JUDICIAL INDEPENDENCE AND THE SELECTION OF SUPREME COURT AND CONSTITUTIONAL COURT JUDGES: THE EXPERIENCE IN EAST AND SOUTHEAST ASIA

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ABSTRACT

Supreme courts, as the seat of the judiciary, and constitutional courts, in jurisdictions with specialized constitutional review mechanisms, play an important role in modern democracy. Their independence from the other branches of the government is crucial in maintaining the balance of powers among the different branches. The manner of their appointment is one important factor in assessing their independence, especially against the branches of government with the selecting and appointing power. While there is no settled standard as to how judges and justices of supreme courts and constitutional courts should be appointed, there are various mechanisms that are practiced, each with its own noteworthy advantages and disadvantages. This article explores the concept of judicial independence in East and Southeast Asia in the context of how judges and justices of supreme courts and constitutional courts are appointed. It will discuss the formal mechanisms of judicial appointment and explore how they are utilized by East and Southeast Asian nations - as reflected primarily in their constitutions and, in some instances, in statutory laws which govern the judicial organization of the state.

I. JUDICIAL SELECTION AND JUDICIAL INDEPENDENCE

Separation of power is a cornerstone of modern democracy. The three branches of government – the executive, legislative, and judiciary – have powers and responsibilities distinct from each other and it is generally not permissible for one branch to interfere in another branch's sphere of control. The introduction of the power of judicial review and the concept of judicial

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supremacy in western societies in the 18th and 19th centuries, consistent with eminent political theories prevalent at that time, gave rise to the conception of the judiciary as a significant social institution vested with an important constitutional role.[1] Currently, it is globally recognized that the judiciary, as an institution, is an essential pillar of liberty and rule of law in every democratic society.[2] And for the judiciary to properly perform this role, it is imperative to provide judicial independence by protecting judges and the court system from legislative, executive, and even popular sentiments.[3]

There is no universally accepted definition of judicial independence. Various countries have differing notions - depending on political, social, economic, historical, and other perspectives - of what constitutes independence and to what degree must the judiciary be separated from external partisan forces. Landes and Posner define an independent judiciary as "one that does not make decisions on the basis of the sorts of political factors … that would influence and in most cases control the decision were to be made by a legislative body."[4] Other definitions offered include:

> Judicial independence can be defined as the ability of the individual judges and the judiciary as a whole to perform their duties free of influence or control by other actors.[5]
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> Judicial independence … encompasses the idea that the individual judges and the judicial branch as a whole should work free of ideological influences. [It is] broken down … into two distinct concepts: decisional independence and institutional, or branch, independence. Decisional independence refers to a judge's ability to render decisions free from political or popular influence based solely on the individual facts and applicable law. Institutional independence describes the separation of the judicial branch from the executive and legislative branches of the government.[6]
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> [A] person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that

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[1] Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CHI. J. INT'L L. 275, 275-277 (2009).

[2] Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L.REV. 579, 592 (2005).

[3] Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW L.J. 31, 34 (1986).

[4] William Landes and Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, J.L. & ECON, 18(3), fn 1, (1975).

[5] Mia Stewart, *Independence of the Judiciary* in Max Planck Encyclopedia of Comparative Constitutional Law, *available at* https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339.

[6] Joseph M. Hood, *Judicial Independence*, 23 J NAT'L ASS'N ADMIN L. JUDGES 137, 138 (2003).

> a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishment or rewards.[7]
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> [The] relation between an actor A that delegates authority to an actor B, where the latter is more or less independent of the former depending on how many controls A retains over B. [Specifically] the relation between the elected branches of (A) that delegate authority to judges and/or the judiciary (B).[8]

There is, nonetheless, a central theme to be noted amongst the many definitions proposed for judicial independence in the context of separation of powers - that courts must be insulated from mechanisms of executive or legislative control or undue influence that could undermine their judgments.

Judicial independence is often related to judicial impartiality. Judges and justices are required to decide on matters solely based on the facts and in strict accordance with the law. The ability of the judiciary to adjudicate without any improper influences, inducements, pressures, threats, or interferences is inimical to most legal systems.[9] A judiciary that is dependent on the other branches of the government, the parties, or interest groups will not be expected to create an impartial decision. But while related, impartiality and independence are still distinct concepts, as observed by the Supreme Court of Canada in *Valente v. The Queen*:[10]

> The concepts of "independence" and "impartiality" […], although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

In the perspective of international human rights law, one's right to an effective remedy requires that he be heard by an independent and impartial

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[7] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 (Issues 2 & 3) S. CAL. L. REV. 353, 355 (1999).

[8] Julio Ríos-Figueroa, *Judicial Independence and Corruption An Analysis on Latin America*, 4-5 (2006), *available at* https://ssrn.com/abstract=912924.

[9] See United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), para 2. See also, the Bangalore Principle of Judicial Conduct.

[10] [1985] 2 SCR 673.

tribunal.[11] The United Nations (UN) Special Rapporteur on the independence of judges and lawyers opines that "the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom."[12] While there is also no precise definition of what constitutes independence of the judiciary in any international treaties, conventions, or agreements, the UN Human Rights Committee (HRC) posits that the notion of an independent and impartial tribunal is absent in situations where the functions and competences of the judiciary and the branches of the government are not clearly distinguishable or where the latter is able to control or direct the former.[13] It further notes the following matters in assessing judicial independence: the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer, and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.[14]

A similar provision which guarantees the right to an independent tribunal is found in the European Convention of Human Rights.[15] The European Court of Human Rights provides the following factors in determining whether a judicial body can be considered to be independent, especially from the executive: the manner of appointment of its members and the duration of their term of office; the existence of guarantees against outside pressures; and the question whether the body presents an appearance of independence.[16] Also, the Inter-American Court of Human Rights had previously held that "the

[11] These provisions include Article 10 of the Universal Declaration of Human Rights, which states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal"' Article 14 of the International Covenant on Civil and Political Rights, which guarantees the right to "be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[12] UNCHR, Report of Special Rapporteur Param Cumaraswamy, *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, (1995) UN Doc. E/CN.4/1995/39, 12.

[13] *Ol Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991 (1993). See also *Fei v. Colombia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995).

[14] UN HRC, CCPR General Comment No. 13: Article 14 (Administration of Justice), para 3.

[15] European Convention of Human Rights, art. 6, provides that "everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law."

[16] *Campbell and Fell v. The United Kingdom*, (1985) 7 EHHR 165, [1984] ECHR 8, 7 EHHR 165, (1985) 7 EHRR 165.

independence of any judge presumes that there is an appropriate appointment process, a fixed term in position and a guarantee against external pressure."[17]

The manner and integrity of the judicial selection and appointment process is therefore recognized as a major factor in achieving and maintaining the independence of individual judges and the judiciary as an institution. The legitimacy of this independence can be viewed as contingent upon the selection and appointment process of judges and justices. The appointment and selection procedure must thus ensure that only those who are the most capable are given a seat in the judiciary and that they are thereafter insulated from any external or political pressures, control, and influence. Mechanisms that perpetuate a system where judges and justices are dependent on the person or authority which appointed them or owes them some gratitude that affects their decision-making must be avoided. Judges and justices that are borne from these mechanisms may not be trusted to adjudicate with neutrality and impartiality, especially on matters where the appointing authority himself is a party to a case or where his actions or policies are assailed or challenged.

Particularly important in this discussion is the manner of selection and appointment of the judges and justices of superior courts or courts of last resort. In countries with a decentralized constitutional review system, this power is vested in the supreme court.[18] In countries with centralized constitutional review, there exist independent constitutional courts which exercise final jurisdiction over constitutional matters and whose decisions are unappealable even to the supreme court.[19] Justices or judges of these superior courts, both supreme courts and constitutional courts, exercise significant authority in every democratic institution. As the final arbiter of judicial and/or constitutional matters, they serve as the ultimate check to restrain and prevent excessive and indiscriminate use of power of the legislative and executive. Because of their position in the judicial hierarchy, they more often face controversial questions, usually of political matters, and can influence or even create, reverse, or modify laws. Thus, it has been suggested that the mechanism

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[17] Inter-American Court of Human Rights, *Case of the Constitutional Court v. Peru*, [1999] IACHR 8. See also, Inter-American Commission for Human Rights, *Guarantees for the Independence of Justice Operators*, OEA/Ser,L/V/II. Doc. 44, 5 December 2013, 25.

[18] For consistency, the term supreme court will be used throughout this article to refer to the highest judicial body of the State, regardless of the nomenclature used by the State in its constitution and statutory laws, *e.g.*, for Taiwan, this paper will cover the Judicial Yuan, and not the Supreme Court, which is merely under the authority of the Judicial Yuan.

[19] For consistency, the term constitutional court will be used to refer to judicial institutions that carry out constitutional review independently of supreme courts, regardless of how they are called, *e.g.*, in Cambodia, it is called the Constitutional Council; in Myanmar, the Constitutional Tribunal.

of appointment for superior courts must be specifically tailored because of their nature.[20] Malleson and Russell explained:

> [I]t is precisely at [the highest ranks of the judiciary] that the highest caliber of judges is needed, and great damage will be done to the legal system if the selection of candidates on the basis of partisan political affiliation rather than skills and ability undermines the quality of the bench. The challenge that all appointment processes for top review courts face is to ensure that the democratic legitimacy of the judiciary is maintained without introducing a form of politicisation that reduces the quality of judges appointed and transforms judges into politicians in wigs.[21]

But while the issue is of significance, especially in the age of rising dictatorial tendencies among leaders of democratic nations, there remains a lack of consensus as to what may be considered as the best selection and appointment mechanism to ensure the independence of superior courts. While some general principles attend to the discussion, no universally-accepted practice is recognized. There are also no binding international agreements or treaties that govern this topic. States are given a wide margin of appreciation in this endeavor, evident in the variety of systems practiced across the globe. The practices vary and depend on, among others, the type of government and legal system, the democratic values of a particular nation, or other non-legal or non-political context, such as history and culture.[22] The diversity of practice considered, several concerns have been raised, especially in recent history, with regard to how the appointment process had been severely politicized and used to advance political motive or to ensure that the composition of courts is drawn along an ideological line that favors the appointing authority. The failed attempt of Franklin Roosevelt in 1937 to pack the Supreme Court of the United States of justices that would uphold his New Deal legislation[23] or the appointments made by the National Party government during the South African apartheid[24] illustrate how, in the past, the appointment mechanism could have been and had been taken advantage of to advance political and partisan agenda by undermining the independence of the judiciary.

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[20] Dmitry Bam, *Tailored Judicial Selection*, 39 U. ARK. LITTLE ROCK L. REV. 521, 522-523 (2017).

[21] Kate Malleson and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, (University of Toronto Press, 2006), at 6.

[22] Resnik, supra note 2, at 600.

[23] William E. Leuchtenburg, *When Franklin Roosevelt Clashed With the Supreme Court—and Lost* (Smithsonian Magazine, May 2005), *available at* https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

[24] Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa*, The Centre for the Study of Violence and Reconciliation (2007), *available at* http://www.csvr.org.za/docs/transition/3.pdf.

"[N]o single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection."[25] But most of these papers deal with theoretical or comparative analysis of systems practiced in American and European nations. There is little that deals with the appointment and selection process in Asia. This leaves a significant gap in the literature considering the number of countries and the diversity of legal and political systems that exist in the continent.

This paper does not attempt to discuss all the previous discourses related to the process of judicial selection and appointment. While the salient arguments in support and in opposition of the different methods will be reviewed, this paper primarily aims to provide a brief comparative review of the constitutional provisions and special laws of East and Southeast Asian countries related to the selection and appointment of supreme court and constitutional court judges and justices - primarily, the members of the Association of Southeast Asian Nations, South Korea, Japan, Mongolia, and Taiwan, although other nations and specialized administrative regions, such as China, Hong Kong, and Timor Leste, are also referred to. This paper excludes judges and justices with no adjudicatory powers and those who sit in military and religious tribunals.[26] Further, a topical, instead of a per-country, approach is used. The different practices will be examined generally and subsequently in the context of how they are established and utilized in the East and Southeast Asian regions. In Part II, the paper will discuss the relevance of prescribing standards of eligibility as a preliminary safeguard mechanism in ensuring the integrity and independence of the appointment process. Part III will elaborate on the various formal mechanisms for the selection and appointment of judges and justices of superior courts, in relation to whom the appointive power is granted. In Part IV, the unique system of judicial election will be discussed.

II. QUALIFICATIONS AND ELIGIBILITY

A merit-based judicial selection process based on objective criteria is inimical in maintaining the independence and impartiality of the courts. "Appointments should be made on the basis of evidence demonstrating that the appointee possesses the various qualities that together constitutes merit."[27]

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[25] Dubois, supra note 3, at 31.

[26] Thus, the justice of the Supreme Court of South Korea who is designated as the Minister of Court Administration is not included.

[27] Simon Evans and John Williams, *Appointing Australian Judges: A New Model*, 30 (2) SIDNEY L.REV. 295, 299 (2008). They define merit as 'legal excellence, a demonstrated capacity for industry and a

The United Nations Basic Principles on the Independence of the Judiciary require that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law" and that the "method of judicial selection shall safeguard against judicial appointments for improper motives."[28] To guarantee that the judiciary is free from political interference or pressure, it is thus critical that the appointment should be on merits and be made "carefully limited to those who possess the necessary temperament, character, capabilities, and credentials."[29]

Details of judicial qualifications vary per jurisdiction. They cover general and specific requirements, but there is no prescribed formula as to how they are weighed. In some instances, the criteria are no more detailed like that in Indonesia's constitution, while the list of qualifications is long in others, as is the case in Myanmar. Objective and specific selection criteria are preferred and required,[30] although it is not uncommon for constitutions and even special laws to include general and subjective criteria, such as requirements of integrity, morality, and good character.[31] This paper will, however, be limited to the former criteria - objective standards that are precise and easily quantified or qualified – and which is further categorized into professional and personal requirements.

A. *Source of Criteria*

The source of the criteria for appointment and of the appointment process itself is an important factor in safeguarding the judiciary from legislative and executive interference. Regulating the judicial appointment process through ordinary legislation, it is argued, runs the risk of being constantly modified by

temperament suited for the performance of judicial functions,' *citing* Philip Ruddock, *Selection and Appointment of Judges*, (Speech delivered at the University of Sidney, 2 May 2005).

[28] UN Basic Principles, sec 10.

[29] American Bar Association, Commission on the 21st Century Judiciary, *Justice In Jeopardy*, 12 (2003).

[30] The UN HRC suggests that the lack of objective criteria governing the appointment and removal of judges, including Supreme Court justices, may undermine the independence of the judiciary. See UN HRC, *Concluding Observations of the Human Rights Committee on Paraguay*, UN Document CCPR/C/PRY/CO/2, para 17. The Venice Commission also opined that although it is essential that a judge have a sense of justice and fairness, these criteria are difficult to assess. Thus, transparent procedures and a coherent practice are required when they are applied. See Study No. 494 / 2008, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para 26.

[31] See e.g. the Constitution of the Republic of Indonesia (Constitution of Indonesia), art 24A, which requires that justices of the Supreme Court "must possess integrity and a personality that is not dishonourable and shall be fair, professional, and possess legal experience." See, however, Resnik, supra note 2, at 598, arguing that this "level of generality [render] them minimally illuminating and constraining."

the legislature. If given the unfettered discretion to manipulate the judicial appointment process, the legislature can prescribe qualifications and establish a selection process that would fill the courts with judges and justices who are more likely to uphold their political agenda. Thus, the stronger position is to ensure that judicial selection issues are established and protected by the constitution.[32] Unlike an ordinary legislation which can be repealed by a mere vote of the legislature, constitutional amendment usually entails a more elaborate process and requires more than just simple legislative vote. In the Philippines, for instance, any amendment to the constitution must be ratified by a majority vote of the voting population in a national plebiscite.[33]

In Southeast Asia, majority of the States enumerate the eligibility requirement for superior courts in their constitutions, such as that in Malaysia, Myanmar, and the Philippines. The constitutions of Indonesia and Singapore likewise refer to some qualifications, but other qualifications may be provided and are provided by special laws.[34] In Thailand, the qualifications for the justices of the Constitutional Court are provided in the constitution, but not the Supreme Court.[35] In contrast, the qualifications for judges of the Supreme Court of Brunei are enumerated in Section 7(2) of the Supreme Court Act. In East Asia, the practice of incorporating the qualifications in the constitution is less common. Except for Mongolia, the qualifications for supreme court and constitutional court judgeship in East Asia are prescribed in special laws. For instance, in Japan, the qualifications are contained in Act No. 59 of April 16, 1947, or the Court Act, while in Taiwan, they are prescribed in the Judicial Yuan Organization Act.

B. *Professional Requirements*

The public expects the judges and justices of supreme and constitutional courts to be highly qualified and professionally competent. To assess competence and expertise, reference is usually made to the education, the practice of the candidate prior to the application, and the duration of such practice.

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[32] Shetreet, supra note 1, at 288.

[33] CONST., art XVII, sec 4.

[34] Constitution of the Republic of Singapore (Constitution of Singapore) art 96 provides that "[a] person is qualified for appointment as a Supreme Court Judge if he has for an aggregate period of not less than 10 years been a qualified person within the meaning of section 2 of the Legal Profession Act xxx or a member of the Singapore Legal Service, or both." The Legal Profession Act (SG) provides for the qualification as to who is deemed a "qualified person."

[35] Constitution of the Kingdom of Thailand (Constitution of Thailand) secs 201-202.

1. *Educational requirement*

A preliminary requirement among the countries reviewed is a degree in law or the authority to practice law in the country. This requirement is present in all superior courts in the region, except for some exceptions in the constitutional courts of Thailand and Cambodia. In Thailand, the ninth justice of its Constitutional Court is required to only have a degree in political science or public administration.[36] Meanwhile, in the Constitutional Council of Cambodia, members are selected from among dignitaries with a higher-education degree not just in law, but in administration, diplomacy, and economics as well.[37] Performance in school is generally not a requirement, but in Singapore, minimum standard of educational attainment, including the class of honours, may be prescribed.[38]

2. *Practice of law*

Experience in the legal profession is the most basic professional requirement for those who seek a seat in superior courts. Basically, judges and justices of superior courts "should come from the ranks of [the] most able and most talented lawyers."[39] There is no formal discrimination with regard to the categories of legal profession or how a candidate engaged in the practice of law. Judges, prosecutors, law professors, and those who engage in private practice have the same opportunity to be appointed or selected as judges or justices of superior courts.

Similar to educational requirement, the constitutional courts of Thailand and Cambodia provide for exceptions. In Thailand's Constitutional Court, non-lawyers may be appointed. Distinguished professors of political science or public administration and directors-general or heads of government agencies are allocated certain numbers of seats. Furthermore, for the seats allocated to those who practice law, only judges of the Supreme Court and the Supreme Administrative Court, law professors, and deputy attorney-generals may be appointed as members. Not all legal professions are therefore qualified for a seat in Thailand's Constitutional Court.[40] In Cambodia, on the other hand,

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[36] *Id.* sec 200.

[37] Constitution of the Kingdom of Cambodia (Constitution of Cambodia) art 138.

[38] Legal Profession Act (SG), as revised (2009), sec 3(b).

[39] Paul Van Osdol, Jr., *Politics and Judicial Selection*, 28(2) ALABAMA LAWYER 167, 172 (1967).

[40] Constitution of Thailand, sec 200.

members of its Constitutional Council need not be lawyers so long as they are dignitaries with the required education and work experience.[41]

3. *Years of practice*

The distinction between the different practices of law becomes relevant when related to the requirement of years in practice. Some countries in the region provide for different minimum-year requirements depending on the candidate's legal profession. In Myanmar, a high court judge vying for a supreme court and constitutional court seat only needs five years of practice. A judicial or law officer, on the other hand, only needs 10 years of practice. A candidate who is engaged in private practice, however, must have done so for at least 20 years.[42] This distinction is similar to Japan. Generally, candidates who are judges of its high court only need 10 years of practice, while a minimum practice of 20 years is required for other judges, prosecutors, lawyers, and law professors.[43] In Brunei, there is even no prescribed years of practice for candidates who are judges of lower courts while seven years of practice is required for non-judges.[44] An even more detailed distinction is applied in Taiwan and the Constitutional Court of Thailand.[45]

No such distinction is found in Indonesia, Malaysia, Singapore, the Philippines, South Korea, and Mongolia. For supreme courts, regardless of the legal profession, Malaysia, Singapore, and Mongolia set their minimum standard at 10 years of practice, the shortest in the region, while Indonesia and South Korea require the longest, that is, 20 years of practice.[46] With regard to constitutional courts, Mongolia has no prescribed years of practice, while South Korea requires 20 years, the longest among the constitutional courts in the region.

C. *Personal Requirements*

This article refers to personal requirements as those qualifications and criteria that are not educational and professional in nature or those that do not

[41] Constitution of Cambodia, art 138.

[42] Myanmar's Constitution, sec 301(d).

[43] Court Act (JP), art 41.

[44] Supreme Court Act (BN), sec 7 (2).

[45] Judicial Yuan Organization Act (TW), art 4; Constitution of Thailand, sec 200.

[46] Constitution of Malaysia, art 123(a); Constitution of Singapore, sec 96; Mongolia's Constitution, art 51(3); Law No. 14 of 1985 (ID), as amended, art 7; Court Organization Act (SK), art 42.

pertain to the prior practice of and experience in law of the candidate. Three of the most common personal requirements will be discussed: age, citizenship, and non-partisanship requirements.

There are other less common criteria that may be imposed. In Indonesia, for instance, a person who has been convicted of a crime punishable by a prison sentence of five years or more or had been declared bankrupt is ineligible for a seat in its Constitutional Court.[47] In South Korea, a person who has been previously dismissed by impeachment cannot be appointed as judge of its Constitutional Court within five years from impeachment.[48] There is also a growing trend toward ensuring diversity in the courts. Constitutional provisions on gender, racial, and cultural equality in the judiciary are becoming more common, particularly in more recent constitutions,[49] but such practice is not yet embraced in the East and Southeast regions, even in those countries with fairly recent constitutions.

1. *Age requirement*

Among the countries in the region reviewed, only three constitutions provide for an age requirement for the supreme court. Myanmar has the oldest minimum age requirement (50 years), while Mongolia has the youngest (35 years). The Philippine Constitution requires the justices of its Supreme Court to be at least 40 years old.[50] This is the same age requirement in South Korea and Japan while Indonesia has a minimum age of 45 years, although such requirement is not in their constitution but in separate laws organizing their judiciary.[51] For constitutional courts, South Korea, Mongolia, and Indonesia set the minimum age requirement at 40 years, while Laos and Thailand set it at 45 years.[52]

2. *Citizenship requirement*

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[47] Law Number 24 of Year 2003 (ID), art 16(1).

[48] Constitutional Court Act (SK), art 5(2) and (3).

[49] See Constitution of Kenya, sec 172(2)(b); South Africa's Constitution, sec 174(2), *cf* Shetreet, supra note 1, at 310-314.

[50] Mongolia's Constitution, art 51(3); Myanmar's Constitution, sec 301(a); Philippine Constitution, art VIII, sec 7(1).

[51] Court Organization Act (SK), art 42; Court Act (JP), art 41(1); Law No. 14 of 1985 (ID), art 7.

[52] Constitutional Court Act (SK), art 5(1); Mongolia's Constitution, art 65(2); Law Number 24 of Year 2003 (ID), art 16(1)(c); Constitution of Thailand, sec 201(2); Law on the Organization and the Functioning of the Constitutional Council (KH), art 3.

Another common personal requirement is that of nationality or citizenship.[53] Malaysia, Myanmar, the Philippines, and Mongolia explicitly prescribe this requirement in their constitution,[54] while in Thailand and Indonesia, it is contained in special laws.[55] In other countries in the region, this requirement is implied from laws governing legal practice, which prescribe nationality or citizenship requirements before one could practice law.[56] A more restrictive approach is practiced in the Philippines, Cambodia, and Myanmar where the requirement is not simple citizenship, but natural-born citizenship.[57] The natural-born citizen requirement, particularly for those in the highest seats in the government, is argued to be rooted in the fear over "ambitious and duplicitous foreigners" and the need to "assure the requisite fealty and allegiance to the nation."[58]

On the opposite end of the spectrum, there are courts that open the appointment process to non-national persons. In Hong Kong, a judge or retired judge of a court of unlimited jurisdiction in another common law jurisdiction is qualified to be appointed in the Court of Final Appeal.[59] In the Supreme Court of Brunei, judges of courts having unlimited or appellate jurisdiction in some countries of the Commonwealth may be appointed.[60] This practice is purportedly formulated to promote public confidence to the judiciary, especially among those who want to conduct international business in the country.[61]

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[53] Under the UN Basic Principles, par. 10, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, in the selection of judges, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

[54] Constitution of Malaysia, art 123(a); Myanmar's Constitution, sec 301, *cf* s 20; Philippine Constitution, art VIII, sec 7(1); Mongolia's Constitution, art 51(3).

[55] Act on Judicial Service of the Courts of Justice B.E. 2543 (TH), sec 26(1).

[56] See Lawyers Act (TH), sec 35, which states that "an applicant for registration and obtaining a License" to practice law must be "a Thai national."

[57] Law on the Organization and the Functioning of the Constitutional Council (KH), art 3, requires "nationality by birth;" Myanmar's Constitution, sec 301, *cf* sec 120, provides that judges of the Supreme Court must be a "citizen who was born of both parents who are citizens." This is the very definition of natural-born under the *jus sanguinis* principle, which is used in Myanmar.

[58] Jack Maskell, U.S. Congressional Research Service, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement*, 5-8 (2011), *available at* https://sgp.fas.org/crs/misc/R42097.pdf.

[59] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art 82, *cf* Court of Final Appeal Ordinance (HK), sec 9.

[60] Supreme Court Act (BN), sec 7(2)(a).

[61] H.P. Lee & Marilyn Pittard, *The challenges of judicial independence in the Asia-Pacific*, in H.P. Lee & Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018), 399-400.

3. *Non-partisanship requirement*

To ensure that judges and justices are detached from any of the political organs of the government and the society, "[i]n many jurisdictions, judges are forbidden from holding other officers in the legislative or executive branches of the government. They may also be forbidden from active membership of a political party."[62] For instance, in Myanmar, the justices of the Supreme Court and the Constitutional Tribunal must be free from party politics. Membership in a political party and being a part of the legislature are grounds for disqualification.[63] In Indonesia, a constitutional court judge is prohibited from concurrently serving as an official occupying a public office in another state institution and from being a member of a political party or a civil servant.[64] A member of the Constitutional Council of Cambodia must not be a member of the legislature or the royal government or the president or vice-president of a political party or a union.[65]

III. SELECTION AND APPOINTMENT MECHANISMS

For judicial appointments to be genuinely based on merit, it is crucial that judges and justices are chosen strictly based on prescribed criteria and qualifications. The mechanism must itself be independent and designed to ensure that the appointing authority relies only on the prescribed criteria and qualifications, not on other factors, such as politics or patronage. As discussed, there is no single accepted mechanism. Different practices are adopted by nations. Ginsburg categorizes these mechanisms of appointment into four: single-body, professional, representative, and cooperative, which will be adopted in this paper. In a single-body appointment mechanism, the appointing power is vested in one person or office without any oversight. In a professional appointment mechanism, the existing judges and justices themselves appoint new judges. Meanwhile, representative and cooperative appointment involves multiple bodies or authorities in the process. In representative appointment, each body or authority has the power to appoint

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[62] Elliot Bulmer, *Judicial Appointment*, International Institute for Democracy and Electoral Assistance, at 18 (2017), *available at* https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf.

[63] Myanmar's Constitution, sec 300 *cf* s 301(f)(g) and sec 333(e)(f).

[64] Law Number 24 of Year 2003 (ID), art 17.

[65] Constitution of Cambodia, art 139.

a certain number of judges, while in cooperative appointment, the bodies or authorities must, as the name suggests, cooperate with each other to appoint. A mixed system of appointment, utilizing more than one of the four categories, is also practiced.[66]

A. *Source of Mechanism*

As with the list of qualifications and eligibilities, the source of the selection and appointment process is crucial in maintaining its integrity. Preferably, the constitution must explicitly and sufficiently describe the process and define the appointing authority so as not to give discretionary power to the legislature to change the process arbitrarily.[67] Except for Brunei, the constitutions of the subject countries contain provisions on superior courts appointments. In some constitutions, the selection and appointment process is laid down in detail, although further elaborating the process in a subsequent ordinary legislation to remedy perceived constitutional deficiencies had been observed in some countries, such as Malaysia, Vietnam, Thailand, Cambodia, and South Korea.

The experience in Malaysia, however, shows why constitutional, and not merely statutory, protection of the appointment process should be the standard. In Malaysia, a Judicial Appointments Commission was created by legislative act in 2009 to screen supreme court candidates and submit names of suitable appointees to the prime minister. This procedure, however, is not present in its constitution and no corresponding amendment thereto was introduced. Absent such constitutional amendment, ultimately, it has been held that the prime minister is not actually limited by the names submitted by the commission and may consider other candidates who are not on the commission's list. This leaves serious doubts as to the effects of the commission and whether the appointment process had been improved by its creation.[68]

B. *Single-Body Appointments*

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[66] Tom Ginsburg, *Judicial Review in New Democracies*, (Cambridge University Press, 2003), 43-44.

[67] Shetreet, supra note 1, at 289-293, proposes six fundamental principles that are imperative to an independent judicial system, which must be protected and contained in the constitution.

[68] Kevin YL Tan, *Judicial Appointments in Malaysia* in Hugh Corder and Jan van Zyl Smit (eds) *Securing Judicial Independence* (Siber Ink, 2017), 123-125.

Single-body appointments may be implemented either through the chief executive, the King in constitutional monarchies, or through the legislature. This appointment mechanism is usually coupled with a consultation process with an advisory or recommendatory body, usually a separate organ of the government, although its advice or recommendation is not binding upon the appointing authority. This distinguishes single-body appointment mechanism from cooperative appointment mechanism because, in the latter, the separate organ is not limited to a recommendatory or advisory role. In a cooperative appointment mechanism, the appointing authority is checked or limited by another body's consent or power to confirm or nominate.

1. *Presidential or Executive Appointments*

The most known method of single-body appointment is through the executive, as this is the common practice in major common law countries and has its roots as early as the 12th century.[69] It empowers the chief executive to simply deliver a "tap on the shoulder" to prospective judges and appoint whomever he chooses to sit in the bench. Those who support executive appointment maintain that the chief executive is the most well-informed authority since both confidential and public information concerning the qualifications of a candidate are available to him, especially with the assistance of his advisors. The simplicity of the process also insulates the candidate from any form of political rigors. This, however, eliminates any check mechanism that could hold the executive accountable for his actions.[70] Critics argue that it leaves too much power to the chief executive or the king, who may use the same to reward individuals or to pay personal and political debts.[71] This leaves the system "more vulnerable to cronyism, patronage, and self-dealing."[72] It "provides an unscrupulous executive with a key device for ensuring a timid judiciary"[73] and to "strengthen a political party's position or to insure judicial

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[69] Mary L. Volcansek, *Judicial Elections and American Exceptionalism: A Comparative Perspective*, 60 DEPAUL L. REV. 805, 806-807 (2011), claims that "[e]xecutive appointment can probably be traced to early English practices when Henry II appointed judges, then called 'commissioners,' as early as 1178."

[70] Special Rapporteur Leandro Despouy notes that the Committee against Torture and the Human Rights Committee had expressed their concern in this regard "given the risk this structure implies for the protection of the rights of individuals before the State." UNCHR, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*' UN Doc. A/HRC/11/41, para 26, (2009) (2009 Report of the UN Special Rapporteur).

[71] Harry O. Lawson, *Methods of Judicial Selection*, 75(1) MICH. BAR J. 20, 21 (1996).

[72] Jed Handelsman Shugerman, *The People's Courts*, (Harvard University Press, 2012), 259.

[73] Lee & Pittard, supra note 61, at 399.

subservience to presidential policies."[74] To possibly remedy this concentration of power, some jurisdiction requires a consultation or advisory process before the executive can appoint a candidate to a superior court seat, although the efficacy of such consultation alone, absent any binding authority, has been the subject of further criticism.[75]

This mechanism is still practiced in some countries in East and Southeast Asia, particularly in countries with monarchical government. In Brunei, the king alone appoints supreme court judges, consistent with its system of absolute monarchy. Although required by the constitution to consult the Council of Ministers, he is not bound to follow their advice.[76] The constitutional monarchies of Japan, Cambodia, and Malaysia differ as to some details in the process, but the appointing authority remains with the king or the chief executive. In Japan, the executive, through the cabinet, exercises the power to appoint the justices of the Supreme Court, although the power to appoint the chief justice is reserved to the emperor as recommended by the cabinet.[77] In Cambodia, the king appoints the justices of the supreme court, based on the recommendation of the Supreme Council of Magistracy.[78] The said council, however, is also led and controlled by the king, with other members coming from the judiciary and agencies of the government.[79] In Malaysia, the king or the Yang di-Pertuan Agong has the power to appoint, upon the advice of the prime minister, and after consultation with senior judges and the Conference of Rulers.[80] As well, the king is not bound by the advice of the prime minister, although there has been no known instance when the king did not accept the prime minister's advice. Similarly, the prime minister may ignore the opinion or view of the senior judges and the Conference of Rulers since the requirement of consultation is understood to be not synonymous with consent or concurrence.[81]

The Philippines, although not a monarchical government, used to vest the sole appointing authority to the President during the martial law regime of Ferdinand Marcos. This was used by Marcos to strengthen his stronghold in

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[74] Volcancek, supra note 69, at 818.

[75] Jan Van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice*, (Bringham Centre for the Rule of Law, 2015), 18-19.

[76] Supreme Court Act (BN), sec 7(1), *cf* Brunei Darussalam's Constitution (Constitution of Brunei), art 18 and 19.

[77] Constitution of Japan, art 79, *cf* art 6.

[78] Constitution of Cambodia, art132, *cf* art 134.

[79] Law on the Organization and Function of the Supreme Council of Magistracy (KH), art 2 and 11.

[80] Constitution of Malaysia, art 122(b).

[81] Tan, supra note 68, at 131-133.

the country.[82] After his ouster, the constitution was amended to depart from single-body appointment mechanism and created an independent appointment council "in response to the public clamor in favor of eliminating politics from the appointment of judges."[83] What happened in the Philippines reflects the experience of several countries in Latin America and Africa during a similar period of authoritarian regime and the subsequent transitional justice mechanism that was imposed to secure judicial independence.

2. *Legislative appointments*

The legislature may also be vested with the sole power of appointment, although this method is not a common mechanism. Proponents argue that legislative appointment "resolves the problem of voter apathy in judicial selection." Since the legislature acts as the representative of the people, who often have limited information with regard to the qualifications of a judicial candidate, it is said to be "in the best position to act as the responsible, informed, indirect voice of the electorate." On the other hand, concerns have been raised as to whether the legislature is any more knowledgeable about judicial candidates than the voting public.[84] Much apprehension is also raised with regard to the use of this power by the legislature to advance the partisan, political, or ideological agenda of the majority or controlling group.[85] "If the same majority who passed the law has the authority to choose those who judge the merits of judicial appeals by minority," they will select judges who are most likely to uphold the law, thereby increasing "the probability of the minority's tyrannization."[86] The risk of politicization is also higher in the legislature since the forum is "very often the main theatre in which party politics are played out."[87] Similarly, the UN Special Rapporteur is of the opinion that although

[82] CONST., art X, sec 4.

[83] Background of the creation of the Judicial and Bar Council, *available at* <http://jbc.judiciary.gov.ph/index.php/about-us/judicial-and-bar-council/3-about-jbc.

[84] Lawson, supra note 71, at 20.

[85] Douglas Keith and Laila Robins, *Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island*, (Brennan Center for Justice, 2017), 4, *available at* <https://www.brennancenter.org/sites/default/files/analysis/North_Carolina.pdf. They conclude that "they can enable favoritism towards legislators and those close to them, breed corruption, produce and suffer from governmental dysfunction, and undermine judicial independence – all while continuing to provide a path for special interests to unduly influence nominations."

[86] Dennis C. Mueller, *Fundamental Issues in Constitutional Reform: With Special Reference to Latin America and the United States*, 10 CONSTITUTIONAL POLITICAL ECONOMY 119, 123 (1999).

[87] Smit, supra note 75, at 25. The European Commission for Democracy Through Law strongly opposed legislative appointment "because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded." Venice Commission, Opinion No. 403 / 2006, CDL-AD(2007)028,

legislative appointment may be seen as providing greater democratic legitimacy in the appointment process, it may lead to the politicization of judicial appointments, with political considerations prevailing over objective criteria or standards.[88] It has been observed as well that legislative appointment propagates the practice of having former legislators appointed as members of judiciary since they already have the access to, or even the support of, the appointing authority[89]

In the region, this mechanism is practiced in Laos and China. In Laos, judges of the People's Supreme Court are appointed by the Standing Committee of the National Assembly based on the recommendation of the President of the People's Supreme Court. The Standing Committee also has the power to appoint the President of the People's Supreme Court.[90] A similar mechanism exists in China, where the President of the Supreme People's Court is elected and removed by the National People's Congress while the other justices are appointed by the Standing Committee of the National People's Congress upon the request of the President of the Supreme People's Court.[91] Because of the single political party system in these countries, the dangers of politicization is even more present. It has been observed that, in China, the judicial appointments are ultimately determined by the Communist Party and the approval of the National People's Congress is but a mere formality[92]

C. *Professional Appointment*

The high probability of politicization in executive or legislative appointments led to an introspective theory that the judiciary must be a self-selecting and self-perpetuating institution. To insulate itself from outside political pressure, it is argued that the judiciary must have the authority to appoint the members of the bench "through a formal co-optation process that

para 12. This is the same position taken by UN Special Rapporteur Leandro Despouy, 2009 Report of the UN Special Rapporteur, supra note 70, para 25.

[88] UN CHR, *Report of the Special Rapporteur on the independence of judges and lawyers*, (UN Doc. A/HRC/38/38 (2018 Report of the UN Special Rapporteur), para 51 (2018).

[89] Lawson, supra note 71, at 20; Keith and Robbins, supra note 85, observed this practice in the states of South Carolina and Rhode Island in the Unites States.

[90] Lao People's Democratic Republic's Constitution, art 81.

[91] Judges Law of the People's Republic of China, art 18. Unofficial English translation available at https://www.chinalawtranslate.com/en/judges-law-of-the-prc-2019.

[92] Christa Laser, et.al, *Selecting the Very Best: The Selection of High-Level Judges in the United States, Europe and Asia*, (Due Process Law Foundation, 2013), 37, *available at* http://www.dplf.org/sites/default/files/selection_high_level_judges_en.pdf.

subjects prospective judges to approval by their superiors."[93] This relies on the premise that current members of the judiciary are in the best position to observe who are deserving and qualified to join their ranks. Lower court judges have the best opportunity to observe lawyers in actual practice while appellate court judges, by the nature of their authority in the judicial hierarchy, constantly assess lower court judges' performance based on cases that are appealed to them. This mechanism, it is argued, encourages competency in the judiciary. Sitting judges and justices would prefer to appoint capable candidates so that their work could be lighter. Meanwhile, those who aspire to be a member of the judiciary, or be promoted to a higher court, must make sure that they excel in their practice or position to impress the judge, or their superiors in the higher court, who has a hand in their appointment.[94]

This process, however, may tilt in favor of lawyers whose practice is in litigation and, for higher court positions, career judges. Law professors, civil servants, and those whose practice do not require frequent appearance or interaction with judges are at a significant disadvantage, unless they have reached some degree of eminence in the bar or if they unduly rely on external factors to secure an appointment. It is also doubted whether the judiciary is less dangerous than political actors in appointments, considering that current members thereof also have their own individual or shared interest that could play a role in judicial selection.[95] Sitting judges may appoint individuals based on favoritism or ideological affinities. They may gatekeep outsiders and impose some form of conformity that could perpetuate existing homogeneity in courts.[96] For countries with a weak judicial system proliferated with corrupt judges and justices, professional appointment could also increase the risk of further populating the judiciary with incompetent and corrupt judges and justices. Persons and authorities who have some degree of influence over the judiciary may also take advantage of this mechanism to further strengthen their stronghold in the institution.

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[93] Elliot W. Bulmer, *Judicial Appointments*, (International Institute for Democracy and Electoral Assistance, 2017), 9, *available at* https://constitutionnet.org/sites/default/files/2017-10/judicial-appointments-primer.pdf.

[94] Mueller, supra note 86, at 124-125.

[95] Samuel Spáč, *Recruiting European Judges in the Age of Judicial Self-Government*, 19(7) GERMAN L.J. 2077, 2100-2101 (2018).

[96] Dante B Gatmaytan and Cielo Magno, *Averting Diversity: A Review of Nominations and Appointments to the Philippine Supreme Court (1998-2008)*, 6 AsJCL [ii], 3 (2011), argue that "[d]ecisions are more likely to be regarded as illegitimate if the decision-making body, whether by a jury or judge, 'is homogeneous, exclusive, and not representative of a cross section of the community'." See also, Felipe Sáez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, AM. U. INT'L L. REV. 13, no. 5, 1267-1325, 1291 (1998), expressing that an autocratic type of selection process could promote "the reproduction of the prevailing corporate culture with very limited accountability to exogenous forces."

In the region, this mechanism is mainly utilized to appoint judges of lower courts. In South Korea, lower court judges are appointed by the Chief Justice with the consent of the Supreme Court Justices' Council, which is composed of the justices of the Supreme Court.[97] In Taiwan, judges of lower courts are selected by the Judicial Yuan, the highest judicial body, through its Judicial Personnel Review Committee, which is composed of judge representatives and academic experts.[98] But this practice has not been fully adapted to appointments to supreme and constitutional courts. There, is in fact, no fully self-selecting superior court in the world. But as will be discussed in the next sections, involvement of the judiciary in the appointment process for supreme or constitutional courts is not entirely absent and is usually practiced as part of representative or cooperative appointment mechanisms.

D. Representative Appointment

In representative appointment, the seats are apportioned, and each appointing authority is allocated a certain number of seats in the court.[99] It is an appointment mechanism that is commonly used in constitutional courts. In Mongolia, South Korea, and Indonesia, the constitutional court has nine judges, and each of the three branches of the government appoints one-third of the members of the court.[100] Of the nine members of the Constitutional Council of Cambodia, for instance, three members are appointed by the executive, three members by the legislative, and three others by the Supreme Council of the Magistracy, not the judiciary.[101] In Myanmar, the president and the two houses of its bicameral congress each has the power to appoint three members of its nine-member Constitutional Tribunal.[102] For supreme courts, only Timor Leste has a system of representative appointment, where one justice is appointed by the parliament, with the rest appointed by the Superior Council for the Judiciary.[103]

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[97] Court Organization Act (SK), art 16 and 41(3),

[98] Judges' Act (TW), art 4.

[99] Volcancek, supra note 69, at 806 and 809-810, uses the term "shared appointment" to refer to systems that "place the authority to names judges to the bench in different institutional hands." If the seats are apportioned on some basis, such as political party or gender, she used the term "parity appointment."

[100] Mongolia's Constitution, art 65; Constitutional Court Act (SK), art 6(1); Law Number 24 of Year 2003 (ID), art 18(1).

[101] Constitution of Cambodia, art 118.

[102] Myanmar's Constitution, sec 321.

[103] Timor Leste's Constitution, art 125 (2).

It is posited that representative appointments "have a stronger likelihood of […] bringing some measure of diversity in thought and political persuasion to the bench" since multiple branches or agencies of the government with potentially differing ideologies or agenda participate in the process.[104] Ginsburg further characterized representative appointment as a "mutually assured politicization." He theorized that an appointing authority under this mechanism would tend to appoint neutral and non-partisan judges instead of his loyal partisan, lest the other appointing authorities respond by appointing judges and justices that are loyal to them. "By appointing someone who appears 'neutral' and non-partisan, the appointing authority signals that it does not anticipate needing or using the court to uphold its controversial actions." He fears, however, that representative systems risk deadlock or stalemate in case the appointing authorities decide to just nominate their loyal partisans instead of moderate judges.[105] The mechanism also fails when there is no healthy inter-branch competition or when one person or entity dominates the different appointing bodies.[106] In tripartite representation mechanisms common in the region, for instance, collusion between just two of the appointing bodies would be sufficient to achieve majority holding in a superior court.

E. *Cooperative Appointment*

Cooperative appointment mechanisms, by requiring the cooperation of two or more institutional or political bodies to appoint judges and justices, impose a super-majoritarian policy to ensure that there is a broad support for the appointment. It also negates the fear of overt and excessive control of one branch over the judiciary by combining legal safeguards that are often ignored in single-body appointments. Ginsburg, however, also noted the possibility of deadlock in case of the failure or refusal of the bodies to agree or cooperate with each other. Hence, without safeguards that would address this impasse, there is a risk that appointment would ultimately not be made.[107]

Cooperative appointments take many forms. It may require the cooperation of just two branches of the government or even the participation

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[104] Volcancek, supra note 69, at 816.
[105] Ginsburg, supra note 66, at 44-45.
[106] Volcancek, supra note 69, at 816.
[107] Ginsburg, supra note 66, at 44.

of all three branches. Judicial selection commissions also play a significant part in this type of appointment, especially in post-authoritarian countries.

1. *Executive-Legislative appointments*

The classic tug-of-war between the executive and legislative had impacted judicial appointment mechanisms. The fear of excessive executive or legislative control in single-body appointment is remedied by making the judicial appointment a shared responsibility between the two political bodies. It is believed that this dispersion of power "can encourage the appointment of adjudicators with solid reputation but moderate views" as a result of discussion and compromise between the two bodies.[108] Also, by splitting the authority between the two political branches, judges gain more legitimacy since they have been vetted and validated twice by the other branches whose authority stem from popular election.[109]

The interplay between the executive and the legislative in the appointment process takes different forms. The executive may be granted the ultimate power to appoint a superior court judge or justices, but subject to the consent or confirmation, and not mere advice, of the legislative, or *vice versa*. Also, the executive may instead be vested with the authority to submit a list of names from which the legislative will eventually pick the superior court judge or justice, or *vice versa*. Countries in the region that utilize this cooperative appointment mechanism use the former process. In Singapore, the justices of the supreme court are appointed by the President, but only if he concurs with the advice of the Prime Minister.[110] In South Korea, the justices of the supreme court are appointed by the President with the consent of the National Assembly.[111] In Taiwan, members of the Judicial Yuan are nominated and, with the consent of the Control Yuan, the legislative body, appointed by the President.[112]

This cooperative mechanism is not without any criticism. Some even question the efficacy of this system since confirming or consenting bodies always tend to just confirm or consent to the nomination made by the appointing authority. In the United States federal courts, well-known for

[108] Charles Manga Fombad, *Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes*, 56(2) JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW 249, 257 (2014).

[109] Resnik, supra note 2, at 594.

[110] Constitution of Singapore, art 9(1).

[111] Court Organization Act (SK), art 4.

[112] Constitution of the Republic of China (Taiwan), art 79.

employing this mechanism, it has been observed that nominated persons are, in practice, sparsely rejected by the appointing authority.[113]

2. *Executive/Legislative-Judiciary appointments*

The judicial appointment power may also be divided between the judiciary and either of the two political branches. The executive-judiciary mechanism is strongly established in India, where the president appoints supreme court judges after consultation with the *collegium*, a body which consists of the Chief Justice of India and the four most senior judges of the Supreme Court. In cases of conflicting opinion, the Chief Justice's opinion generally prevails.[114] No such system exists in East and Southeast Asia. In jurisdictions where only the executive and the judiciary are involved in superior courts' appointment process, the involvement of the judiciary is often indirect, either through an advisory capacity, like in Malaysia, or in relation to a judicial selection committee, as will be further discussed.

3. *Executive-Legislative-Judiciary appointments*

Judicial selection may also require the cooperation of the three branches of the government. In Vietnam, the selection of superior court judges undergoes a three-step process that involves the Chief Justice of the Supreme People's Court, the National Assembly, and the President. Initially, the Chief Justice proposes to the National Assembly the appointment of judges of the Supreme People's Court. The National Assembly then considers the approval of this proposal. Pursuant to the approval of the National Assembly, the President shall issue the final decision to appoint judges of the Supreme People's Court.[115] This selection mechanism is uncommon and not much literature and studies can be found on the matter. It can, however, be reasonably argued that the same positions with two-body cooperative mechanism apply to three-body cooperative mechanisms. The participation of

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[113] Glenn R Winters, *One-Man Judicial Selection*, 45 J Am. Jud. Soc. 198, 200-201 (1962).

[114] Constitution of India, sec 124. Because of the primacy of the opinion of the Chief Justice in appointment, there are views that the Supreme Court of India is a self-selecting institution, and thus employs a professional appointment mechanism. The Constitution of India, however, is very clear with regard to the formal appointment mechanism. Moreover, the current appointment system has been subject of criticism with regard to its constitutionality. For an extensive discussion, see Rehan Abeyratne, *Judicial Independence and the Rise of the Supreme Court in India* in H.P. Lee & Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018), 169-185; Anashri Pillay, *Protecting judicial independence through appointment processes: a review of the Indian and South African experiences*, 1 INDIAN L. REV. 283 (2018).

[115] Law on the Organisation of People's Courts (VT), art 72.

the three branches of the government creates a more rigorous selection process that mixes the political nature of the executive and the legislative and the existing ideals of the judiciary. However, the risk of deadlock is still present, if not magnified, and the possibility of collusion or subservience remains a danger, especially in countries with a single-party system or where, traditionally and historically, one branch of the government has some significant influence over the others.

4. *Judicial Selection Commissions*

The most recent trend in the appointment process is the creation of judicial selection commissions or JSCs[116] – independent, self-governing bodies which promote and protect judicial independence through judicial selection and appointment. JSCs have garnered much attention and support in recent years because of their potential to insulate the judiciary and the judicial appointment process from external political pressures.[117] For instance, in the Philippines, the Judicial and Bar Council was created post-Marcos' regime to prevent absolute executive discretion in judicial selection. The UN Special Rapporteur even considers the creation of judicial councils, in general, as good practice, and encourages its establishment for nations with no existing mechanism to ensure judicial independence.[118]

There are several working constitutional JSCs in the region which operate in the superior courts level, including Cambodia's Supreme Council of Magistracy, the Philippines' Judicial and Bar Council, the Judicial General Council of Mongolia, Timor Leste's Superior Council for the Judiciary, Thailand's Judicial Commission, and Indonesia's Judicial Commission. While Malaysia has a Judicial Appointments Commission, as discussed above, there is no constitutional protection afforded to it and its participation in judicial selection process remains in question.

There is no one-size-fits-all model of JSCs, and its creation and function vary per jurisdiction. Even the JSCs in the region are unique in several aspects from each other. Nonetheless, there are general principles that are common

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[116] For consistency, the term judicial selection commissions or JSCs will be used to refer to these bodies in general, regardless of the nomenclature used in a particular jurisdiction.

[117] See, for instance, the Universal Charter of the Judge adopted by the International Association of Judges, which prescribes that the "selection [of judges] must be carried out by [a Council for the Judiciary] or an equivalent body;' the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, prepared and adopted by the African Commission on Human & Peoples' Rights, which encourages the 'establishment of an independent body for [the processing of appointments to judicial bodies.]"

[118] 2018 Report of UN Special Rapporteur, supra note 88.

among JSCs which are relevant to and directly relates to their purpose in the grand scheme of judicial independence - first, how JSCs participate in the judicial selection process; second, how the JSC is composed; and third, how the members of the JSC are selected or chosen.

The concept of judicial independence is primarily related to the part that the JSC plays in the appointment process, which may be direct or indirect. The participation is direct if the JSC has the final word in the process and itself appoints the superior court judge or justice. At present, this is an uncommon method of utilizing JSCs. In the region, Timor Leste is the only country that adopts this system, with the Supreme Council for the Judiciary directly appointing all justices of the supreme court, except for one that is reserved for the parliament's choice.

On the other hand, the participation is indirect if the JSC is merely a nominating or proposing body.[119] Three models have been utilized for this purpose: a) the JSC submits a single name which is binding upon the final appointing authority; b) the JSC submits a single name and the final appointing authority retains the discretionary power or latitude to reject the nomination or proposal; and c) the JSC produces a shortlist of candidates for the selection of the final appointing authority.[120] In Thailand, appointment is upon the approval of the Judicial Commission and subsequent submission to the King for the Royal Command of Appointment[121] while in Indonesia, a candidate justice is proposed by the Judicial Commission for the approval of the House of Representative and final appointment of the President. The third model is employed in the Philippines, where the Judicial and Bar Council is constitutionally mandated only to prepare a list of at least three nominees from which the president, the final appointing authority, chooses. In the second and third models, where the final appointing authority has the discretion to reject or choose, the UN Special Rapporteur maintains that the discretion must be exercised only in exceptional circumstances:

> Where an organ of the executive or legislative branch is the one formally appointing judges following their selection by an independent body, recommendations from such a body should only be rejected in exceptional cases and on the basis of well established criteria that have been made public in advance. For such cases, there should be a specific procedure by which the executive body is required to substantiate in a

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[119] Some scholars suggest that, in this mechanism, the final appointment decision should rest with the chief executive. See Alicia Bannon, *Choosing State Judges: A Plan for Reform*, (Brennan Center for Justice, 2018), *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

[120] Smit, supra note 75, at 52.

[121] Act on Judicial Service of the Courts of Justice (TH), art 19.

> written manner for which reasons it has not followed the recommendation of the above-mentioned independent body for the appointment of a proposed candidate. Furthermore, such written substantiation should be made accessible to the public. Such a procedure would help enhance transparency and accountability of selection and appointment.[122]

The ability of the JSC to operate according to its purpose is also affected by its institutional composition and structure. If the goal is to make the judiciary independent, the members of the JSC must themselves be independent. Regarding the JSC's composition, the recent global practice is to have a mixture of members who are judges, legal professionals, politicians, and lay persons. As to how the membership should be allocated, there is a consensus to ensure the presence of members of judiciary and legal profession in the JSCs. The IBA Minimum Standards of Judicial Independence simply require that majority be composed of judges and representatives of the legal profession.[123] This standard is observed in the Philippines, where four of the seven members of the Judicial and Bar Council are lawyers, although only one is a sitting judge – the chief justice. The three other lawyer-members come from the academe, the integrated bar, and a retired justice of the Supreme Court.[124] In contrast, this minimum threshold is not present in Timor Leste's Supreme Council for the judiciary, where only two out of five members are required to be lawyers. The Committee of Ministers of the Council of Europe, on the other hand, proposes a stricter approach that judges, not just lawyers, must constitute the majority of the JSC,[125] which is the same position adopted by the UN Special Rapporteur:

> The composition of this body matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges. While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference.[126]

The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region further suggests that judge representatives must

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[122] 2009 Report of the UN Special Rapporteur, supra note 70, para 33.

[123] Adopted 1982, para 3(a), *available at* https://www.icj.org/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf.

[124] CONST., art VIII, sec 8(1).

[125] Smit, supra note 75, at 33-34.

[126] 2009 Report of the UN Special Rapporteur, supra note 70, para 28.

come from the higher judiciary.[127] The Judicial Commission of Thailand follows this model. Thirteen of the fifteen members thereof are members of the judiciary. The president of the supreme court acts as the chairperson while the other twelve judges-representatives are elected from different court levels – four each from the supreme court, the appellate courts, and the courts of first instance.[128] The nine-member Supreme Council of Magistracy of Cambodia has five members from the judiciary and three lawyers. The king is the only member that is not involved in the practice of law.[129]

The UN Special Rapporteur warns, however, that if the proportion of judges in the JSC is too high, there is a risk of "corporatism" and would insulate the JSC from any external oversight. The Consultative Council of European Judges is of the position that "a mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism and of reflecting the different viewpoints within society, thus providing the Judiciary with an additional source of legitimacy."[130] Hence, the necessity of including non-judge lawyers, such as law professors and members of the bar, and non-lawyers and lay members, such as those who are experts in social sciences.[131] The inclusion of non-lawyers or lay members is justified by the need to have a civil society perspective or to contribute non-legal expertise. The inclusion of politicians, on the other hand, is believed to give the JSC some form of democratic legitimacy, although the same risk in single-body appointments with regard to the politicization of the judicial appointment process is present with this inclusion.[132] The Philippine Judicial and Bar Council, for example, has representatives from the private sector and the legislative. Similarly, two members of the Judicial Commission of Thailand must be non-lawyers.

Aside from its composition, also relevant in the analysis of the JSC is the manner of the selection of its members. In recent years, major concern has been raised as to the extent to which the JSC is dominated by members appointed, whether directly or indirectly, by the appointing authority itself, usually the executive. The purpose of the JSC and its allure as an apolitical body are defeated because the executive still has a significant say in the selection of JSC members. One author noted that:

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[127] Beijing Statement of Principles of the Independence of the Judiciary, para 15.

[128] Act on Judicial Service of the Courts of Justice (TH), art 36.

[129] Law on the Organization and Function of the Supreme Council of Magistracy (KH), art 2.

[130] Consultative Council of European Judges, Opinion No.10 (2007), para 19.

[131] 2018 Report of the UN Special Rapporteur, supra note 88, para 67-68.

[132] Smit, supra note 75, at 37-38.

> The appointing authority should have no control over selecting commissioners on the judicial nominating commission. If that is not politically feasible, the appointing authority should have as little control as possible… If the appointing authority controls enough commissioners, he may be able to control the output of the commission, and therefore, help ensure that he is fed back his political choice' from whom he will select. This may also give the impression, accurate or not, that that the system is "wired" in favor of nominees connected to the appointing authority[.][133]

This issue is particularly relevant in Indonesia, where all the members of the Judicial Commission are appointed by the president.[134] While there is diversity in the Judicial and Bar Council of the Philippines, with the exception of the representative of the legislative, all the members thereof are presidential appointees.[135] In contrast, of the fifteen members of the Judicial Commission of Thailand, only three may be considered as political appointees. The president of the supreme court, who acts as the chairman, is appointed by the king while the two others are elected by the legislative. The twelve judge members are elected by their peers in the judiciary.[136] The selection mechanism of JSC members in Timor Leste is even more varied. Its Supreme Council of the Judiciary is composed of the president of the supreme court, one member who is designated by the president; one elected by the Parliament; one designated by the government; and one elected by the judges of the courts of law from among their peers.[137]

IV. JUDICIAL ELECTIONS

Issues surrounding the politicization and patronage system in the appointment process lend credence to the view that the power to put judges and justices to the courts, especially in the higher appellate courts, should be exercised directly by the people. Thus, the practice of judicial election. Instead of appointment, it is proposed that the members of the judiciary should be elected by popular votes or through the people's exercise of suffrage.

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[133] Norman Greene, *Perspective on Judicial Selection*, 56(3) MERCER L. REV. 949, 962-963 (2005).

[134] Constitution of Indonesia, art 24B.

[135] Philippine Constitution, art VIII, sec 8(1) and (2).

[136] Act on Judicial Service of the Courts of Justice (TH), art 36.

[137] Timor-Leste's Constitution, art 128 (2).

This is a common practice in state-level courts in the United States, with twenty-two states electing their justices.[138] This can be traced back to the 19th century, when several states believed that elected judges are "more independent from political elites and therefore worthy of greater public trust and confidence."[139] As opposed to the notion that the judiciary is not a political actor, some argue that courts are vested with the power to make and invalidate law, so they are, ultimately, political actors with their own constituency and they must consequently derive their authority from them through popular election.[140] Judicial election provides the judiciary with a certain degree of democratic legitimacy. Some also see judicial elections as a rejection of traditional, anti-majoritarian constitutional theories and a check on judicial activism and overreach.[141] Today, the common thread among those who support judicial elections revolves around the concepts of judicial accountability and the desirability of having a judiciary that is broadly representative of the population that it serves.[142] "[M]aking judges 'dependent on none but themselves' ran counter to the principle of 'a government founded on the public will.'"[143] Judicial election, it is argued, offers the people a direct check over the judiciary and gives them the means and forum to operationalize their outrage and register their dissent.[144]

This practice significantly deviates from the appointment process adopted for the federal Supreme Court of the United States. Madison and Hamilton argued strongly against election of judges and consistently warned against the "tyranny of the majority"[145] and the "encroachments and oppressions of the representative body."[146] Those who oppose the practice of judicial election maintain that the "American political system is not based on pure

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[138] The Brennan Center for Justice, *Judicial Selection: Significant Figures*, (2015), available at https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures.

[139] Richard L. Jolly, *Judges as Politicians: The Enduring Tension of Judicial Elections in the Twenty-First Century*, 92 NOTRE DAME L. REV. ONLINE 71, 74 (2017). For a brief history of judicial election in the United States, see Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L.REV. 1061, 1065-1107 (2010).

[140] See Chris Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections*, (Routledge, 2009) chapter 1.

[141] See David Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047 (2009); James J. Bopp, *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMEND. L. REV. 180 (2018).

[142] See Dubois, supra note 3, at 32; Shugerman, supra note 139, at 1124, citing Larry D. Kramer, *The People Themselves* (Oxford University Press, 2004), at 144.

[143] Jolly, supra note 139, at 81, quoting Thomas Jefferson, *Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816)* in Paul Leicester Ford (ed) *The Works of Thomas Jefferson* vol. 5 (1904).

[144] Pozen, supra note 141, at 2070-2071.

[145] James Madison, *Federalist Paper No. 47* (1787).

[146] Alexander Hamilton, *Federalist Paper No. 78'*(1788).

majoritarianism and that the judges must be free to offer protection to the essential rights of minorities against infringement by majoritarian political interest in the elected branch and in the population at large."[147] Subjecting the courts to majoritarian pressures could lead to judges compromising "the constitutional rights of subsets of their judicial electorate who are unpopular, unorganized, or otherwise outvoted"[148] for the fear that they might not be re-elected or elected to higher office in the future. Hence, the central thesis among those who oppose judicial election is the rejection of the notion that courts can be at once both democratic and independent.[149] Elected judges, because they are answerable to the voting public and the political bodies that support them, are "more likely to respond to political pressures" and popular preference, to "rule for favorable voters and campaign contributors,"[150] and to "bow to the temporary whims of the public rather than to protect the enduring principles of law."[151]

Elections for judges and justices of superior courts, however, did not achieve prominence and is very rarely practiced outside of the United States. Only Bolivia employs election by popular votes to determine the highest-ranking authorities of its judicial organ.[152] Some form of judicial election is practiced in other jurisdictions, but they do not involve elections to superior courts.[153] In the East and Southeast Asian region, no country selects the composition of its superior courts through popular election. While Japan has a system of judicial election, it is only utilized in the retention of supreme court judges after they have been appointed. A sitting judge of the Japan Supreme Court shall be dismissed if the majority of the voters favor his dismissal.[154] This reflects "the postwar constitution's rejection of the emperor's sovereignty and

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[147] Dubois, supra note 3, at 38-39.

[148] Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727 (1995).

[149] Jolly, supra note 139, at 73. See also Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1591-1592 (2009), arguing that "judicial election […] turn judges into politicians at the expense of judicial independence" and that "the deeply rooted conviction that judicial elections are inconsistent with judicial independence."

[150] *Id.* at 82.

[151] Dubois, supra note 3, at 37. Several studies support this argument and have shown that election significantly affects judges' decision-making.

[152] Bolivia (Plurinational State of)'s Constitution of 2009, art 182, para 1 *cf* para 5.

[153] Luis Pasara, *Judicial Elections in Bolivia: An Unprecedented Event*, (nd), available at http://www.dplf.org/sites/default/files/executive_summary_rev_web.pdf. See also Jolly, supra note 139, at 72 (note 2); Shugerman, supra note 139, at 1064 (note 3).

[154] Constitution of Japan, art 79.

the recognition of popular sovereignty,"[155] although it has been observed that in practice, it is unlikely to remove a judge through this process.[156] Moreover, Japanese voters tend to not take judicial retention election with the same rigor as in executive or legislative election. Supreme court judges often have not yet participated in important legal matters at the time of their first retention election and their qualifications and voting records are not adequately provided to the public, thus voters have very little basis to evaluate them. Also, the habit of appointing supreme court judges of older age, in relation to the mandated retirement age, renders popular review moot in most instances.[157]

V. CONCLUSION

Judicial selection is one of the trickiest aspects of designing a legal system. How nations should select their judges and justices, especially for the highest or superior courts, is a crucial aspect that has been the constant subject of debate in the past decades. Different systems have been utilized, some of them have been modified, to adapt to the ever-changing political environment and perception of how the government and modern democracy must work. Discourses on this topic had primarily focused on the institutional independence of the judiciary and the decisional independence of the judge or justice from politics and partisan interest, with the ultimate goal of designing a judicial appointment mechanism that would allow a person once appointed to withstand political pressure and stand above the fray of ordinary politics. Yet, not one concrete, specific solution or process has been agreed upon or practiced in the arena of international law. The paper's comparative analysis of the different legal systems in the East and Southeast Asian regions reflects the variety of practices observed across the globe and the lack of unanimity as to what constitutes good or bad practices of judicial appointment. Unlike highly developed countries or regions, which have some form or mechanism of regional legal oversight, where vast majority of literature is concentrated, however, less attention has been devoted to Asian systems in this discourse. The diversity in government structures, constitutional regimes, and the historical and cultural backgrounds of the different countries in the region

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[155] David M. O'Brien and Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary* in Peter H. Russell and David M. O'Brien (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001), at 53.

[156] Masahito Tadano, *The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan* in Yumiko Nakanishi (eds) *Contemporary Issues in Human Rights Law* (Springer, Singapore 2018), at 77.

[157] Tokuji Izumi, *Concerning the Japanese Public's Evaluation of Supreme Court Justices*, 88 Wash. U. L. Rev. 1769, 1776-1777 (2011). See also O'Brien and Ohkoshi, supra note 155, at 52-53.

should warrant more attention to further the discussion and analysis on the topic.