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TOWARDS REFORM IN SELECTION AND APPOINTMENT OF JUDICIAL OFFICERS IN SOUTHERN AND EASTERN AFRICA

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INTRODUCTION

- Doctrine of separation of powers. Well known in the realm of governance.
- Age old one. Well expounded by Montesquieu French jurist (1689 to 1755) **BOOK :THE SPIRIT OF LAWS**
- Best form of government is one in which the executive, legislative and judicial powers are separate and keep each other in check to prevent any branch from becoming powerful. (Tripartite system). (Briefly explain the roles of each of these branches)
- Is a system of government most modern states follow to date

THE JUDICIAL POWERS

- Judicial powers primarily entail the interpretation of the various laws of a state.
- Montesquieu is said to have a judge as *the mouth that pronounces the word of the law*. - a judge should not pronounce words that emanate from other sources as the citizenry can only have their rights and freedoms guaranteed if bound solely by the law not other whims.
- The exercise of judicial powers is a daunting task which has to be tackled with *great circumspection, that is, with full attention to all the relevant facts and circumstances of each given case*

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- The exercise of judicial powers and functions demands caution, wariness, watchfulness, thoughtfulness, care, vigilance, attention, prudence, discretion and forecast.
- These demands make it imperative that appointment to judicial office must be a well informed decision. It must be through a process that is credible and impeccable.
Example of section 34 of Courts Act - “ fit and proper person”

SOUTHERN AND EASTERN AFRICA REGION APPOINTMENT PROCESSES/PROCEDURES

- There seem to be about 16 member jurisdictions under SEACJF.
- In most of the SEACJF, jurisdictions' judicial appointments are spelt out in their respective constitutions, with the **Judicial Service Commissions (JSC)** playing a central role in the process.
- While there are similarities in terms of executive involvement and reliance on merit-based recommendations, the specific procedures and legal provisions differ across these countries.
- The following are 10 some samples

1. SOUTH AFRICA

- Judges are appointed through a system that emphasizes judicial independence, with the **Judicial Service Commission (JSC)** playing a pivotal role.
- -The **President** appoints judges of the **Constitutional Court** (including the Chief Justice and Deputy Chief Justice) after consulting the JSC and leaders of political parties in the National Assembly.
- -Other judges, such as those in the **Supreme Court of Appeal and High Courts**, are appointed by the President on the advice of the JSC.

SOUTH AFRICA CONTINUED.....

- **RELEVANT PROVISIONS**
- **Section 174(3) of the Constitution of South Africa, 1996:** Constitutional Court judges are appointed by the President after consulting the JSC and political leaders.
- **Section 174(6):** Judges of other courts are appointed by the President on the advice of the JSC

ZAMBIA

- The President appoints judges of the **Supreme Court**, **Constitutional Court**, and **High Court**, based on recommendations from the Judicial Service Commission, with some appointments requiring parliamentary ratification.
- -The President appoints **Supreme Court** and **Constitutional Court Judges**, including the Chief Justice, subject to approval by the **National Assembly**.
- -For **High Court Judges**, the President appoints on the recommendation of the JSC but without the need for parliamentary ratification.

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- **RELEVANT PROVISIONS**
- **Article 140 of the Constitution of Zambia (Amendment) Act, 2016:** Supreme Court and Constitutional Court judges are appointed by the President, subject to ratification by the National Assembly.
- **Article 141:** High Court judges are appointed by the President on the recommendation of the Judicial Service Commission

KENYA

- The judicial appointment process is managed by the **Judicial Service Commission (JSC)**, with the President appointing judges based on the JSC's recommendations and, in some cases, requiring parliamentary approval.
- -The **Chief Justice and Deputy Chief Justice** are appointed by the President on the recommendation of the JSC, and approval by the National Assembly.
- -Judges of the **Supreme Court, Court of Appeal, and High Court** are appointed by the President based on JSC nominations, without the need for parliamentary approval.

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- **RELEVANT PROVISIONS**
- **Article 166(1) of the Constitution of Kenya, 2010:** The Chief Justice and Deputy Chief Justice are appointed by the President upon the recommendation of the JSC, with approval by the National Assembly.
- **Article 166(2):** Judges of the Supreme Court, Court of Appeal, and High Court are appointed by the President on the recommendation of the JSC.
- **Article 172:** Establishes the Judicial Service Commission and its role in judicial appointments

ZIMBABWE

- The **Judicial Service Commission (JSC)** recommends candidates to the President for appointment. The President must appoint judges from the list provided by the JSC, following public interviews.
- -**Chief Justice, Deputy Chief Justice, and judges of the Constitutional Court, Supreme Court, and High Court** are appointed by the President after public interviews and recommendations by the JSC. The President can reject the JSC's list but must request a new one.

- **RELEVANT PROVISIONS**

- **Section 180(1) of the Constitution of Zimbabwe, 2013:** The President appoints judges from a list provided by the Judicial Service Commission after a public interview process.
- **Section 180(2):** If the President rejects the JSC's nominees, a new list must be provided.
- **Section 189:** Establishes the Judicial Service Commission and outlines its role in judicial appointments.

TANZANIA

- The President has broad discretionary powers in appointing judges, with consultation from the Judicial Service Commission.
- -The **Chief Justice** is appointed directly by the President without the need for consultation or ratification.
- -Judges of the **Court of Appeal** and **High Court** are appointed by the President after consultation with the JSC.

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- **RELEVANT PROVISIONS**
- **-Article 118 of the Constitution of the United Republic of Tanzania, 1977 (as amended):** The Chief Justice is appointed by the President.
- **-Article 109:** Judges of the Court of Appeal and High Court are appointed by the President after consulting with the JSC.
- **-Article 112:** Establishes the Judicial Service Commission and its advisory role in judicial appointments.

MALAWI

- The judicial appointment process is governed by the **Constitution of the Republic of Malawi (1994)**.
- -Chief Justice:
- -Section 111(1): "The Chief Justice shall be appointed by the President and confirmed by a majority of the members of the National Assembly."

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- **Judges of the Supreme Court of Appeal and High Court:**
 - **Section 111(2):** "All other justices of appeal and judges of the High Court shall be appointed by the President on the recommendation of the Judicial Service Commission."

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- **Judicial Service Commission (JSC):**
- **Section 117** outlines the composition of the JSC, which includes the Chief Justice, a Justice of Appeal, and representatives from legal professionals, ensuring checks on the appointments. (There are an on going reform process on the composition of the JSC)

BOTSWANA

- The Constitution of Botswana (1966, as amended) outlines the process for judicial appointments.
- - Key provisions include:
- **Chief Justice:**
- **Section 96(1):** "The Chief Justice shall be appointed by the President."

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- **Judges of the Court of Appeal and High Court:**
- **Section 96(2):** "The other judges of the Court of Appeal and the High Court shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission."
- **Judicial Service Commission (JSC):**
- **Section 103(1):** The JSC is composed of the Chief Justice, the President of the Court of Appeal, the Attorney General, and a member nominated by the legal profession.

LESOTHO

- Judicial appointments in Lesotho are governed by the **Constitution of Lesotho (1993)**.
- The relevant provisions are:
- **Chief Justice:**
- **Section 120(1):** "The Chief Justice shall be appointed by the King acting in accordance with the advice of the Prime Minister."
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- **Judges of the Court of Appeal and High Court:**
- **Section 120(2):** "Judges of the Court of Appeal and of the High Court shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission."
- **Judicial Service Commission (JSC):**
- **Section 132(1):** The JSC is chaired by the Chief Justice and includes the Attorney General, a representative of the legal profession, and others as specified by law.

NAMIBIA

- **The Constitution of the Republic of Namibia (1990)** provides for the judicial appointment process.
- The relevant provisions are:
- **Chief Justice:**
- **Article 82(1):** "The Chief Justice of Namibia shall be appointed by the President on the recommendation of the Judicial Service Commission."

- **Judges of the Supreme Court and High Court:**
- **Article 82(2):** "All other judges of the Supreme Court and the High Court shall be appointed by the President on the recommendation of the Judicial Service Commission."
- **Judicial Service Commission (JSC):**
- **Article 85** defines the JSC, which consists of the Chief Justice, a judge appointed by the President, the Attorney General, and two members from the legal profession nominated by the Law Society.

MOZAMBIQUE

- **President of the Supreme Court**
- The President of the Supreme Court is elected by the judges of the Supreme Court from among its members and appointed by the President of the Republic.

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- **RELEVANT PROVISION**
- **Article 223(1):** "The President of the Supreme Court shall be elected by the judges of the Supreme Court from among its members and appointed by the President of the Republic."

CONTINUED.....

- **Judges of the Supreme Court**
- Judges of the Supreme Court are appointed by the President of the Republic, from a list of candidates proposed by the **Higher Council of the Judiciary (Conselho Superior da Magistratura Judicial, CSMJ)**.

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- **RELEVANT PROVISION**

- **Article 224(1):** "The judges of the Supreme Court shall be appointed by the President of the Republic, from among persons proposed by the Higher Council of the Judiciary."

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- **Judges of Other Courts**
- -Judges of the lower courts (e.g., provincial courts, district courts) are appointed directly by the **Higher Council of the Judiciary (CSMJ)**, which is responsible for the management of judicial careers.

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- **RELEVANT PROVISION**
- **Article 227(1):** "The appointment, promotion, and transfer of judges of other courts, as well as the exercise of disciplinary powers over them, shall be the responsibility of the Higher Council of the Judiciary."
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- **Higher Council of the Judiciary (CSMJ)**
- -The CSMJ plays a central role in judicial appointments, promotions, and discipline. It is responsible for overseeing the career progression of judges and ensuring the independence of the judiciary.

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- **RELEVANT PROVISION**
- **Article 223(2):** "The Higher Council of the Judiciary is responsible for the appointment, promotion, transfer, and discipline of judges of the other courts."

OBSERVATIONS

- Evidently each country emphasizes a blend of executive involvement and judicial independence, with the Judicial Service Commission playing a significant role in recommending or advising on appointments. However, the President's powers and the need for parliamentary oversight vary among these nations.
- In Malawi, the role of the National Assembly in confirming the Chief Justice, adds a legislative check not seen in the other countries.

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- Across all countries, the JSC is vital in maintaining judicial independence, though its influence and composition vary slightly. In Namibia, the JSC has broader representation from the legal community.
- In Botswana, Lesotho, Namibia, the executive (President or King) appoints judges on the advice of the JSC, which is designed to provide independent recommendations.

THE LILONGWE PRONCIPLES AND GUIDELINES

- At its 2015 Annual Conference, the Southern African Chief Justices' Forum
- (SACJF), made a firm commitment towards improving both the institutional independence of judiciaries and the decisional independence of judges.
- The forum noted that one of the key processes which enhances judicial independence is the selection and appointment of judicial officers.

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- To that end it adopted a resolution to Establish an ad hoc team of Judicial Service Commissions from the region to work towards developing regional principles and guidelines on selection and appointment of judges in Africa to be presented to the SACJF for discussion.

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- *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe, 30 October 2018*
- *Research by the Democratic Governance and Rights Unit (DGRU) of the University of Cape Town, and also taking into account international and regional declarations and instruments relating to judicial appointments*

OVERRIDING PURPOSE AND OBJECTIVES

- The overriding purpose of the guiding principles and best practices is to safeguard the independence and integrity of the judiciary.
- The working group is cognisant that judicial independence is ensured through the integrity of the selection and appointment process along with security of tenure of judicial officers. This process also enhances public confidence and trust in the administration of justice.
- The implementation of the principles and guidelines will take place subject to national law.

THE PRINCIPLES AND GUIDELINES

- 1. *Transparency*
- Principle: *The principle of transparency should permeate every stage of the selection and appointment process.*
- Guideline: *Appropriate records of each stage of the process shall be kept by the selection and appointment authority and available to interested parties.*

2. Independence of selection and appointment authority

- Principle : *The selection and appointment authority should be independent and impartial.*
- Guideline: *The Chief Justice should represent the Judiciary on the selection and appointment authority.*

3. *Fairness*

- Principle : *The process for the selection and appointment of Judicial Officers shall be fair.*
- There should be fairness at all levels of the selection and appointment process including measures designed to guard against abuse of discretion, arbitrary interference, and unconscious bias. There should be substantively equal treatment of similarly placed candidates.

4. Appointment on merit

- Principle (iv): *Judicial appointees should exceed minimum standards of competency, diligence and ethics.*
- Principle (v): *Appointments of candidates should be made according to merit.*
- Appointments should primarily be made according to merit. There is an overarching need to ensure that judicial appointees exceed the minimum standards of competency, diligence and ethics through rigorous interviewing and vetting processes in order to ensure effective and just decision-making, and the integrity of the judiciary.

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- Meritorious appointments increase public confidence in the judiciary.
- Seniority on the bench may be a relevant criterion for the purpose of continuity and judicial promotion, but should not equate to automatic promotion.
- A candidate's professional performance may be a key component of assessment of eligibility for appointment or promotion.

5. Stakeholder engagement

- Principle (vi): *The appointment process should ensure stakeholder*
- *engagement at all relevant stages of the process.*
- In order to ensure the legitimacy and accountability of the process,
- meaningful engagement and participation from all relevant stakeholders
- should be sought at all applicable stages of the process.

6. CRITERIA

- Principle (vii): *Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that selection process.*
- Guideline: *In order to be appointable, judicial officers should, at a minimum:*
 - (a) *hold a recognised law degree;*
 - (b) *hold an appropriate level of post-qualification experience;*
 - (c) *be a fit and proper person;*

Continued.....

- *(d) be competent to perform the functions of a judicial officer;*
- *(e) possess good written and communication skills;*
- *(f) be able to diligently render a reasoned decision;*
- *(g) not have any criminal convictions, other than for minor offences;*
- *(h) not have any ongoing political affiliation after*
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- Principle (viii): *The judicial bench should reflect the diversity of society in all respects and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.*

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- The principles of fairness and transparency are reinforced by the publication of criteria for the selection of judicial officers.
- These criteria should be pre-set by the selection and appointment authority, advertised at the opening of the recruitment process, and should not be altered during the process, in line with the rule of law.
- Established criteria act as a guide to candidates and provide objective standards to bind the actions of the selection and appointment authority.

Minimum requirements

- Criteria should cover the minimum requirements candidates are expected to meet, and should include:
 - a) academic qualifications, including, at minimum, a recognised law degree;
 - b) a specified minimum level of post-qualification experience;
 - c) ethical (fit and proper) standards;

MINIMUM REQUIREMENTS CONT.....

- d) competence to perform the functions of a judicial officer including the appropriate personal skills, adequate cultural and legal knowledge, and analytical capabilities;
- e) good written and communication skills, and
- f) an ability to make reasoned decisions, and to do so diligently

7. Fit and Proper standards

- Candidates shall be fit and proper persons to hold judicial office. The fit and proper requirement shall take into account the ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics.
- It is guided by the requirements in the Bangalore Principles of Judicial Conduct.

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- Immediately following appointment, candidates shall divest themselves of all interests which may affect their ability to carry out their judicial duties.
- At a minimum, appointees shall not hold political office or have any active political affiliations or membership.
- Subject to domestic laws, candidates should not have any previous criminal convictions besides minor offences.

8. Diversity

- In appointing candidates, the selection and appointment authority should ensure that the judicial bench reflects society in all respects, and may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.

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- Appropriate grounds include:
- a) diversity of academic, personal, social, and professional background;
- b) gender;
- c) race;
- d) culture;

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- e) ethnicity;
- f) disability;
- g) geographical and regional representation;
- h) religion;
- i) language; and
- j) people who have worked with those groups and are thereby aware of specific issues or challenges experienced by the groups.

9. SHORTLISTING

- Principle (x): *The shortlisting of candidates shall be credible, fair, and transparent.*
- Guideline (1): *Objective criteria should be developed to guide the process for the shortlisting of appointable candidates.*
- Guideline (2): *These criteria should be agreed and publicised before the shortlisting process.*
- Guideline (3): *The body responsible for shortlisting should be made known to stakeholders and the candidates.*

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- The selection and appointment authority shall develop guidelines to enable it to create a shortlist of appointable candidates who meet the minimum criteria for the available positions.
- Shortlisting criteria, including how and by whom the shortlisting is done, shall be known prior to the sourcing of candidates.

- The selection and appointment authority should ensure that a sufficient number of applicants are shortlisted to ensure a meaningful appointment process.
- The selection and appointment authority may decide to make the names on the shortlist public.

10. Vetting and stakeholder engagement

- Principle (xi): *Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.*
- Post-shortlisting, prior to interviewing, candidates shall be vetted and stakeholder comments shall be actively encouraged. Where the selection and appointment authority does not undertake the vetting process it shall not abdicate its function, but shall have the final say on the weight to be attached to findings about the suitability of candidates.

Vetting continued.....

- Financial interests, criminal records, wealth declarations and reference checks shall be carried out to ensure veracity of disclosure.
- Vetting procedures shall be objective, factual and fair.

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- Stakeholder comment shall be encouraged as best practice. Comments shall be solicited from core groups, including the bar, academia, the judiciary and civil society. The shortlisted names should be made available to the general public.
- Anonymous comments on candidates' suitability may be entertained where the comments have some foundation taking into account the gravity of the complaint, the credibility of the source, and the reasons for confidentiality.

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- Candidates shall be made aware of adverse comments arising out of the vetting process and stakeholder comment. Candidates may be given the opportunity to respond appropriately at, or prior to, the interview stage.

11. Interviews and selection

- Principle (xii): *Interviews should be held for the selection of candidates for appointment to Judicial Office.*
- Guideline (1): *Interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to adverse comments made against the candidate.*

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- Guideline (2): *Records of interviews shall be made, kept, and available.*
- Best practice is that interviews are held for the selection of candidates.
- The interview process should ensure substantive equality in the treatment of candidates.

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- The interview may be supplemented by a written assessment.
- Questions which may be put to candidates should be agreed in advance by the members of the selection and appointment authority, taking into account the need for flexibility in assessing persons from different backgrounds.
- Substantively similar questions shall be put to each candidate. Questions should be relevant to measuring the competencies and attributes of the candidate against the criteria for the appointment.

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- The tone of the interview should be non-confrontational and ensure that candidates are treated with dignity and respect. However, the selection and appointment authority may engage in robust but respectful
- questioning in appropriate cases. Interview questions should not seek to serve alternative agendas or take candidates by surprise.

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- Candidates should have the opportunity to respond adequately to adverse comments during the interview. The selection and appointment authority should enable candidates to elect to answer certain personal questions in private or in public. Candidates should also be able to withdraw from the process.
- Records of the interview process shall be maintained by the selection and appointment authority, and made available.

12. Decision making

- Principle (xiii): *The final selection (decision) to recommend for appointment shall be fair, objective, and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.*
- After interviews, the decision-making process shall be fair, objective, and based on a weighing of the pre-set criteria.

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- Emerging best practice is for the development of a ranking and scoring process for assessing candidates. The selection and appointment authority is encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary as a whole.
- This creates substantive reasons for their recommendations

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- Members of the selection and appointment authority should attempt to reach consensus, and may resolve deadlock by vote as a final resort.
- Records of the decision-making process shall be kept by the selection and appointment authority.
- Subject to constitutional and national legislation, the selection and appointing authority may choose to make its recommendations public for transparency purposes.

13. Appointment

- Principle (xiv): *Formal appointment shall be made constitutionally and lawfully.*
- The appointment of judicial officers is made according to constitutional and national legislative provisions. Best practice is that this is made timeously.

14. Post appointment

- Principle (xv): *Provision shall be made for judicial officers to assume office timeously once appointed.*
- Guideline (1): *Appointed candidates shall assume office timeously, preferably within six months of appointment.*
- Guideline (2): *Appointees shall have adequate time to complete cases, close legal practices, and divest themselves of potential conflicts of interest.*
- Guideline (3): *Arrangements shall be made for appropriate induction to the appointment position and ongoing skill and legal development.*

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- Following appointment, the appointing authority and the judiciary should coordinate to ensure that the appointee assumes office within a reasonable time, allowing a maximum period of six months for the appointee to wrap up their practice, or finish judgments and to take appropriate steps to resign from conflicting interests.
- Furthermore, the judiciary is responsible for ensuring that appointees are appropriately inducted. A compulsory period of training immediately post appointment is best practice, and requirements for ongoing legal and skills development should be encouraged.

15. APPLICABILITY

- Guideline (1): *The principles underlying these guidelines should be followed in the appointment of all judicial officers*
- Guideline (2): *These guidelines should be applied as far as possible in the appointment of all judicial officers*

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- As far as practicable these principles and guidelines for appointment should be applied to all judicial appointments, including short-term acting and contractual appointments, subject to variations in the constitutional and legislative frameworks governing such appointments. It is acknowledged that in some jurisdictions the appointment of judges on contract remains an important supplement to the bench, and measures should be taken to ensure that such candidates are appointed through the same process as permanent appointees.

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- Where abridged appointment processes take place for the appointment of acting judges, the same principles of merit, fairness, transparency and rationality of the appointment shall apply.

CONCLUSION

- Undoubtedly, the process of appointment of judicial officers has a significant bearing on the institutional independence of the judiciary and indeed, that of individual judicial officers in making judicial determinations and decisions.
- The Lilongwe principles and guidelines on the selection and appointment of judicial officers are a significant initiative and milestone by SEACJF in the quest to strengthen the integrity of the processes of judicial appointments and independence

- Are the processes in the various member jurisdictions in tandem with the principles and guidelines?
- It remains up to a member jurisdictions to embrace or domesticate the principles and guidelines in so far a local circumstance permit



•THANK YOU.....ASANTE SANA