**JUDICIAL APPOINTMENTS**
**DEVELOPMENTS IN PROCESS AND TRANSPARENCY**

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**Introduction**

Today the respect for the separation of powers and in particular the independence of the judiciary has diminished.

The Commonwealth (Latimer House) Principles on the Accountability and Relationship between the Three Branches of Government of 2003 call for:
*"each institution to exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of the constitutional functions of other institutions*".

A key element in ensuring independence is through the appointment process. However, the appointment process has been used by the Executive and Parliament in Commonwealth countries, to exert pressure and control over the judiciary. To quote former Justice Desiree Bernard puts it eloquently: *"Rulers….. regard the judiciary as a wild horse which needs to be tamed and controlled lest it gets out of hand".*[1]

Most modern constitutions contain provisions relating to the way judicial appointments are made especially in the higher courts. The process of appointment has to be entrenched in the constitution otherwise, it can be open to abuse and to ensure that the Executive cannot just ignore the process by abolishing legislative provisions as we saw in Tonga in 2010 when the King abolished the independent process of appointment in 2010 in favour of a regressive system with a Lord Chancellor and a non- independent "Judicial Appointments and Disciplinary Board". It has taken until this month for Parliament in Tonga to see an amended version of the bill proposed in 2014 to re-establish an independent JAC.

However, many of the recent controversial appointments have resulted from the unconstitutional removal of judges in post and the deliberate selection or promotion of judicial officers by *"improper means*" or with disregard to "due process".

In most jurisdictions the constitutional safeguards for magistrates' or judges of limited jurisdiction are minimal if they exist at all. The Executive still considered them as "civil servants" in some jurisdictions and their modes of appointment/removal reflect this.

[1] Speech given at the Heads of Judiciary Conference, Belize 2003- extract from "Reflections and Opinions" by Desiree Patricia Bernard, published by Hansib in 2018

In South Africa where magistrates have not been considered "civil servants" since the ending of apartheid. However the Executive still think they should under their control and should be treated like any other civil servant. Magistrates' continue to be appointed by a separate commission despite the commitment to amalgamate the Magistrates Commission with the Judicial Services Commissions.

In other jurisdictions, the Attorney General or Minister of Justice has been made responsible for the appointment of magistrates. In 2001, the Scottish Supreme Court found in the *Starrs v Procurator Fiscal (Linlithgow)* case that that the existing system of appointment of temporary sheriffs brought into question their independence as they were appointed by the Lord Advocate at the time. Not only was the system found to be contrary to the Latimer House Principles but also to the European Convention on Human Rights and created a perception of bias in favour of the government. As a result, the Scottish judiciary had to change its appointment process.

The CMJA recommends a holistic approach to appointments and suggests that all judicial officers whatever their rank should be appointed in the same manner through the same institution though the appointment of the Chief Justice may require a special procedure. In those countries where the lay magistracy exists, the JAC may delegate the appointment but the process should be approved and remain under the ultimate authority of the JAC. This is essential to ensure judicial independence.

There is currently no harmonised view of what a judicial appointments system should look like in the Commonwealth though attempts have been made to provide more guidance in this area , most notably through the Commonwealth (Latimer House) Principles.

**The Commonwealth (Latimer House) Principles and Judicial Appointments**

The Latimer House Guidelines on "Parliamentary Supremacy and Judicial Independence" of 1998, included a suggestion that the best method to ensure independence was to set up a Judicial Appointments Commission.

The Guidelines recommended a majority of judges on any such commission as they are best placed to assess the competences required for judicial office. However there have been arguments that this can lead to perceptions that the process is a closed shop. In some countries members of the Executive (such as the Attorney General or Minister of Justice ) and equivalent positions in the opposition are members of Commissions dealing with both appointments and discipline of judicial officers.

In addition, the Legislature in some Commonwealth jurisdictions has sought vetting rights over judicial appointments and this can adversely impact on the independence of the judiciary and the separation of powers. There are many examples that spring to mind, but in India in 2016 and Bangladesh in 2017, constitutional amendments giving Parliament more powers in relation to appointments or discipline were overturned by the courts.

The perception of political influence can also affect applications from judges and lawyers as well as the perception that the appointment system is not independent as we have seen in South Africa.

The Expert Group of Ministers and Commonwealth Associations which formulated the Commonwealth (Latimer House) Principles of 2003 distilled from the Guidelines agreed that:

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

1. *Equality of opportunity for all who are eligible for judicial office;*
2. *Appointment on merit;*
3. *That appropriate consideration be given to the need for the progressive attainment of gender equity and the removal of historic factors of discrimination."*

This clause was designed to meet cases where no commission existed but where that process was in practice seen to be independent.

This includes all transfers/promotions which should be done within the context of international norms, such as the Basic Principles on the Independence of Judges[2], which state that promotions should be based on objective factors *"…[such as] ability, integrity, and experience*".

The Nairobi Plan of Action on the Latimer House Principles of 2005 (as well as the Edinburgh Plan of Action of 2008) commend governments to:
*"set in place clearly defined criteria and a publicly declared process for judicial appointments",* and the Latimer House Working Group favoured the structured, constitutionally enshrined independent judicial appointments commission or board. But of course, much still depends on how independent these JSCs are in their composition, structure and finances.

In 2013, the CLA, CLEA and CMJA undertook an analysis of judicial appointments across the Commonwealth and the report which emerged on " ***Judicial Appointments Commissions: A clause for Constitution***" outlined the importance of an independent system of appointments with little or no involvement of Parliament or the Executive and set out the basic requirements for this. The selection of Commissioners needs to involve as much due diligence as any scrutiny of potential judicial officers to avoid political or business interests influencing the selection of candidates for judicial posts or the removal of judicial officers. The **Compendium on "The Appointment, Tenure and Removal of Judges under Commonwealth Principles"** produced by the Bingham Centre for the Commonwealth Secretariat in 2015 points out that only about 19% of Commonwealth jurisdictions still have an Executive led appointments system. 81% of Commonwealth countries now have judicial appointments or services commissions[3].

[2] These principles were 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

[3] "The Appointment, Tenure and Removal of Judges under Commonwealth Principles"- A Compendium and Analysis of Best Practice, produced for the Commonwealth Secretariat by the Bingham Centre, 2015

The report and model clause were used by the Commonwealth Secretariat to develop a **Model law on Judicial Services Commissions** following wide reaching consultations with senior judges in the Commonwealth and was endorsed by Commonwealth Law Ministers in the Bahamas in October 2017 and is available on the Commonwealth Secretariat's website.

And within the SADC Region, we have the **Cape Town Principles on the Role of Independent Commissions on the Selection and Appointments of Judges** of 2015 and as well as the Southern African Chief Justice Forum ***Guidelines on the Selection and Appointment of Judicial Officers*** adopted in Malawi in October 2018.

All these documents recognise that the composition of any JAC must be independent from the Executive and Legislature. The politicization (or the perceived politicization) of the Commissioners is to be avoided at all costs.

In Canada, in the Nadon case of October 2013, the Supreme Court challenged the Executive insistence on appointing a judge that was deemed "ineligible" to sit on the Supreme Court. However, when the Canadian government finally appointed another judge to the position, they ignored the existing processes (including a public hearing and a selection committee). The Minister of Justice stated when challenged: *"these appointments have always been a matter for the executive and continue to be."*

In some jurisdictions it is believed that the Chief Justice as the Head of the Judiciary, should be the Chair of the JAC as they are responsible for the running of the courts though they can delegate this responsibility to another senior judge. In some of the UK's dependent territories, it is the President of the Court of Appeal who is responsible but this is not ideal especially if there is no permanent Court of Appeal (as in Gibraltar), the President of the Court of Appeal can have little understanding, if any, of the local requirements.

Public scrutiny, transparency and balance can be provided by including a lay presence on the JAC. The legal profession should also be represented. Some constitutions have included in their list of Commissioners a law teacher. Whatever the membership, the JAC must reflect the composition of the community in terms of gender, ethnicity, social and religious groups as well as regional balance and there should be a limitation on their term of service. Whilst consideration has been given to an ideal number of Commissioners, each jurisdiction needs to adapt to their own needs, especially in small jurisdictions. Once selected, the Commissioners are deemed to be appointed in their own right and mustn't represent the views of the professional body they come from. Those making the appointments must be seen to be independent and should not reflect the views of their appointing professional body. Scotland has introduced a Code of Conduct for Board members which outlines the principles all board members should comply with: public service, selflessness, integrity, objectivity, accountability and stewardship, openness, honesty, leadership and respect. Commissioners are required to complete a detailed declaration of interests as well.

There must be a transparent system for appointment for persons chosen to nominate judicial officers. In England and Wales all Commissioners are chosen through open competition and a public process advertised widely.

There should be a permanent Secretariat for the JAC. The Secretariat must call the meetings on a regular basis. Criticism has been levelled at some regional Judicial and Legal Commissions, which include members from Courts of Appeal resident outside the jurisdiction who only meet irregularly. Delays in appointments has caused delays to court proceedings. Where the Government controls the resources of the JAC secretariat delays have jeopardised the good administration of justice. So the Secretariat for the JAC should also be independent of Executive influence and should be administered separately, with specific resources approved by Parliament or under the auspices of the judicial budget.

**Criteria for selection of candidates for judicial office**

The CLA, CLEA and CMJA, in their examination of judicial appointments processes, have looked at the criteria for the selection of judicial officers. Of course the Latimer House Principles set out the overall criteria. However, the detail is left to JACs themselves.

Judicial officers need to be chosen on the basis of their:

- *"professional qualification and experience;*
- *intellectual capacity;*
- *integrity;*
- *independence;*
- *objectivity;*
- *authority;*
- *communication skills;*
- *efficiency; and*
- *ability to understand and deal fairly with all persons and communities served by the courts."*[4]

The persons selected must be of good character and selection must be made having regard to diversity in the range of persons selected in line the *"need for the progressive attainment of gender equity and the removal of historic factors of discrimination."* Whilst some jurisdictions provide quota systems for appointments, consistent with the Basic Principles on the Independence of Judges. According to the former UN Special Rapporteur Leandro Despouy such measures can only be used on a temporary basis to achieve greater representation. [5]

There needs to be an appropriate mechanism in place for all appointments or promotions at all levels so that there can be no perception of undue influence being brought to bear. And all vacancies should be advertised. Whether or not the process followed should also be in the public

[4] Model Law on Judicial Services Commissions" 2017
[5] Annual Report of the Special Rapporteur on the Independence of Judges and Lawyers 2009

domain, is still debatable. In South Africa and Kenya there are public consultations in relation to all candidates for appointments to the High Court and above.

The Executive (through the Minister of Justice, Prime Minister or Head of State) usually has ultimate authority to approve the appointments following the recommendation of the JAC though again the Latimer House Working Group see a limited role for the Executive with no power of veto.

In Barbados we saw the refusal of the Prime Minister to accept the recommendation of the JAC based on seniority for the post of Chief Justice and his insistence on his choice of candidate (publicly debated in the press) leading to an amendment of the constitution and the nationality laws. This in turn led, rightly or wrongly, to the perception that the judiciary was no longer independent.

In many jurisdictions candidates for appointment are limited by the age of retirement of the judges in the Constitution. There should be no discrimination in relation to age, these provisions, if they are included in the constitutions must be complied with by the Executive.

In Zambia, we witnessed the controversy over President Sata's appointment of a retired justice as Acting Chief Justice of Zambia and the refusal by Parliament to confirm the appointment as she is over the age of retirement according to the Constitution. A few years ago, in Uganda, the Supreme Court threw out the Presidential decision to re-appoint former Chief Justice Odoki after he had retired as Chief Justice.

A number of countries now provide for a Judicial Appointments Ombudsman who has the responsibility for the handling of complaints about the appointments process. The JAO checks to see if there has been any maladministration but also to provide feedback on improving standards. All judicial officers have a right to have complaints or appeals against the appointments process being heard by an independent process.

Whilst the judiciary of Kenya agreed to the vetting of existing judicial officers under the new constitution, critics of the process have pointed out that allowing disgruntled defenders /parties the opportunity to air their personal grievances in public was not helpful and that there should have been appeal process built into such a system to enable judicial officers to appeal against their livelihood being taken away from them. The vetting process in Kenya amounted to a re-appointment process.

**CONCLUSION**

It is impossible to design a one size fits all model judicial appointments process or Commission. However, the model clause put together by the CLA, CLEA and CMJA and the subsequent Model Law produced by the Commonwealth Secretariat are useful to those who are redrafting their constitutions or setting up a judicial appointments system.

Even then provisions, where they exist, are continually subject to amendment, misinterpretation, lack of implementation or abrogation. To quote Dr Peter Slinn in his article in the Commonwealth

Lawyer on the situation that arose in Sri Lanka: "*Had it been properly implemented, the 17th amendment to the Sri Lanka Constitution, might have provided a model of compliance with CLHP in terms of the protection of judicial independence and the imposition of effective restraints on the exercise of presidential executive power*".

It is high time for governments to recognise that democracy can only be achieved by selecting the right people for the jobs not the most maniable or politically convenient.

All Commonwealth countries have signed up to the Commonwealth fundamental values including Latimer House. These are not aspirational in nature but are the basic requirements of membership of this club!

There are too many examples in the Commonwealth today of undue influences in the appointments process which have only lead to the weakening of the independence of the judiciary across the Commonwealth as countries.

Judicial independence is the right of every citizen and they should be allowed a fair hearing in accordance with international principles and norms by a judge who has been independently selected.

*"An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice".*[6]

Dr Karen Brewer

[6] Commonwealth (Latimer House) Principles 2003