and the specialist Constitutional Court.

### *Appointments*

- The President appoints all the judges of the superior courts on the binding advice of the Prime Minister (arts 85(1) and 96(1)).
- A Commission for the Administration of Justice (CAJ) is established (art 101A). It consists of 10 members: five judicial members (the Chief Justice, two Superior Court judges, and two magistrates, elected by their peers); the President (who chairs the Commission); the Attorney-General; two members appointed by the Prime Minister and Leader of the Opposition respectively; and the President of the Chamber of Advocates. The Commission may, when requested by the Prime Minister, give non-binding advice regarding judicial appointments (art 101A(11)(c)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 (art 97).
- The salary and terms of office of a judge, other than allowances, are not to be altered to the judge's disadvantage after appointment (art 107(3)).
- The office of a judge of the superior courts shall not, without the judge's consent, be abolished during his or her continuance in office (art 95(6)).

### *Removal*

- The grounds upon which a judge may be removed from office are 'proved inability to perform the functions of his office (whether

## APPENDIX 2

arising from infirmity of body or mind or any other cause) or proved misbehaviour' (art 97(2)).

- Parliament may legislate on the procedure to be followed in removal matters and 'for the investigation and proof' of the grounds of removal (art 97(3)). Such provision is found in the Commission for the Administration of Justice Act 1994, s 9.
- Proceedings to remove a judge are initiated by a Parliamentary motion. The Speaker keeps the motion pending and refers the issue for investigation to the CAJ (Commission for the Administration of Justice Act 1994, s 9(1)).
- The motion must contain 'definite charges' against the judge, and the judge must be given 'a reasonable opportunity to present a written statement of defence within such time as may be specified by the Commission' (Commission for the Administration of Justice Act 1994, s 9(2) and (3)). Furthermore, 'Proceedings by the Commission under this article shall be held *in camera*. The member of the House presenting the motion and the judge or magistrate whose conduct is being investigated shall have a right to be present during the whole process, to produce witnesses in support of the charges set in the motion or in defence, and to be assisted by any advocate or legal procurator' (Commission for the Administration of Justice Act 1994, s 9(7)).
- Once it has concluded its investigations, the CAJ reports to the Speaker. Only if the CAJ finds that the alleged misbehaviour or incapacity has been *prima facie* proved may Parliament proceed to debate the motion (Commission for the Administration of Justice Act 1994, s 9(5)).
- The support of two thirds of all the members of Parliament is required in order for the motion to be passed (Constitution, art 97(2)), whereupon the President formally removes the judge.

### **Mauritius**

Constitution 1968; Judicial and Legal Service Commission Regulation 1967; Courts Act 1945. All references are to the Constitution unless otherwise stated.

#### *Background*

Mauritius is a republic with a unicameral legislature, an indirectly elected President as Head of State, and a Prime Minister as Head of Government.

The Supreme Court includes a court of criminal appeal and a court of civil appeal among its divisions. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.

### *Appointments*

- A Judicial and Legal Service Commission (JLSC) is established (s 85). It consists of four members: three judicial members (the Chief Justice, who chairs the Commission, the Senior Puisne Judge, and one serving or retired judge of any Commonwealth jurisdiction appointed by the President, acting in accordance with the advice of the Chief Justice); and the Chairman of the Public Service Commission (s 85).
- The President appoints the Chief Justice 'acting after consultation with the Prime Minister' (s 77(1)). The Senior Puisne Judge is appointed by the President, 'acting in accordance with the advice of the Chief Justice'. Other judges are appointed by the President 'acting in accordance with the advice' of the JLSC (s 77(3)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 62 years. The Constitution authorises the legislature to change the retirement age but this will not apply to judges already in office without their consent (s 78(1) and (7)). The retirement age of judges was extended to 67 under the s 3 of the Courts Act.
- There is protection against reduction of judicial salaries (s 108).
- The office of a judge shall not be abolished while any person is holding that office unless that person consents to its abolition (s 76(2)).

### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour' (s 78(2)).
- The President, exercising his or her own deliberate judgment, initiates the removal process in relation to the Chief Justice, and the Chief Justice does so in relation to any other judge (s 78(4) and (6)).
- Once proceedings have been initiated, the President forms an *ad hoc* tribunal composed of no fewer than three serving or retired judges of Mauritius or any other Commonwealth jurisdiction. The tribunal must report to the President on the facts of the matter and

## APPENDIX 2

make a recommendation, which the President must act upon, as to whether the question of removal should be referred to the Judicial Committee of the Privy Council (s 78(4)).

- While proceedings are pending before the tribunal, the President may suspend the judge in question (s 78(5)).
- Judges are ultimately removed by the President, who must do so when advised accordingly by the Judicial Committee of the Privy Council (s 78(3)).

### **Mozambique**

Constitution of the Republic of Mozambique 1990; Organic Law of the Judicial Courts Law No 10/92 of 6 May 1992; Judicial Magistrates Law No 10/91 of 30 July 1991. All references are to the Constitution unless otherwise stated.

#### *Background*

Mozambique is a republic with a unicameral legislature and a directly elected President who is Head of State and a Prime Minister who is Head of Government. The courts include the Constitutional Council, the Supreme Court, the Administrative Court and civil courts.

#### *Appointments*

- A Superior Council of the Judiciary (SCJ) is established. The SCJ consists of 16 members: nine judicial members (the President and Vice-President of the Supreme Court and seven members of the judiciary elected by their peers); two members appointed by the President; and five members elected by the Assembly of the Republic according to principles of proportional representation (art 221). The President of the Supreme Court chairs the SCJ.
- The President of Mozambique appoints the President and Vice-President of the Supreme Court 'after consultation' with the SCJ, and the other judges of the Supreme Court 'on the recommendation' of the SCJ (art 226(2)-(3)).
- The Constitutional Council consists of seven judges. The President of Mozambique appoints the President of the Constitutional Council. Five members are appointed by the Assembly in accordance with the principles of proportional representation and the remaining member is appointed by the SCJ (art 241).



*Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 67 years.

*Removal*

- Judges 'shall be irremovable, inasmuch as they cannot be transferred, suspended, retired or dismissed, except in the cases established by law' (art 217(3)).
- The SCJ is entrusted with the power to conduct disciplinary proceedings (art 222).
- The disciplinary procedures of the SCJ are regulated by Judicial Magistrates Law No 10/91 of 30 July 1991, arts 110–125, and include a requirement that the judge be given notice of the allegations in writing and a period of 10–30 days to file a response. The judge may present evidence and call witnesses.

**Namibia**

Constitution of Namibia 1990; High Court Act 1990; Supreme Court Act 1990; Judicial Service Commission Act 1995; Judicial Service Commission Regulations 2011. All references are to the Constitution unless otherwise stated.

*Background*

Namibia is a republic with a bicameral legislature and a directly elected President who is both the Head of State and Head of Government. The superior courts are the High Court and the Supreme Court.

*Appointments*

- A Judicial Service Commission (JSC) is established (art 85). It consists of five members: two judicial members (the Chief Justice and the Deputy Chief Justice); the Attorney-General; and two members of the legal profession appointed by the president from legal practitioners nominated by relevant professional bodies (art 85(1); Judicial Service Commission Act 1995, s 2).
- All judicial appointments 'shall be made by the President on the recommendation of the Judicial Service Commission' (art 82(1)).

## APPENDIX 2

- The JSC must have 'due regard to affirmative action and the need for a balanced structuring of judicial offices' (Judicial Service Commission Act 1995, s 5(1)).
- The President 'may for good cause reject a recommendation' and request the JSC to reconsider, but must provide reasons for doing so (Judicial Service Commission Act 1995, s 5(2)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 years but the President may extend the retiring age of any individual judge to 70, and Parliament may provide for a higher retirement age (art 82(4)).
- The remuneration of serving and retired judges of the Supreme Court is protected by statute (Supreme Court Act 1990, s 10).

### *Removal*

- 'Judges may only be removed from office on the ground of mental incapacity or for gross misconduct' (art 84(2)).
- The JSC is responsible for investigating whether a judge should be removed from office, and must inform the President of its recommendation (art 84(3)). In the event that the JSC considers that a complaint against a judge may warrant his or her removal, it may establish an investigatory committee consisting of at least two members of the JSC (Judicial Service Commission Regulations 2011, reg 9). If the JSC on receiving the committee's report decides to pursue removal proceedings, the full JSC must hold an inquiry at which the judge has the right to be legally represented, to lead evidence and to cross-examine witnesses (Judicial Service Commission Regulations 2011, reg 10-11). If the JSC decides to recommend that the judge be removed from office it must provide the judge with reasons for doing so, and may receive evidence in aggravation or mitigation of its proposed recommendation. (Judicial Service Commission Regulations 2011, reg 12).
- The President may remove a judge from office on the recommendation of the JSC (art 84(3)).

## **Nauru**

Constitution of Nauru 1968; Courts Act 1972.

### *Background*

Nauru is a republic with a unicameral legislature and an indirectly elected President as Head of State and Head of Government. The superior court is the Supreme Court and there is the possibility of appealing to the High Court of Australia.

### *Appointments*

- Judges of the Supreme Court are appointed by the President (art 49(2)).

### *Tenure*

- There is constitutional protection against the reduction of salary during the term of a judge (art 65(3)–(4)).
- 'A judge of the Supreme Court ceases to hold office on attaining the age of sixty-five years or, if a greater age is prescribed by law for the purposes of this Article, on attaining that greater age' (art 50(1)). The retirement age of Supreme Court judges is 75 (s 5 Courts Act).

### *Removal*

- 'A judge of the Supreme Court may not be removed from office except on a resolution of Parliament approved by not less than two-thirds of the total number of members of Parliament praying for his removal from office on the ground of proved incapacity or misconduct' (art 51(1)).

## **New Zealand**

Constitution Act 1986; Judicature Act 1908; Supreme Court Act 2003; Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (JCCJCPA).

### *Background*

New Zealand is a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is unicameral and the Prime Minister is the Head of Government. The superior courts are the High

## APPENDIX 2

Court, the Court of Appeal and the Supreme Court, and members of the latter two courts also hold concurrent office as judges of the High Court.

### *Appointments*

- The Governor-General formally appoints all judges (Judicature Act 1908, ss 4(2) and 57(2); Supreme Court Act 2003, s 17). According to established procedure the Governor-General acts on the advice of the Prime Minister in respect of appointments to the position of Chief Justice and the advice of the Attorney-General, who in this regard serves as First Law Officer, in respect of all other appointments. See P Joseph, 'Appointment, Discipline and Removal of Judges in New Zealand' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011), 67–70.
- The Attorney-General presently follows the 'Judicial Appointments Protocol', (May 2014) available at [http://www.crownlaw.govt.nz/uploads/judicial\\_protocol.pdf](http://www.crownlaw.govt.nz/uploads/judicial_protocol.pdf).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 70 (Judicature Act 1908, ss 13 and 26E(3)).
- Judges' salaries are protected against reduction while they are in office (Constitution Act 1986, s 24).

### *Removal*

- A judge may be removed from office 'only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office' (Constitution Act 1986, s 23).
- Complaints about judicial misconduct are investigated by a Judicial Conduct Commissioner. If the Commissioner considers that the allegations justify an inquiry and may warrant consideration of the removal of the judge, the Commissioner may recommend to the Attorney-General that a Judicial Conduct Panel be established (JCCJCPA, s 18). Such panels are to be composed of at least one judge, another serving or retired judge or a lawyer, and a lay person (JCCJCPA, s 22). The Panel must observe the principles of natural justice and the judge is entitled to legal representation at public expense (JCCJCPA, ss 26–27). If the Panel recommends, in a report that sets out factual findings and reasons for its recommendation, that consideration of the judge's

removal is justified, then the Attorney-General, in his or her absolute discretion, may take steps to initiate the removal of the judge (ss 32–33). The Attorney-General may also take such steps, without any need for a Panel inquiry, if a judge is convicted of a criminal offence punishable by imprisonment for two or more years (JCCJCPA, s 34).

- Judges are ultimately removed 'by the Sovereign or the Governor-General, acting upon an address of the House of Representatives' (Constitution Act 1986, s 23).

## **Nigeria**

Constitution of the Federal Republic of Nigeria 1999.

### *Background*

Nigeria is a federal republic with a bicameral legislature and a directly elected President who is the Head of State and the Head of Government. The superior courts include the High Courts of the states and the federal High Court, Court of Appeal and the Supreme Court.

### *Appointments*

- A National Judicial Council (NJC) is established (s 153(1)(i)). It is composed of 24 members: 17 judicial members (the Chief Justice, the next most senior judge of the Supreme Court, the President of the Court of Appeal, five retired judges, the Chief Judge of the Federal Court, the President of the National Industrial Court, five Chief Judges of state courts, one Grand Kadi, and a President of the Customary Court of Appeal); five members of the Nigerian Bar Association (including one Senior Advocate of Nigeria); and two members appointed by the President (Third Schedule, Part 1, Para 20). The Chief Justice chairs the NJC.
- There is also a Federal Judicial Service Commission (s 153(1)(e)). It is composed of nine members: four judicial members (the Chief Justice of Nigeria, the President of the Court of Appeal, the Chief Judge of the Federal High Court and the President of the National Industrial Court); the Attorney-General of the federation; two qualified persons recommended by the Nigerian Bar Association; and two members appointed by the President (Third Schedule, Part 1, Para 12).

## APPENDIX 2

- Finally, there is a state Judicial Service Commission in each state (s 197(1)(c)). It is composed of eight members: three judicial members (the Chief Judge of the State and two other judges); the Attorney-General of the State; two qualified legal practitioners; and two members appointed by the Governor (Third Schedule, Part 2, Para 5).
- The NJC is the ultimate advisory body and recommends candidates to the President for appointment to the federal courts and to state governors for appointment to state courts (ss 231, 238, 250 and 271). The federal and state Judicial Service Commission advise the NJC on judicial appointments to federal and state courts respectively (Third Schedule, Part I (13), Part II (6)).
- The appointment of Supreme Court judges and the heads of the federal Court of Appeal and High Courts must be confirmed by the federal Senate, and the appointment of the Chief Judge of a state by the House of Assembly of that state (ss 231, 238, 250 and 271).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 70 in the case of Supreme Court and Court of Appeal judges, and 65 in the case of all other judges (s 291).
- The remuneration of judges and certain other office holders is protected by provision that the 'remuneration and salaries payable and their conditions of service, other than allowances, shall not be altered to their disadvantage after their appointment' (s 84(3)).

### *Removal*

- A judge may be removed from office only 'for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct' (s 292(1)). This is a reference to the Code of Conduct for Public Officers set out in the Fifth Schedule to the Constitution. The Code restrains judges among other things from, operating foreign accounts, receiving improper gifts and loans, taking bribes, abusing their powers, and failure to make a declaration of assets as prescribed.
- The principal removal process is initiated by the NJC which undertakes initial investigations on receipt of a complaint against a judge. If the complaint is of sufficient seriousness, a Committee or Panel

- of Inquiry is constituted to investigate the allegations. Both the complainant and the accused are afforded the opportunity for full legal representation. (This process is described by Justice AN Nwankwo, 'The Role of National Judicial Council (NJC) in the Sustenance of the Judiciary under Nigeria's Democracy' in T Oyeyipo, L Gummi and I Umezulike (eds), *Judicial Integrity, Independence and Reforms* (Snaap Press 2006), 131–132.)
- A separate process exists for violations of the Code of Conduct for Public Officers. A Code of Conduct Tribunal is constituted to investigate any breach. It is chaired by a judge and consists of two other members appointed by the President on recommendation by the NJC. Possible sanctions for breach of the Code include removal from office. There is a right of appeal to the federal Court of Appeal (Fifth Schedule, Part I, 15–18).
  - Judges who are heads of a court are removed by the President acting on an address supported by a majority of two-thirds of the Senate, or the relevant state House of Assembly, in the case of a federal court or a state court respectively. Other judges are removed by the President acting on the recommendation of the NJC (s 292(1)).

### **Organisation of Eastern Caribbean States**

West Indies Associated States Supreme Court Order 1967, No 223 of 1967.

#### *Background*

The Organisation of Eastern Caribbean States (OECS) consists of six sovereign Commonwealth member states (Antigua and Barbuda; Dominica; Grenada; St Kitts and Nevis; St Lucia; and St Vincent and the Grenadines) and three British Overseas Territories (Anguilla; the British Virgin Islands; and, Montserrat). OECS members have established a number of shared institutions in areas including economic and legal affairs. The Eastern Caribbean Supreme Court (ECSC) serves as the superior court of record for all OECS member states. The ECSC was established in 1967 by the West Indies Associated States Supreme Court Order, and consists of a High Court of Justice and a Court of Appeal. There is the possibility in some cases of further appeal to the Judicial Committee of the Privy Council.

## APPENDIX 2

### *Appointments*

- A Judicial and Legal Service Commission (JLSC) is established (s 18). It consists of five members: three judicial members (the Chief Justice, who chairs the Commission; a High or Court of Appeal judge chosen by the Chief Justice and one retired Commonwealth judge appointed by the Chief Justice with the concurrence of at least four Premiers of Member States); and the Chairs of the Public Service Commission of two Member States acting in rotation (s 18).
- The Chief Justice is appointed by Her Majesty The Queen, and the other judges by the JLSC on behalf of Her Majesty (s 5). It is conventional that Her Majesty acts upon the recommendation of the Heads of Government of the OECS member states.

### *Tenure*

- Judges of the High Court retire at the age of 62 while judges of the Court of Appeal retire at the age of 65. The tenure of judges who have reached retirement age may be extended for a maximum period of three years by the JLSC 'acting with the concurrence of the Premiers of all the States' (s 8(1)).
- The salary and pensionable allowances of a judge shall not be varied to the disadvantage of that judge once appointed (s 11(1)(b)).
- No office of Justice of Appeal or Puisne Judge shall be abolished while there is a substantive holder thereof without the consent of the holder thereof (s 4(5)).

### *Removal*

- A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (s 8(3)).
- The Premier of any of the OECS member states may initiate the removal process in respect of the Chief Justice representing to the Lord Chancellor of the United Kingdom that a question of removal has arisen, and the JLSC may do the same in relation to any other judge by making a representation to that effect to the Chief Justice (s 8(5)).
- The Lord Chancellor or the Chief Justice, as the case may be, then forms an *ad hoc* tribunal. The tribunal is composed of no fewer than three serving or retired judges of any Commonwealth jurisdiction. The tribunal must report on the facts of the matter and make a



recommendation which the Lord Chancellor or the Chief Justice, as the case may be, must act upon, as to whether the question of removal should be referred to the Judicial Committee of the Privy Council (s 8(5)).

- Members of the tribunal have the same powers as a judge of the High Court to compel evidence and witnesses, and the accused judge has the right to legal representation (Schedule 2).
- While proceedings are pending before a tribunal the JLSC (or Lord Chancellor in the case of the Chief Justice), may suspend the judge in question for any part of the period until proceedings before the tribunal and the Judicial Committee of the Privy Council are concluded (s 8(7)–(8)).
- Ultimately, judges are removed by the JLSC, and the Chief Justice is removed by the Queen. However, the judge may only be removed if the Judicial Committee of the Privy Council has advised accordingly (s 8(4)).

## **Pakistan**

Constitution of the Islamic Republic of Pakistan 1973; Judicial Commission of Pakistan Rules 2010 (SRO 122(KE)/2010); Supreme Judicial Council Procedure of Enquiry 2005 (P Reg 113/2005-SJC). All references are to the Constitution unless otherwise stated.

### *Background*

Pakistan is a federal republic with a bicameral legislature, an indirectly elected President as Head of State and a Prime Minister as Head of Government. The superior courts include the High Courts of the provinces and the Supreme Court.

### *Appointments*

- A Judicial Commission of Pakistan (JCP) is established. Its membership, mainly judicial, varies according to whether appointments are made to the Supreme or High Courts (art 175A(1)–(5)). For appointments to the Supreme Court the JCP is composed of the Chief Justice who acts as chairman, the four most senior judges of the Supreme Court, a retired Chief Justice or Supreme Court judge, the Federal Minister for Law and Justice, the Attorney-General and a senior advocate appointed by the Pakistan Bar Council

## APPENDIX 2

(art 175A(2)). For appointments to the Islamabad High Court and High Courts of the Provinces, the Commission retains its basic membership but is joined by the Chief Justice and the most senior judge of the Islamabad (in the case of the former) and provincial High Courts; as well as the Provincial Minister for Law and a qualified advocate nominated by the Bar Council of that Province (in the case of the latter) (art 175A(5–6)).

- The process adopted by the JCP for selection of candidates is set out in the Judicial Commission of Pakistan Rules, 2010 (SRO122(KE)/2010).
- The JCP selects a candidate for each vacancy and forwards the name to a Parliamentary Committee composed of four members from the Senate and four members from the National Assembly, who are selected in equal numbers from the ruling party and the opposition. The Committee may confirm or, by a three-fourths majority, reject the candidate. If confirmed, the Prime Minister forwards the name of the candidate to the President for appointment (art 175A(8)–(13)).
- This process is not applicable to the appointment of the Chief Justice, since the President must appoint the most senior judge of the Supreme Court to this position (art 175A(3)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 in the case of members of the Supreme Court, and 62 in the case of members of the High Court (arts 179, 195).
- The salary and pension rights of judges are specified in the Fifth Schedule to the Constitution.

### *Removal*

- A judge may be removed from office on the ground that he or she is 'incapable of properly performing the duties of his office by reason of physical or mental incapacity' or for 'misconduct' (art 209(5)–(6)).
- The constitutional grounds for removal are further defined in the Supreme Judicial Council Procedure of Enquiry 2005, s 3 in the following terms: "Incapacity" will include all forms of physical or mental incapacity howsoever described or narrated, which render the Judge incapable of performing the duties of his office. "Misconduct" includes (i) conduct unbecoming of a Judge, (ii) is in disregard of the Code of Conduct issued under Article 209(8) of the

Constitution of Islamic Republic of Pakistan, (iii) is found to be inefficient or has ceased to be efficient.’

- The Constitution empowers the President to remove judges of the Supreme and High Courts, but only after receiving a report by the Supreme Judicial Council (SJC) advising accordingly (art 209(6)). Membership of the Council is as follows: the Chief Justice of Pakistan; the two next most senior Judges of the Supreme Court; and the two most senior Chief Justices of High Courts (art 209(2)).
- The process is initiated by the receipt of a complaint concerning a judge from anyone. If the information is judged to be sufficient to open an enquiry the SJC must meet and consider the information. The judge may be called to answer the allegations. If the SJC decides to proceed, a show cause notice is issued to the judge along with supporting material calling upon the judge to respond to the allegations within fourteen days (Supreme Judicial Council Procedure of Enquiry 2005, ss 8–13).

## **Papua New Guinea**

Constitution of the Independent State of Papua New Guinea 1975.

### *Background*

Papua New Guinea is a Commonwealth realm in which the Governor-General is Her Majesty’s representative in the exercise of the constitutionally designated role of ‘Head of State’. There is a unicameral legislature and an indirectly elected Prime Minister is the Head of Government. The superior courts are the Supreme Court and the National Court.

### *Appointments*

- A Judicial and Legal Services Commission (JLSC) is established (s 183). It consists of five members: three judicial members (the Chief Justice, Deputy Chief Justice and the Chief Ombudsman); the Minister responsible for the National Justice Administration (or his nominee), as Chairman; and a Member of Parliament appointed by the Parliament (s 183(2)).
- The Chief Justice is appointed by the Head of State ‘acting with, and in accordance with, the advice of the National Executive Council given after consultation with the Minister responsible for the National Justice Administration’ (s 169(2)).
- All other judges are appointed directly by the JLSC (s 170(2)).

## APPENDIX 2

### *Tenure*

- Fixed term appointments are the norm in the National and Supreme Court. Full-time citizen judges are appointed for a 10-year period whilst full-time non-citizen Judges are appointed for a three-year term. In both instances, judges may be reappointed up until the mandatory retirement age of 72, which may be extended by the Judicial and Legal Services Commission to an age of 75 (ss 2 and 7 Organic Law on the Terms and Conditions of Employment of Judges (amended 2010)).
- The following protection of remuneration applies to judges (in virtue of s 221): 'The total emoluments of a constitutional office-holder shall not be reduced while he is in office, except (a) as part of a general reduction applicable equally or proportionately to all constitutional office-holders or, if he is a member of a State Service, to members of that service; or (b) as a result of taxation that does not discriminate against him as a constitutional office-holder, or against constitutional office-holders generally'(s 223(4)).
- The office of a judge serving in a court established by the Constitution may not be abolished while there is a substantive holder of that office (s 223(5)).

### *Removal*

- A judge may be removed from office only for 'inability (whether arising from physical or mental infirmity or otherwise) to perform the functions and duties of his office', 'misbehaviour' or 'misconduct in office' in breach of the Leadership Code (s 178). The Leadership Code requires judges among other things to avoid conflicts of interest and to maintain manifest propriety (ss 26–31).
- The removal process is initiated by the JLSC in respect of judges other than the Chief Justice, and by the Head of State 'acting with, and in accordance with the advice of the National Executive Council' in respect of the Chief Justice (ss 179(1) and 180(1)). In each case the initiating body must establish an *ad hoc* tribunal and refer the matter to the tribunal 'together with a statement of reasons for its opinion'.
- The *ad hoc* tribunal must consist of three serving or retired judges of Papua New Guinea, the pre-independence Supreme Court or 'a court of unlimited jurisdiction of a country with a legal system similar to that of Papua New Guinea, or of a court to which an appeal from such a court lies' (s 181(1)).

- The *ad hoc* tribunal 'shall make due inquiry into any matter referred to it without regard to legal formalities or the rules of evidence, and shall inform itself in such manner as it thinks proper, subject to compliance with the principles of natural justice' (s 181(2)).
- While proceedings are pending before an ad hoc committee the Head of State, in accordance with the advice of the JLSC (or the National Executive Council in the case of the Chief Justice), may suspend the judge in question on full pay for any part of the period until proceedings are concluded (s 182).
- If the tribunal 'reports that there are good grounds for removing a judge', the body which initiated the removal process may remove that judge from office (ss 179(2) and 180(2)).

## **Rwanda**

Constitution of the Republic of Rwanda 2003; Organic Law No 01/2004 Establishing the Organisation, Functioning and Jurisdiction of the Supreme Court; Organic Law No 02/2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary; Law N° 6bis/2004 On the Statutes for Judges and other Judicial Personnel; Organic Law No 51/2008 Determining the Organisation, Functioning and Jurisdiction of Courts. All references are to the Constitution unless otherwise stated.

### *Background*

Rwanda is a republic with a bicameral legislature and a directly elected President who is the Head of State. The President nominates the Prime Minister who is Head of Government. The superior courts are the High Court (first instance and appellate court) and the Supreme Court. The President of the Supreme Court is head of the judiciary.

### *Appointments*

- A High Council of the Judiciary (HCJ) is established (art 158; Organic Law No 02/2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary). Its membership is largely judicial and consists of 24 members: 18 judicial members (the President of the Supreme Court who acts as Chairperson; the Vice-President of the Supreme Court; a judge of the Supreme Court, the Presidents and a judge of the High and

## APPENDIX 2

Commercial High Courts, elected by their peers; a judge of the Commercial Courts; and five judges from the Intermediate and Primary Courts, elected by their peers); two Law deans; a representative of the Bar Association; a representative of the Ministry of Justice appointed by the Minister of Justice; the President of the National Commission of Human Rights; the Ombudsman; and other officers designated by the Organic Law.

- Appointments to the High Court, except of the President and Vice-President of the High Court, are undertaken by the President of the Supreme Court on approval by the HCJ (Organic Law No 51/2008 of 09/09/2008, art 19).
- Appointments to the Supreme Court and of the President and Vice-President of the High Court are carried out by the President of Rwanda after obtaining the approval of the Senate of the Parliament of Rwanda and following consultation with the Cabinet and HCJ (arts 147 and 149; Organic Law No 01/2004, arts 5-7).

### *Tenure*

- Judges, with the exception of the President and Vice-President of the Supreme Court, retire at the age of 65. This age may be extended by five years by the SCJ at the request of the concerned judge (Organic Law N° 01/2004, art 14; Law No 6bis/2004, s 79).
- The President and Vice-President of the Supreme Court are appointed for a non-renewable term of eight years. The President and Vice-President of the High Court are appointed for a term of five years renewable once (art 142; Organic Law No 01/2004, arts 5-6).
- Contract judges may be appointed in the High Court but not in the Supreme Court. Their contract 'is concluded between them and the President of the Supreme Court after approval by the High Council of the Judiciary' (Organic Law No 51/2008 of 09/09/2008, art 41).
- There is no constitutional protection against reduction of the salary of judges. However, there is statutory provision for a regular increase of salary based on performance evaluations. The statute further prohibits any reduction of salary except in the case of a judge under disciplinary sanction (Law N° 6bis/2004, arts 25-27).

### *Removal*

- Judges may be removed from office on the grounds of 'serious misconduct' or 'failure to discharge duties on grounds other than

- sickness or infirmity' (Law No 6bis/2004, art 78). A judge who is unable to perform his or her duties due to infirmity or sickness is automatically dismissed on certification 'by a commission of three (3) doctors' (Law No 6bis/2004, arts 72–73).
- The disciplinary process is entirely controlled by the HCJ, except for the matters concerning the President and Vice-President of the Supreme Court (art 157(2); Law No 6bis/2004, art 33).
  - Where a judge is suspected of committing a 'serious disciplinary fault', the President of the Supreme Court may, after seeking the opinion of the President of the accused judge's court, suspend that judge. If within one month, the case has not come before the HCJ, the suspension will be revoked. Pending final determination of the matter, the HCJ may also suspend the judge (Law N° 6bis/2004, arts 35 and 40).
  - The accused judge is entitled to notice of the allegations at issue, and to be present and represented at a hearing before the HCJ. The proceedings of the HCJ take place *in camera*, but reasons must be given. The decision to remove a judge requires a two-thirds majority of the HCJ. There is no right to appeal or obtain judicial review of the HCJ's decision unless a decision has been taken in the absence of the judge (Organic Law N. 02/2004, arts 21–28; Law No 6bis/2004, Chapter 4).
  - The President and Vice-President of the High Court, and the President, Vice-President and judges of the Supreme Court 'may be removed from office on account of serious misconduct, incompetence or serious professional misconduct upon request by three fifths (3/5) of either the Chamber of Deputies or the Senate and shall be removed by a two thirds (2/3) majority votes of each Chamber of the Parliament, in a joint session' (arts 147 and 149).

## Samoa

The Constitution of the Independent State of Samoa 1960.

### *Background*

Samoa is a republic with a unicameral legislature, a Prime Minister as Head of Government and an indirectly elected Head of State. The superior courts are the Supreme Court and the Court of Appeal.

## APPENDIX 2

### *Appointments*

- A Judicial Service Commission (JSC) is established (art 72). It consists of three members: the Chief Justice, who chairs the Commission; the Attorney-General; and a member appointed by the Minister of Justice (art 72).
- All judges, except the Chief Justice, are appointed by the Head of State acting on the advice of the JSC (arts 26 and 72(3)). The Chief Justice is appointed by the Head of State who is bound to act on the advice of the Prime Minister (arts 26 and 65(2)).

### *Tenure*

- Judges retire on reaching the age of 68 (art 68(1)). However, the Head of State may extend the term of a judge who has reached retirement age acting on advice of Prime Minister, in the case of Chief Justice, or acting on advice of the JSC in all other cases (art 68(1)).
- Non-citizens of Samoa may be appointed for a fixed term to the Supreme Court irrespective of their age (art 68(2)). Judges of the Court of Appeal may be appointed for a fixed term or even to determine a single case (art 75(5)).
- The salaries of regular judges of the Supreme Court are not to be reduced 'during their period of office, unless as part of a general reduction of salaries applied proportionately to all persons whose salaries are determined by Act' (art 69).

### *Removal*

- Judges may only be removed on the grounds of 'stated misbehaviour or of infirmity of body or mind' (art 68(5)).
- Judges are ultimately removed by the Head of State. However, the Head of State may only remove a judge 'on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies)' (art 68(5)).

## **Seychelles**

Constitution 1993; Judiciary Act (Chapter 104) 1976. All references are to the Constitution unless otherwise stated.



### *Background*

Seychelles is a republic with a unicameral legislature. The President is both Head of State and Head of Government. The superior courts are the Supreme Court and the Court of Appeal.

### *Appointments*

- A Constitutional Appointments Authority (CAA) is established (Chapter IX). It consists of three members, two of whom are appointed by the President and Leader of the Opposition respectively, and a third member who is appointed by the agreement of the first two members and who chairs the CAA (art 140(1)).
- The President appoints all judges 'from candidates proposed by' the CAA (arts 123 and 127).

### *Tenure*

- Judges who are citizens of Seychelles hold office until the mandatory retirement age of 70 years (art 131(1)(d)). Non-citizen judges hold office until the expiry of their fixed term of appointment (art 131(1)(e)).
- The salary and allowances of a judge are not to be altered to the judge's disadvantage after appointment (art 133(1)-(2)).
- The office of Justice of Appeal or Judge shall not, without the consent of the Justice of Appeal or Judge, be abolished during the Justice's of Appeal or Judges' continuance in office (art 132(1)).

### *Removal*

- A judge may only be removed from office 'for inability to perform the functions of the office, whether arising from infirmity of body, or mind or from any other cause, or for misbehaviour' (art 134).
- If the CAA considers that the question of removing a judge from office ought to be investigated, it appoints an *ad hoc* tribunal consisting of at least three serving or retired judges (art 134(2)).
- While proceedings are pending before the *ad hoc* tribunal the President may suspend the judge in question for any part of the period until proceedings are concluded (art 134(4)).
- The tribunal reports to the CAA on the facts of the matter and recommends to the President whether or not the judge should be removed from office (art 134(2)(b)). If the recommendation is for

## APPENDIX 2

removal, the President must remove the judge from office (art 134(3)).

### **Sierra Leone**

Constitution of Sierra Leone 1991. All references are to the Constitution unless otherwise stated.

#### *Background*

Sierra Leone is a republic with a unicameral legislature and a directly elected President who is both Head of State and Head of Government. The superior courts are the High Court, the Court of Appeal and the Supreme Court.

#### *Appointments*

- A Judicial and Legal Service Commission (JLSC) is established. It consists of seven members: two judicial members (the Chief Justice, who chairs the Commission, and the most senior Court of Appeal Justice); the Solicitor-General; the Chairman of the Public Service Commission; a qualified Counsel nominated by the Sierra Leone Bar Association and two lay persons appointed by the President, one of whom must be approved by Parliament (s 140(1)).
- The President makes all judicial appointments 'acting on the advice of' the JLSC and the approval of Parliament is also required (s 135(1) and (2)).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 years (s 137(2)).
- The remuneration of serving and retired judges is protected (s 138(1)-(3)).
- No office of Judge of the High Court, Justice of Appeal or Justice of the Supreme Court shall be abolished while there is a substantive holder thereof (s 120(15)).

### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of his office, whether arising from infirmity of body or mind or for statement misconduct' (s 137(4)).
- Proceedings to remove a judge other than the Chief Justice are initiated by the JLSC. In the case of the removal of the Chief Justice, proceedings are initiated by the President (s 137(5) and (8)).
- If the question of removal concerns a judge other than the Chief Justice, the President, 'acting in consultation with' the JSLC, must appoint an *ad hoc* tribunal consisting of three serving or former Justices of the Supreme Court or persons qualified for appointment to that Court. If the question concerns the Chief Justice, the President, 'acting in consultation with' the Cabinet, must appoint an *ad hoc* tribunal consisting of 'three justices of the Supreme Court, or legal practitioners qualified to be appointed as justices of the Supreme Court' and 'two other persons who are not members of Parliament or legal practitioners' (s 137(5)(a) and (8)(a)).
- While proceedings are pending before an *ad hoc* tribunal, the President may suspend the judge in question for any part of the period until proceedings are concluded (s 137(6)).
- The President must remove the judge or Chief Justice, as the case may be if '(a) the question of his removal from office has been referred to a tribunal ... and the tribunal has recommended to the President that he ought to be removed from office and (b) if his removal has been approved by a two-thirds majority in Parliament' (s 137(7) and (9)).

### **Singapore**

Constitution of Singapore 1965; Supreme Court of Judicature Act (Chapter 322) 1969; Judges Remuneration Act 1994. All references are to the Constitution unless otherwise stated.

### *Background*

Singapore is a republic with a unicameral legislature, a President as Head of State and a Prime Minister as Head of Government. The judicial power of Singapore is vested in a Supreme Court, which consists of the High Court and the Court of Appeal.

## APPENDIX 2

### *Appointments*

- The President makes all judicial appointments 'if he, acting in his discretion, concurs with the advice of the Prime Minister' (art 95(1)). The Prime Minister is required to consult the Chief Justice prior to tendering such advice unless the position to be filled is the Chief Justiceship (art 95(6)). If the President refuses to appoint a particular candidate the legislature may overrule the President's decision by a resolution passed by no less than two-thirds of the total number of elected Members of Parliament (art 22(2)).

### *Tenure*

- The appointment of a judge is permanent 'until he attains the age of 65 years or such later time not being later than 6 months after he attains that age, as the President may approve' (art 98(1)).
- Judges may be appointed to the Supreme Court for a specified period after they have attained the age of 65 by the President with agreement from the Prime Minister. The appointee can be a previous Supreme Court Justice (art 95(2)).
- 'The remuneration and other terms of office (including pension rights) of a Judge of the Supreme Court shall not be altered to his disadvantage after his appointment' (art 98(8)).
- The office of a Judge of the Supreme Court shall not be abolished during his or her continuance in office (art 95(3)).

### *Removal*

- A judge may be removed from office only on the grounds of 'misbehaviour and inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office' (art 98(3)).
- The removal process is initiated by the Prime Minister, or the Chief Justice after consulting the Prime Minister, representing to the President that a judge ought to be removed (art 98(3)).
- The President then appoints an *ad hoc* tribunal consisting of no fewer than five serving or retired judges of Singapore or any other Commonwealth state (art 98(3)-(4)).
- If the President concurs with the recommendation of the Prime Minister or Chief Justice, while proceedings are pending before an *ad hoc* tribunal the President may, acting in his or her discretion, suspend the judge in question for any part of the period until proceedings are concluded (art 98(5)).

- On the recommendation of the tribunal, the President may remove the Judge from office (art 98(3)-(4)).

## **Solomon Islands**

Constitution of the Solomon Islands 1978.

### *Background*

The Solomon Islands are a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is unicameral and the Prime Minister is Head of Government. The superior courts are the High Court and the Court of Appeal.

### *Appointments*

- A Judicial and Legal Service Commission (JLSC) is established (s 117(1)). It consists of six members: the Chief Justice, who serves as chairman of the Commission; the Attorney-General; the Chairman of the Public Service Commission; the President of the Bar Association; and two other members appointed by the Governor-General, in accordance with the advice of the Prime Minister (s 117).
- The Governor-General appoints all judges 'acting in accordance with the advice' of the JLSC (ss 78(1),(2) and 86(1),(2)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 70 years (ss 80(1) and 87(1)).
- A judge who is over 70 may be appointed for a fixed period of time (ss 80(2) and 87(2)).
- The remuneration of judges shall not be altered to their disadvantage after their appointment, except as part of any alteration generally applicable to holders of specified offices (s 107(3)).
- The office of a judge shall not be abolished while any person is holding that office unless that person consents to its abolition (s 77(2)).

### *Removal*

- A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (ss 80(4) and 87(4)).

## APPENDIX 2

- The process is initiated by the Governor-General, acting 'in his own deliberate judgment' (ss 80(8) and 87(8)). The Governor-General must appoint an *ad hoc* tribunal consisting of no fewer than three serving or retired judges of any Commonwealth jurisdiction (ss 80(6) and 87(6)).
- While proceedings are pending before an *ad hoc* tribunal the Governor-General may suspend the judge in question for any part of the period until proceedings are concluded (ss 80(7) and 87(7)).
- The Governor-General must give effect to the recommendation of the *ad hoc* tribunal as to whether the judge should be removed.

### South Africa

Constitution of the Republic of South Africa 1996; Judicial Services Commission Act (No 9 of 1994); Judges' Remuneration and Conditions of Employment Act 2001 (No 47 of 2001). All references are to the Constitution unless otherwise stated.

#### *Background*

South Africa is a republic with a bicameral legislature and an indirectly elected President who is the Head of State and the Head of Government. The superior courts are the High Court and specialised courts of equivalent status, the Supreme Court of Appeal and the Constitutional Court.

#### *Appointments*

- A Judicial Service Commission (JSC) is established (s 178(1)). It consists of 23 members: three judicial members (the Chief Justice, who chairs the Commission; the President of the Supreme Court of Appeal; and one Judge President designated by the Judges President of the provincial High Courts); the Minister of Justice; four legal practitioners nominated from within the legal profession; one legal academic representing the legal academics of the country; six members of the National Assembly, at least three of whom must be members of opposition parties; four members of the National Council of Provinces; and four persons designated by the President as head of the national executive. If the vacancy to be filled is in a provincial High Court, the Judge President of that High Court and the Premier of the province concerned also sit as members of the JSC.

- Save for the members of the Constitutional Court and the President and Deputy-President of the Supreme Court of Appeal, the President of South Africa 'must appoint the judges of all other courts on the advice of the Judicial Service Commission' (s 174(6)).
- The President of South Africa appoints the judges of the Constitutional Court, other than the Chief Justice and the Deputy Chief Justice, from among candidates shortlisted by the JSC, after consulting with the Chief Justice and the leaders of the parties represented in the National Assembly (s 174(4)). The JSC must forward to the President a slate of selected candidates containing three more names than the number of vacancies. The President may reject one or more of these names as unsuitable so long as reasons are furnished to the JSC for doing so. The President must then select a candidate from the next slate, duly supplemented with names to replace those who have been rejected.
- The JSC must be consulted before the appointment of the Chief Justice and Deputy Chief Justice, who are appointed by the President of South Africa after consultation with the leaders of the parties represented in the National Assembly. The JSC is also to be consulted before the appointment by the President of South Africa of the President and Deputy President of the Supreme Court of Appeal (s 174(3)).

### *Tenure*

- A 'Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge' (s 176(1)). Legislation provides that Constitutional Court judges who have not held prior judicial office are appointed for 15 years, and all others are appointed for a period of at least 12 years and any balance of time during which their total period of judicial service remains less than 15 years. Constitutional Court judges retire when they reach 15 years of judicial service or the age of 75, whichever is the earlier (Judges' Remuneration and Conditions of Employment Act 2001, ss 3(1) and 4). Other permanent judges hold office until they reach the age of 70 or, where that judge has not yet completed 10 years of active service, on the date immediately following the day on which he or she completes that period (Judges' Remuneration and Conditions of Employment Act, s 3(2)).
- The Constitutional Court has struck down a provision giving the President discretion to extend the term of the Chief Justice upon

## APPENDIX 2

reaching the prescribed retirement age (*Justice Alliance of South Africa v President of Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).)

- The 'salaries, allowances and benefits of judges may not be reduced' (s 176(3)).

### *Removal*

- A judge may be removed from office 'only if (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members' (s 177(1)). If a resolution is passed in accordance with this provision, the President must remove the judge from office (s 177(2)).
- The JSC, sitting without its Parliamentary members in all matters concerning judicial discipline, initiates the removal process. Once it has decided that there is a case to answer, it must establish a tribunal of two judges and layperson (Judicial Service Commission Act, s 22(1)). The tribunal conducts a full hearing, of which the accused judge must be given reasonable notice, and at which the judge has the right to be present, to be legally represented and to call or cross-examine witnesses. The tribunal must convey its reasoned findings of fact in a report to the JSC, which makes the final decision whether to refer the matter to the National Assembly (Judicial Service Commission Act 1994, ss 19, 20 and 33). In disciplinary matters the JSC sits without its Parliamentary members (s 178(5)).

## **Sri Lanka**

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978; Judicature Act 1979; Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka. All references are to the Constitution unless otherwise stated.

### *Background*

Sri Lanka is a republic with a unicameral legislature and a directly elected President who is both the Head of State and Head of Government. The



superior courts are the Court of Appeal and the Supreme Court (the highest appellate court). Although the High Court is not designated as a superior court of record, it is an important court of first instance.

### *Appointments*

- A Judicial Service Commission (JSC) is established (art 111D(1)). It consists of three members, all of whom are judicial: the Chief Justice, who chairs the Commission, and two other Supreme Court judges appointed by the President (art 111D).
- All judges of the Supreme Court and the Court of Appeal 'shall be appointed by the President by Warrant under his hand' (art 107).
- High Court judges are also appointed by the President. Recommendations are offered to the President by the JSC. The JSC must consult with the Attorney General before offering its recommendations to the President (art 111(2)(a)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 in the case of Supreme Court judges and 63 in the case of Court of Appeal judges (art 107(5)). High Court judges must retire on reaching the age of 61 (Judicature Act, s 6(3)).
- The 'salary payable to, and the pension entitlement of a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment' (art 108(2)). This provision does not extend to High Court judges.

### *Removal*

- The constitutional grounds for removal are 'proved misbehaviour or incapacity' (s 107(2)). These apply only to judges of the Supreme Court and of the Court of Appeal (art 107(3)). The grounds for removal of High Court judges are not specified in the Constitution. However, judges of the High Court are subject to removal and discipline by the President on recommendation of the JSC (arts 111(2)(b) and 111H(2)(a)).
- The process for removing a judge of the Court of Appeal or Supreme Court is initiated by the tabling of a resolution signed by at least one-third of the total number of Members of Parliament (arts 107(2)).
- The Constitution further provides for the proceedings to determine whether a judge should be removed from office in the following

## APPENDIX 2

terms: 'Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative' (art 107(3)).

- The Standing Orders (78 A) of the Parliament of Sri Lanka provide that when a resolution for removal is presented to Parliament, 'the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution' (Standing Order 78A(2)). The Committee is to inform the accused judge of the allegations and ask for a written statement of defence 'within such period as may be specified by it' (Standing Order 78A(3)). Furthermore, the accused judge has the right to appear before the Select Committee and to be heard in person or by a representative and to adduce evidence, oral or documentary, in his or her defence (Standing Order 78A(5)). The proceedings are to be conducted in private and are not to be made public unless and until the allegations are found to be proved and the report submitted to Parliament (Standing Order 78A(8)).
- Judges of the Supreme Court and Court of Appeal are ultimately removed by an order of the President, following an address of Parliament supported by a majority of the total number of MPs (art 107(2)).

## Swaziland

Constitution of Swaziland 2005.

### *Background*

Swaziland has a bicameral legislature, a King who is Head of State and a Prime Minister as Head of Government. The superior courts are the High Court and the Supreme Court.

### *Appointments*

- A Judicial Service Commission (JSC) is established (ss 159, 160 and 161). It consists of six members: the Chief Justice (who chairs the Commission); the Chairman of the Civil Service Commission; and

- four persons appointed by the King, two of whom must be legally qualified (s 159(2)).
- The President appoints judges 'on the advice of' the JSC (s 153(1)).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 75 (ss 155 and 156(1)).
- The remuneration of serving and retired judges is protected against reduction (s 208(3)–(4)).
- The office of a judge shall not be abolished while there is a substantive holder of that office (s 155(2)).

#### *Removal*

- A judge may be removed from office only 'for stated serious misbehaviour or inability to perform the functions of office arising from infirmity of body or mind' (s 158(2)).
- An *ad hoc* committee made up of the Minister responsible for Justice, the Chairman of the Civil Service Commission and the President of the Law Society of Swaziland initiates the removal process in relation to the Chief Justice (s 158(3) and (10)). In the case of any other judge the Chief Justice advises the King that the question of removal ought to be investigated. The King is then obliged to refer the matter to the JSC for investigation (s 158(3)).
- While proceedings are pending before the Commission, the King may suspend the judge in question for any part of the period until proceedings are concluded (s 158(6) and (9)).
- The JSC shall enquire into the matter and recommend to the King whether the judge ought to be removed from office (s 158(4)). 'Notwithstanding any provision of this Constitution, the King shall in each case act on the recommendation of the Commission' (s 158(5)).

### **Tanzania**

Constitution of the United Republic of Tanzania 1977; the Judicial Administration Act 2011. All references are to the Constitution unless otherwise stated.

## *APPENDIX 2*

### *Background*

Tanzania is a republic with a unicameral legislature and a directly elected President who is both Head of State and Head of Government. The full-time superior courts are the High Court and the Court of Appeal.

### *Appointments*

- A Judicial Service Commission (JSC) is established (art 112). It is composed of six members: three judicial members (the Chief Justice, who chairs the Commission; a Justice of the Court of Appeal of Tanzania appointed by the President after consultation with the Chief Justice; and the Principal Judge); the Attorney General; and two members appointed by the President who must not be Members of Parliament (art 112(2)–(3)).
- The President appoints the judges of the High Court ‘after consultation with’ the JSC (art 109(1)). The President appoints the Chief Justice acting alone (art 118(2)), and the members of the Court of Appeal, ‘after consultation with’ the Chief Justice (art 118(3)).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 60 years in the case of High Court judges and 65 years in the case of members of the Court of Appeal (art 110(1) and 120(1)). The President may extend the tenure of a judge who has reached retirement age (arts 110(3) and 120(3)).
- The remuneration of serving and retired judges is protected (art 142).
- The office of Judge of the High Court or Court of Appeal shall not be abolished while there is a person holding that office (arts 109(5) and 118(9)).

### *Removal*

- A Judge may only be removed ‘for reason of inability to perform the functions of his office (either due to illness or to any other reason) or for misbehaviour’ (art 110A(1)). The grounds for removing a judge from office are ‘inability to perform the functions of his office (either due to illness or to any other reason)’ (all judges) and ‘behaviour inconsistent with the ethics of office of Judge or with the law concerning the ethics of public leaders’ (in the case of High Court judges) or ‘misbehaviour’ (in the case of Court of Appeal judges) (arts 110A(2), 120A(2)).

- The removal process is initiated by the President (art 110A(3)), but the JSC advises the President with regard to certain grounds of removal (Judiciary Administration Act 2011, s 29).
- Where the question of removal is to be investigated, the President, after consultation with the JSC, must suspend that judge from office (arts 110A(3)(a) and 120A(2)).
- The President appoints an *ad hoc* tribunal consisting of at least three members, and must ensure that the chairperson and at least half of the members are judges in a Commonwealth jurisdiction. The tribunal must investigate and advise the President 'on the whole matter', including whether the judge should be removed, and the President must act in accordance with that advice (art 110A(3)-(4)).

## **Tonga**

Constitution of Tonga 1988; Judicial Code of Conduct Rules 2010. All references are to the Constitution unless otherwise stated.

### *Background*

Tonga has a unicameral legislature, a King who is Head of State and a Prime Minister who is Head of Government. The superior courts are the Supreme Court and the Court of Appeal.

### *Appointments*

- There is a Judicial Appointments and Discipline Panel of the Privy Council which makes recommendations to the King in Privy Council on the appointment of persons to the Judiciary, including the Chief Justice (ss 83C and 86(1)). The panel consists of the Lord Chancellor, who acts as Chairman; the Lord Chief Justice; the Attorney-General; and the Law Lords appointed by the King (s 83C). A Bill to amend the Constitution and a Judicial and Legal Service Commission Bill, had been passed at the time of writing but were still awaiting royal assent.

### *Tenure*

- There is no retirement age for judges.
- 'The judges, subject to any contractual arrangements, shall hold office during good behaviour: provided that it shall be lawful to

## APPENDIX 2

appoint Judges of the Supreme Court and Court of Appeal for limited periods, or for the purposes of a particular sitting of the Supreme Court or Court of Appeal, or of particular proceedings to come before the Court, on such terms as may be approved by the King in Privy Council' (s 87).

### *Removal*

- 'The Judicial Appointments and Discipline Panel shall recommend to the King in Privy Council ... the dismissal of members of the Judiciary for bad behaviour through gross misconduct or repeated breaches of the Code of Judicial Conduct' (s 83C(2)(c)).
- 'The King in Privy Council shall determine the terms of appointment of the Judges of the Court of Appeal, the Judges of the Supreme Court and the Chief Justice, and may dismiss them' (ss 85(2) and 86(2)).

## **Trinidad and Tobago**

Trinidad and Tobago Constitution 1976; Judicial and Legal Service Act (Chapter 6:01) 1977. All references are to the Constitution unless otherwise stated.

### *Background*

Trinidad and Tobago is a republic with a bicameral legislature, a President as Head of State and a Prime Minister as Head of Government. The Supreme Court consists of the High Court and the Court of Appeal.

### *Appointments*

- A Judicial and Legal Service Commission (JLSC) is established (s 110). It consists of five members: two judicial members (the Chief Justice who acts as Chairman, and a serving or retired judge of any Commonwealth jurisdiction); the Chairman of the Public Service Commission; and two persons with legal qualifications appointed by the President after consultation with the Prime Minister and Leader of the Opposition (s 110(2)–(3)).
- All judges other than the Chief Justice are appointed by the President 'acting in accordance with the advice' of the JLSC (s 104(1)).
- The President appoints the Chief Justice 'after consultation with the Prime Minister and the Leader of the Opposition' (s 102).

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 years 'or such other age as may be prescribed' (s 136(1)).
- The salaries of judges are protected against reduction after their appointment (s 136). Salaries are reviewed from time to time by the Salaries Review Committee (s 141).
- No office of Judge shall be abolished while there is a substantive holder of that office (s 106(2)).

### *Removal*

- A judge may be removed from office only 'for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (s 137(1)).
- The Prime Minister initiates the removal process in relation to the Chief Justice, and the JLSC does so in relation to any other judge (s 137(3)), by notifying the President that a question of removal has arisen.
- The President then forms an *ad hoc* tribunal composed of no fewer than three serving or retired judges of any Commonwealth jurisdiction. The tribunal must report to the President on the facts of the matter and make a recommendation, which the President must act upon, as to whether the question of removal should be referred to the Judicial Committee of the Privy Council (s 137(3)).
- While proceedings are pending before the tribunal, the President, in accordance with the advice of the Chief Justice (or the Prime Minister in the case of the Chief Justice), may suspend the judge in question for any part of the period until proceedings are concluded (s 137(4)).
- Judges are ultimately removed by the President, who must do so when advised accordingly by the Judicial Committee of the Privy Council (s 137(2)).

### **Tuvalu**

Constitution of Tuvalu 1986; Superior Courts Act (revised edition) 2008. All references are to the Constitution unless otherwise stated.

## *APPENDIX 2*

### *Background*

Tuvalu is a Commonwealth realm in which the Governor-General is Her Majesty's representative. The legislature is unicameral and the Prime Minister is the Head of Government. There is a High Court whose rulings can be appealed to the Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.

### *Appointments*

- The judges of the High Court are appointed by the Governor-General, acting in accordance with the advice of the Cabinet given after consultation with the Chief Justice (s 123).
- The Governor-General, acting in accordance with the advice of the Cabinet, appoints the judges in the Court of Appeal (Superior Courts Act, s 8).
- The Chief Justice is appointed by the Governor-General, acting in accordance with the advice of the Cabinet (s 122).

### *Tenure*

- Judges of the High Court may be appointed for a fixed term or permanently until death or resignation (s 126(1)). Judges of the Court of Appeal are appointed on such terms set out in their instrument of appointment, and may be appointed for a single case (Superior Courts Act, s 8).
- There is a constitutional guarantee against the reduction of salary for judges (s 169), and the salary and benefits of a judge will not be affected while suspended during a disciplinary proceeding (s 129(3)).

### *Removal*

- A judge may be removed from office 'only for inability to perform properly the functions of his office (whether arising from infirmity of body or mind, or from some other cause) or for misbehaviour' (s 127(1)).
- 'If the Cabinet decides, or Parliament resolves, that the question of removing a Judge from office should be investigated, the Head of State, acting after consultation with (a) the Prime Minister; and (b) in the case of a judge other than the Chief Justice, the Chief Justice, shall appoint an independent tribunal' to investigate the



- matter (s 127(3)). This *ad hoc* tribunal must consist of at least two members who are themselves qualified for appointment as judges of the High Court.
- While proceedings are pending before the tribunal, the Head of State, in accordance with the advice of the Cabinet, may suspend the judge in question, with pay, for any part of the period until proceedings are concluded (s 128).
  - Parliament may remove a judge from office by resolution, 'if the question of the removal from office has been referred to a tribunal and the tribunal has advised Parliament that the judge ought to be removed from office' (s 127(2)).

## **Uganda**

Constitution of the Republic of Uganda 1995; Judicial Service (Complaints and Disciplinary Proceedings) Regulations 2005 (S.I. no 88 of 2005); Judicial Service Regulations 2005 (S.I. no 87 of 2005); Judicial Service Act (Chapter 14) 1997; Rules of Procedure of the Parliament of Uganda 2012. All references are to the Constitution unless otherwise stated.

### *Background*

Uganda is a republic with a unicameral legislature and a directly elected President who is the Head of State and Head of Government. The superior courts are the High Court, the Court of Appeal and the Supreme Court.

### *Appointments*

- A Judicial Service Commission (JSC) is established (art 146(1)). It consists of nine members: a Chairperson and Deputy Chairperson qualified to be appointed as Justices of the Supreme Court (other than the Chief Justice and Deputy Chief Justice and the Principal Judge); one judge of the Supreme Court; one person nominated by the Public Service Commission; two qualified advocates nominated by the Uganda Law Society; the Attorney-General; and two members of the public nominated by the President (art 146(2)).
- Judges of the superior courts of record, including the Chief Justice, are 'appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament' (art 142(1)).

## APPENDIX 2

### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65, for High Court judges, or 70 for Court of Appeal and Supreme Court judges (art 144(1)). Parliament may by law set a different retirement age (art 144(1)).
- The 'salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage' (art 128(7)).
- The office of a judge shall not be abolished when there is a substantive holder of that office (art 128(8)).

### *Removal*

- A judge may be removed 'only for inability to perform the functions of his or her office arising from infirmity of body or mind, misbehaviour, misconduct or incompetence' (art 144(2)).
- The process may be initiated by a referral to the President either by the JSC or the Cabinet (art 144(4)).
- A person or organisation with a complaint concerning the judiciary may make a complaint to the Commission (Judicial Service (Complaints and Disciplinary Proceedings) Regulations, reg 3(1)). Where the commission decides that a prima facie case has been established, 'the JSC ceases to have authority to proceed with the matter by way of trial, if the person concerned is a judge. At that stage, it must consider whether or not to make a recommendation to the President to constitute a Tribunal to consider removal of a judge ... [T]he JSC is obliged to investigate the complaint, by itself or by anyone else authorized by it. The investigations include interviewing witnesses, the complainant, and the respondent, collecting documentary evidence, or a written report where it has authorized someone else to investigate' (*Hon Justice Anup Singh Choudry v Attorney General* [2014] UGCA 18).
- The JSC is bound by the rules of natural justice and must ensure that the accused is 'informed about the particulars of the case against him or her; given the right to defend himself or herself and present his or her case at the meeting of the commission or at any inquiry set up by the commission for the purpose; where practicable, given the right to engage an advocate of his or her own choice; and told the reasons for the decision of the commission' (Judicial Service Act 1997, s 11).

- A decision to recommend the removal of a judge must be carried by at least six members of the commission at a meeting at which the Attorney General is present (Judicial Service Act 1997, s 9).
- Following the referral of the question of whether to remove a judge to the President, the President appoints an *ad hoc* tribunal, which consists of: '(a) in the case of the Chief Justice, the Deputy Chief Justice or the Principal Judge, five persons who are or have been justices of the Supreme Court or are or have been judges of a court having similar jurisdiction or who are advocates of at least twenty years' standing; (b) in the case of a justice of the Supreme Court or a justice of Appeal, three persons who are or have been justices of the Supreme Court or who are or have been judges of a court of similar jurisdiction or who are advocates of at least fifteen years' standing; or (c) in the case of a judge of the High Court, three persons who are or have held office as judges of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from such a court or who are advocates of at least ten years' standing' (art 144(4)).
- If the tribunal has been composed the President must suspend the judge from office (144(5)).
- Ultimately the removal of a judge is undertaken by the President if the tribunal recommends that the judge be removed (art 144(3)).

## United Kingdom

Constitutional Reform Act 2005 (CRA); Senior Courts Act 1981; Supreme Court (Judicial Appointments) Regulations 2013; Judicial Appointments Commission Regulations 2013; Judicial Appointments Regulations 2013; Judicial Discipline (Prescribed Procedures) Regulations 2013; Judicature (Northern Ireland) Act 1978; Justice (Northern Ireland) Act 2002; Judiciary and Courts (Scotland) Act 2008; Scotland Act 1998.

### *Background*

The UK is a constitutional monarchy with a bicameral legislature. The Queen is the Head of State and the Prime Minister the Head of Government. There are distinct court systems in England and Wales, Scotland and Northern Ireland. The UK Supreme Court is the final court of appeal for all UK civil cases, and criminal cases from England, Wales and Northern Ireland. A High Court and Court of Appeal are established in England and Wales and in Northern Ireland. In Scotland the superior courts are the High Court of the Justiciary and the Court of Session.

## APPENDIX 2

### *Appointments*

- A Judicial Appointments Commission is established in England and Wales (CRA, s 61 and Schedule 12). The Northern Ireland Judicial Appointments Commission is established in Northern Ireland (Justice (Northern Ireland) Act 2002, s 3). The Judicial Appointments Board for Scotland is established in Scotland (Judiciary and Courts (Scotland) Act 2008, s 9 and Schedule 1).
- Judicial appointments to the UK Supreme Court are made by the Crown on the recommendation of the Prime Minister, who in turn may only recommend candidates whose names have been notified by the Lord Chancellor. The Lord Chancellor may only notify the Prime Minister of candidates selected by a five-member selection commission composed of two senior judges, one of whom will be the President of the Supreme Court unless the vacancy that is due to be filled is in respect of that position, and one member representing each of the judicial appointments bodies for England and Wales, Scotland and Northern Ireland (CRA Part 3 and Schedule 8; Supreme Court (Judicial Appointments) Regulations 2013). The Lord Chancellor may once reject a selected candidate and once ask the commission to reconsider its selection, but must thereafter notify a name selected by the commission at any stage in the process in relation to that particular vacancy, and not previously rejected, to the Prime Minister. The grounds for rejecting a candidate and for requiring the commission to reconsider its selection are narrowly defined and if the Lord Chancellor exercises either power, he or she must give written reasons to the commission (Supreme Court (Judicial Appointments) Regulations 2013).
- In England and Wales, appointments to the Court of Appeal and High Court are made by the Crown on recommendation by the Lord Chancellor of a candidate selected by the Judicial Appointments Commission (in the case of puisne judges of the High Court) or selection committees formed to make appointments to the Court of Appeal or to the position of Lord Chief Justice or other Heads of Division. In each case, as in relation to appointments to the UK Supreme Court, the Lord Chancellor may once reject a selected candidate and require reconsideration once before recommending one of the candidates selected and not previously rejected (CRA Part 4 and Judicial Appointment Regulations 2013).
- The Commission consists of 15 members: seven judicial members (a Lord Justice of Appeal; one puisne judge of the High Court; one senior tribunal office-holder; a circuit judge; a district judge; one

- judge of a first-tier tribunal or employment judge; and one non-legally qualified judicial member); two practising or employed lawyers; and six lay members (one of whom acts as chairman) (CRA Schedule 12 and Judicial Appointments Commission Regulations 2013).
- In Northern Ireland, judges of the High Court are selected by the Northern Ireland Judicial Appointments Commission (NIJAC) and appointed by the Crown on the Lord Chancellor's recommendation (Justice (Northern Ireland) Act 2002, s 5 and Schedules 1 and 3).
  - The NIJAC consists of 13 members: six judicial members (the Lord Chief Justice, who chairs the Commission, and five additional judicial members nominated by the Lord Chief Justice); a barrister and a solicitor nominated by the General Council of the Bar and Law Society of Northern Ireland respectively; and five lay members, all appointed by the First and Deputy First Minister acting jointly (Justice (Northern Ireland) Act 2002, s3).
  - Justices of the Court of Appeal and the Lord Chief Justice are appointed by the Crown on the recommendation of the Prime Minister after consultation with the senior judiciary and the NIJAC (Judicature (Northern Ireland) Act 1978, s 12).
  - In Scotland the Judicial Appointments Board for Scotland (JABS) selects candidates for appointment by the Crown on the First Minister's recommendation.
  - The JABS consists of 12 members: four judicial members (a Court of Session judge other than the Lord President and the Lord Justice Clerk, a sheriff principal, a sheriff, and one person holding the position of Chamber President or of Vice-President within the Scottish Tribunals); one practising advocate and one solicitor; and six lay members appointed by the Scottish Ministers (Judiciary and Courts (Scotland) Act 2008, Schedule 1).
  - In selecting the Lord President and Lord Justice Clerk (the two most senior Scottish judges), the First Minister is only required to have regard to the recommendation of an advisory panel composed of the chairman of the JABS, one lay member and two senior judges (Judiciary and Courts (Scotland) Act 2008, s 19 and Schedule 2). In respect of other appointments, the First Minister must appoint a candidate recommended by the JABS, but has the power not to accept a recommended candidate and require the JABS to make a further recommendation, which may be the same candidate or a different candidate (Judiciary and Courts (Scotland) Act 2008, ss 10 and 11). The First Minister is obliged to provide the Board with reasons if he or she does not accept a recommended candidate.

## APPENDIX 2

### *Tenure*

- Judges retire at the age of 70 years (Judicial Pensions and Retirement Act 1993, s 26), and provisions are in place to secure judicial salaries against reduction other than by Act of Parliament (Senior Courts Act 1981, s 12).

### *Removal*

- Judges in England and Wales hold office 'during good behaviour'. They are removed from office by the Crown on an address presented by both Houses of Parliament (Senior Courts Act 1981, s 11(3)).
- The same removal mechanism applies to members of the UK Supreme Court (CRA, s 33). A member of the Supreme Court who faces an allegation of misconduct will have the opportunity to appear before a tribunal whose members include the heads of court of the various jurisdictions within the UK, and the tribunal must report before any motion is tabled in Parliament (guidance published at <https://www.supremecourt.uk/about/judicial-conduct-and-complaints.html>).
- If a complaint is received against a judge in England and Wales, the Office for Judicial Complaints operates a system of preliminary inquiry and investigation carried out by two different judges, followed by a review panel which decides whether to advise the Lord Chancellor to table a motion in Parliament (Judicial Discipline (Prescribed Procedures) Regulations 2013).
- In Scotland, judges are removed by the Crown on recommendation by the Scottish First Minister. The recommendation cannot be made unless a resolution to that effect is passed by the Scottish Parliament on a motion initiated by the First Minister. That motion cannot however be initiated unless a tribunal, constituted of two serving or retired judges, a senior lawyer and a lay person, has laid before the Scottish Parliament a report concluding that the judge is unfit for office by reason of inability, neglect of duty or misbehaviour. In the case of proposed removal of the Lord President or the Lord Justice Clerk, the Scottish First Minister must also consult the UK Prime Minister (Scotland Act 1998, s 95 and Judiciary and Courts (Scotland) Act 2008, ss 35–38).
- A similar provision applies in Northern Ireland, where the tribunal consists of two senior judges and a lay member of the Northern Ireland Judicial Appointments Commission (Judicature (Northern Ireland) Act 1978, s 12C).

## **Vanuatu**

Vanuatu Constitution 1980; Judicial Service Commission Act 2003; Vanuatu Leadership Code Act 2006. All references are to the Constitution unless otherwise stated.

### *Background*

Vanuatu is a republic with a unicameral legislature, an indirectly elected President as Head of State and a Prime Minister as the Head of Government. The superior courts are the Supreme Court and the Court of Appeal.

### *Appointments*

- A Judicial Service Commission (JSC) is established (art 48). It consists of four members: the Minister responsible for justice as Chairman; the Chief Justice; the Chairman of the Public Service Commission and a representative of the National Council of Chiefs, appointed by the Council (art 48(1)).
- 'The Chief Justice is appointed by the President of the Republic after consultation with the Prime Minister and the Leader of the Opposition' (art 49(3)).
- All other judges are appointed by the President 'acting on the advice' of the JSC (art 47(2)).

### *Tenure*

- Judges 'shall hold office until they reach the age of retirement' (art 47(3)). By statute, this is set at 65 years (Judicial Service Commission Act 2003, art 36(1)).
- The Government Remuneration Tribunal may review judicial salaries every two years and make recommendations to the JSC, which the JSC may adopt 'but not to the detriment of any office holder while he or she is in office' (Judicial Service Commission Act 2003, art 67).

### *Removal*

- Judges may be removed from office on the grounds of '(a) conviction and sentence of a criminal charge; or (b) a determination by the Judicial Service Commission of gross misconduct, incapacity or professional incompetence' (art 47(3)).

## APPENDIX 2

### Zambia

Constitution of the Republic of Zambia 1996; Service Commissions Act (Chapter 259); Judicial (Code of Conduct) Act 1999. All references are to the Constitution unless otherwise stated.

#### *Background*

Zambia is a republic with a unicameral legislature and a directly elected President who is Head of State and Head of Government. The superior courts are the High Court and the Supreme Court.

#### *Appointments*

- A Judicial Service Commission (JSC) is established (art 123(1); Service Commissions Act, s 3). It consists of nine members: a chairperson who is qualified to be judge and is appointed by the President; two judicial members (a judge and magistrate nominated by the Chief Justice); the Attorney-General; a member of the National Assembly appointed by the Speaker; a representative of the division responsible for public service management, nominated by the secretary to the Cabinet; a representative of the Law Association, nominated by the association and appointed by the president; the Dean of a law school nominated by the Minister responsible for justice; and one further member appointed by the President (Service Commissions Act s 2).
- The President makes all judicial appointments, which are subject to confirmation by the National Assembly. If a Presidential nominee has been rejected by the National Assembly twice, then the appointment will take effect on a third nomination. In respect of appointments to the High Court the President receives the non-binding advice of the JSC (arts 44(4), 44(6), 93(1)–(2) and 95(1)).

#### *Tenure*

- Judicial appointments are permanent until the mandatory retirement age of 65 years (art 98(1)). The President may extend the tenure a judge of the High Court (in accordance with the advice of the JSC) or a judge of the Supreme Court, who has attained the age of 65 years, for such further period, not exceeding seven years, as the President may determine (art 98(1)).



- A judge's salary and terms of service are not to be altered to the judge's disadvantage after appointment (art 119).
- The office of the Chief Justice, Deputy Chief Justice, Supreme Court Judge or Puisne judge, shall not be abolished while there is a substantive holder thereof (arts 92(3) and 94(5)).

#### *Removal*

- A judge may be removed from office 'only for inability to perform the functions of office, whether arising from infirmity of body or mind, incompetence or misbehaviour' (art 98(2)).
- The President is responsible for initiating the removal process (art 98(3)). However, a Judicial Complaints Authority is established which may carry out investigations and make recommendations to the Chief Justice or to the President (where the Chief Justice is under investigation) as to whether the removal process should be initiated (Judicial (Code of Conduct) Act 1999, s 24). The Judicial Complaints Authority consists of five persons who are serving or retired judges or qualified for judicial office, appointed by the President with the approval of the National Assembly.
- To determine the question of whether a judge is to be removed from office, the President then appoints an *ad hoc* tribunal composed of at least three serving or retired judges (art 98(3)).
- While proceedings are pending before the tribunal, the President may suspend the judge in question for any part of the period until proceedings are concluded (art 98(5)).
- If the *ad hoc* tribunal recommends that the judge should be removed from office, the President must do so (art 98(4)).





## The Appointment, Tenure and Removal of Judges Under Commonwealth Principles

An independent, impartial and competent judiciary is essential to the rule of law. This study considers the legal frameworks used to achieve this and examines trends in the 53 member states of the Commonwealth. It asks:

- who should appoint judges and by what process?
- what should be the duration of judicial tenure and how should judges' remuneration be determined?
- what grounds justify the removal of a judge and who should carry out the necessary investigation and inquiries?

The study notes the increasing use of independent judicial appointment commissions; the preference for permanent rather than fixed-term judicial appointments; the fuller articulation of procedural safeguards necessary to inquiries into judicial misconduct; and many other developments with implications for strengthening the rule of law.

These findings form the basis for recommendations on best practice in giving effect to the *Commonwealth Latimer House Principles* (2003), the leading Commonwealth statement on the responsibilities and interactions of the three main branches of government.

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This research was commissioned by the Commonwealth Secretariat, and undertaken and produced independently by the Bingham Centre for the Rule of Law. The Centre is part of the British Institute of International and Comparative Law.



Bingham Centre for the Rule of Law  
British Institute of International and Comparative Law  
Charles Clore House, 17 Russell Square, London WC1B 5JP

