



**MEMORANDUM
ON THE SETTING UP OF AN
INDEPENDENT JUDICIAL
COMMISSION**

BAR COUNCIL MALAYSIA

A MEMORANDUM ON THE SETTING UP OF AN INDEPENDENT JUDICIAL COMMISSION

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(A) INTRODUCTION

1. On 19th August 1995 the Chief Justices (or their representatives) of Asia and the Pacific unanimously resolved to adopt the Statement of Principles of the Independence of the Judiciary (the Beijing Statement).
2. The Beijing Statement reflects consensus that it represents “the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary”. This statement was endorsed by Malaysia’s then Chief Justice The Rt Honourable Tan Sri Dato’ Haji Mohd Eusoff bin Chin.
3. The Statement, amongst other things dealt with the issue of the appointment of judges in the following terms :

“In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.”

(B) PURPOSE OF THIS PAPER

4. The purpose of this paper is to discuss the appointments process of Judges in Malaysia and to discuss the need for a change in the present regime.

(C) THE PRESENT REGIME OF THE APPOINTMENT OF JUDGES

5. The appointment of Judges in Malaysia is governed by Article 122B of the Federal Constitution.
6. The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and other Judges of

the Federal Court, of the Court of Appeal and of the High Courts are appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister, after consulting the Conference of Rulers.

7. For appointments other than that of the Chief Justice of the Federal Court, the Prime Minister must consult the Chief Justice as well as the heads of the respective courts before tendering his advice to the Yang di-Pertuan Agong. For the appointment of the Chief Judge of the High Court of Sabah and Sarawak, the Prime Minister has to consult the Chief Minister of each of the states of Sabah and Sarawak.
8. In practice, the Chief Justice generally submits a name or a shortlist of names to the Prime Minister. The concern that has been raised is the lack of any established and discernible system or criteria in the selection process of Judges.

(D) THE NEED FOR A JUDICIAL COMMISSION IN MALAYSIA

9. It is an essential element to the maintenance of the rule of law that the independence, integrity and the credibility of the judiciary is beyond reproach.
10. Judges perform a valuable and important role in society. In presiding over cases that arise in the criminal and civil justice systems, they make decisions that affect society in many areas. There are new challenges that face the Judiciary in this globalised and technologically advanced era. It is therefore timely that the demands of the public for a transparent system for the appointment of Judges be met. Such a system can only enhance the independence and credibility of this critical institution.
11. The repercussions of not having an independent (or seemingly independent) judiciary are real and far-reaching, and go beyond the courtroom. Investors are sensitive to the strength of the legal system in a country as it is the legal system that they rely on to protect their

interests. At the MITI Annual Dialogue 2006, one of the issues discussed was the relationship between foreign direct investment and the judicial process and the following statement was debated:

A legal system which is efficient, reliable, independent and fair is a major consideration for foreign investors to invest in Malaysia. Individuals and companies involved in international trade and investment must be given an assurance that contracts in Malaysia will be honoured, that they will have access to justice, and that if they resort to the courts, their cases will be dealt with in a just manner, at a reasonable cost and with reasonable speed. The judicial process should involve as much certainty as possible, and the final outcome should be duly enforceable. To give an assurance of such certainty, an independent and well-developed judicial system is required. The independence of the judiciary may be strengthened through judicial reform, e.g. by ensuring an open and fair mechanism for the appointment of judges based on merit.

12. Any judicial system must inspire confidence. Apart from independence and quality, it must also be reflective of the society which it serves.
13. The establishment of a judicial appointments commission will only improve the method of selecting Judges making the criteria certain and the process transparent. This augurs well for society and will build up the morale of the Judicial officers in the institution. It will also ensure quality and judicial independence.
14. At the time the idea of setting up of a judicial commission was discussed in New Zealand, the then Chief Justice (Sir Thomas Eichelbaum), President of the Court of Appeal (Sir Robin Cooke) and Solicitor General (John McGrath QC) lent their support for the idea and in their view, a commission¹ would:

¹ John McGrath QC, (Sept 1998) Appointing the Judiciary, New Zealand Law Commission

- (a) remove the mystique attached to the current process;
- (b) be more efficient;
- (c) allow wider consultation; and
- (d) avoid any sense that political considerations affect the selections.

15. The Department of Constitutional Affairs Consultation Paper 2003 had the following rationale for a Judicial Appointments Commission in England & Wales:

“(a) Despite this programme of improvements to the current system of appointments, many of the most fundamental features of the system, including the role of the Lord Chancellor, remain rooted in the past. **Incremental changes to the system can only achieve limited results, because the fundamental problem with the current system is that a Government minister, the Lord Chancellor, has sole responsibility for the appointments process and for making or recommending those appointments. However well this has worked in practice, this system no longer commands public confidence, and is increasingly hard to reconcile with the demands of the Human Rights Act.**

(b) In the same way, the central role he has played in the selection of judges has taken up much of the time of successive Lord Chancellors. This has inevitably diverted their attention from the core business of administering the justice system and in particular, running the courts.

(c) The time has now come for a radical change to the judicial appointments system to enable it to meet the needs and expectations of the public in the 21st century. **Any system, which is introduced, must, in addition to ensuring quality, also guarantee judicial independence. A Commission will provide a guarantee of judicial independence, will make the system for appointing judges more open and more transparent, and will work to make our judiciary more reflective of the society it serves. A Commission will also free the Department to focus on its core responsibilities.”**²

² Department of Constitutional Affairs Consultation Paper 2003

(E) CURRENT METHODS OF APPOINTMENT IN OTHER JURISDICTIONS

16. There are broadly four methods of appointing judges in jurisdictions around the world and these are:

(a) Appointment on the advice of the executive and/or the legislature

This is the method that is in practice in Malaysia. Traditionally, this has been the method in most common law countries, for e.g. in Britain, Canada, Australia and New Zealand. At the federal level in the USA, the President appoints judges who are then confirmed by the Senate.

(b) Formal training programme

Recruitment is by competitive examination after completion of law studies. This is usual in civil law countries, especially in Continental Europe.

(c) Election

This is the method of appointment of judges at the State level in the USA, but this has been gradually replaced by the use of judicial appointment commissions.

(d) Judicial Appointments Commission

A judicial appointments commission that identifies suitable candidates for appointment. There are three main models:

- (i) An appointing commission which would itself make the appointments;
- (ii) A recommending commission which would make recommendations as to who should be appointed; or

(iii) A hybrid commission which would act as an appointing commission in relation to more junior appointments, and as a recommending commission in relation to more senior appointments.

17. The current method that is in practice in Malaysia, as discussed, has its shortcomings and it is clear that the time has come for Malaysia to advance towards a more transparent selection system.
18. It is the view of the Bar Council that the judicial appointments commission system is the option that will best ensure that all the concerns facing the current regime are addressed. It is our suggestion that the judicial appointments commission act in a recommending capacity in that the Chief Justice's advice on candidates will be the candidates identified by the judicial appointments commission. This idea requires further refining if accepted in principle.

(F) ESSENTIAL REQUIREMENTS OF A JUDICIAL APPOINTMENTS COMMISSION

19. Any judicial appointments commission should, in discharging its duties:
- (a) Appoint on the basis of merit;
 - (b) Maintain the confidence of the public, the courts and the judiciary;
 - (c) Result in a judiciary, which is both
 - i. Capable of independent, impartial and competent decision-making; and
 - ii. Reflective of the society it serves;
 - (d) Avoid inappropriate politicisation.
20. The selection process must be:
- (a) Fair;
 - (b) Based on clear criteria;
 - (c) Protect the privacy of applicants (especially unsuccessful

- applicants);
- (d) Transparent; and
- (e) Accountable.

(G) COMPOSITION OF THE JUDICIAL COMMISSION

21. The composition of any judicial commission in Malaysia must reflect her peculiar identity. “A wide range of different commissions is in use around the world... The powers, procedures and membership of these bodies differ considerably, reflecting the fact that a commission is not an ‘off the shelf’ product which can be adopted wholesale but is a system that must be construed to accommodate the particular legal political and cultural conditions of the country.”³
22. If the composition of the judicial appointments commission is well-balanced and reflective of Malaysian society, it would only enhance the judiciary and society as a whole.
23. It is thus recommended that the Malaysian judicial appointments commission should comprise 13 members made up of:
 - (a) Chief Justice who should head the Commission;
 - (b) The Attorney General;
 - (c) The President of the Court of Appeal;
 - (d) The Chief Judge of Malaya;
 - (e) The Chief Judge of Sabah and Sarawak;
 - (f) The Minister of Law or his nominee;
 - (g) President or Vice President of the Malaysian Bar;
 - (h) Three senior practising lawyers (nominated by the Bar Council);
 - (i) Three lay people, who are not practising lawyers and have never held judicial office (to be appointed by agreement of the other members of the Commission).

³ Dr. Kate Malleson (2004) “Creating a Judicial Appointments Commission: Which Model Works Best?” Public Law, pp 102-121

(H) THE PROPOSED APPOINTMENTS PROCESS

24. An ideal process would be one where potential candidates are continuously and regularly identified from time to time via a consultative process.
25. Two or more members of the Commission can be entrusted with the duty of consulting a range of groups of persons to identify potential candidates.
26. This will ensure that a sufficiently broad base is tapped for prospective candidates. There must also be no room for any suggestion of gender bias as merit ought to be the overriding consideration.
27. Potential candidates should then be invited to make a formal application to be considered for judicial office.
28. Every applicant should then be asked to provide *inter alia* the following information: -
 - (a) Details of academic and professional qualifications;
 - (b) Career history, including areas of specialization;
 - (c) High points of the candidate's career, such as reported decisions, personal achievements; etc
 - (d) Professional affiliations and positions held in the organization, if any;
 - (e) List of publications;
 - (g) Community activities;
 - (h) Languages spoken;
 - (j) Lectures, speeches and papers delivered;
 - (k) Or such other information as may be required by the Commission.
29. There will then be a process to verify the information provided which will be conducted with the consent of the applicant.
30. Once all inquiries are completed, the Commission can then review each application, and if necessary, conduct interviews with the

applicant and such other persons, as the Commissions may consider necessary.

31. The Commission would then be able to identify the most suitable candidate to be recommended for judicial office.

32. The candidate(s) should have the following characteristics:

(a) Legal Ability

- i. Professional qualifications and experience;
- ii. Sound knowledge of the law and experience in its application;
- iii. Overall high quality as a lawyer.

(b) Strength of Character

- iv. Personal honesty and integrity;
- v. Intellectual honesty, impartiality, open-mindedness and good judgment;
- vi. Courtesy, patience and ability to listen;
- vii. Capacity, diligence and commitment to work and duty;
- viii. Social awareness and appreciation of diversity in society;
- ix. A strong desire to be fair and an acute awareness of the need to minimize personal influence in decision-making.

(c) Personal Skills

- x. Clarity and precision in expression, oral and written;
- xi. Ability to absorb and analyse complex and competing factual and legal material;
- xiv. Management and leadership ability.

(d) Judicial Quality

- xiii. Can be trusted to exercise discretion and judicial powers responsibly;
- xiv. Ability to stand up to any interference with his or her independence – an unblemished personal record so that he or she cannot fall prey to such interference.

33. To ensure full and frank disclosure and to protect the privacy of the applicants, it is imperative that a high degree of confidentiality be maintained. This could be ensured by:
- (a) members of the Commission and their staff signing confidentiality undertakings;
 - (b) access to information in respect of the potential candidates be restricted to only the members of the Commission and their staff directly involved in the process;
 - (c) upon judicial appointment of a particular candidate, all information kept by the Commission in respect of that particular candidate should be transferred to the Chief Justice's Office and copies deleted.

(I) SECURITY OF TENURE OF JUDGES

34. Security of tenure is vital to the independence of the judiciary.
35. Accordingly, it is recommended that the present system of appointment of judicial commissioners as probationary judges prior to elevation to the office of a judge be abolished. Its use as a probationary period is not, in our view, envisaged under the Constitution.
36. With a judicial appointments commission system, there will no longer be a need to appoint judicial commissioners as the qualities of a particular person for judicial office would have already been determined.
37. Judicial commissioners may however, continue to be appointed for specific purposes namely as pro tempore (temporary) judges.

(J) PROMOTIONS

38. The promotion of judges to higher office should also be based on merit and upon the same criteria as stated above.

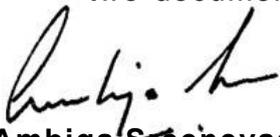
39. All recommendations for promotions should be reviewed and confirmed by the Judicial Services Commission.

(K) RESOURCES

40. On a final note, this paper also recommends a review of the current working conditions of Judges including their remuneration and resources allocated to them in the performance of their onerous duties.

41. It is suggested that the judicial appointments commission be empowered to review and recommend changes in this regard.

42. Annexure 1 to this paper contains a table, which shows the composition of such a Judicial Commission in selected countries. Annexure 2 is the Beijing Statement. Annexure 3 contains the relevant portion of the Latimer House Guidelines. It is recommended that the Beijing Statement and the Latimer House Guidelines form the basis and guiding principles in the establishment of the judicial appointments commission and in the strengthening of the Judiciary as a whole. Many of the suggestions in this paper are inspired by these two documents.



Ambiga Sreenevasan

President

Malaysian Bar

26 September 2007.

Annexure 1

(L) COMPARATIVE TABLE

Country	Appointments process	Powers	Composition
England & Wales	Judicial Appointments Commission	To select judicial office holders. Recommendations are made to the Lord Chancellor. (Lord Chancellor can reject recommendations but is required to provide reasons for rejection. He cannot select an alternative candidate)	15 Commissioners comprising: <ol style="list-style-type: none"> 1. Chairman (lay member) 2. 5 judicial members 3. 2 professional members (1 barrister 1 solicitor) 4. 5 lay members 5. 1 tribunal member 6. 1 lay justice member
Scotland	Judicial Appointments Board	Board provides First Minister with a list of candidates recommended for appointment as Judge of the Court of Session, Sheriff Principal, Sheriff and Part-time Sheriff	10 members appointed by the Scottish Ministers after advertising for applicants
South Africa	Judicial Services Commission	Commission advises the President of the National Assembly on the appointment of all judges of the higher courts	The Judicial Service Commission includes the Chief Justice, the President of the Constitutional Court and the Minister of Justice. It is a widely representative body – among its other members are two practising advocates, two practising attorneys, six members from the National Assembly (including three from opposition parties) and four from the National Council of Provinces
Sri Lanka	Judicial Service Commission	The appointment, transfer, dismissal and disciplinary control of judicial officers is vested in the Commission <i>(note -judicial officer does not include Judge of the Supreme Court /Court of Appeal /High Court)</i>	The Judicial Service Commission shall consist of the Chief Justice who shall be the Chairman, and two Judges of the Supreme Court appointed by the President of the Republic
Thailand	Judicial Commission	The King appoints and removes judges after the	The Judicial Commission consists of the following

		<p>Judicial Commission advises the King</p> <p>Promotion, increase of salaries, and punishment of Judges shall be approved by the Judicial Commission</p>	<p>persons:</p> <ol style="list-style-type: none"> 1) the President of the Supreme Court as Chairperson 2) twelve qualified members of all levels of courts 3) two qualified members, not or were not judicial officials, are elected by the Senate
Hong Kong	Judicial Officers Recommendation Commission	<p>After 1 July 1997, the process of appointment of the Chief Justice and judges of the Court of Final Appeal and the Chief Judge of the High Court can be summarised into the following procedures: (1) the Judicial Officers Recommendation Commission (JORC) advises or makes recommendation to the Chief Executive; (2) the Chief Executive accepts the recommendation of JORC, and subject to the endorsement of the Legislative Council will make the recommended appointment</p>	<p>Judicial Officers Recommendation Commission, consist of-</p> <ol style="list-style-type: none"> (a) the Chief Justice, who shall be the Chairman (b) the Secretary for Justice (c) 7 members appointed by the Chief Executive of whom <ol style="list-style-type: none"> (i) 2 shall be judges; (ii) 1 shall be a barrister and 1 shall be a solicitor, each holding a practising certificate issued under the Legal Practitioners Ordinance (iii) 3 shall be persons who are not, in the opinion of the Chief Executive, connected in any way with the practice of law

RD 070907

(M) BEIJING STATEMENT OF PRINCIPLES

OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION

INTRODUCTION

Every two years since 1985, a conference of Supreme Court Chief Justices from the Asia Pacific region has been held in cooperation with the Judicial Section of LAWASIA, the Law Association for Asia and the Pacific. Since its inception, the conference has served as a useful forum for sharing information and discussing issues of mutual concern among the Chief Justices of the region.

At the 6th Conference of Chief Justices, held in Beijing in August 1997, 20 Chief Justices first adopted a joint Statement of Principles of the Independence of the Judiciary. This Statement was further refined during the 7th Conference of Chief Justices, held in Manila in August 1997. It has now been signed by 32 Chief Justices throughout the Asia Pacific region.

FOREWORD

The Beijing Statement of Principles of the Independence of the Judiciary finds its origins in 1982 in a statement of principles formulated by the Law Association for Asia and the Pacific (LAWASIA) Human Rights Standing Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo ("the Tokyo Principles"). The decision to formulate the current Statement was made at the 4th Conference of Chief Justices of Asia and the Pacific in Perth, Western Australia in 1991. The Secretary of the LAWASIA Judicial Section, The Honourable Justice R D Nicholson, and I undertook the drafting of the Statement, a first draft of which was presented to the 5th Conference in Colombo, Sri Lanka, in 1993. In light of comments received at that conference and subsequently, and following further consideration at the conference in Beijing in August 1995, the Statement of Principles was adopted by the Chief Justices from 20 countries in the Asia Pacific. A revised version of the Statement as it is presented here was adopted in its final form at the 7th Conference of the Chief Justices in Manila in August 1997. The Statement has now been signed and subscribed to by 32 countries in the Asia Pacific region.

The Statement is a tribute to the determination of all signatories to leave aside differences in both legal and social traditions to formulate a single Statement on the Independence of the Judiciary.

The Honourable David K Malcolm

Chairman, Judicial Section, LAWASIA

Chief Justice of Western Australia

In every region of the globe, countries are wrestling with the complex challenges of legal and judicial reform, including the key question of developing and refining the role and functions of the judiciary. In this regard, the coming together of 32 Supreme Court Chief Justices from throughout the

Asia Pacific region to issue a joint statement on the independence of the judiciary represents a significant step forward in addressing a crucial worldwide issue.

The Asia Foundation's role in this effort dates back to 1984, when The Asia Foundation's Senior Advisor for Judicial Administration and Judicial Systems, Judge J Clifford Wallace of the US Ninth Circuit Court of Appeals, recommended the establishment of a Conference of Chief Justices of Asia to provide a forum for interaction and cross-fertilization on important common issues. At the request of The Asia Foundation, the Judicial Section of LAWASIA agreed to be a co-sponsor. The first conference was held in Malaysia, in August 1985, and conferences (later adding the Pacific nations) have been held every two years since, ***most recently in the Philippines in 1997***. As the conference series has developed, it has become increasingly more effective both in its information-sharing role and in taking on important issues affecting legal development and reform in the region, as exemplified in the Chief Justices' joint statement.

The Asia Pacific Chief Justices conference is now self-supporting, but The Asia Foundation is proud to have provided the necessary funding during its formative years to help the conference become established as an important regional forum. And we are extremely pleased now to have arranged for the printing of this important document.

William P Fuller

President, The Asia Foundation

PREAMBLE TO STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY

Beijing, 19 August 1995

Whereas the *Charter of the United Nations* the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination;

Whereas the *Universal Declaration of Human Rights* enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law;

Whereas the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both guarantee the exercise of those rights, and in addition the *Covenant on Civil and Political Rights* further guarantees the right to be tried without undue delay;

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality;

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles;

Whereas the 6th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors;

Whereas the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985, adopted the *Basic Principles on the Independence of the Judiciary* by consensus;

Whereas the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended the *Basic Principles on the Independence of the Judiciary* for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;

Whereas on 17-18 July 1982 the LAWASIA Human Rights Standing Committee met in Tokyo, Japan and in consultation with members of the judiciary formulated a *Statement of Principles on the Independence of the Judiciary in the LAWASIA Region* ("the *Tokyo Principles*") in the context of the history and culture of the region;

Whereas the 5th Conference of Chief Justices of Asia and the Pacific at Colombo, Sri Lanka on 13-15 September 1993 recognised that it was desirable to revise the *Tokyo Principles* in the light of subsequent developments with a view to adopting a clear statement of principles of the independence of the judiciary, and considered a first draft of a *Revised Statement of Principles on the Independence of the Judiciary* and requested the Acting Chairman of the Judicial Section of LAWASIA to prepare a second draft of the *Revised Statement* taking into account the views expressed at the 5th Conference of the Chief Justices and comments and suggestions to be made by the Chief Justices or their representatives; and

Noting that the 6th Conference of Chief Justices of Asia and the Pacific was held in Beijing in conjunction with the 14th LAWASIA Biennial, the primary object of which is:

"To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region."

The 6th Conference of the Chief Justices of Asia and the Pacific:

Adopts the *Statement of Principles on the Independence of the Judiciary* contained in the annex to this resolution to be known as the *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*.

Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region

(As Amended at Manila, 28 August 1997)

INDEPENDENCE OF THE JUDICIARY

1. The Judiciary is an institution of the highest value in every society.
2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.
3. Independence of the Judiciary requires that:
 - a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
 - b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.
4. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.
5. It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.
6. In the decision-making process, any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgement in accordance with Article 3 (a). The judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.
7. Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.
8. To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.
9. Judges shall be free, subject to any applicable law, to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

OBJECTIVES OF THE JUDICIARY

10. The objectives and functions of the judiciary include the following:
 - a) To ensure that all persons are able to live securely under the rule of law;

- b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- c) To administer the law impartially among person and between persons and the State.

APPOINTMENT OF JUDGES

11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, 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.

14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

TENURE

18. Judges must have security of tenure.

19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedures.

20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge's tenure must not be altered to the disadvantage of the judge during his or her term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge.

23. It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

26. In any event, the judge who is sought to be removed must have the right to a fair hearing.

27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28. Judgements in disciplinary proceedings, whether held in camera or in public, should be published.

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30. Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge.

JUDICIAL CONDITIONS

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

JURISDICTION

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

JUDICIAL ADMINISTRATION

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

RELATIONSHIP WITH THE EXECUTIVE

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

40. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

RESOURCES

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the rule of law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

EMERGENCY

43. Some derogations from independence of the judiciary may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of person administratively without charge shall be subject to review by courts of other independent authority by way of *habeus corpus* or similar procedures.

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court or tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

It is the conclusion of the Chief Justices and other judges of Asia and Pacific listed below that these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.

SIGNATORIES AT BEIJING, 19 AUGUST 1995

The Hon Sir Gerard Brennan AC KBE

Chief Justice of Australia

The Hon Mr Justice A. T. M. Afzal

Chief Justice of Bangladesh

HE Mr Wang Jingrong

Vice-President, Supreme People's Court of the People's Republic of China
(Representing HE President Ren Jianxin, President of the Supreme People's Court)

The Hon Sir Ti Liang Yang

Chief Justice of Hong Kong, SAR

The Hon Shri Justice S. C. Agrawal

Justice of the Supreme Court of India

(Representing The Hon Mr Justice A. M. Ahmadi, Chief Justice of India)

The Hon Justice S. H. Soerjono

Chief Justice of Indonesia

The Hon Yun Kwan

Chief Justice of the Republic of Korea

The Hon D. Dembereltseren

Chief Justice of Mongolia

The Hon U Aung Toe

Chief Justice of the Supreme Court of The Union of Myanmar (Burma)

The Rt Hon Mr Justice Biswanath Upadhyaya

Chief Justice of Nepal

Monsieur Le Premier Président Olivier Aimot

Premier Président of the Court of Appeal of New Caledonia

The Rt Hon Sir Thomas Eichelbaum GBE

Chief Justice of New Zealand

The Hon Mr Justice Sajjad Ali Shah

Chief Justice of Pakistan

The Hon Sir Arnold K. Amet

Chief Justice of Papua New Guinea

The Hon Andres R. Narvasa

Chief Justice of the Philippines

The Hon Justice Yong Pung How

Chief Justice of Singapore

The Hon Mr Justice P. R. P. Perera

Justice of the Supreme Court of Sri Lanka

(Representing The Hon Mr Justice G. P. S. De Silva, Chief Justice of Sri Lanka)

The Hon Charles Vaudin D'Imecourt

Chief Justice of Vanuatu

The Hon Mr Justice Pham Hung

Chief Justice of Vietnam

Tiavaasue Falefatu Maka Sapolu

Chief Justice of Western Samoa

SUBSEQUENT SIGNATORIES:

The Hon Sir Timoci Tuivaga

Chief Justice of Fiji

The Hon Kim Yong Joon

President of the Constitutional Court of Korea

The Hon Tun Dato Sri Mohd Eusoff b. Chin

Chief Justice of Malaysia
The Hon Justice V Allear
Chief Justice of the Republic of the Seychelles
The Hon Sir John Muria
Chief Justice of the Solomon Islands
The Hon Nigel Hampton
Chief Justice of Tonga

SIGNATORIES AT MANILA, 28 AUGUST 1997:

The Hon Richard Brunt Lussick
Chief Justice of the Republic of Kiribati
The Hon Daniel Cadra
Chief Justice of the High Court
(Representing the Hon Allan Fields Chief Justice of the Marshall Islands)
Chief Justice Sir Gaven Donne
Chief Justice of Nauru and Tuvalu
Chief Justice Vyacheslav M. Lebedev
Chief Justice of the Supreme Court Russian Federation

SUBSEQUENT SIGNATORIES:

The Hon Toru Miyoshi
Chief Justice of Japan
(Subject to reservation in attached Statement, as regards Article 9.)
The Hon Justice Sadka Makkamakkul
President of the Supreme Court of Thailand
Supreme Court of Japan, Tokyo

Annexure 3

(N) LATIMER HOUSE GUIDELINES (extract)

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;
- 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. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

GUIDELINES

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.

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.

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.

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

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.