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REPORT

"JUDICIAL SELF GOVERNMENT"

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The idea of judicial self-government is rooted in the notion of separation of powers which Mr. Gstoehl spoke about yesterday. He described the intention behind the scheme of separation of powers elaborated in the *Federalist Papers* as being primarily to prevent an over concentration of power in one institution of State. Thus was conceived the idea that the three branches of State power, the legislative, executive and judicial, each have the exclusive power within their own domains. But it was also part of the concept of the separation of that the three branches were interlocking and to a degree exercised supervision or control over each other. For example, in the United States Constitution the executive power is given to the President and the Government, but in relation to the exercise of certain powers there is a need for the legislature to give their advice and consent. Similarly, the legislative power which is conferred on Congress is subject to an executive veto and also to judicial review by the courts for constitutionality. And while judicial power is vested in the judges the power of appointment of judges depends on a nomination from the executive and an approval from the legislature. Powers of impeachment and removal of judges and executive officers again involve carefully balanced distribution of powers between the different branches of Government. The whole intention behind this scheme is, of course, to ensure that no one individual or branch of Government dominates to the exclusion of the others.

The primary purpose of judicial self-government is to protect the independence of the judiciary. Why is there a need for judicial independence? Apart from the need to protect the effective separation of powers by preventing improper interference from the other branches of Government with the exercise of judicial functions, the primary purpose must be to ensure a fair and impartial administration of justice. While at the level of the individual case there is no guarantee that any particular judge will get the decision right, it is clear that in the overall result of having justice administered by judges who have no interest in or partiality towards either of the parties will produce a fairer and better system of justice. Of course, judicial independence is no guarantee against a judge getting it wrong, and for that reason a functioning judicial system needs an effective system of appeals. It is important to recall that one cannot have a truly independent judiciary without affording them the liberty to get decisions wrong from time to time and this is part of the price we pay for an independent judiciary. For this reason it is important that there be restraint in criticism of judicial decisions, in particular from members of the executive and the legislature. Of course, this ought not to prevent temperately expressed and reasonable criticism of the rationale of judicial decisions. What is important is that criticism is not used to undermine the judiciary as an institution or to destroy respect for the individual judge.

How should we go about protecting judicial independence? A statement at the constitutional level recognising the independence of judges is usual and is important. However, this in itself is not enough. There are many ways in which a judiciary which is formally declared to be independent can nonetheless be subservient to outside interests in practice. Ways in which independence can be undermined can include the following

- Inappropriate systems of appointment which permit the appointment of unsuitable persons, in particular persons who may be thought likely to favour a particular point of view or a particular interest in society.
- Systems of promotion which may encourage judges to curry favour with persons they see as having power to promote them.
- Threats of dismissal which may be calculated to persuade judges to decide cases in a particular manner.
- Control over pay and conditions of the judges.
- Control over the allocation of resources.

It needs to be borne in mind that judicial independence has two facets. Firstly, there is the need for independence of the judiciary as a whole. Secondly, it is essential that the independence of the individual judge who decides the particular case is recognised. In this regard it needs to be recognized that a threat to the independence of the individual can come from fellow judges or from judicial intuitions. This risk is recognised in the Bangalore principles. [1]

The idea of a judicial council is principally to protect judicial independence by countering a number of the threats to that independence already referred to, primarily by exercising a role in relation to appointments, promotions, dismissals and discipline. At its meeting in Venice on 16 and 17 March 2007 the Venice Commission adopted a report on judicial appointments in which they discussed the role of a judicial council in the appointments procedure.

The Venice Commission's report referred to opinion no 1(2001) of the CCEJ

> "Every decision relating to a judges appointment or career should be based on objective criteria and be either taken by an independent authority or be subject to guarantees to ensure that it is not taken other than on the basis of such criteria."

The report also referred to the European Charter on the statute for judges adopted in Strasburg in July 1998 (DAG/DOC(98)23) which states

> "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

There is no single model for judicial councils. The Venice Commission have expressed the opinion that

> "A judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available[2]."

The Venice Commission has taken the view that while the participation of a judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice

> "An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self governing. The management of the administrate or organisation of the judiciary should not necessarily be entirely in the hands of judges." [3]

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[1] Principle 1.4 states as follows: "In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently."

[2] Opinion of the Venice Commission on judicial appointments (CDL-AD (2000) 028 adopted 16 to 17 March 2007 at paragraph 25.

[3] Ibid paragraph 26

Notwithstanding this opinion of the Venice Commission, however, there is no doubt that control over allocation of resources can be a tool for interfering with the independence of judges. I have been aware on more than one occasion when taking part in missions abroad of complaints from judges that matters as to whether a courtroom is painted or not or whether adequate furniture or heating or lighting are provided can be used as a form of reward for judges or as a means of punishing judges who are disapproved of. Furthermore, judges' who are not adequately remunerated maybe prone to accept bribes. It is therefore important to ensure that if such administrative decisions are left in the hands of the executive that they are safeguards to prevent their abuse or to allow them to be used as a means of putting pressure on judges to reach any particular decisions.

With regard to the composition of judicial councils, the European Charter on the statute for judges already referred to above envisages that at least half of the members of a judicial council should be judges elected by their peers. In the opinion of the Venice Commission is that a substantial element or a majority of the members of the judicial council should be elected by the judiciary itself. [4]

There are judicial councils which consists solely of judges. However, there are some advantages in providing for other representation as well as those of judges. In the opinion of the Venice Commission

> "In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by parliament." [5]

A possible disadvantage in judicial councils consisting solely of judges is that the judiciary may be seen as both insulated and isolated from society as a whole and there may be a risk of the judiciary becoming, or at least being seen as, a self appointing elite.

However, where there is a parliamentary component in a judicial council the Venice Commission has taken the view that its members should not be active members of parliament. In order to avoid over politicisation of any parliamentary component the Venice Commission has also advocated that there should be a qualified majority for the election of any parliamentary component in the judicial council.[6]

With regard to discipline, the report of the Venice Commission saw certain drawbacks in allowing a judicial council to act directly in relation to disciplinary matters. They identified the risk that disciplinary procedures against judges might not be carried out effectively by a body consisting entirely or manly of judges which might be marred by undue peer restraint. For this reason it is common for disciplinary functions to be carried out by a subsidiary body. It is, of course necessary that there should be an appeal to a court of law against any decision of a disciplinary body. The need to avoid the "negative effects of corporatism within the judiciary" provides a further reason to have a non-judicial component within judicial councils. [7]

[4] Ibid paragraph 29

[5] Ibid paragraph 31

[6] Ibid paragraph 32

[7] Ibid paragraph 27

A related problem relates to temporary judges. The European Charter on the statute of judges has described the existence of probationary periods or renewal requirements as presenting difficulties if not dangers from the angle of the independence and impartiality of the judge in question. The universal declaration on the independence of justice, adopted in Montreal in June 1983 by the world conference on the independence of justice goes further in stating

> "the appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually."[8]

However, while the Venice Commission considers that setting probationary periods can undermine the independence of judges, they do not exclude all possibilities for establishing temporary judges. In particular they refer to countries with relatively new judicial systems where there might be a practical need to ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. For this reason the Venice Commission expressed the view that if probationary appointments are considered indispensable

> "a refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office." [9]

Finally, the question of budgets for the judiciary is an important one. Obviously financial pressures and inducements can be used to undermine the independence of the judiciary. It is a common provision in constitutions to prohibit the reduction of a judge's salary during his or her term in office. While the allocation of resources is generally regarded as a matter to be decided by the directly elected house of parliament, which also retains control over taxation, it is clearly desirable that the budget for a judiciary should be separate from other budgetary items so that at least there is a transparency and accountability in relation to any decisions pertaining to the budget. It is also desirable that some mechanism be found whereby the judiciary themselves can make representations to those authorities who are responsible for preparing budgets prior to parliamentary approval. This is a function which could be performed by judicial councils, or alternatively by senior judges such as the presidents of courts.

Conclusion

An independent judiciary is a vital component in securing both a proper balance of power between the different elements of State power and ensuring justice and fairness of judicial procedures. There are many possible threats to the independence of judges even in systems which on paper guarantee that independence. A judicial council can provide a vital role in ensuring that decisions relating to appointment, dismissal, promotion and discipline of judges are based on objective criteria rather than used as possible a mechanism whereby persons from outside the judiciary can exert undue pressure on judges. There is no one single model for a judicial council and what is appropriate may vary from one society to another. However, the Venice Commission's report on judicial appointments has identified certain minimum criteria in relation to judicial councils which should be met in order to guarantee their effectiveness in serving as watchdogs of basic democratic principles and protecting the autonomy and independence of the judiciary.

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[8] Ibid quoted in paragraph 39

[9] Ibid paragraph 41