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UNDP: JUDICIAL INTEGRITY NETWORK IN ASEAN

SYSTEMS OF JUDICIAL SUPERVISION AND JUDICIAL APPOINTMENT

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SUPERVISION

The notion of having public servants or others outside the judiciary evaluating the performance of appointed judges would be bound to attract huge opposition in most common law countries. Traditionally, since the 'Glorious Revolution' in England's superior court judges hold their offices during 'good behaviour: they are only subject to discipline or removal by Parliament on the basis of 'proved incapacity or misconduct. This limitation is seen as for the protection of the citizens and only incidentally for the judges themselves. They are not employees. It is deliberately very difficult to discipline them and nearly impossible to remove them.

2. In part this is for historical reasons. On the whole (with relatively few exceptions) people who are appointed judges in this tradition may have had

[**] Former Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of Solomon Islands (1995-6); President of the Court of Appeal of NSW (1984-96); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-83); Deputy President of the Australian Conciliation and Arbitration Commission (1975-84). One time President of the International Commission of Jurists (1995-8) and Co-Chair of the International Bar Association Human Rights Institute (2017-).

their faults. But they were not faults in the performance of duties. The appointing authority (ordinarily the Attorney-General or like Minister) generally knew those who had appointed judges would be excoriated if someone was appointed who did not have the ability and integrity to discharge the functions of office. The complaints about judges was rarely about their competence, ability, diligence and talent. Rather, it was of their predilections, inclinations on the conservative/progressive spectrum; and empathy or hostility towards politicians whose causes came before the courts.

3. It is important to recognise that there is a very significant difference in the way judges are recruited and appointed in common law countries, at least for the highest courts. In civil law countries judges enter a professional service organised by the government. They do so generally soon after university graduation (or even before). They are part of the government employment service. They are recruited as government employees usually are, including in common law countries. They are promoted, usually on the basis of evaluation of their work performance. This includes evaluation of their work capacity and devotion, including throughput. But it also includes scrutiny of their decision-making and where it is out of line with that of colleagues. There is less tolerance of diversity of judicial opinion, values and aspirations in civil law countries than in common law countries. This is connected with the facility of judicial dissent available to judges in multi-member higher courts in the common law. Dissent is not normally permitted in civil law countries. When one speaks to judges from civil law jurisdictions, they normally dispute the right of dissent and do not seek it. They feel it

aggrandises the role of the individual judge who should be an anonymous "bouche de la loi" (mouth of the law). [1]

4. In the years since the *Charter* of the United Nations and the development of universal human rights, more civil law countries have adopted a right of dissent. After 1945, Germany and Japan provided for this in their highest courts on the insistence on the victorious Allies. The human rights courts of global regions commonly recognise the need for a facility for dissent by reason of their functions. But otherwise civil law countries generally adhere to rejection of dissent and opposition to dissent as a judicial quality worth respect.

5. An extreme example of this attitude is shown in the recent law of the French Republic governing the publication of algorithms that might be used to predict the judicial outcomes of individual judges by reference to analysis of their earlier decisions. Attempting this kind of analysis is now a serious crime in France and carries penal consequences. In most common law countries, it is not regarded as inappropriate or impermissible at all. Scalograms on outcomes of the US Supreme Court decisions have been available for decades, including in the work of Professor Glendon Schubert and other authors. Because in France, the civil law likes to believe that all legal/judicial questions can have but one lawful and legitimate answer, the notion that empirical evidence could demonstrate the contrary has to be firmly hit on the head.

[1] J. McGill and A. Salyzyn, "Judging by Numbers: How will Judicial Analysis Impact the Justice System and its Stakeholders?" (2021) 44:1 Dalhousie LJ (forthcoming). The French law is LOI no. 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice, article 33.

6. So far as I know, not a single country of the common law tradition has switched to outlawing dissent. South African introduced the civilian principle of term appointments for judges of the Constitutional Court rather than service to a certain age (62, 65, 70 or otherwise). But it did not move to introduce an obligation of unanimity or a prohibition on dissent. By the same token, few civil law national courts have introduced the acknowledgment of dissent.

7. The contemporary availability of computer analysis of judicial outcomes, including by algorithms presents a quandary both to the civil law and common law systems. On the one hand it demonstrates to civil law systems that judges are human beings and not automatons. In the diverse and complex issues arising (especially in final courts of appeal) they are virtually bound, to reach diverse and different outcomes by reason of different approaches to jurisprudence, interpretation and legal values. According to the common law judiciary, these should be openly revealed and justified or explained and not hidden and repressed. On the other hand, if and when computer analysis and algorithms demonstrate that a validly appointed, honest and hard-working judge is completely out of harmony with his or her colleagues, what is then to be done? Is the diversity simply to be tolerated or accepted as a feature of judicial independence? Or is it to be regarded as unacceptable and an injurious burden on citizens whose cases "draw" such minority judges. The extreme case may demonstrate a need for some form of monitoring, scrutiny, judicial education, or institutional response. This is an awkward question for any legal and judicial system that prizes judicial independence, to tackle.

APPOINTMENT

8. There is no doubt that time appears to be on the side of the creation of Judicial Appointments Commissions for the purpose of selecting newly appointed judges, even those appointed to the highest ("final") court of a country. In this respect, time does not appear to be on the side of the traditional rule that left it to a political official (the Attorney-General) to nominate (and effectively appoint) judges for high judicial posts, without consultation with, let alone approval of a legislative committee or appointments commission.

9. Most countries of the Commonwealth of Nations have now moved away from the traditional system that was followed in the British Empire. To some extent this shift has come about through recognition of the fact (demonstrated by judicial dissent and now by political and other analysis and algorithms) that values as well as technical skills are important in the selection and appointment of judges. Especially is this so where the judges concerned are selected to serve in the highest (final) national court.

10. Nevertheless, there are dangers in the interposition of judicial appointments commissions. A significant danger is that they will remove the inbuilt values of political selection that follows, over time, from the changing course of political governance in most democratic countries. That changing course has resulted in changes in values that inform judicial appointments, reflected along the conservative/progressive spectrum. The expectation would be that, say, politicians of left leaning political parties might appoint more progressive/reformist judges whilst conservative parties might appoint judges of a more formalistic, self/satisfied perspective who do not generally

favour reform or change in the law. Once appointed the judge is untouchable. Government cannot dismiss them because of their decisions. They enjoy tenure. If scalograms and algorithms demonstrate the existence of judges of particular dispositions, the challenge is presented (once political appointment is removed) of ensuring that political appointments, over time, should reflect reverse inclinations. The appointment of judges essentially on the estimation of other judges has the disadvantage of building into the appointments process the tendency towards conservatism and the "old boys' network". How can a factor that injects a desirable evolutionary consideration of change be introduced?

11. No system is perfect for this purpose. President Eisenhower admitted to only two mistakes in his service as President of the United States. He added "both of them [inferentially Warren CJ and Brennan J] are on the Supreme Court". The same has also been true with judicial appointments in Australia. Some Justices appointed to the High Court of Australia (the final court) on the recommendation of Labor governments have turned out to be conservative in legal values and technique (Justice M.H. McHugh). Others appointed by Coalition governments have proved not conservative at all but progressive and dynamic (Justice W.P. Deane). Similar stories exist in many jurisdictions. The law is already generally a hierarchical, traditional, ceremonial and patriarchal institution. To introduce a committee system that reflects these characters without allowing for Charles Darwin's "rule of variation" (as explained in *The Origin of Species*) will remove a desirable evolutionary characteristic that the political selection was designed to inject.

12. Creating a Judicial Appointments Commission which includes notable citizens and distinguished personalities sounds as if it will be a solution to this problem. However, there are a number of reasons why it may not be so. If the appointed personages are lawyers or former judges, there will be strong inclination for them to defer to currently serving judges on the appointing body. Many lay citizens do not understand and may not sympathise with the crucial role of variation in judicial performance. Most lay observers believe that the law is ultimately certain; insusceptible to varied outcomes; and better that it should remain so. This may not be in the best interests of the development of law as a discipline and in the operation of the judiciary as a constitutional and social institution.

13. In some national jurisdictions, such as Australia, significant constitutional problems might arise if an attempt were made to substitute judicial appointment by a Judicial Appointments Commission other than the elected minister, formally constituted as a member of the Federal Executive Council. On the other hand, a number of features could be copied without embracing either of the Indian solutions (of a judicial 'Collegium' reflecting the "old boys' network) or the highly politicised system that has emerged in the United States of America from the power of the Federal Senate Judiciary Committee to "advise and consent" upon nominations by the elected president of the day.

CONCLUSIONS

14. Recognising the desirability of increasing the transparency of judicial appointment, I would be prepared to accept a Judicial Appointments Commission to take the place of purely political appointment. I do not believe

that political system has been often abused, at least in the United Kingdom, Canada, Australia, New Zealand or other countries where it survives. The innovation of advertisements calling for applications for consideration is desirable in the case of judicial appointments, including to the highest courts. On the other hand, it must be recognised that some leading counsel would never apply for a judicial post. But they might accept it if invited. In earlier times, such invitation was a badge of honour. Nowadays, many invitees prefer the freedom offered by paid professional service as an advocate to the duty of long-time judicial service.

15. In short, I am not convinced for the need for supervision of serving judges in the highest courts, save for supervision that already exists in the submission of their opinions, procedures, conduct, diligence and quality of work to appellate processes and academic, media, public and political scrutiny.

16. In terms of appointment, I acknowledge the arguments to replace political nomination by a multi-member commission. However, such a commission, where constitutionally permissible, should be constituted of mixed members who, by their experience, knowledge and personality will not replace the political opponent of variation with an “old boys’ network” where nominated laymen are overawed or outnumbered by judicial selectors. Their tendency to choose persons with values and attitudes just like their own needs to be resisted if the judiciary of the future is to be as robust, independent and properly creative as the best judiciaries of the past.