



Judicial Tenure, Removal, Immunity and Accountability

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About this series

These constitution-building primers are intended to assist in-country constitution-building or constitutional-reform processes by: (i) helping citizens, political parties, civil society organisations, public officials, and members of constituent assemblies, to make wise constitutional choices; and (ii) helping staff of intergovernmental organizations and other external actors to give good, well-informed, context-relevant support to local decision-makers. The primers are designed as an introduction for non-specialist readers, and as a convenient aide-memoire for those with prior knowledge or experience of constitution-building. Arranged thematically around the practical choices faced by constitution-builders, the primers aim to explain complex issues in a quick and easy way.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

Overview

What?

- This primer covers the rules governing the tenure, immunity, discipline and removal of judges in constitutional democracies.
- In particular, it discusses various attempts to balance the need for judicial independence and neutrality to be balanced against judicial responsiveness and accountability.

Why?

- The judiciary interprets the law and applies it to particular cases. An independent, politically impartial, honest and competent judiciary is necessary for the rule of law and for a strong and resilient democratic constitutional order. It is important that the mode of removing and disciplining judges help to meet these requirements.

How?

- The independence of the judiciary from the executive and legislature, party politics, and vested interests is ensured through security of tenure, immunities and other means.
- The need to remove corrupt, negligent and otherwise unsuitable judges is met by having a thorough, robust and politically impartial judicial disciplinary and removal process.

Where?

- Judicial independence and accountability are concerns throughout the world. Standard methods of reconciling these concerns tend to be clustered according to civil-/common-law distinctions and presidential/parliamentary forms of government. The mechanisms of judicial discipline and removal must always fit the wider social, legal and political context.

What Is the Issue?

The primer on Judicial Appointments discusses the importance of the independence of the judiciary for the maintenance of the rule of law and human rights in a democratic constitutional order. It explains the need for balance in judicial appointments: on the one hand, the judiciary must be protected from partisan influence over appointments, but, on the other hand, judges must be reflective of, and responsive to, the changing needs of society in general.

In pursuit of a judiciary that is neutral and independent, but at the same time accountable and held to standards of competence and integrity, the same principles of balance must be applied to the immunities of judges once appointed and to the process of removing them from office:

- Judges should not be subject to arbitrary removal.
- They should not be dependent on the appointing authorities (whether because they are personally indebted to these authorities for their initial appointment, or because they hope for future promotion).
- They should not be subject to political interference or any undue influence that undermines independence or neutrality.
- Judges also need to be held accountable, however, with mechanisms in place to discipline and possibly remove judges who neglect their duties or abuse their position of trust.

This primer aims to help constitution-makers find appropriate balances between these two potentially opposing considerations, having due regard for the practical effect of constitutional provisions in the political and cultural context to which they are applied.

Think Point: Judicial appointment mechanisms and qualifications and judicial immunities and removal mechanisms are two parts of the same overall design package. Neither can be viewed in isolation from the other, and neither can be separated from the political system as a whole. It is necessary to consider provisions relating to the judiciary as part of an overall scheme of checks and balances.

Standards and Principles

'As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.' (Alexander Hamilton, 1788)

Usual Practice of National Constitutions

The protection of judges from arbitrary removal, together with other guarantees of judicial independence, has long been recognized as an essential element of a constitutional system of government in many parts of the world. For example, the very influential Belgian Constitution of 1831 prescribed that: 'Judges are appointed for life. No judge may be deprived of his office nor suspended except by a judgment. The transfer of a judge shall not take place except by a new appointment and with his consent' (article 100). It also stated that, 'The salaries of members of the judiciary are fixed by law' (article 102), and forbade judges from holding other paid offices (article 103). Removal from office 'by a judgment' meant that the judiciary was responsible for preserving the professional integrity and good conduct of its own members through the enforcement of

criminal and disciplinary laws. As constitutionalism spread to Latin America, Eastern Europe, the Middle East and East Asia, similar provisions were included in many other constitutions. Today, provisions against the arbitrary removal of judges are incorporated in the constitutions of almost all newly democratizing (or re-democratizing) states. The absence or neglect of such provisions would be a serious anomaly, and would put the legitimacy and efficacy of the judiciary at grave risk.

International Standards

A country in the process of democratic transition or constitution-building may wish, both for intrinsic reasons of good governance and for reasons of internal and external legitimacy, to ensure that its provisions regarding judicial removal, immunity and accountability conform to international standards. These include article 14 of the International Covenant on Civil and Political Rights, which provides that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’; the UN Basic Principles on the Independence of the Judiciary (1985); the Minimum Standards of the International Bar Association (1982); and the Latimer House Guidance on Parliamentary Supremacy and Judicial Independence (1998).

The UN Basic Principles state, *inter alia*, that: ‘The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Judges...shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.’

The International Bar Association’s Minimum Standards state, *inter alia*, that, ‘Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment. The grounds for removal of judges shall be fixed by law and shall be clearly defined. A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.’

The Latimer House guidelines, which apply only to members of the Commonwealth, state that ‘Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties’ and that ‘arrangements for appropriate security of tenure and protection of levels of remuneration must be in place’.

Judicial Terms of Office

Judges may be appointed for life (or until retirement) or for fixed terms of office. Life tenure or long terms of office will tend to promote judicial independence, albeit at the cost—unless other means are in place for removing an unsuitable judge—of weakening judicial accountability. Short terms of service will have the opposite effect. Judges seeking reappointment will need to satisfy and defer to the appointing body in order to keep their jobs, while those who are not eligible for reappointment will need to seek positions elsewhere. Either way, this potentially compromises their independence.

Tenure ‘During Good Behaviour’ and Retirement Ages

An appointment ‘during good behaviour’ implies that a judge, once appointed, should continue in office for life unless removed for misbehaviour (usually defined in terms of corruption or other breach of trust or dereliction of duty). This arrangement has been described as ‘the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws’ (Hamilton 1788).

However, life tenure subject to removal only on the grounds of misbehaviour may mean that very elderly people continue in office as judges despite declining health. Moreover, turnover can be slow, and vacancies irregular, which potentially raises the stakes—and uncertainty—of each appointment. For example, Oliver Wendell Holmes was 90 years old when he retired from the US Supreme Court. To avoid such situations, almost every country—including, for example, Canada, Germany, India, Kenya, the Netherlands and South Africa—now has a compulsory retirement age for judges.

Judicial retirement ages vary: for example, it is 62 years in India and 70 in the Netherlands. The optimum retirement age is difficult to specify. If it is too high, elderly judges may become too far removed from the mindset of the general population, and may remain on the bench after their intellectual peak has passed. If it is too low, judges will only serve a relatively short term on the bench and will retire when they are still fit, able and seeking further employment, making them vulnerable to corruption by those who can offer such rewards. If constitution-makers cannot decide on a suitable retirement age or do not wish to specify a fixed retirement age in the text of the constitution, phrases such as ‘subject to retirement at an age to be prescribed by law’ may be used. To prevent the manipulation of such provisions, it might also be stipulated in the constitution that any future reduction of the retirement age would not apply to existing judges without their consent. A higher retirement age is often applied to Supreme Court judges in recognition of the fact that judges will typically be appointed to these courts at the end of their careers. In Japan, for example, Supreme Court judges retire at 70, while members of the lower courts retire at 65 (Bridge 2007: 16).

Fixed Terms of Office and Reappointment

It is quite usual, especially in civil-law countries, for Constitutional Court judges to serve for fixed terms. In Germany, for example, members of the Federal Constitutional Court serve for a term of 12 years; in France, members of the Constitutional Council serve terms of nine years. Usually, fixed terms are staggered so that the composition of the court is renewed by halves, thirds, or quarters.

Depending on the length of terms adopted, this can enable some of the advantages of life tenure—security, irremovability, and thus independence—to be combined with a system of rotation in office that prevents any one set of judges from maintaining their hold on the court for an extended period.

Judges serving fixed terms may either be eligible or ineligible for reappointment. If judges are eligible for reappointment, they are likely to remain dependent on the appointing authorities. The extent of this dependence will depend, in large measure, on the length of the term and therefore the frequency with which judges become candidates for reappointment. If judges are not eligible for reappointment, they will be independent of the appointing authority, but, depending on the lengths of their terms, their pensions and future career prospects, they may be eager to seek employment elsewhere. As a general rule, it is believed that longer terms of office combined with prohibition on reappointment will produce a more independent bench (as in Germany, where judges of the Federal Constitutional Court are ineligible for reappointment after a single 12-year term), while short terms and eligibility for reappointment may render the judiciary subservient (as in Guatemala, where Supreme Court justices serve five-year terms, after which they must be re-elected by the legislature).

Discipline and Removal of Judges

In finding a workable balance between, on the one hand, protecting judges from arbitrary dismissal, transfer or demotion and, on the other hand, ensuring that criminal, corrupt or incompetent judges can be censured and removed from office, it is necessary to consider:

- (i) The method of removal, i.e. how a judge can be removed, and by whom;
- (ii) The grounds for removal, i.e. the circumstances under which removal is permissible.

Three main methods of judicial removal can be found in existing democratic constitutions: (i) removal by a court judgment or internal judicial disciplinary process; (ii) removal by political actors—usually in the form of an address from the legislature requesting the removal of a judge for reasons that the legislature deems sufficient; and (iii) impeachment, which combines political and legal decisions. Removal by a court judgment is more usual in civil-law jurisdictions, while common-law jurisdictions have traditionally relied more on removal by parliamentary address or impeachment.

Removal by Court Judgment or Disciplinary Process

A widespread formulation, especially in civil-law countries, is for judges to hold office for life (or until retirement), subject to removal by the judgment of a competent court for disciplinary offences or misconduct. The Constitution of the Netherlands (2008), which may be taken as a representative example of this formulation, states that: ‘Members of the judiciary shall be appointed for life. Such persons shall cease to hold office on resignation or on attaining an age to be determined by [an] Act of Parliament. In cases laid down by [an] Act of Parliament such persons may be suspended or dismissed by a court that is part of the judiciary and designated by [said] Act of Parliament’ (article 117). According to the Constitution of France, in contrast, the disciplinary function is performed not by a court but by the Supreme Council of the Judiciary (article 65), although the membership of that Council is primarily judicial, so the principle of disciplinary self-regulation by the judicial corps is largely maintained.

Constitutions are sometimes silent about how such a judgment might take place, leaving this to be determined by ordinary legislation or judicial practice. Executive officials may have a role—although not the decisive role—in the process. In Denmark, for example, the chief public prosecutor, upon a motion by the minister of justice, accuses judges before a special court consisting of judges from the Supreme Court and other courts (Bridge 2007: 21). Proceedings concerning judicial discipline in France ‘are initiated by the Minister for Justice, who is also responsible for the enforcement, if necessary, of the decisions reached’ (McKillop 1997).

Removal by Parliament

In some jurisdictions, judges are removable by a legislative resolution or address. This was the traditional English practice, following the Act of Settlement of 1701, and has been adopted by the constitutions of many former British colonies. For example, article 72 of the Constitution of Australia states that ‘Justices of the High Court and of the other courts created by the Parliament... shall not be removed except... on an address from both Houses of the Parliament in the same session, [requesting] such removal on the ground of proved misbehaviour or incapacity’. This constitutional rule is usually framed only as a prohibition against arbitrary dismissal: parliament does not have the authority to unilaterally remove a judge, only to ask for—and thereby to authorize—the removal of a judge by the executive branch. Also, although parliament cannot request the removal of a judge, say, for partisan reasons, or because of disagreement with a particular decision, parliament’s decision as to what constitutes ‘proved misbehaviour or incapacity’ is final and is not subject to judicial review.

A variation on this system (found in Malta and India, among others) requires a two-thirds majority vote to pass an address requesting the removal of a judge (Constitution of Malta, article 97; Constitution of India, article 124). This means that, in most conceivable political circumstances, the removal of a judge will require a joint decision of the government and the opposition parties, although, as explained below, this depends on the electoral system and political conditions.

Removal by Impeachment

Impeachment originated as a medieval English process, according to which parliament could remove the king's officers or advisors for 'high crimes and misdemeanors'. Crucially, impeachable high crimes and misdemeanors are not limited to indictable criminal offences: the definition includes attempting to subvert the laws and liberties of the realm, corruption and a variety of other forms of misconduct in office. Impeachment gradually fell out of practical use in the United Kingdom, but it continues to have relevance in the constitutions of other countries, including the United States (for all civil officers, including federal judges) and Paraguay (for members of the Supreme Court).

An impeachment process consists of two stages. The first is the adoption of articles of impeachment by the legislature. In countries with a bicameral legislature, this is normally undertaken by the lower house. These articles recite the various high crimes and misdemeanors that the accused must answer for. The second stage is the trial of the accused. In countries with a bicameral legislature, this function is normally performed by the upper house, which may, for this purpose, be presided over by a judge rather than its usual president; otherwise, a special court may be convened for this purpose.

Showing Grounds for Removal

The grounds for removal may be specified with greater or lesser precision in the constitution. They typically include gross misconduct, incapacity, neglect of duty, corruption or other high crimes and misdemeanors. The Constitution of India, for example, allows the removal of a Supreme Court judge only on grounds of 'proved misbehaviour or incapacity' (article 124.4), while the 2010 Constitution of Kenya specifies that judges of the superior courts may be removed only for 'inability to perform the functions of his office, a breach of a code of conduct, bankruptcy, incompetence, or gross misconduct or misbehaviour' (article 168).

Involving the judiciary at an early stage of the removal process, in establishing the grounds for removal, provides a further means of protecting judicial independence: a judicial council, judicial service commission or disciplinary tribunal can act as a gatekeeper blocking politically motivated dismissals. There is an important difference, for example, between a system that enables a legislative majority to remove a judge for any unstated reasons that seem sufficient to that majority, and one in which a legislative majority may only remove a judge on the basis of a specific complaint that has been investigated by an independent judicial disciplinary tribunal. In India, for instance, the Judges (Inquiry) Act of 1968 requires the appointment of a committee, consisting of serving judges and distinguished jurists, to conduct an investigation into judicial misconduct before the two houses of the legislature vote on removal.

Promotion, Demotion and Transfer of Judges

Principles applicable to the appointment and removal of judges can also be applied to the promotion, demotion and transfer of judges. Arbitrary power to promote, demote and transfer judges could be almost as damaging to judicial independence as the arbitrary power to appoint and dismiss them.

As a general rule, demotion is treated similarly to removal: there must be grounds and a process for demoting a judge against his or her will. It is rare in most established constitutional democracies for a judge to be demoted, since misbehaviour or incapacity of sufficient severity to justify the demotion of a judge is likely also to be grounds for dismissal.

Promotions and transfers are often considered as new appointments, and several constitutions make explicit provisions to this effect. However, there are exceptions: in Ireland, for example, the advice of the Judicial Appointments Advisory Board is sought only for new appointees to the bench, and subsequent promotion takes place at the unaided discretion of the government.

Judicial Immunities, Incompatibilities, Budgets and Salaries

Immunities and Incompatibilities

Immunity refers to a judge's absence of civil or criminal liability arising from their official actions: a judge enjoying immunity may not be sued or penalized, for example, for deciding a case a particular way. Such immunity may be absolute, as in the United Kingdom, or it may be limited in cases where a judge is motivated by deliberate malevolent intent, negligence or ignorance (Bridge 2007: 19–20). In some cases, immunity is not extended to cases in which a judge or official is caught in the act of committing a criminal offence.

In many jurisdictions, judges are forbidden by constitutional provisions from holding elective office, from membership of political parties and from undertaking other political activities. A balancing corollary is that judges may be protected—by the constitution, law or conventional norms—from public criticism. Such rules are intended to protect the independence and neutrality of the judiciary by separating the law from politics. On the other hand, immunity clauses, if improperly applied, can promote corruption and prevent judicial accountability. In the 2014 Constitution of Egypt, for example, criticism of a judge was made a criminal offence—a provision that limits freedom of expression and limits the ability of the wider public to hold judges to account for their actions.

Budgets and Salaries

To secure the independence of judges from financial pressure, judicial salaries must be: (i) sufficient to make a judge resistant to the temptations of corruption; (ii) guaranteed, such that judges cannot be manipulated by having their salaries reduced or suspended by the political branches. A common constitutional provision specifies that a judge's salary cannot be reduced during his or her term in office. In India, it was proposed that the salaries of judges should be specified in absolute terms by the constitution, although the difficulty of amending the constitution, coupled with ever-fluctuating rates of inflation, made this an impractical option (Austin 2000). It might also be possible—although there is no known example of a state adopting this system—to constitutionally link the salaries of judges to other institutional actors, such as cabinet ministers, whose salaries are unlikely to be reduced while in office.

Alternatively, an independent commission may be established by the constitution to periodically review judges' salaries, with a view to ensuring that they remain adequate, but without having the power to decrease the salary of any judge. For example, section 140 of the Constitution of Trinidad and Tobago establishes a Salaries Review Commission, consisting of members nominated by the head of state after consulting with both the prime minister and the leader of the opposition. The Salaries Review Commission provides recommendations relating to the salaries of a range of officials, including diplomatic representatives and senior military officers, as well as judges (Parliament of the Republic of Trinidad and Tobago 2006).

An independent and properly functioning judiciary may also necessitate practical considerations such as adequate funding, not just for the sake of individual judges, but also for the maintenance of the court system as a whole. In the constitutions of many Commonwealth countries, including Malta and Jamaica, the salaries of judges are a standing charge on the budget meaning that the government is obliged to pay them from its main bank account, without being dependent on annual appropriation acts enacted by parliament.

Think Point: (1) What constitutional provisions are required to ensure the financial independence of the judiciary? (2) Should a provision specifically prohibiting judges from political activities be inserted, and, if so, how might this best be enforced?

Contextual Considerations:

The Mechanism for Removing Judges Must Fit within the Political System as a Whole

The greater the number of actors (who may be individuals, institutions or political parties) required to remove a judge, the more likely it is that competing political forces or institutional barriers will be able to prevent arbitrary or improper removal. The more barriers there are in place, however, the greater the risk that a corrupt or incompetent judge can remain in office. The number of legislative chambers, the electoral system and the balance of power between the executive and legislature can all influence the institutional resilience of the judiciary. A critical question is what *combination* of actors can remove a judge, and under what *circumstances*.

- In a presidential system, checks and balances exist between the legislative and executive branches, and therefore a mechanism such as legislative impeachment may be appropriate. In a parliamentary system, there is little or no separation between the government and the parliamentary majority. Checks and balances exist primarily within the parliament between government and opposition, so a removal mechanism that gives the opposition parties a veto over removal may be appropriate.
- However, the political dynamics must be considered. If a parliamentary legislature is elected by proportional representation and there is a multiparty system, then a rule enabling judges to be removed by a two-thirds majority of the legislature is likely to provide a relatively strong protection against arbitrary dismissal. If, however, the legislature is elected by a simple plurality vote, such that one party could win a two-thirds majority in parliament with a plurality of the popular vote, then, under certain political conditions, the same two-thirds majority rule might provide only a weak protection against arbitrary removal of judges.
- Placing the appointment and removal of judges in the same institution might give that institution too much power. For example, if the head of state, on the advice of a judicial council, can appoint judges, some other authority—such as the legislature—should be involved as a gatekeeper in the removal process, to prevent the judicial council having excessive authority.

Think Point: Although checks and balances do not eliminate the potential for political abuse, a mechanism that requires agreement between multiple actors reduces its likelihood. Where are checks and balances found in this country? Is it between institutions or between parties?

Political and Judicial Culture: Extent and Specificity of Constitutional Provisions

It is necessary to consider the social, cultural and political realities behind institutional rules. In societies where high levels of professionalism are routinely expected of judges, and where the norms of judicial independence and impartiality are well enshrined in social custom and political tradition, the constitutional rules surrounding the removal and discipline of judges can be implied rather than explicit, or general rather than specific, without disastrous consequences.

The Rarity of Judicial Removal: The Power of Norms

The removal of judges in long-established constitutional democracies is quite unusual.

In Ireland, since independence in 1922, no Supreme or High Court judge has been removed from office.

In Canada, since self-government in 1867, no judge of a superior court has been removed from office.

In these cases, although judges could be removed by simple majorities in the legislature, strong cultural and traditional norms prevent the misuse of this power.

In Canada, for example, there is no constitutional provision for the independent investigation of judges prior to removal, and nothing to prevent a government with a majority in both houses from removing judges at will, for trivial or partisan reasons. However, statutory laws and customary practices (widely accepted and long-established norms of behaviour) prevent the abuse of such constitutional elasticity. Where such customs and traditions do not prevail, on the other hand, tighter and more specific regulation in the constitution may be required in order to protect judges from politically motivated removal from office and to establish and enforce norms of good conduct by both the judiciary and the political branches.

Likewise, in situations where the independence of the judiciary has long been well respected, general provisions to this effect may be sufficient in the constitution. In situations where judicial independence is being reconstructed after a period of dictatorship, or where judicial independence has never been widely respected, more explicit and extensive constitutional provision—for example, prohibiting judges from taking part in partisan political activity, and preventing the executive from interfering in judicial decisions—may be appropriate. As a general rule, when drafting provisions for the constitution of a newly democratizing country, newer constitutions might be better models than the old constitutions of stable, long-established democracies.

Think Point: Based on past experience, can most political actors be trusted to behave responsibly with regard to questions of judicial discipline and removal, or would excessive partisanship and/or political corruption make self-regulation by the judiciary necessary?

Quasi-judicial, Oversight and Integrity-Branch institutions

Many of the constitutional provisions applicable to judges are also applicable to other quasi-judicial or integrity-branch or oversight officials, such as members of electoral commissions, ombudsmen, auditors and human rights commissioners. The same principles of independence from political manipulation, freedom from undue influence and political impartiality, coupled with a need for legitimacy and ultimate accountability, apply to these institutions. In drafting a constitution, consideration should be given to extending judicial guarantees to these officials.

Examples

Country	Tenure of Judges	Removal Mechanism	Other Constitutional Provisions
<p>France Democracy since 1875 (Constitution of 1958) Unitary semi-presidential republic Civil law</p>	<p>Constitutional Council: Appointed members serve for a single term of nine years; ex officio members (former presidents) serve for life. Ordinary courts: Judges shall be irremovable from office, except by means of a disciplinary process.</p>	<p>Constitutional Council: No constitutional provision. Ordinary Courts: The section of the judicial council (<i>Conseil Supérieur de la Magistrature</i>) with jurisdiction over judges acts as the disciplinary tribunal for judges. The minister of justice may participate in all the sittings of the various sections of the Judicial Council except those concerning disciplinary matters.</p>	<p>The president of the republic shall be the guarantor of the independence of the judiciary. He shall be assisted by the judicial council.</p>
<p>India Democracy since 1947 (Constitution of 1950) Federal parliamentary republic Common law</p>	<p>Judges appointed until retirement at age 62, subject to good behaviour.</p>	<p>A judge of the Supreme Court shall not be removed from office except on the grounds of proved misbehaviour or incapacity, by an order of the president in response to an address passed by a two-thirds majority of the votes cast in each house of parliament Parliament may regulate by law the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge.</p>	<p>Neither the privileges nor the allowances of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.</p>
<p>South Africa Democracy since 1994 (Constitution of 1996) Federal parliamentary republic Mixed civil and common law</p>	<p>A Constitutional Court judge holds office for a non-renewable term of 12 years or until he or she attains the age of 70, whichever occurs first, except where an act of parliament extends the term of office of Constitutional Court judges. Other judges hold office until they are discharged from active service by an act of parliament.</p>	<p>A judge may be removed from office only if: (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members. The president must remove a judge from office upon adoption of a resolution calling for that judge to be removed. The president, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a removal procedure.</p>	<p>The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. The salaries, allowances and benefits of judges may not be reduced.</p>
<p>Poland Democracy from 1991 (Constitution of 1997) Unitary semi-presidential republic Civil law</p>	<p>Judges shall be appointed for an indefinite period. A judge may be retired as a result of illness or infirmity that prevents him/her discharging the duties of his/her office. The procedure for doing so, as well as for appealing against such a decision, shall be specified by statute. A statute shall establish an age limit beyond which a judge shall proceed to retirement.</p>	<p>Judges shall not be removable. Recall of a judge from office, suspension from office or transfer to another bench or position against his/her will may only occur by virtue of a court judgment and only in those instances prescribed in a statute. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his/her full remuneration.</p>	<p>A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible or deprived of his/her liberty. Judges, within the exercise of their office, shall be independent and subject only to the constitution and statutes. Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties. A judge shall not belong to a political party or a trade union or perform public activities incompatible with the principles of independence of the courts and judges.</p>

<p>Kenya Democracy from 1992 (Constitution of 2010) Decentralized presidential republic Common law</p>	<p>A judge shall retire from office upon attaining the age of 70 years, but may elect to retire at any time after attaining the age of 65 years.</p>	<p>A judge of a superior court may be removed from office only on the grounds of inability to perform the functions of office arising from mental or physical incapacity, a breach of the code of conduct, bankruptcy, incompetence or gross misconduct or misbehaviour. The removal of a judge may be initiated only by the Judicial Service Commission. In such a case, the president suspends the judge and, acting in accordance with the recommendation of the Judicial Service Commission, appoints a tribunal (with a constitutionally specified, mainly judicial, composition) to inquire into the matter and to make binding recommendations (for removal) to the president.</p>	<p>In the exercise of judicial authority, the judiciary, as constituted by article 161, shall be subject only to the constitution and the law and shall not be subject to the control or direction of any person or authority. The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office. The remuneration and benefits payable to judges shall be a standing charge on the budget. A member of the judiciary is not liable in an action or suit in respect of anything done or omitted in good faith in the lawful performance of a judicial function.</p>
<p>Mongolia Democracy from 1992 Unitary parliamentary republic Civil law</p>	<p>Constitutional Court: fixed term of six years. Supreme Court and other courts: security of tenure during good behaviour. 15-member Judicial Disciplinary Committee conducts investigations into breaches of law or norms of judicial ethics.</p>	<p>'Removal of a judge of a court of any instance is prohibited except in cases he or she is relieved at his or her own request or removed by a valid court decision on the grounds provided for in the Constitution and the law on the judiciary.'</p>	<p>The General Council of Courts ensures the independence of the judiciary, and 'without interfering in the activities of courts and judges, deals exclusively with the selection of judges from among lawyers, protection of their rights, and other matters pertaining to ensuring conditions guaranteeing the independence of the judiciary.'</p>

Decision-making Questions

- (1) What is the problem that the new system is intended to solve? Is the judiciary too dependent and therefore in need of a disciplinary and removal mechanism that will strengthen its independence? Or is it too unaccountable and therefore in need of a disciplinary and removal mechanism that will make it more responsive to public interests? Are there low standards of professionalism and integrity and therefore a need to concentrate on enforcing the juristic standards and professional ethics of judges?
- (2) What is the political situation and the prospective state of the parties? What combination of political winners is likely to be able to remove a judge? For example, would the removal of judges by a two-thirds majority vote in the legislature provide an effective check against the abuse of this power, or would it effectively give the right to remove judges to one party or to the governing coalition?
- (3) How are the guarantees of judicial independence related to the procedural rules and institutions for removing and disciplining judges? If the previous or existing constitution declared that judges were independent, but *de facto* independence fell short of that claim, then how will those same declarations be made effective in future? What institutional provisions need to be put in place to ensure that rules regarding judicial discipline and removal are fairly and honestly administered?
- (4) What loopholes need to be closed? If the judiciary has security of tenure, do judges also need to be protected from arbitrary transfer or demotion? If salaries are secure, what about pensions?
- (5) How do the provisions for the removal and discipline of judges relate to the wider distribution of powers in the political system? For example, if there is a desire to limit the

excessive powers of an executive presidency, consideration should be given to excluding the president from all parts of the judicial discipline and removal process (even from, for example, making a complaint against a judge). If, on the other hand, there is a non-executive president acting as counterpoise to a parliamentary executive, it might be reasonable for the president to act as an impartial chair of the judicial council.

- (6) Will the body with the authority to appoint judges also have the authority to remove them? If so, what substantive and procedural checks are in place to prevent one institution from having too much power over the judiciary?

References and Resources

- Austin, Granville, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 2000)
- Bridge, John, 'Constitutional Guarantees of the Independence of the Judiciary', *Electronic Journal of Comparative Law*, 11/3 (December 2007)
- Cahill, M., 'Collateral Damage of Seanad Abolition', Constitution Project, University College Cork, 2013
- Hamilton, Alexander, 'The Judiciary Department', in James Madison, Alexander Hamilton and John Jay(eds.), *The Federalist Papers* (New York, 1788), available at <http://thomas.loc.gov/home/histdox/fed_78.html>
- Latimer House Guidance on Parliamentary Supremacy and Judicial Independence, 1998, available at <www.cpahq.org/cpahq/cpadocs/Latimer%20House%20Principles.pdf>
- McKillop, Bron, 'The Judiciary in France: Reconstructing Lost Independence' in Helen Cunningham (ed.), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Sydney: Judicial Commission of New South Wales, 1997)
- Minimum Standards' of the International Bar Association, 1982, available at <<http://www.ibanet.org/Document/Default.aspx>>
- Parliament of the Republic of Trinidad and Tobago, *Eightieth Report of the Salaries Review Commission*, 2006
- United Nations, Basic Principles on the Independence of the Judiciary, 1985, available at <www.ohchr.org/EN/.../Pages/IndependenceJudiciary.aspx>