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Cape Town Principles

on the Role of Independent Commissions in the Selection and Appointment of Judges

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What are the Cape Town Principles?

One of the most sensitive tasks in a constitutional democracy is the selection and appointment of judges. In South Africa, the bulk of this work has been entrusted to the Judicial Service Commission that was established in 1994. Similar bodies now exist in many jurisdictions across the developed and the developing world.

The Cape Town Principles are a set of principles that build on that international and comparative experience. They aim to provide practical guidance to constitution-makers, legislators and existing judicial service commissions or equivalent bodies, by identifying ways in which processes for the selection and appointment of judges can strengthen the independence of the judiciary and the rule of law, while preserving sufficient adaptability to suit national legal systems.

Where do they come from?

The Cape Town Principles are the outcome of an international research project which brought together scholars from Canada, Kenya, Malaysia, Nigeria, South Africa and the UK to examine the processes by which judges are appointed in their countries. The project was led by Professor Hugh Corder of the University of Cape Town, and carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law. It was funded by the Claude Leon Foundation, a leading charitable foundation supporting research in South Africa.

Why do they matter?

Two of the project participants explain why and how the Cape Town Principles are important.

Justice Kate O'Regan, who served for a 15-year term on the Constitutional Court of South Africa from 1994:

> "Appointing independent, competent and trusted judges is central to ensuring the rule of law in a democracy. The last few decades have seen the establishment of judicial appointment committees in many Commonwealth countries that have diminished the power of the executive over the appointment of judges. The Cape Town Principles provide welcome guidance on the processes and principles that should inform the work of these committees, which should in turn contribute to the enhancement of the rule of law and independence of the judiciary across the Commonwealth."

Professor Sir Jeffrey Jowell QC, Founding Director of the London-based Bingham Centre for the Rule of Law:

> "These principles provide a sorely needed guide to the role of judicial appointment commissions, their composition, and their proper procedures – all in the interest of a judiciary that is legitimate, competent and wholly independent."

Principles drawn up and approved by:

Professor Hugh Corder, South Africa (Convenor)
Professor Richard Devlin FRSC, Canada
Professor Dame Hazel Genn QC FBA, UK
Professor Jill Ghai, Kenya
Professor Yash Ghai, Kenya
Professor Ameze Guobadia, Nigeria
Professor Sir Jeffrey Jowell QC, UK
Professor Kevin Tan Yew Lee, Singapore/Malaysia
Ms Tabeth Masengu, South Africa
Justice Kate O'Regan, South Africa
Mr Chris Oxtoby, South Africa
Mr Harish Salve SA, India
Mr Gregory Solik, South Africa
Dr Jan van Zyl Smit, UK

The persons listed above are the project participants, together with the jurisdictions they represented. They have authorised the issuing of these Principles, which reflect discussions that took place at the project workshop held in Cape Town on 21-23 April 2015 and subsequent consultations with bodies including the Commonwealth Secretariat, the Commonwealth Magistrates' and Judges' Association and the Judicial Appointments Commission for England and Wales. However, the content of the Principles should not be attributed to any individual participant or person who was consulted or to any institutions with which they are affiliated.

Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth

I. General

1. An independent judiciary is indispensable in any country to uphold the rule of law and to ensure access to justice through the courts. The ability of the judiciary to discharge these responsibilities depends upon the independence, impartiality, integrity and professional competence of its members. The principal objective of any system of judicial appointments must therefore be to identify and secure the appointment of persons who possess these qualities, and any additional attributes that may be stipulated for positions that require specific expertise or leadership.

2. The process of selection and appointment should be conducted fairly and in a way that encourages the best candidates from any background to seek a judicial career, and that generally enhances public confidence in the judiciary.

3. Appointment to judicial office must be open to all suitably qualified candidates without discrimination on the prohibited grounds recognised in international human rights law and applicable domestic law. Depending on the context of a particular society, measures may be required to redress past or present patterns of unfair disadvantage or exclusion affecting actual or potential candidates differentially on the basis of race, gender or other personal characteristics.

II. Establishment of an independent commission with responsibility for selecting judges

4. In many jurisdictions, commissions dedicated to judicial affairs which function at arm's length from the other institutions of government have been entrusted with responsibility for the selection of judges. If they are to make a contribution to creating and sustaining an independent judiciary, such commissions must themselves be manifestly independent, and suitably composed and resourced. The benefit of a commission will be maximised if it has a wide mandate, encompassing all levels of the superior court hierarchy and including temporary, acting or part-time judges, where such positions exist.

5. The existence, basic composition and powers of the commission should be entrenched, insofar as that is possible in a legal system, to help secure the commission's independence and in recognition of the inherently constitutional nature of its functions.

6. The commission should consist of members drawn both from the judiciary and from a range of other institutional, professional and lay backgrounds, in proportions which safeguard against unjustified dominance of the commission by the executive or by members of parliament or representatives of political parties. It is desirable that the membership of the commission should be appropriately diverse in terms of race, gender, professional and life experience, and other relevant considerations in the context of a particular society.

7. Members of the commission should be required to apply their individual judgement to all matters of judicial selection, to avoid conflicts of interest and to observe the highest standard of ethics. As a safeguard of their individual independence, members should enjoy security of tenure, subject to appropriate term limits, and should not be vulnerable to arbitrary termination of their membership. The ethical obligations of members may be reinforced by an oath or affirmation of office, a code of conduct, and provisions that temporarily disqualify members or former members from applying for judicial office.

8. The commission, as an independent institution, should be provided with a secretariat under its direction and a sufficient complement of staff with appropriate skills and experience to enable the commission to perform all its functions efficiently and independently.

III. Criteria and process of selection

9. The criteria for judicial office and the process of selection should be set out in written form and published in a manner that makes them readily accessible to candidates for selection and the public at large. Such transparency provides a foundation for public confidence in the selection process.

10. It should be open to all qualified candidates to apply for available judicial posts, which should be widely advertised with sufficient time allowed for applications to be submitted.

11. The commission must make all its decisions about applications on the basis of evidence of the extent to which a candidate satisfies the criteria prescribed for the judicial post in question. The application process should include some form of self-assessment by the candidate against the prescribed criteria, and the submission of written work (such as judgments, legal opinions or articles). Evidence may also be solicited externally, either from referees nominated by the candidate or from third parties. Each shortlisted candidate should be interviewed. The commission should ensure that full records are kept of the information obtained from all sources.

12. Candidate interviews are a valuable part of any selection process. The commission must ensure that interviews are conducted in a manner that is respectful to candidates and fair between candidates. Consideration should be given to holding interviews in public, where there is reason to believe that this will promote the legitimacy of the selection process in the context of a particular society. The interview should be considered as providing additional evidence pertaining to a candidate's suitability, but not as displacing all other evidence received during the selection process.

13. The procedures for deliberation by the commission should enable it to come to a reasoned decision in matters of selection. Deliberations should take place in private, but a sufficient record of proceedings must be kept. The commission should communicate its selection decisions to the final appointing authority, if any, without undue delay.

IV. Appointment

14. The commission should make the decision on which candidates are appointed to judicial office, even when the formal power of appointment is vested in another branch of government, as in the case of senior appointments that are formally made by the head of state. It should therefore be the norm that a commission will recommend a single selected candidate for a judicial vacancy, who must then be appointed to that position by the appointing authority.

15. In exceptional cases, depending on the judicial office in question and the context of a particular society, it may be justifiable to provide that the appointing authority has the right to choose from a list of selected candidates recommended by the commission, or that the appointing authority may reject or require reconsideration of a candidate or list of candidates recommended by the commission. This should only occur if express provision is made to that effect in the legal framework for judicial appointments. In any event the appointing authority should be required to provide reasons when exercising any power to reject a recommended candidate or list of candidates or to require reconsideration, and the exercise of such powers may be confined to specified grounds. The total number of selected candidates which the commission may be required to recommend in respect of any particular vacancy must be limited, and no candidate who has not been selected by the commission should be eligible for appointment.

V. Accountability

16. The commission should be accountable both for its decisions on individual applications for judicial office, through the provision of feedback and reasons on request, and for the general performance of its institutional functions by way of reports published at least annually and by other public interventions.

17. Decisions of the commission may be subject to examination by an independent ombudsman dedicated to judicial affairs with power to make findings and non-binding recommendations in the case of maladministration. Decisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality.

About the Faculty of Law, University of Cape Town

The Faculty of Law at the University of Cape Town is widely regarded as one of the leading centres of legal education in Africa. Research and publications on the judiciary have long been a focus of several of its members, who contributed to the drafting of the South African Constitutions of 1993 and 1996. Since 2009, the Democratic Governance and Rights Unit within the Faculty has concentrated most of its research and socially responsive activities on the judicial branch of government, both in South Africa and more widely on the continent.

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About the Bingham Centre for the Rule of Law

The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. The Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Centre has worked with bodies including the Commonwealth Secretariat, the Palestinian Authority and the Kenya Judges and Magistrates Vetting Board on judicial independence issues. The Centre's publications include *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (2015). The Bingham Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

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