

Judicial Exits: The Tenure of Judges in Three Apex Courts

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I Introduction

Judicial tenure is an important facet of judicial independence and a key principle underpinning the rule of law. Robust provisions for tenure allow judges the freedom to decide cases according to law, without fearing reprisal through demotion or dismissal, or anticipating favour through promotion or reappointment by executive government. It has not always been so. In 17th century England, judges were commonly transferred or dismissed after deciding cases in a manner that displeased the monarch who appointed them. Since then, systems of government have evolved to give much greater protection to judicial officers by enshrining principles of tenure in law and practice, although the evolutionary process has been uneven and some countries have a chequered history of judicial independence.

Tenure is not a binary concept that either does or does not exist. Provisions relating to tenure can be crafted in diverse ways that support a greater or lesser degree of independence. This chapter examines three modes of judicial exit, namely: death, attaining a mandatory retirement age, and reaching the end of a fixed term appointment. These correspond to three models of tenure that are here called *life limits*, *age limits* and *term limits*. This chapter examines constitutional models of judicial tenure by investigating three apex courts that exemplify disparate practices – the Supreme Court of the United States in the case of life limits (the Supreme Court); the High Court of Australia in the case of age limits (the High Court); and the Constitutional Court of South Africa in the case of term limits (the Constitutional Court). A novel feature of this chapter is that it provides a comparative empirical assessment of the tenure practices of the selected courts by examining changes over time in the judges' age at appointment, age at termination and length of service.

An examination of models of judicial tenure is timely because there appears to be dissatisfaction with historical models and growing divergence in contemporary constitutional practice. While the importance of judicial independence has not diminished, the social context in which independence is to be protected has altered, necessitating a reappraisal of available tenure options.

* This chapter is based on an article published in (2015) 35 *Oxford Journal of Legal Studies* 627, where the topic is addressed in greater depth.

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