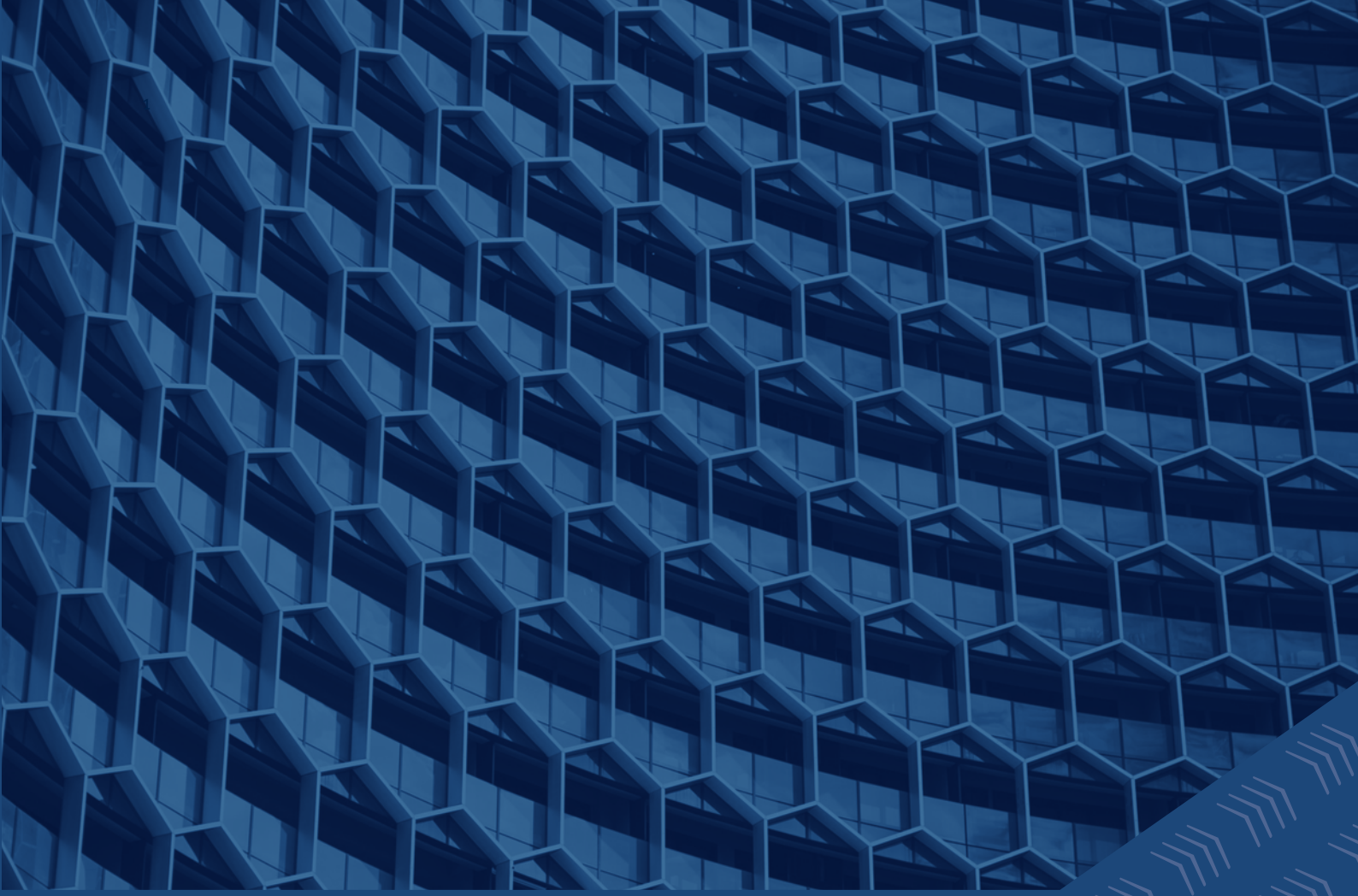

Constitution Hill Global Guidelines on Apex Court Appointments

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INSTITUTE FOR INTEGRATED TRANSITIONS

Overview

There are many important national, regional and international principles and guidelines on the selection and appointment of judges. What has been missing is a set of baseline principles tailored to the unique role and characteristics of *Apex Courts* and customisable to the unique conditions of diverse country and/or regional contexts.

To fill the gap, the **Institute for Integrated Transitions** (IFIT) – in partnership with Constitutional Transitions (CT) and a High-Level Advisory Panel composed of distinguished judges and jurists from a wide spectrum of legal systems – launched the **Initiative on Apex Court Appointments** in 2021. Yale Law School, King & Spalding LLP, and W Legal Limited provided pro bono support at key stages, while the Effective Institutions Project provided earmarked financial support. The result is the enclosed *Constitution Hill Global Guidelines on Apex Court Appointments*.

The *Guidelines* are divided into four sections: (i) the structural role and characteristics of Apex Courts; (ii) appointment criteria for Apex Courts; (iii) appointment procedures for Apex Courts; and (iv) conditions of service and tenure for Apex Courts. *Apex Courts* are defined in the guidelines as the supreme judicial authority on constitutional law questions in a given country.

The *Guidelines* are entirely original but draw from a range of key sources including: (i) a detailed IFIT study of existing global and regional principles on judicial appointments and judicial independence; (ii) a comprehensive survey of national standards; (iii) in-depth interviews conducted with the initiative's High-Level Panel members and with additional judges and jurists globally; and (iv) early work in the Southern African region from whence the project originated with the support of IFIT's Zimbabwe Resource Group.

Starting in July 2023, a first draft of the *Guidelines* was the centrepiece of an expert consultation and feedback process with 100+ leading global and regional legal and judicial institutions, associations and networks. In early 2024, an updated version of the *Guidelines* passed through a second phase of global consultation and feedback, culminating in a high-level judicial and legal summit held at Constitution Hill in Johannesburg, South Africa in May 2024.

Translated versions of the enclosed *Guidelines* are available in other languages.

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I. The Structural Role and Characteristics of Apex Courts

A. Definition: An Apex Court is the supreme judicial authority in a given country. For purposes of these guidelines, it refers to the supreme judicial authority on constitutional law questions.

1. The term 'apex' refers to the authority of the court, not to its formal name.
2. An Apex Court's formal name depends on the legal system. It may be called the Supreme Court, Constitutional Court, Constitutional Tribunal, Constitutional Council or another name.
3. Supreme judicial authority on constitutional questions may be shared by more than one Apex Court in a given country (e.g., between a Constitutional Court and a Supreme Court in a civil law jurisdiction). As such, references in these guidelines to Apex Court denote whichever court has judicial authority over constitutional questions as its sole or principal function.

B. Roles: An Apex Court has at least three core roles within a democracy:

1. **Its role vis-à-vis executive and legislative branches of government at both the state and substate levels:** The legal authority wielded by an Apex Court reflects an institutional check on the exercise of power at the highest levels in a democracy. Apex Courts typically wield ultimate interpretive authority for determining the constitutional limits of action of the executive and legislative branches of government. In a federal or devolved political system, an Apex Court also exercises ultimate interpretive authority for the distribution of legislative and executive power within and between state and substate levels of government.
2. **Its role vis-à-vis the country's judicial system:** An Apex Court is the highest institution of a country's judicial system and the ultimate promoter and protector of the constitutional values and standards against which a country's laws are assessed. It creates the constitutional precedents to which all other levels of the judiciary in a given country are bound. It is generally able to overrule decisions on constitutional questions rendered by all other levels of the judiciary in the country.
3. **Its role vis-à-vis the general public:** The decisions of Apex Courts on constitutional matters contribute to baseline norms that structure democratic politics in a given society. Although the majority of the public is unlikely to interact directly with an Apex Court, all members of the public will be affected by its decisions.

In a society that is wholly or largely undemocratic, these three core roles of an Apex Court are, *ipso facto*, qualitatively weak or absent. However, they may function as ideals that inform the design and function of Apex Courts in the event of future democratic transition.

C. **Structural features:** An Apex Court has at least seven unique features in comparison to other levels of the judiciary in a country:

1. **Exercising the final word in constitutional interpretation:** The decisions of an Apex Court are definitive on constitutional matters. They cannot be overturned except by the court itself.
2. **Dealing with highly consequential social and political controversies:** As the court of final record on constitutional matters, an Apex Court necessarily hears controversial and complex cases with far-reaching implications, which can range from the validity of an election or a peace agreement to the scope of fundamental human rights.
3. **Hearing cases and rendering judgments in plenary or panel format:** Unlike in the rest of the judicial system, an Apex Court case is never tried or decided on the merits by a judge sitting alone, but always in plenary or panel format, often requiring votes.
4. **Providing multi-level normative leadership:** An Apex Court shapes normative expectations and standards on constitutional questions vis-à-vis multiple audiences, including: the parties in the case being heard; the legislative and executive at all levels of government; the overall judicial system; the legal profession; the civil service; and society at large.
5. **Comprising highly visible representatives of a country's judiciary:** The judges belonging to the Apex Court are typically among the country's most-experienced and highest-profile judges, and thus the image of the Apex Court will heavily influence the image of the judiciary as a whole.
6. **Experiencing greater political pressure:** In contrast to other levels of the judiciary, Apex Courts tend to experience, directly or indirectly, elevated political pressures because of the finality of their judgements on constitutional questions.
7. **Facing higher media and public scrutiny:** Compared to other levels of the judiciary, Apex Courts experience a greater 'spotlight effect', involving more media attention and more intensive public commentary.

For all of these reasons, the **appointment criteria** for the judges of an Apex Court, the **appointment procedures** for selection to the court, and the **conditions of service and tenure** of the judges on the court require tailored guidelines that are distinct from those used for other courts.

II. Appointment Criteria for Apex Courts

A. Initial Considerations

General: The appointment criteria for Apex Court judges fall into two broad categories: (i) individual criteria; and (ii) collective criteria. Individual criteria may be divided into two sub-categories: explicit criteria of inclusion based on character and merit; and explicit criteria of exclusion based on past conduct, age thresholds and conflicts of interest. Collective criteria focus on the importance of diversity in an Apex Court.

Comparisons with appointment criteria for other courts: As is the case for all levels of the judiciary, the judges on Apex Courts must meet minimal criteria of merit. Nevertheless, given an Apex Court's unique structural features: (i) individual criteria of character have special importance alongside individual criteria of merit; and (ii) collective criteria of diversity are likewise important.

B. Individual Criteria of Inclusion

Criteria of inclusion that should inform the appointment of judges to an Apex Court can be divided into those addressing character and merit.

There are at least six individual criteria of character:

1. **Integrity:** Each Apex Court judge must have the strength of character to resist bribes, refrain from any corrupt activity or offering, and generally uphold the highest possible standards of integrity in all aspects of their lives, both on and off the bench.
2. **Composure:** Each Apex Court judge must have the temperament or ability to operate calmly under pressure, especially in cases that attract strong public and political scrutiny.
3. **Impartiality:** Each Apex Court judge must possess the capacity to approach cases with an open mind, including an awareness of and ability to manage any individual biases that would otherwise inappropriately affect their judgement.
4. **Independent mindedness:** Each Apex Court judge must remain staunchly detached from any pressure group – political, foreign or private – and maintain this distance within potentially stressful circumstances.
5. **Courage:** Each Apex Court judge must be willing to make rulings that resist majority public opinion or that defy power, knowing that these may generate personal and professional risks and consequences.

6. **Collegiality:** Since all Apex Court cases are heard in panel or plenary format, each Apex Court judge must possess the ability to dialogue and collaborate with other members of the court.

There are at least six individual criteria of merit:

1. **Expertise:** Since an Apex Court's jurisdiction is focused on constitutional matters, each Apex Court judge must have some discernible expertise in constitutional, human rights and public law, and acceptable levels of expertise in the general area of law.
2. **Diligence:** Each Apex Court judge must have a demonstrated capacity for efficiency, as the court must be able to hear cases and hand down judgments with well-written reasons in a timely fashion.
3. **Intellectual ability:** Each Apex Court judge must be capable of deciding legal issues of unusual complexity, and thus possess exceptional intellectual skills.
4. **Contextual knowledge:** Each Apex Court judge must have a broad and deep understanding of the country jurisdiction, including its history, society and politics.
5. **Inventiveness:** Each Apex Court judge must have a demonstrated capacity to tackle legal questions imaginatively and innovatively, being able and willing to break new legal ground when necessary.
6. **Prior experience:** Each Apex Court judge must have a minimum number of years of relevant professional experience, having regard to the structure of the law profession in the country.

C. Individual Criteria of Exclusion

There are at least three individual criteria of exclusion from serving as a judge on an Apex Court:

1. **Criminal record:** No member of an Apex Court should have a criminal record for any serious offences proven in a fair trial before an independent, impartial, and competent court, unless those offences are the subject of a democratically-enacted amnesty or pardon. By corollary, no person convicted by a court lacking those hallmarks shall be subject to this criterion of exclusion
2. **Age requirement:** If there is a reasonable number of years of prior experience required by law to serve as an Apex Court judge in a particular country (see individual inclusion criteria, above), there is no cause for a minimum age of eligibility. As for the maximum age to serve as an Apex Court judge,

this should be set at a level considered appropriate in the country having regard, where relevant, to the official retirement age and the avoidance of perverse incentives in relation to post-retirement roles.

3. **Conflicts of interest:** No member of an Apex Court should have a conflict of interest at the time of appointment that would cause direct or indirect damage to the reputation of the court.

D. Collective Criteria of Inclusion

Diversity on an Apex Court will bring a multiplicity of important perspectives and experiences to bear on difficult cases and be more legitimate in the eyes of the public.

There are at least three collective criteria of inclusion to ensure diversity on an Apex Court:

1. **Viewpoint diversity:** An Apex Court's membership should ideally reflect, and be seen to reflect, a diversity of social, cultural and philosophical viewpoints that fall within the constitutional standards of the country and, in the case of smaller countries that share an apex court, the region.
2. **Professional diversity:** While the great majority of an Apex Court's membership should have legal training and experience as sitting judges, senior lawyers and/or law professors, a minority of the court's judges might come from law-adjacent backgrounds provided that their prior experience is directly relevant to the mandate of the court and reflective of the law-based nature of the court's work.
3. **Demographic diversity:** An Apex Court's membership should in some general form reflect the broader diversity of the country, inter alia, in terms of region, gender, race, religion, ethnicity, language, and similar categories and attributes.

III. Appointment Procedures for Apex Courts

A. Initial Considerations

1. **General:** The appointment procedures for Apex Court judges should encompass an *application and nomination procedure*, an *interview and vetting procedure*, and a *selection procedure*. These procedures may proceed linearly, concurrently, or in another order.
2. **Single or multiple bodies:** Apex Court appointment procedures can be administered by a single body such as an independent judicial appointments commission (chaired by an Apex Court chief justice), or by multiple bodies with sole or shared authority for different components of the overall process. The body or bodies shall be democratically established and have a statutory foundation.
3. **Different bodies for different phases:** The application and nomination procedure can allow for wide participation, potentially including significant participation by impartial non-state actors. By contrast, the interview and vetting procedure and the selection procedure are less amenable to the same breadth of non-state participation, except when the participation takes place by and through an independent judicial appointments commission.
4. **Laypersons and legal and judicial sector participation:** Distinguished and impartial laypersons and members of the judiciary and legal profession (who do not have existing roles on the country's Apex Court) should have the opportunity to participate meaningfully in at least one of the appointment procedures.
5. **Political participation:** Appointment procedures for an Apex Court are vulnerable to accusations of politicisation that can jeopardise public trust in the court and weaken its structural role as an independent check on the other branches of government. This can be mitigated by appointment procedures in which the role of the executive branch, where included, is not dominant and is limited to the final selection; and in which legislative participation, where included, is cross-partisan and limited in scope.
6. **Legitimacy:** In light of the unique structural role of Apex Courts in a democracy *(see Section I)*, it is critical for appointment procedures to be exceptionally fair, rigorous and transparent. The integrity of the procedures is a *sine qua non* for the legitimacy and proper functioning of the court, including the acceptance of its decisions.

7. **Publication:** The guidelines, regulations and score sheet criteria used across appointment procedures for an Apex Court should be publicly available.

8. **Open procedures:** As many of the appointment procedures as possible should be held in public in order to enhance accountability and protect against the reality or perception of corruption or patronage. Application, nomination, vetting and/or deliberation procedures may, however, be more private to ensure that good candidates are not deterred by early or excessive publicity.

9. **Filling vacancies:** Appointment procedures for an Apex Court should balance legitimacy and efficiency goals. Major delays in filling Apex Court vacancies (which can be caused, *inter alia*, by burdensome participation rules or by unanimity requirements that foreseeably generate stalemates) undermine the ability of the court to function normally or to perform its three core roles in a democracy.

10. **Diversity:** The composition of the body or bodies involved in the appointment procedures for an Apex Court should, in aggregate, reflect viewpoint, professional and demographic diversity. This will help to reassure prospective and actual candidates that they will be assessed fairly, while also contributing to public confidence in the fairness of the process.

B. Application and Nomination Procedure

1. **Collecting applications:** Applications and nominations of Apex Court judges should be open to all suitably qualified candidates, without discrimination, based on the published criteria for appointment to the court *(see Section II)*. Vacancies should be widely advertised and a reasonable period of time should be allowed for candidate applications and/or nominations to be submitted. In systems where nominations emanate from the executive branch, they should conform to the published criteria for appointment.

2. **Confidentiality:** Applications and nominations should be processed confidentially, but the shortlist of those selected for interview should ordinarily be made public.

C. Interview and Vetting Procedure

1. **Interview:** All shortlisted candidates to the Apex Court should receive an interview. A second round of interviews may be relevant to break stalemates in the final selection.

2. **Format:** Interviews of Apex Court candidates should generally be conducted in public and/or in a manner that allows for public discussion, as this can increase public trust and help to vet for candidates that will need to

serve under intense media scrutiny as members of the court. Public formats should, however, proceed according to published rules that minimise politicisation and the risk of performative or improper conduct by the interviewers.

3. **Fair treatment:** To ensure procedural fairness, there must be consistency of treatment and format in the interviews of each shortlisted candidate to the Apex Court. Interviews should be conducted in a professional manner that shows respect to each candidate, omitting questions that could damage public confidence in the court.

4. **Score sheet:** The published criteria for appointment to an Apex Court should be incorporated into a score sheet that is used in all the interviews, in conjunction with the nuanced deliberation that must accompany the use of any such sheet.

   - For each individual criterion of inclusion, candidates should receive one of three qualitative scores – 'not established', 'established' or 'outstanding'. Candidates who receive a 'not established' score for any individual criterion of inclusion, and candidates who meet any individual criterion of exclusion, are not appointable.
   - For each collective criterion of inclusion, candidates should receive qualitative scores regarding how their appointment would add diversity to the court, assuming that the rest of the court's composition is known.
   - Candidates should not receive an overall score because that would involve or imply assigning an identical weight to a highly varied set of appointment criteria.

5. **Information:** Information acquired from interviews should be used in conjunction with other information on shortlisted candidates. In particular, external evidence on candidates' backgrounds and professional activities should be gathered and taken into account, and a mechanism should exist for both receiving and corroborating outside input about their qualifications or any credible private complaints, including those alleging instances or patterns of sexual or financial impropriety. The vetting process should include a financial audit of each candidate and may potentially include a psychological fitness test provided that it can be conducted on a non-discriminatory basis.

6. **Importance of vetting:** Given the unique structural role of Apex Courts in a democracy *(see Section I)* and the exceptional thresholds that need to be met for there to be any potential discipline or dismissal of an Apex Court judge *(see Section IV)*, the vetting of shortlisted candidates must be thorough and proactive. Intentionally false statements, misrepresentations, or concealments of material information in the application should constitute grounds for exclusion of an Apex Court candidate.

D. Selection Procedure

1. **Deliberation:** The selection procedure for Apex Courts should be designed to encourage sober and evidence-informed deliberation that is focused on the match between the proposed candidate and the objective appointment criteria *(see Section II)*. The method should provide appropriate safeguards against bias or improper considerations.
2. **Decision-making:** If an independent judicial appointments commission exists, it should have a direct role in the decision-making process for Apex Court appointments, even if the final selection is made by the executive and/or legislative branch of government.
3. **Tie-breaking mechanism:** Where multiple actors are involved in the final selection of Apex Court judges, the decision should ideally be made by consensus among those involved. If a vote is needed, it should follow an established protocol and encompass a tie-breaking mechanism to avoid stalemates or excessive delays in filling vacancies. The mechanism should be designed in such a way that its results are unforeseeable. Where two candidates are deemed to be of equal distinction, preference can be given to the one whose appointment would best advance collective criteria of inclusion on the particular Apex Court *(see Section II)*.

E. Appointment Procedure for Acting Judges

For jurisdictions that allow for the appointment of acting (i.e. temporary) judges to an Apex Court for positions other than the chief justice – such as when there is a provisional vacancy on the court or provisional need for an increase in judicial capacity – the procedures described in this section apply, *mutatis mutandis*, bearing in mind the exceptional nature of such appointments as well as the paramount interest of protecting the integrity and legitimacy of the court and its unique structural role in a democracy *(see Section I)*.

IV. Conditions of Service and Tenure for Apex Courts

A. Initial Considerations

1. **General:** The conditions of service and tenure of Apex Court judges are important for ensuring the independence, effective functioning, and public image of the court. The conditions should cover remuneration; term length; the scope of permissible outside activities; immunity; and procedures for discipline, suspension and removal.
2. **Legal safeguards:** The conditions of service and tenure of Apex Court judges should be set out in detail in legislation, provided that certain baseline conditions of service are constitutionally entrenched.

B. Remuneration

1. **Highest standard:** Apex Court judges should command the highest salary within the judicial system, both to reinforce the unique role and characteristics of the office and to attract the most qualified candidates. Remuneration must be high enough to limit the risk of conflicts of interest or corruption arising from the need for Apex Court judges to supplement their income. Remuneration should be benchmarked, as a minimum, to the most senior executive and legislative branch compensation; and it should be adjusted annually to account for official inflation.

C. Term Duration

1. **Probation:** When assuming office, Apex Court judges should not be subject to probationary periods of any kind. This is to avoid undermining the credibility of the appointment process, compromising judicial independence, or sowing public confusion.
2. **Security of tenure:** To maintain independence, the term of appointment of Apex Court judges must be stated in the constitution. Retroactive shortening or lengthening of the terms of sitting judges should be impermissible.
3. **Term lengths:** Once they are established in the constitution, the term lengths of Apex Court judges are, *ipso facto*, difficult to adjust. In the case of an Apex Court being established *ab initio* (e.g., the creation of a Constitutional Court), terms should be non-renewable and have a fixed duration of at least ten years or conclude at a mandatory retirement age. Whether the term has a fixed duration or mandatory retirement age is a question determined by the legal-political traditions and preferences in the given country.

D. Extra-judicial Activities

1. **Extra-judicial behavioural standard:** Outside of the courtroom, Apex Court judges should behave in such a manner as to preserve the actual and perceived legitimacy, impartiality and independence of the court. This standard, including an implementation oversight mechanism, should be set out in a published code of conduct; and Apex Court judges should have access to advice and possibly to advisory rulings to ensure compliance with such a code, including as regards rules on gifts and financial disclosure, recusals for actual or perceived conflict of interest or apprehension of bias, and standards of conduct for immediate family members of the judges.

2. **Impermissible extra-judicial activities or functions:** During their term of office, Apex Court judges should be precluded from engaging in any external activity that is incompatible with the extra-judicial behavioural standard. Among other things, Apex Court judges in office must not permitted to exercise any political or legislative functions; engage in the practice of law; hold other in-country professional roles or titles; conduct business activities; or comment publicly on political matters or upon any legislation, drafts, proposals or subject matters likely to come before their court.

3. **Permissible extra-judicial activities or functions:** Like any other individual, Apex Court judges enjoy human rights, including freedom of expression, belief, association and assembly. However, during their term of office, Apex Court judges should be required to exercise these rights in a manner compatible with the extra-judicial behavioural standard. Permissible extra-judicial activities for Apex Court judges in office include, *inter alia*, participating in judicial colloquia or judicial training; conducting voluntary activities as a member of a judicial association; and teaching and publishing research in approved areas. Some of these permissible activities (e.g., continued judicial education) may even be conditions of service and tenure.

4. **Conflicts of interest:** During their time in office, Apex Court judges must disclose actual or potential conflicts of interest occasioned through outside activities or functions that would risk affecting their actual or perceived independence or impartiality as a member of the court, such as instances in which they hold any material personal, professional or financial interest in the outcome of a case. Conflicts of interest should be governed by a published code of conduct setting out the criteria for recusal in the event of a conflict.

5. **Post-tenure restrictions:** After their term in office, former Apex Court judges should continue to comply with the extra-judicial behavioural standard. The scope of permissible activities will be wider but should be included in the published code of conduct.

E. Immunity

1. **Judicial immunity:** Apex Court judges should enjoy full judicial immunity, meaning that they cannot be compelled to testify regarding matters that occurred while carrying out their judicial functions.
2. **Personal immunity:** While in office, Apex Court judges should also have immunity regarding matters that occurred outside the exercise of their judicial functions. This is to protect against illegal harassment, threat or reprisal against them, their families or their property. The immunity standard should nevertheless be limited in ways akin to the *Vienna Convention on Diplomatic Relations*, such that Apex Court judges are not above the law.

F. Procedures for Discipline, Suspension and Removal

1. **Limits:** In light of the core roles of an Apex Court in a democracy, and the fact that the appointment process for Apex Court judges is more exigent than for any other level of the judiciary:
   - I. The scope for discipline, suspension and removal of Apex Court judges should be extremely limited;
   - II. The procedures for discipline, suspension or removal should be more rigorous than for the appointment process; and
   - III. Discipline, suspension and removal procedures should be administered by actors not involved in the original appointment.
2. **Suspension:** As a rule, the suspension of an Apex Court judge from office should only be possible as a sanction at the conclusion of a disciplinary or removal procedure. As an exception, temporary suspension may be possible while procedures are ongoing if there is strong *prima facie* evidence of misconduct that would undermine public confidence in the judicial system.
3. **Procedures and sanctions:** In order to reinforce the principle of judicial independence, there must be a legally established, impartial and independent procedure and designated authority regarding the handling of all allegations of misconduct lodged against Apex Court judges. The procedure should include a screening process to exclude allegations that lack merit or that otherwise fail to meet the standard of seriousness to warrant a full proceeding. Any full proceeding should accord an impugned judge due process according to the standards of a civil trial, including in terms of judicial review and appeal. The scope of disciplinary sanctions may include, *inter alia*, warnings, censure, counselling, education, apology, suspension and, in extreme cases, removal.

4. **Incapacity:** Incapacity is another possible ground for removing an Apex Court judge. Allegations of incapacity should follow a separate procedure that affords the impugned judge the same procedural rights as for serious misconduct. The process should be designed to minimise the risk of abusive invocation and should be limited to cases that cannot be otherwise addressed by a reasonable accommodation of the judge.

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www.ifit-transitions.org
info@ifit-transitions.org

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