

Selection and Appointment of Judges

Selected International Standards for a presentation by Matt Pollard, Director of the ICJ Centre for the Independence of Judges and Lawyers, at the launch of the UNODC Judicial Integrity Network, Vienna, 10 April 2018

UN Basic Principles on the Independence of the Judiciary

(endorsed by General Assembly resolutions 40/32 and 40/146, 1985)

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

(adopted by the African Commission on Human and Peoples' Rights, 2003)

- A.4. (h) The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.
- (i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.
- (j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:
1. prescribe a minimum age or experience for candidates for judicial office;
 2. prescribe a maximum or retirement age or duration of service for judicial officers;
 3. prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;
 4. require that only nationals of the state concerned shall be eligible for appointment to judicial office.
- (k) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.
- (n) Judicial officers shall not be:
- ... 3. appointed under a contract for a fixed term.

UN Special Rapporteur on Independence of Judges and Lawyers.

Report on corruption and the judicial system (UN Doc A/67/305, 2012).

45. The processes of appointing and selecting judges emerge as critical when the issue of judicial corruption is examined. Judicial appointments can easily be manipulated by the executive or legislative branches or by private sector interests in the election of specific lawyers financing their campaigns, which can lead to the selection of non-independent judges or judges biased towards particular political or economic interests. It is stipulated in principle 10 that “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives”.

46. The Special Rapporteur believes that an appointment body acting independently of both the executive and legislative branches of Government contributes greatly to avoiding the politicization of the appointment of judges and their potential improper allegiance to interests other than those of fair justice. When selection criteria used by such bodies are objective, clear, based on merit, transparent and well publicized, public understanding of the process and the basis for the appointment of judges increases, and the perception of unfair selection or appointments tainted with corruption is avoided.

113. (j) The processes for appointing and selecting judges and prosecutors should be guided by objective criteria, based on merit, and clear and transparent procedures, and take place through a public competitive selection process, free from political or economic influences or other external interference;

(k) States should establish a judicial oversight body, the majority of members of which should be judges, independent from the executive and legislative branches to oversee the appointment, selection, promotion and transfer of judges;

Report on parameters necessary to effectively guarantee the independence of judges (UN Doc A/HRC/11/41, 2009, footnotes omitted).

23. The Basic Principles on the Independence of the Judiciary prescribe that judges be selected on the basis of integrity and ability and that any method of judicial selection should include safeguards against judicial appointments for improper motives. This key principle is also established by a number of regional standards. Furthermore, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight the importance of transparency and accountability in the selection and appointment procedures.

24. The Special Rapporteur takes note of the variety of existing systems for the selection and appointment of judges worldwide. One can broadly distinguish political appointments (selection by the legislative or executive branches of power), appointments by popular elections, corporative appointments (by bodies composed of judges only), selection by judicial councils with plural representation, or a variety of mixed systems where the nominating body is of one type (e.g. judicial council) and the one in charge of appointments is of a different nature (e.g. a political appointing body). He wishes to highlight below aspects of selection and appointment procedures that crucially strengthen judicial independence.

25. The Special Rapporteur notes the existence of manifold constitutional provisions and domestic legislation providing for the election of judges by the legislature. He would like to raise the general concern that the involvement of the legislature in judicial appointments risks their politicization. On many occasions and in light of situations studied by the Special Rapporteur, it is difficult to ascertain the benefit this procedure brings, particularly to the selection of lower-level judges. But even for higher-level courts for which the selection of nominees is usually justified on grounds of the court’s need to give particular consideration to matters of general interest or welfare, in most cases political appointments are not appropriate

means to reach those objectives. In particular, in times of transition from an authoritarian to a democratic system, it is crucial that the population gain confidence in a court system administering justice in an independent and impartial manner, free from political considerations.

26. Likewise, in many other countries, the executive branch of power has a decisive say in the selection and appointment of judges. The Committee against Torture and the Human Rights Committee expressed several times their concern in this regard, as did also the Special Rapporteur in several country mission reports, given the risk this structure implies for the protection of the rights of individuals before the State.

27. Several regional standards, along with the Human Rights Committee in several concluding observations, recommend the establishment of an independent authority in charge with the selection of judges. That was also recommended by the Special Rapporteur in several country visit reports.

28. The composition of this body matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges. While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference. In the Special Rapporteur's view, if the body is composed primarily of political representatives there is always a risk that these "independent bodies" might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly.

29. In order to ensure that such a body is apt to select judges in an objective, fair and independent manner, the judiciary and other parties directly linked with the justice system must have a substantial say with respect to selecting and appointing the members of such a body. According to some regional standards, members of the independent body should be selected by the judiciary.

30. In addition to the composition of the selecting body, it is also important to determine the extent of powers given to this organ, as this element has a great impact on the degree of independence of judges, not only from political power, but also from the selecting body itself. The competency of this body could range from conducting competitive examinations and interviews in order to appoint those who score highest to directly possessing the power to appoint nominees at its discretion. In order to secure the independence of judges and the selection of the most suitable candidates, the Special Rapporteur highlights the importance of the establishment and application of objective criteria in the selection of judges. The principle of objective criteria was also highlighted by the Human Rights Committee and by the Committee against Torture. These objective criteria should relate particularly to qualifications, integrity, ability and efficiency. The Special Rapporteur emphasizes that selection of judges must be based on merit alone, a key principle also enshrined in Recommendation No. R (94) 1228 and the Statute of the Ibero-American Judge. The Special Rapporteur underscores that competitive examinations conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process.

31. As a complement to a selection and nomination process that uses objective criteria to select judges, other procedures may be implemented to enhance the public certainty on the nominee's integrity. Such could be the holding of public hearings where citizens, non-governmental organizations or other interested parties, are able to express their concern or support for particular candidates. In this connection the Special Rapporteur refers to the appointment of the judges of the Supreme Court of Ecuador in 2005, which were made in accordance with his recommendations, in particular those referring to objective criteria to select candidates with a view to their independence, competencies and integrity. This ensured the transparency of the selection and appointment processes. Furthermore, for the first time in Ecuador's history, public hearings were held at which backgrounds of the nominees could be

openly scrutinized. This experience was qualified by the United Nations as a major example of good practices.

33. Where an organ of the executive or legislative branch is the one formally appointing judges following their selection by an independent body, recommendations from such a body should only be rejected in exceptional cases and on the basis of well established criteria that have been made public in advance. For such cases, there should be a specific procedure by which the executive body is required to substantiate in a written manner for which reasons it has not followed the recommendation of the above-mentioned independent body for the appointment of a proposed candidate. Furthermore, such written substantiation should be made accessible to the public. Such a procedure would help enhance transparency and accountability of selection and appointment.

34. When conducting country visits, the Special Rapporteur regularly examined the representation of women and of ethnic minorities in the judiciary. In some countries, he concluded that this representation is very low or non-existent. The Special Rapporteur underlined the importance to adopt and implement temporary special measures to achieve greater representation for both women and ethnic minorities until fair balance has been achieved.

97. With respect to selection, appointment and promotion of judges, [the Special Rapporteur] recommends that:

- Member States consider establishing an independent body in charge of the selection of judges, which should have a plural and balanced composition, and avoid politicization by giving judges a substantial say.
- Member States adopt legislation enshrining objective criteria to be applied in the selection of judges, ensuring that selection of judges be based on merit only. Member States consider the possibility of selecting judges by competitive exams conducted at least partly in a written and anonymous manner.
- Selection and appointment procedures be transparent and public access to relevant records be ensured.
- Clear procedures and objective criteria for the promotion of judges be established by law. Final decisions on promotions be preferably taken by the independent body in charge of the selection of judges.

Universal Charter of the Judge

(adopted by the International Association of Judges, 1999 updated 2017)

Article 2-3 – Council for the Judiciary

In order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means.

The Council for the Judiciary must be completely independent of other State powers.

It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation.

The Council for the Judiciary can have members who are not judges, in order to represent the variety of civil society. In order to avoid any suspicion, such members cannot be politicians. They must have the same qualifications in terms of integrity, independence, impartiality and skills of judges. No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary.

The Council for the Judiciary must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges.

...

Article 4-1: Recruitment

The recruitment or selection of judges must be based only on objective criteria, which may ensure professional skills; it must be done by the body described in Article 2.3.

Selection must be done independently of gender, ethnic or social origin, philosophical and political opinions, or religious beliefs.

...

Article 5-1 – Appointment

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.

The selection should be carried out by the independent body defined by Article 2-3 of this Charter, or an equivalent body.

Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct

(adopted by the Judicial Integrity Group, 2010, footnotes omitted)

11. Qualifications for Judicial Office

- 11.1 Persons selected for judicial office should be individuals of ability, integrity and efficiency with appropriate training or qualifications in law.
- 11.2 The assessment of a candidate for judicial office should involve consideration not only of his or her legal expertise and general professional abilities, but also of his or her social awareness and sensitivity, and other personal qualities (including a sense of ethics, patience, courtesy, honesty, commonsense, tact, humility and punctuality) and communication skills. The political, religious or other beliefs or allegiances of a candidate, except where they are proved to intrude upon the judge's performance of judicial duties, should not be relevant.

11.3 In the selection of judges, there should be no discrimination on irrelevant grounds. A requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory on irrelevant grounds. Due consideration should be given to ensuring a fair reflection by the judiciary of society in all its aspects.

12. The Appointment of Judges

12.1 Provision for the appointment of judges should be made by law.

12.2 Members of the judiciary and members of the community should each play appropriately defined roles in the selection of candidates suitable for judicial office.

12.3 In order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office. All judicial vacancies should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment.

12.4 One mechanism which has received particular support in respect of States developing new constitutional arrangements consists in the creation of a Higher Council for the Judiciary, with mixed judicial and lay representation, membership of which should not be dominated by political considerations.

12.5 Where an independent council or commission is constituted for the appointment of judges, its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism.

See also:

Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (7th Conference of the Chief Justices of Asia and the Pacific, 1997), paras 11 to 16.

Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), Guideline II(1).

Consultative Council of European Judges, Opinion n°10 (2007) on "Council for the Judiciary in the service of society", paras 48 to 51.

European Commission for Democracy through Law (Venice Commission), Report on Judicial Appointments (2007).

ICJ Practitioners Guide no. 1 on the Independence and Accountability of Judges, Lawyers and Prosecutors (ICJ, 2nd edition 2009), pp 41-49.

European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System I: The Independence of Judges (2010), paras 23 to 32.

Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability (OSCE Office for Democratic Institutions and Human Rights, 2010).

Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paras 44 to 48.

Magna Carta of Judges (Consultative Council of European Judges, 2010), paras 5 and 13.

European Network of Councils for the Judiciary, Dublin Declaration setting Minimum Standards for the selection and appointment of judges (2012).

Guarantees for the Independence of Justice Operators (Inter-American Commission of Human Rights, 2013), paras 56 to 82, 98 to 108, Recommendations 6 to 9 (para 249).

Istanbul Declaration on Transparency in the Judicial Process (Adopted by the Conference of Chief Justices and Senior Justices of the Asian Region, 2013), Principle 13.

Judicial Appointments Commissions: A model clause for constitutions (Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association, 2013).

The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Bingham Centre for the Rule of Law, 2015).