

Judicial councils and other national mechanisms for selecting, appointing, promoting, transferring, suspending or removing judges

Submission to the Special Rapporteur on Independence of Judges and Lawyers for a report to the Human Rights Council session in June 2018

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The International Commission of Jurists (ICJ) thanks the Special Rapporteur for this opportunity to provide input to the Rapporteur's forthcoming report on national judicial councils and other national mechanisms for selecting, appoint, promoting, transferring suspending or removing judges.

In addition to the relevant provisions of the UN Basic Principles on the Independence of the Judiciary, the ICJ would draw the Special Rapporteur's attention to the following legal and other sources:¹

- Practitioners Guide no. 1 on the Independence and Accountability of Judges, Lawyers and Prosecutors (ICJ, 2005), pp 45-49.
- Practitioners Guide no. 13 on Judicial Accountability (ICJ, 2016), pp. 35-40.
- The Universal Charter of the Judge (International Association of Judges, updated 2017), Article 2-3.
- Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (Judicial Group on Strengthening Judicial Integrity, 2010), paras 12.4 to 12.6, 15.3 and 15.4.
- Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges (2016).
- 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).
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Commission on Human and Peoples' Rights, 2005), paras A.4(h) and (u).
- Guarantees for the Independence of Justice Operators (Inter-American Commission of Human Rights, 2013), paras 240 to 248 and 249(26).
- 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), para 15.
- 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, 2nd paragraph; Principle 14, and Principle 15.

¹ Most available at <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/> and <https://www.icj.org/category/publications/practitioners-guides-series/>.

- Commonwealth (Latimer House) Guidelines on Parliamentary Supremacy and Judicial Independence (1998), Guideline 2(1).
- Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paras 26 to 29, 46 to 48.
- Magna Carta of Judges (Consultative Council of European Judges, 2010), para 13.
- Consultative Council of European Judges, Opinion n°10 (2007) on "Council for the Judiciary in the service of society".
- European Network of Councils for the Judiciary, Budapest resolution on Self Governance for the Judiciary: Balancing Independence and Accountability (2008).²
- European Network of Councils for the Judiciary, Dublin Declaration setting Minimum Standards for the selection and appointment of judges (2012), part II "Indicators of Minimum Standards in relation to the Competent Body to decide on the Recruitment, Selection, Appointment and (where relevant) the Promotion of Members of the Judiciary".
- European Commission for Democracy through Law (Venice Commission), Report on Judicial Appointments (2007), paras 18 to 35, 48 to 50.
- European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System I: The Independence of Judges (2010), paras 28 to 32, 82(4) and (6).
- 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).
- Judicial Appointments Commissions: A model clause for constitutions (Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association, 2013).

Based on the above sources, as well as the ICJ's global experience with States and judiciaries from around the world over some six decades, the ICJ states the following conclusions in relation to judicial councils (which should be understood below to include all similar bodies by whatever name they may be called in the particular national context):

1. Judicial councils are a proven means of safeguarding judicial independence and ensuring judicial accountability. Even in countries where judicial independence and accountability have traditionally been secured by other means, consideration should be given to the establishment of a judicial council. At the same time, the existence of a judicial council, in itself, does not guarantee independence and accountability of the judiciary; the judicial council must be part of a context of broader implementation of and respect for relevant international standards.

² <https://www.ency.eu/images/stories/pdf/resolutionbudapestfinal.pdf>

2. Judicial Councils must be fully independent of the executive and legislative branches of government.
 - a. To this end the majority of the membership of a judicial council should be judges elected by their peers.
 - b. The inclusion of some non-judicial members, particularly representatives of the legal profession, lay members of the public, and other members of civil society should also be considered, although there may be certain functions of the council in which the non-judicial members do not participate. The method of appointment of such members should itself be independent of the executive and legislative branches of government.
 - c. In no circumstances should the Head of State, or officials of the executive or legislative branches of government, or candidates for political office, be members of the judicial council.
3. The judicial council should in principle be responsible for all decisions relating to the selection, appointment, promotion, transfer, discipline, suspension and removal of judges.
 - a. International standards may require differing degrees of independence for different categories of such decisions – for instance a body responsible for decision on removal of a judge might require a higher degree of independence than a body selecting candidates for judicial office. However, if several such functions are entrusted to a single body such as a judicial council, the composition and institutional guarantees for the council must satisfy the highest applicable standards of independence.
 - b. It is usually preferable that other actors play no formal role in relation to decisions for selection, appointment, promotion, transfer, discipline, suspension, or removal of judges. However, if for instance the Head of State is given constitutional authority to implement the decision to remove a judge, the role of the judicial council in the process should be treated by all actors as decisive and the Head of State should be seen as bound to act and without discretion in the matter.
4. To guarantee its independence and impartiality in operation, the judicial council should manage its own budget and have adequate human and financial resources for its functions.
5. To ensure that the judicial council is in fact representative and has the expertise and perspectives required, States should implement proactive measures to improve, for instance, the proportion of women or persons from minority or marginalized groups (whether judges or laypersons) among its members whenever there are reasonable concerns that such persons would otherwise be under-represented. In such circumstances, and the selection or election procedures should still incorporate other criteria for competence and impartiality.
6. Means should also be considered for ensuring representation of judicial officers from across all levels of the judiciary and at all stages of their career, for instance by reserving some seats for election by and from within particular levels of court or age groups. The inclusion of more junior or younger judges can help promote a sense of engagement with and relevance of the mechanism throughout all levels of the judiciary, and junior and younger members can also bring fresh perspectives to the work of the body which complement the experience and acquired wisdom of more senior members.