Judicial Appointments and Executive Interference*

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A. Introduction

1. The Singapore Constitution is based on the Westminster model of constitutional government, under which the sovereign power of the State is distributed among the Legislature, the Executive and the Judiciary.[1] The ideal behind this separation of power is that each organ of state should serve as a check and balance against abuse of power by the other organs. How does Singapore ensure that the Judiciary is independent enough to serve as a check, in the face of an Executive so empowered by legislation that it is self-avowedly its own "*hatchet man*"?[2]

2. To answer this question, this paper examines five empirical dimensions of judicial independence, namely, the appointment process, security of tenure, remuneration, administrative resources and the robustness of judgments. Common criticisms of the system will be addressed where appropriate.

3. It is also appropriate at this juncture to make mention of the Latimer House Principles on the accountability and relationship between the three branches of government adopted by commonwealth governments in 2003. A copy of the principles is annexed hereto as Annex 1.

B. Process of Judicial Appointments

4. Supreme Court judges are appointed by the President on the advice of the Prime Minister.[3] As for judicial officers in the State Courts and Family Courts as well as registrars of the Supreme Court, they are appointed and overseen by a Judicial Service Commission ("**JSC**"). The JSC is an 8-man board comprising of the Chief Justice (as president), the Chairman of the Public Service Commission (as vice-president), and 6 other members selected by the Chief Justice, the Chairman of the Public Service Commission and the Prime Minister.[4]

5. Critics often point to the past professional affiliations which Supreme Court appointees have with the Executive (e.g. the Attorney-General's Chambers), or the ruling political party, as 'evidence' that the judicial appointments are politically driven.[5] There is an innocuous explanation for such correlations: Truth be told, in such a small jurisdiction, there will be very few potential appointees of the requisite calibre who have never had anything to do with the Executive government.[6]

6. Another bone of contention is that because the power of appointment vests in the Executive, at a fundamental level "*the Singapore Judiciary can hardly be said to be independent of the Executive*".[7]

7. However, even though Supreme Court judicial appointments are made by the President on the Prime Minister's advice, the initial recommendation of a candidate originates from the Chief Justice, whose recommendations culminate from consultations with his judicial colleagues. A retired Chief Justice shared that the appointment process strives to equip the Supreme Court with a diversity of judicial

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1 Articles 23(1), 38 and 93 of the Constitution of the Republic of Singapore (2020 Rev Ed), ["the Constitution"].

2 *Singapore Parliamentary Debates*, Official Report (2 November 1995) vol 65 at cols 234-235 (Lee Kuan Yew, Senior Minister), [*Singapore Parliamentary Debates*, (2 November 1995)].

3 Article 95(1) of the Constitution.

4 Articles 111B(2) and 111F(1) of the Constitution.

5 Tey Tsun Hang, "Judicial Internalising of Singapore's Supreme Political Ideology" (2010) 40:2 Hong Kong LJ 29 at 298, [Tey, "Judicial Internalising"]; Ross Worthington, "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28:4 JL & Soc'y 490 at 516-517, [Worthington, "Hermes and Themis"].

6 Michael Hor, "The Independence of the Criminal Justice System in Singapore" (2002) Sing JLS 497 at 502, [Hor, "The Independence of the Criminal Justice System"].

7 Tey, "Judicial Internalising" at 298.

outlooks and values. This is achieved by recruiting members with "*different perspective on political, social and cultural issues*" from the Bar, public service and academia.[8]

8. In summary, the law empowers the Executive to appoint the judges, but the Judiciary's participation in this process serves as a check in practice. This is a balance struck in the Singapore framework, which has withstood the scrutiny of an educated electorate and enlightened critics. As observed by retired Judge of Appeal L.P. Thean:

"*[A] pure form of judicial independence, as conceived in the classical doctrine of separation of powers, is difficult to achieve… Even in the United States of America, whose constitution contains possibly the purest form of the separation of powers doctrine, appointments to the federal Judiciary and the Supreme Court are made by the Executive together with the Legislature… The lack of doctrinal purity, however, does not mean an introduction of Executive interference… the true foundation of judicial independence from the Executive, does not lie solely in the provisions of the Constitution, but also in the complex mix of political, economic and other forces acting on the Executive*."[9]

9. There is nothing inherently unconstitutional about the Singapore Constitution providing for Executive participation in judicial appointment. This is a constitutional feature which our Commonwealth comrades share:

(a) In **Malaysia**, appointments to the Federal Court and High Courts (of Malaya, Sabah and Sarawak) are made by the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Conference of Rulers (i.e. the Sultans). Under Malaysian common law, the Prime Minister has the final say if the Conference of Rulers disagrees with an appointment.[10] In 2009, following public outcry over a perceived lack of judicial independence (i.e. the 'VK Lingam Tape' incident in 2007), Malaysia established a Judicial Appointment Commission which shortlists candidates for the Prime Minister's consideration. However, this reform has also been criticised by Malaysian academics as ineffectual, since the Prime Minister remains entitled to continually reject nominations from the Commission until a candidate acceptable to him is proposed.[11]

(b) In **India**, Supreme Court Judges and High Court Judges are appointed by the President on the advice of the Prime Minister. The Prime Minister's advice is based on the recommendations given by a committee of the four senior-most Supreme Court judges. The initial recommendation of the committee is prepared by the Chief Justice. Former Indian Chief Justice P Sathasivam describes India's judicial appointment process as a "*combined effort of the Executive and the Judiciary*".[12]

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8 Chan Sek Keong, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229 at 237; [Chan, "Securing and Maintaining Independence"].

9 L.P. Thean, "Judicial Independence and Effectiveness" in The Eighth General Assembly and Conference Workshop Papers (ASEAN Law Association, 2003) at 3 [Thean, "Judicial Independence and Effectiveness"].

10 *In the matter of an oral application by Dato` Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal* [2000] 2 MLJ 481.

11 Farid Sufian Shuaib, "Malaysian judicial appointment process: An overview of the reform" (2011) J. Appl. Sci. Res., 7(13): 2273-2278 at 2276.

12 P Sathasivam, "Establishing an Independent Judiciary" *Core Values of an Effective Judiciary*, (Academy Publishing, 2015).

(c) In **Australia**, the law provides that High Court Judges are to be appointed by the Governor-General (i.e. the Head of State) acting on the advice of the Prime Minister. In practice, the decision is made by Cabinet following the recommendation of their Attorney-General.[13]

(d) In the **UK**, Supreme Court Judges are appointed by the Head of State on the advice of the Prime Minister, who is in turn advised by the Lord Chancellor (a high ranking Minister). While the initial nomination of a judicial candidate originates from an independent Judicial Appointments Commission, the Lord Chancellor has a veto power and may reject the nomination or request the Commission to reconsider.[14]

(e) See the list of selected countries annexed hereto.

10. Singaporeans, as with their Commonwealth cousins, live with the reality that their Constitution provides for Executive participation in the appointment of judges. Still, it is unduly pessimistic to hypothesize that judicial independence is inconceivable as a consequence. The real question is whether, in the totality of circumstances (of which the appointment framework is but one piece of the puzzle), there are sufficient safeguards to protect judicial independence.

C. Security of Judicial Tenure

11. Supreme Court judges enjoy security of tenure and cannot be removed from office except by the President acting on a tribunal's recommendations, through a process initiated by the Prime Minister or the Chief Justice in consultation with the Prime Minister.[15] It is noteworthy that Malaysia shares the same constitutional framework, and it did not prevent the Malaysian constitutional crisis in 1988 involving the removal of the Lord President of the Federal Court and the suspension of five other Supreme Court judges.[16] Contrary to Malaysia's experience however, no sitting Supreme Court judge in Singapore has ever been removed by the President.

12. It is worth mentioning Article 98(1A) of the Constitution which provides that a Supreme Court Judge may only hold office until the age of 65 years old, after which his continued service on the Bench is subject to the approval of the President.

13. Singapore judges have neither publicly defended nor protested against the fact that the power of extending their retirement age vests in the Executive. The inscrutability of the Judiciary's views on this issue is illustrated in a retired Chief Justice's dispassionate allusion to his constitutional retirement age as the reason for him entrusting Singapore's 'constitutional salvation' to his successors:

"*Coming back to the book, Evolution of a Revolution, it concluded with this hopeful note: The power-justice-culture elements in the constitution may well change with the exigencies of a new season, as the next generation continues to work out its own constitutional salvation. If this conclusion is correct, salvation from the*

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13 Susan Kiefel and Cheryl Saunders, "Country Report: Australia" in *The Independence of a Meritorious Elite: The Government of Judges and Democracy* (lecture at the XIX International Congress of Comparative Law, Vienna, Austria, July 2014) at 6.

14 Constitutional Reform Act 2005 (c 4) (UK), ss 73, 82 and 90; Judicial Appointments Regulations 2013 (UK) regs 8, 14, 20 and 26.

15 Articles 98(1) to 98(4) of the Constitution.

16 George Seah, "Crisis in the Judiciary - Part 4 & 5 The suspension of the Supreme Court" (Praxis/Infoline, 2005). The said article's author was one of the Supreme Court judges who were suspended.

Judiciary has to wait a bit longer, as I do not even belong to the present generation of judges. I am past my constitutional retirement age."[17] [emphasis added]

14. Incidentally, the above article by Chan Sek Keong was published in December 2012, just one month after his retirement as Chief Justice in November 2012. Even though Chan Sek Keong's 6 year tenure as Chief Justice was relatively short (his two predecessors served for 27 and 16 years), his contributions to Singapore's legal landscape are immense. For example, just three months before his retirement, Chan CJ made the ground-breaking observation that the separation of powers is part of the basic structure of the Singapore Constitution.[18] The special significance of the basic structure doctrine in the context of judicial independence is further discussed below.

15. Up until 2021, State Court judges and State prosecutors came under the purview of the Legal Service Commission. The policy then was to transfer judges and prosecutors between the State Courts and the Attorney-General's Chambers routinely to expose them to "both sides of the fence". For decades, this policy exposed the government to criticism of manipulating the judges' careers by transferring them to the Attorney-General's Chambers whenever a judge delivers a judgment against the government. This "cozy" arrangement was revamped in 2022 with the establishment of the JSC which took over the management of State Court judges while the Legal Service Commission continues to oversee the recruitment of prosecutors.

D. Judicial Remuneration

16. The remuneration of Supreme Court judges cannot be altered to their disadvantage during their office.[19] The Prime Minister is responsible for administering the Judges' Remuneration Act 1994, which determines the quantum of remuneration paid to Supreme Court judges.[20]

17. Retired judges have explained that judicial remuneration is fixed to insulate judges from corruption while ensuring the recruitment of the best legal minds to the bench.[21] '*If you pay peanuts, you get monkeys'* is the belief which undergirds Singapore's policy in fixing public service salaries across the board. Then Senior Minister Lee Kuan Yew defended this policy in Parliament:

"*It is absurd for anyone to suggest that [Singapore's second Chief Justice Yong Pung How] would give up his position as Chairman of our largest bank, earning more than $2.6 million a year, to become a compliant Chief Justice for less than one-fifth the salary... Of course, money did not matter to him so much because he had inherited some properties from his parents and so was not deterred by the loss of income as a banker.*

However, Singapore cannot in future depend on finding a Chief Justice who happens to be good and bedecked with ability, integrity and judicial temperament who also happens to have inherited properties from his parents. Hence, I urged upon the Prime Minister the need for a fundamental revision of salaries from the President downwards, including the Chief Justice, the Judges and the civil

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17 Chan Sek Keong, "The Courts and the 'Rule of Law' in Singapore" (2012) Sing JLS 209 at 216, [Chan, "The Courts and the Rule of Law"].

18 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [11], ["*Faizal*"].

19 Article 98(8) of the Constitution.

20 Section 2(1) of the Judges' Remuneration Act 1994 read with the Second Schedule of the Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2020.

21 Thean, "Judicial Independence and Effectiveness" at 7-8.

servants, so that they are now earning 60% of their market earnings, of their peers in the private sector and, in the longer term, two-thirds of their market earnings.

If Singapore is to remain squeaky clean when that revolutionary generation that threw me and my colleagues up cannot be reproduced, this is the only way."[22]

E. Administrative Resources

18. A malicious Executive may insidiously exert pressure on the Judiciary by leveraging the latter's dependency on the former for administrative resources. For example, the Executive may cut the Judiciary's funding for vital support staff to indirectly sanction 'official disapproval' of certain judgments and at the same time incapacitate the Judiciary.[23] This is an easily overlooked aspect of judicial independence as constitutional provisions rarely contemplate direct protection for the Judiciary's access to administrative resources.

19. Former Australian High Court Judge Kenneth M Hayne cautioned of the many practical constitutional difficulties which can spring from the seemingly innocent issue of administrative resources:

"*It is the political branches of government, not the judicial branch, which are immediately responsible and accountable for the way in which public money is spent. So at once the fundamental point of friction is obvious. Who is to be responsible for budgeting and financial management of the courts? Who decides what is "sufficient"?*

More particular points of friction can then be identified. Who is to determine how many, and what, administrative staff a court needs? Who is to determine what those administrative staff are paid? To whom are the administrative staff of the court immediately answerable – the Chief Justice, a chief executive officer of the court appointed by the court, a chief executive officer of the court appointed by the Government, the government Minister who is responsible for the judicial system, or the government Minister who is responsible for finance?

Second, who is to be responsible for court accommodation and use of court buildings?

Third, if a court has a backlog of cases, who decides which kinds of case should be dealt with first?

Fourth, if judges may be assigned to perform particular kinds of work, in particular places in the country, who makes those decisions?"[24]

F. Reasoned Judgments Subject to Scrutiny

20. All Court cases involving the Executive are naturally high profile, conducted in open Court transparently, and inevitably reported in the media contemporaneously.

21. All High Court decisions are reasoned and immortalized in the Law Reports. Any sycophantic judge currying favour with the Executive in any Court case knows all

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22 *Singapore Parliamentary Debates*, (2 November 1995) at cols 234-235.

23 Thio Li-ann, "The Judiciary" in *A Treatise on Singapore Constitutional Law*, (Academy Publishing, 2012) at para 10.151, [Thio, "The Judiciary"]; Steven Thiru, "Strengthening the Independence and Efficiency of the Judiciary" in The Eighth General Assembly and Conference Workshop Papers (ASEAN Law Association, 2003) at para 20.

24 Kenneth M Hayne, "An Administratively Independent Judiciary" in *Core Values of an Effective Judiciary*, (Academy Publishing, 2015).

too well that his decision will be reported and scrutinized by the judiciary, legal practitioners, academics, and the entire legal community.

22. If such a sycophantic judge favours the Executive unsupported by the law, the evidence or the facts, such said judge would in fact be doing the Executive a disfavour if his judgment suffers ridicule and brings the entire judiciary into disrepute. The Honourable Chief Justice Sundaresh Menon explained how open justice safeguards judicial impartiality in the following manner:

"*Fundamental to the principle of open justice is the notion that justice must not only be done but must also be seen to be done (see Millar v Dickson [2002] 1 WLR 1615 at 1639). There are two key reasons why justice cannot be hidden from the public eye and ear. First, the public administration of justice promotes transparency and "provides a safeguard against judicial arbitrariness or idiosyncrasy" (see Attorney-General v Leveller Magazine Ltd and others [1979] 2 WLR 247 ("Leveller") at 252). Open justice is thus central to the rule of law because it "keeps the judge, while trying, under trial" (see The Works of Jeremy Bentham vol 4 (William Tait, 1843) at pp 316–317). Second, by enabling the public to witness the operation of the rule of law, open court proceedings safeguard public confidence in the judicial system and dampen the desire for recourse to vigilante justice (see the Honourable Justice Stephen Hall, Judge of the Supreme Court of Western Australia, "Open Justice – Seen to be Done", keynote address at the Fremantle Law Conference (19 February 2021))*."[25] [emphasis added]

23. Critics occasionally cite Executive interference when they disagree with the law or the legal reasoning behind a judgment. In Chan Sek Keong's words:

"*[I]t is one thing to criticise a judge for deciding case wrongly on the facts or the law, whether as a result of ignorance of the law, applying the wrong law, applying it too widely or too narrowly, or making wrong findings of fact. This is wholly unexceptional and is indeed the function of law academics, so as to promote the sound development of the law. But, it is an entirely different thing to accuse the courts of having the same political or ideological views of the Government and allowing these views to colour their decisions in cases involving the Government and the foreign media or opposition politicians, or even ordinary citizens. It is equally objectionable to suggest that the judge has deliberately disregarded or ignored the law for this purpose*." [26]

24. Judges only hear legal and factual arguments from the parties before them, who litigate to win the dispute at hand and not necessarily to advance the public interest. The extent of a judge's discretion is also usually limited to granting or withholding the remedies sought by parties. The courtroom setting is not designed to resolve political questions:

"*Judicial independence from the legislature and the executive comes at a price. Judges are protected, but in return they are expected to be impartial and politically neutral… The role of a judge is constitutionally defined. Where a judge wanders into criticisms of the executive or the legislature beyond what is necessary for the resolution of the case before him, he should be prepared to receive responses in kind. On the other hand, such judicial restraint from comments on the executive or legislature would necessarily have to give way to duty, in cases such as those involving judicial review, where a judge may have to quash a decision of a minister or government officer, and give reasons for such a decision*."[27]

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25 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [34].

26 Chan, "The Courts and the Rule of Law" at 213.

27 Thean, "Judicial Independence and Effectiveness" at 5-6.

25. Thus, one expects the courts to decide cases in accordance with the laws enacted by Legislature, for this is their constitutional duty. In former Chief Justice Yong Pung How's words, as long as a law is constitutionally valid, "*the court is not concerned with whether it is also fair, just and reasonable*".[28] The latter inquiry is a political question which belongs in the legislative sphere.[29] As observed by former Chief Justice Chan Sek Keong:

> "*In truth, the courts have never shirked from exercising judicial review of the exercise of legislative and executive powers whenever issues of illegality of such nature are raised in court proceedings. The point is that courts do not proceed on the basis that Parliament is in the habit of legislating unconstitutionally or that the Executive is in the habit of acting unlawfully*."[30]

G. Conclusion

26. Notwithstanding the above safeguards for judicial independence collated in this speech, government critics theorise that the government can easily bulldoze through all obstacles by enacting new laws, amending existing laws or even the Constitution when push comes to shove.[31] Such critics point to the fact that the ruling party in Singapore has time and again won an overwhelming parliamentary majority far in excess of the two-thirds majority required for constitutional amendments.[32]

27. To mitigate the risk of Legislature abusing their powers to amend the Constitution, the common law developed the 'basic structure doctrine', which allows the Court to strike down any constitutional amendment inconsistent with the Constitution's basic structure. Thus, the basic structure doctrine gives substance to the principle that "*all power has legal limits*"[33] by preventing a rogue government from shifting the goalposts of unconstitutionality through constitutional amendments.

28. While the basic structure doctrine has not found express recognition in Singapore,[34] this position may yet change in an appropriate future case. In this regard, it is significant that former Chief Justice Chan Sek Keong has argued forcefully in support of the basic structure doctrine.[35] Furthermore, the Court of Appeal (Singapore's apex Court) has also endorsed Chan CJ's observation in *Faizal* that the separation of powers is part of the "*basic structure*" of our Constitution.[36]

29. Because the Singapore government is aware that Singapore's "*squeaky clean*" reputation in upholding the law is its economic lifeblood, it recognises the existential necessity of safeguarding the competence and impartiality of Singapore judges.[37] Judicial independence is only as incorruptible as the men and women comprising it. As Chan Sek Keong put it:

> "*Ultimately, it comes down to <u>the moral character of the judge</u>, and, to a large extent, <u>the corporate culture of the Judiciary as an institution as regards integrity</u>*

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28 *Jabar bin Kadermastan v Public Prosecutor* [1995] 1 SLR(R) 326 at [52].
29 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [80].
30 Chan, "The Courts and the Rule of Law" at 221.
31 Tey, "Judicial Internalising" at 298.
32 Singapore Electoral Department website <https://www.eld.gov.sg/elections_past_parliamentary.html> (accessed 29 August 2022); Article 5(2) of the Constitution.
33 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [33].
34 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [78]).
35 Chan Sek Keong, "Basic Structure and Supremacy of the Singapore Constitution" (2017) 29 SAcLJ 619.
36 *Prabagaran a/l Srivijayan v Public Prosecutor* [2017] 1 SLR 173 at [57].
37 *Singapore Parliamentary Debates*, (2 November 1995) at cols 231-232.

and respect for the rule of law under the moral leadership of the Chief Justice."[38] [emphasis added]

30. Singapore's incumbent Chief Justice Sundaresh Menon concurs that judicial independence boils down to the courage, backbone and integrity of each individual judge:

"*The hallowed Latin aphorism that best describes the judge's obligation to stand up and do the right thing in the face of overwhelming political and personal pressures to do otherwise thus goes: "Fiat justitia, ruat caelum" – "Let justice be done, though the heavens fall". Having the courage and backbone to stand up for and defend their decisions and the reasons for their decisions is clearly an important judicial quality ... Whilst measures put in place to preserve judicial independence, such as security of tenure and remuneration, will go some way towards alleviating the pressures, influences and even threats faced by the judge, they cannot fully insulate the judge from the public opprobrium he and his family can sometimes expect to encounter. Integrity, which encapsulates the quality of being able to stand for something becomes the ultimate guarantor of judicial independence.*"[39] [emphasis added]

31. Another commentator made the hopeful observation that the key role played by the individuals within the system is what enables progress to occur across generations:

"*[T]he most perfectly constructed institutions will still allow the Judge or Public Prosecutor of the day to give in to improper Executive pressure, direct and indirect. To expect the constitution to do more is risky—formally entrenching a greater degree of independence for the Judiciary or the Public Prosecutor might backfire when the moral roles are reversed (ie when it is a bona fide Executive pitted against a retrograde Judiciary or Public Prosecutor) … Singapore has often been criticised for having a formal veneer of constitutionalism which masks what is essentially an autocracy. I offer no views on this, but only to say that perhaps a veneer is better than none, for there is the hope that the values inherent in its constitution will seep deeper into the national consciousness, and together with a populace which is fast achieving political maturity, the constitution may eventually come into its own*."[40] [emphasis added]

32. The ruling political party in Singapore has enjoyed an overwhelming majority support at every general election since Singapore's independence in 1965 to date. This gives the government impunity to enact whatever draconian laws it wishes which the courts would be legally bound to execute and uphold. With such powers, there is no need for the Executive to pack the courts with pliant or compliant judges. Individual judges with rightist or leftist inclinations are part and parcel of human nature cutting across every profession and vocation. This does not equate to Executive interference.

33. A system engineered for Singapore's needs in its turbulent founding days may not be a perfect fit in all aspects for present day Singapore. It behoves the various stakeholders inheriting the reins of Singapore's legal system to continue reshaping it in fulfilment of the ideals that today's Singaporeans believe in.

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38 Chan, "Securing and Maintaining Independence" at 235.

39 Sundaresh Menon, "The Integrity of Judges" in *Core Values of an Effective Judiciary*, (Academy Publishing, 2012).

40 Hor, "The Independence of the Criminal Justice System" at 512-513.

ANNEX 1

COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT

NOVEMBER 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.

(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 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

PARLIAMENTARY SUPREMACY

JUDICIAL INDEPENDENCE

LATIMER HOUSE GUIDELINES FOR THE COMMONWEALTH

19 JUNE 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.

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 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.[1] 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[2] 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 (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.[3]

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.[4]

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.[5]

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[6]

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.[7]

III) PRESERVING THE INDEPENDENCE OF PARLIAMENTARIANS[8]

1. Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:

"That the Freedome 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[9];
(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[10]

1. To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced, 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[11];
(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[12]:
(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. 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 Infor mation 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 law-making 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[13] 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.

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 disputeresolution 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.[14]

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

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 approachto 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. 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.

ANNEX 2

Judicial Appointment Processes Around the World

Australia

1. Section 72(i) of the *Commonwealth of Australia Constitution Act 1900* (Imp) provides that Federal judges and High Court judges are appointed by the Governor-General in Council. In practice, the Commonwealth Attorney-General considers who might be a suitable appointment. The Attorney-General then writes to the Prime Minister to seek the approval of the Prime Minister and the Cabinet. If approved, the Attorney-General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council process. The process has been criticised for its lack of transparency. Brennan J, for instance, noted that:

   "*We entrusted judicial appointments to the uncontrolled and unreviewable discretion of the executive government. True it is that, in general, the power has been wisely exercised and Australia has been privileged to have judges who, with very few exceptions, have been competent judges possessed of the judicial virtues I have mentioned. The respectful aura with which the judiciary has been traditionally surrounded encouraged the public to expect and governments overall to satisfy the expectation, that judges would be appointed 'on merit'."* (Francis Gerard Brennan, 'The Selection of Judges for Commonwealth Courts', *Papers on Parliament Number 48* (January 2008), 1.)

2. Based on the data of all High Court of Australia cases decided over the period of 1995-2019, it has reportedly been found that there is evidence of a 'loyalty effect', whereby justices found in favour of the federal government more frequently when the Prime Minister who appointed them was in office. (Patrick Leslie, Zoe Robinson and Russell Smyth, 'Personal or Political Patronage? Judicial appointments and justice loyalty in the High Court of Australia' (2021) 56(4) *Australian Journal of Political Science* 445.) Australian Law Reform Commission (ALRC) released a consultation paper in Apr 2021. Consultation proposal 14 asks whether the Australian Government should commit to a more transparent process for appointing federal judicial officers that involve a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community (Australian Law Reform Commission, *Judicial Impartiality: consultation paper and background paper* (Consultation paper, April 2021) 1, 26.)

Canada

3. Judges of the Supreme Court (apex) are appointed by the Governor in Council pursuant to section 4 of the *Supreme Court Act*. Judges of the Federal Court of Appeal and the Federal Court are appointed by the Governor in Council (s 5.2 *Federal Courts Act*). Provincial courts judges are appointed by the Lieutenant Governor in Council (s 9.1 *Provincial Court Act*).

Ecuador

4. Under art 434 of the Constitution of the Republic of Ecuador, members of the Constitutional Court are elected from the candidates submitted by the following branches of the government (1) the legislative, (2) the executive and (3) transparency and social monitoring, through a public examination process. Citizens are able to challenge the process. Despite the seemingly 'robust' judicial appointment process, Ecuador has had instances where politicians have undermined the independence of the judiciary. For instance, the premature removal of judges in 2007 and the interference of President Raefael Correa's administration with cases that touched on government interests.

England

5. Appointment of judges:

   (a) **Supreme court:** Supreme court judges are appointed by the King on the advice of the Prime Minister, who receives recommendations from the Judicial Appointments Commission.

   (b) **Court of Appeal:** Court of Appeal judges are appointed by The King on the recommendation of a selection panel convened by the Judicial Appointments Commission.

   (c) **High court**: High Court judges are appointed by the King on the recommendation of the Lord Chancellor, after a fair and open competition administered by the Judicial Appointments Commission.

   (d) **Crown court**: Circuit judges who sit at the crown court are appointed by the King, on the advice of the Lord Chancellor and the Lord Chief Justice, following a fair and open competition administered by the Judicial Appointments Commission.

   (e) **District courts** District Judges who sit at the district court are appointed by the King, following a fair and open competition administered by the Judicial Appointments Commission, and the statutory qualification is five-years of appropriate professional legal experience such as a practicing as a barrister, solicitor or legal-executive.

   (f) **Magistrates' courts:** District Judges who sit in the magistrates' courts are appointed by the King, on the recommendation of the Lord Chancellor, following a fair and open competition administered by the Judicial Appointments Commission.

6. Judicial Appointment Commission: an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales.

Hong Kong

7. According to section 6 of the *Hong Kong Court of Final Appeal Ordinance* (Hong Kong) cap 848, the Chief Justice and the permanent judges in the court of final appeal (apex) are appointed by the Chief Executive with the recommendation of the Judicial Officers Recommendation Commission.

   (a) High Court judges are appointed by the Governor (*High Court Ordinance* (Hong Kong) cap 4)).

   (b) District judges are appointed by the Chief Executive (*District Court Ordinance* (Hong Kong) cap 336).

   (c) Magistrates are appointed by the Chief Executive (*Magistrate Ordinance* (Hong Kong) cap 227).

India

8. The apex court in India is the Supreme Court. Under the present Collegium system, the Chief Justice of India and four senior-most Supreme Court judges recommend appointments of judges to the government for approval. The Collegium system is not rooted in the Constitution and is instead case law.

9. The Indian government has been pushing for greater executive involvement in the judicial appointment process by critiquing that the current Collegium system is 'opaque'. As such, the *Constitution (99th Amendment) Act* established the National Judicial Appointments Commission (NJAC) to replace the Collegium system. The NJAC comprises both judges and politicians. However, the laws were repealed in October 2015 after they were ruled unconstitutional on the ground of judicial independence.

10. Oddly, however, the most updated English version of the Constitution of India (as of May 2022) still provides the following:

    (a) Pursuant to article 124 of the Constitution of India, Supreme Court judges are appointed by the president on the recommendation of the National Judicial Appointments Commission (NJAC).

    (b) Chief Justice and judges of the High Courts of India are appointed by the President on the recommendation of the NJAC under article 217 of the Constitution of India.

    (c) District Court judges are appointed by the Governor of State in consultation with respective High Courts of the respective states (art 233).

Ireland

11. In Ireland, art 35.1 of the Constitution provides that judges shall be appointed by the President. However, art 13.9 requires that this power may only be exercised on the advice of the government. Judge appointment process is described as a 'rather informal process pursued by successive governments who are seen to appoint, almost invariably, their own supports to judicial office' (All Party Oireachtas Committee on the Constitution, Fourth Progress Report (Pn 7831, 1999) 1, 7 quoted in Michael J. S. Moran, 'Impartiality in Judicial Appointments: An Absent Concept' (2007) 10 *Trinity College Law Review* 5).

12. In 1994, the Taoiseach of the day (i.e. head of government of Ireland) appointed the new president of the High Court. The Attorney-General was appointed to the office of the President of the High Court despite the fact that his department had been responsible for a nine-month delay in processing the extradition warrant of a suspected paedophile. The circumstances in which High Court President was appointed attracted much media and political protest.

Israel

13. The *Judges Act 1953* provides the procedure for the appointment of judges to all courts in Israel. (Unable to find the Act online, unable to provide section numbers). Supreme Court (apex court) judges are appointed by the President of Israel from names submitted by the Judicial Selection Committee. The Committee is composed of nine members:

    (a) three Supreme Court judges (including the president of the Supreme Court);

    (b) two cabinet ministers (one of them being the Minister of Justice);

    (c) two Knesset members (i.e. unicameral legislature of Israel); and

    (d) two representatives of the Israel Bar Association.

14. Appointing Supreme Court judges requires a majority of seven of the nine committee members or two less than the number present at the meeting. However, Israel's government has announced plans to overhaul the judicial system on the grounds of reduced public confidence in the judicial system. One of the proposed laws seeks to

empower the 120-seat Knesset with the ability to override Supreme Court decisions once there is a majority of 61 votes. The sentiments of the far-right government to restrict the power of the Supreme Court can also be evidenced in the delayed firing of Interior Minister Aryeh Deri despite findings of tax fraud.

Malaysia

15. The Federal Constitution of Malaysia provides for an executive-centric mechanism in judicial appointment where the Prime Minister has the final say. Pursuant to article 122B of the Federal Constitution, the *Yang di-Pertuan Agong* appoints:

    (a) the Chief Justice of the Federal Court;

    (b) the President of Court of Appeal;

    (c) the two Chief Judges of the High Courts; and

    (d) the judges of the Federal Court, the Court of Appeal and the High Court.

16. The above appointments are made on the advice of the Prime Minister after consulting the Conference of Rulers. Notably, the Judicial Appointments Commission will oversee the process of nomination and appointment **preceding** the process stipulated in art 122B to ensure 'transparency'.

17. With regard to subordinate courts:

    (a) Session Court judges are appointed by the *Yang di-Pertuan Agong* on the recommendation of the Chief Judge (*Subordinate Courts Act 1948* act 59(3)).

    (b) First Class Magistrates of the Federal Territory are appointed by the *Yang di-Pertuan Agong* on the recommendation of the Chief Judge (*Subordinate Courts Act 1948* act 78(a)).

    (c) First Class Magistrates of each state are appointed by the State Authority on the recommendation of the respective Chief Judge (*Subordinate Courts Act 1948* act 78(b)).

    (d) Second Class Magistrates of the Federal Territory are appointed by the *Yang di-Pertuan Agong* while Second Class Magistrates of each state are appointed by the State Authority. (*Subordinate Courts Act 1948* act 79(1)-(2)).

New Zealand

18. Pursuant to section 100 of the *Senior Courts Act 2016* (NZ), judges of the Supreme court, the Court of Appeal and the High court are appointed by the Governor-General acting on the advice of the Attorney-General. District court judges are appointed by the Governor General on the advice of the Attorney-General under section 11 of the *District Court Act 2016* (NZ).

Russia

19. Article 128(1) of the Constitution of Russian Federation provides that judges of the Constitution Court, Supreme Court and Higher Arbitration Court shall be appointed by the Council of the Federation u[on the proposals by the President. Judges of other federal courts shall be appointed by the President according to rules fixed by the federal law (art 128(2)). Russia is known for 'telephone justice' which is a practice by which outcomes of cases allegedly come from orders issued over the phone by those with

political power rather than the application of law. If judges do not follow through with the orders, a decision may be revoked while a judge may face disciplinary measures (International Commission of Jurists, *The State of the Judiciary in Russia* (Report, 20-24 June 2010) 1, 16-7).

US

20. Pursuant to article II section 2 of the United States Constitution, federal judges are appointed by the president on approval of the Senate. Unlike judicial appointments at the federal level, judges are selected in five different manners across the state courts. These five methods are:

    (a) Partisan elections: Judges are elected by the people, and candidates are listed on the ballot alongside a label designating political party affiliation.

    (b) Nonpartisan elections: Judges are elected by the people, and candidates are listed on the ballot without a label designating party affiliation.

    (c) Legislative elections: Judges are selected by the state legislature.

    (d) Gubernatorial appointment: Judges are appointed by the governor. In some cases, approval from the legislative body is required.

    (e) Assisted appointment: A nominating commission reviews the qualifications of judicial candidates and submits a list of names to the governor, who appoints a judge from the list. After serving an initial term, the judge must be confirmed by the people in a yes-no retention election to remain on the court.