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Sophie Turenne *Editor*

Fair Reflection of Society in Judicial Systems - A Comparative Study

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Chapter 1
Fair Reflection of Society in Judicial Systems

Sophie Turenne

Abstract This introductory chapter seeks to address the widespread concern that judges should have some knowledge of the community they live in so that justice is administered 'in the name of the people'. In considering ways to develop public confidence in the judiciary, we challenge the assumption that the composition of the highest courts is the core instrument to achieve a fair reflection of the community in the judiciary. Public confidence in the courts is gained by procedures in various forms and shapes relating to the institutional structure of the judiciary. There may be the use of lay participants, or there may be substantial lay participation in selecting individual judges. Besides, it is arguable that the popular acceptability of judicial decisions is, or can be, enhanced by the style of judgments and reasoning. Ultimately, however, views differ on whether lay participants can be used to gain the respect of the community. It may be that recruitment among professional lawyers remains the best way forward, provided (1) that they need not necessarily be drawn solely from the ranks of legal practitioners but may (in some courts) include academics or other professionals (2) that the composition of the judiciary does not reflect a perceived wider social exclusion of some minority groups, and (3) that there is judicial training in social problems with which many judges may be personally unfamiliar.

Keywords Fair reflection of society • Judicial diversity • Judicial systems • Lay participation • Public confidence in the judiciary • Separation of powers • Judicial independence • Judicial selection • Judicial impartiality • Community knowledge

1 Justice in the Name of the People

In democratic societies, judicial decision-makers are considered to be independent and in no way subordinate to the wishes of the executive power. But the institutional and personal independence of judicial decision-makers is not only an end in itself. Rather, it creates the most favorable conditions under which the judge may decide

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in an impartial way, *sine spe ac metu* (without fear or hope).[1] Unlike other public office-holders, who might be expected to be partial to the concerns of the constituencies that put them into office, judicial decision-makers stand apart from the parties and the government which might be funding them: 'Justice, must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having'.[2] The blindfold sometimes placed on Justice in public fora further suggests that the ideal judicial decision-maker hears all arguments on their merits and detached from the identity of those making them. Yet the independence of judicial decision-makers may also foster a sense of isolation from the community, understood in this chapter as any kind of human communal living. Judicial decision-makers may neglect wider societal concerns and this may legitimately impact on the extent to which their judgments win acceptance from some or even all sections of the community. There is, after all, another interpretation to the blindfold on Justice; that she might be 'turning a blind eye' to extra-legal factors that everyone else can see.[3]

This general report seeks to address the concern, in many legal systems, that judges should have some knowledge of the community they live in so that justice is administered 'in the name of the people'. The principle that justice is delivered 'in the name of the people' is stated in different national constitutions, such as the Spanish or French Constitutions, and it appears in the common law judicial oath of office: judges must do right 'to all manner of people' according to law. The general reporter and national reporters were tasked to address this concern under the broad heading of 'The independence of a meritorious elite: the government of judges and democracy'. A questionnaire in the form of guidelines was duly circulated (see the Annex), and national reporters were invited to concentrate on the issues most pertinent to their jurisdiction. The availability of scholars with the appropriate interest and expertise dictated the range of national legal systems under comparison.[4] In addition, the national reporters'

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[1] G di Frederico, 'Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective' in A Sajo and R Bentch (eds), *Judicial Integrity* (Leiden, Brill Publications, 2004) 181, 185.

[2] *AWG Group v Morrison Ltd* [2006] EWCA Civ 6, para 29 [Mummery LJ].

[3] J Resnik and D Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (Yale, Yale University Press, 2011) 104.

[4] Reports were received from the following countries: Argentina (Professor Sebastiàn Elias, Universidad de San Andrés, Buenos Aires), Australia (Justice Susan Kiefel (High Court of Australia) and Cheryl Saunders, Laureate Professor, University of Melbourne Law School), Belgium (Professor Maurice Adams, University of Antwerp, and Dr Benoit Allemeersch, Leuven University), Canada (Professor Stéphane Bernatchez, University of Sherbrooke, Québec), the Czech Republic (Professor Michal Bobek, College of Europe, Bruges), Denmark (Professor Ditlev Tamm, University of Copenhagen), Finland (Professor Pia Letto-Vanamo, University of Helsinki), Germany (Professor Michael Lothar, University Heinrich-Heine, Düsseldorf), Greece (Professor Nicolaos Klamaris, University of Athens), Hungary (Dr Balázs Fekete, Pázmány Péter Catholic University), Ireland (David Prendergast, Trinity College Dublin, and David Kenny, University College Dublin), Italy (Professor Pier Giuseppe Monateri, University of Turin), Netherlands (Professor Ton Hol, University of Utrecht), Poland (Professor Margareta Kol, University of Lodz), Portugal (Professor Cristina Machado de Queiroz Leitão, University of Porto), Serbia (Professor

analysis is coloured by their own expertise, whether it is legal history, legal theory, civil procedure or constitutional law. Therefore, while this chapter aims to bring together the many threads running in the national reports, the present writer's conclusions remain distinct from the individual views of the national reporters.

2 Judicial Diversity and Community Knowledge

Some community knowledge of some sort is undoubtedly required for justice to be seen to be done. As a sui generis public service, the administration of justice produces social links.[5] Judicial decisions in recurrent kinds of circumstances ought to be generally accepted and approved by a particular community for trust in the judiciary to subsist.[6] Judicial decision-makers must demonstrate a reasonable degree of openness and responsiveness to the community and to individual members of the community. It is however a matter of debate as to what degree of knowledge of a community is required and for what purpose. Community knowledge can be both relevant and a source of bias, as illustrated by the Sixth Amendment of the United States Constitution, which provides both that the jury must be comprised from the 'State and district wherein the crime shall have been committed' and it must be 'impartial'.[7] It is in the context of such discussion that our national experts submitted their answers to one main question: can, or ought judicial decision-makers to reflect the community, either in the profile of the judicial decision-makers or in the opinions they espouse, so that they might be thought to be legitimate?

Previous legal and political scholarship, mostly Anglo-American, takes the merit of this debate for granted. The highest courts in particular give judgments of a more evaluative kind than other courts and their judgments may be seen as conflicting with the policies of the democratically elected institutions. Scholars thus tend to focus on the judicial composition of the highest courts to assess a fair reflection of the community in the judiciary. Our comparative study, however, challenges the

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Dušan Nikolić, University of Novi Sad), Romania (Dr Lavinia Lefterache, University of Bucharest), Slovenia (Ms Nina Betetto, Vice-President, the Supreme Court of the Republic of Slovenia), Switzerland (Professor Luc Gonin and Dr Olivier Bigler, Université de Neuchâtel), United States of America (Professor Mortimer Sellers, University of Baltimore School of Law), Venezuela (Professor Allan Brewer-Carías, Universidad Central de Venezuela). Not all national reports are included in this volume, but they can be found in national publications or communicated upon request. My thanks go to all national reporters for their stimulating reports. I am also grateful to John Bell for some insightful discussions, and to Joanna McCunn for her editorial assistance. All remaining shortcomings are mine.

[5] The European Commission for the Efficiency of Justice (CEPEJ), *Checklist for promoting the quality of justice and the courts* (Strasbourg, Council of Europe, 2008) 2.

[6] G Barden and T Murphy, *Law and Justice in Community* (Oxford, Oxford University Press, 2010) 4.

[7] US Constitution, Amendment VI; see also *Blakely v Washington* 542 US 296 (2004) at 306. Individuals with personal knowledge of the disputants or events cannot be members of the jury, however.

assumption that the composition of the highest courts is the core instrument to achieve a fair reflection of the community in the judiciary. Our contributors discuss a variety of institutional designs towards a better reflection of the community and this, we suggest, significantly expands, the existing scholarship beyond the consideration of the profile or the opinions and rulings of judicial decision-makers.

Our reporters demonstrate that the inclusion of a diversity of perspectives within the judgment can be secured by other legal procedures than those relating to the composition of the judiciary or to the opinions espoused by judges. The 'quality' of the judge is perhaps not everything; allowing diverse inputs at various stages of the decision-making process can also achieve greater reflection of the community in the decision, and so does the debate that continues after the judgment is delivered. Arguably, the variety of institutional designs relates to the multitude of interpretations of the requisite 'community knowledge'. Thus, our reporters broadly agree that community knowledge is required so as to enable fair judgments and the equal treatment of all. They may concur that community knowledge comprises a broad knowledge of the concerns and aspirations of all classes of persons regardless of, inter alia, age, health, and occupation. It may also extend to the knowledge of cultural differences, local customs, and more besides. Nevertheless, their national reports reflect some distinct understandings of the community knowledge required for justice to be done, and to be seen to be done. In some countries, the figure of the judge in itself is the embodiment of community values; this seems to correspond with a perception of judicial detachment from the community. In other places, the judge may be expected to be aware of, or knowing diverse social views; or/and to be sympathetic to the views of the minorities in society; or/and to be receptive to arguments from the different sections of society. Accordingly, procedures will be more or less directly connected to the judicial decision-maker – from the amicus curiae procedure to a statutory emphasis on judicial diversity in the composition of the court, depending on whether they are aimed to supplement, enhance and/or visibly demonstrate the judge's knowledge of his or her community.

Several different ways of recognising democratic legitimacy[8] in the institutional structure are thus possible. There may be the use of lay participants. They are understood as lay assessors, or people who act as judges without being professional judges, or judges who are not lawyers (whether they necessarily reflect the population at large is not lightly to be assumed). These non-professional judicial decision-makers may then act as representatives of a particular section of the community and bring some particular expertise. For example, most Employment Tribunals have panel members from employee or employers' representative backgrounds. They may also represent the community at large, as jury members do. Our reporters discuss whether, and for what reasons it is felt important to have lay people taking part in the judicial decision-making beyond their participation in the criminal justice system.

[8] Legitimacy refers to the acceptance of a court by the parties, the citizens and society at large. It justifies public trust in the court on the basis of various factors, such as the selection of judges, their independence and the reasoning supporting the Court's judgments, see JE Soeharno, 'From Rechtsstaat to Ruler in the Rule of Law: An Inquiry into the Increased Role of the Judiciary' in A van Hoek et al. (eds), *Multilevel Governance in Enforcement and Adjudication* (Antwerp, Intersentia, 2006) 157.

Alternatively professional judges might themselves be selected with the needs of diversity in mind; or there may be substantial lay participation in selecting individual judges. However 'lay' input may easily translate to 'political' input rather than simply 'non-legal' input. Perhaps the dangers of political interference are the most consistent point among the range of countries from which we received reports. The reports for Venezuela and Argentina confirm, if needs be, that judicial independence is a pre-requisite for considering the question that guides our comparative survey. Thus, during the past fifteen years the Venezuelan judiciary has been composed primarily of temporary and provisional judges, without any career stability. They have been appointed outside the public competition process of selection established in the Constitution, and subject to dismissal for political reasons.[9] A similar lack of independence can be observed in Argentina, where the elected leaders have politicized the Supreme Court by repeatedly modifying its size and composition. Further, formal guarantees of judicial independence may exist without judicial independence being guaranteed in practice. In the case of Romania, for example, a report from the European Commission report recently noted 'indications of manipulations and pressure which affected institutions, members of the judiciary, and eventually had a serious impact on society as a whole'.[10]

Finally, some of our contributors thought that the popular acceptability of judicial decisions is, or can be enhanced by the style of judgments and reasoning. The national legal culture shapes the style of judgments and the judicial reasoning, and thereby the role-perception of judges too.[11] The degree of deference vis-à-vis the legislature is embedded in each legal and judicial culture.[12] Comparative scholarship on the legitimacy of courts' rulings in specific fields of law is rife, and in most cases our national reporters primarily examine the structure of their judiciary, its composition and the modus operandi of the judicial decision-makers in their legal system.

One of our reporters objects to 'a judiciary that does not trust the people much and, correspondingly, not that many people trust the courts'.[13] This statement goes to the heart of the question raised in this comparative study. Trust requires judicial decision-makers to reflect the considered judgments of the community, but not necessarily, and not exclusively, in the profile of the judicial decision-makers or in the opinions they espouse. Trust in the judicial institution can be strengthened through

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[9] See Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Venezuela' OEA/Ser L/V/II.118, doc 4 rev 2 (2003) at para 174.

[10] European Commission, 'Final Report from the Commission to the European Parliament and the Council. On Progress in Romania under the Cooperation and Verification Mechanism' COM (2012) 410, at 4.

[11] Values, practices and concepts are integrated into the operation of legal institutions and the interpretation of legal texts in a specific way in each legal system, J Bell, 'English Law and French Law – Not So Different?' (1995) 48 *Current Legal Problems* 63, 70.

[12] D Grimm, 'Domestic Courts and International Courts' in S Muller and M Loth (eds), *Highest Courts and the Internationalisation of Law. Challenges and Changes* (The Hague, The Hague Academic Press, 2009) 121, 127.

[13] M Bobek, Ch 6 below.

a wider range of institutional procedures, which have all in common their aim to make judicial decision-makers more reflective of society.

Our legal and institutional approach therefore effectively supplements a dominant political analysis of the principle of a fair reflection of the community in the judiciary. A political perspective concentrates on the way in which the people influence the way in which the judiciary exercises its powers; a legal analysis puts the emphasis on the legal framework by which the judiciary is organized and its actual functioning.[14] Thus, to take but one example, our Slovenian reporter points to a 'structural defect', the excessive length of civil and criminal trials, as a key explanation for the enduring lack of public trust in the Slovenian judiciary. This limits the public confidence gained through having, e.g., strict rules of judicial conduct within and outside the courtroom. The lack of a public relations policy from the judiciary is also perceived as 'unrealistic' in a society where, according to our reporter, criticism of public institutions is the norm.

This project therefore assumes that the institutional organisation of the judiciary conveys a particular view of the relationship between the judicial function and the community at large. Systems of appointment, in particular, reflect the community to a degree which is thought to be desirable – and whether parliament or an independent appointment body is involved in judicial selection will be decided by constitutional developments specific to each legal system. The terms of the relationship between the judiciary and the community ultimately place constraints upon the judicial decision-making itself.

3 Lay Participants Checking Professional Judges

It may seem reasonable to expect the involvement of lay people to contribute to greater public confidence in the justice system. Tocqueville praised the American jury trial for putting 'the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government'.[15] In modern terms, lay participation in the form of juries or lay assessors gives individuals the opportunity to participate in the governance of the people, thereby strengthening their commitment to the law. In the Netherlands, lay participation in the judiciary, in the form of juries and lay assessors in criminal trials (mainly), was and is still understood as a civic duty of the responsible citizen. The involvement of lay people in the judicial system is also perceived as filling a gap in the way educated lawyers and 'ordinary

[14] Neil MacCormick stated that 'politics is essentially concerned with the power of decision making in human communities on matters of communal interest or importance, with competition for that power and with its exercise. As for law, the essence is not power but normative order…Law is about institutional normative relations between normatively recognised persons of all sort', N MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.

[15] 1 A de Tocqueville, *Democracy in America* (Francis Bowen translation, Alfred A. Knopf, Inc 4th prtg 1948) (1835) at 282.

people' think about the law. Thus Tocqueville approved the American jury's ability to be 'the voice of the community represented by that institution'.[16] Early debates in Denmark, leading to the enactment of the Danish Constitution in 1849, also show that lay participants in criminal trials are expected to introduce a 'vox populi' in the judicial decision-making. Further, in the United States and England, historically, jurors were chosen from the immediate neighbourhood to the crime, for their knowledge of the crime or their ability to find out.[17] As much as Justice's blindfold is expected to enable impartial judgments, complete isolation from the incident was, in that case, perceived as causing an excessive detachment from the community. Lay participants were and are still today expected to introduce greater responsiveness to the context of the case. Thus, in Denmark, today, in favour of keeping juries, it is said that juries reflect a less bureaucratic way of looking at the law than the trained judges. Trial by jury, however, is a rarity in Denmark and this is also true for most European countries.[18]

This brings us to the key role played by lay participants in the judicial decision-making process. Polish lay assessors (*lawnicy*) are expected to judge in fairness or equity. They sit as assessors in first instance courts (employment and social security law cases), represent different professions and are expected to bring, in the words of our reporter, 'a fresh, non-routine perspective on the system of administration of justice'. In a survey cited by our reporter, a majority of Polish court presidents believe that the lay judges' primary task is to make sure that judicial decision-making should not be 'blurred by the law'. The lay assessor is expected to tell a professional judge when the other 'excessively relies on the "letter of the law" and disregards the assessment of a social role of the defendant'.

Yet we are told that these Polish lay assessors are also, in practice, made fun of due to their lack of commitment: 'lay judges will often treat their duties mainly as a source of additional income, or literally as the main means of support'. Our Hungarian reporter also notes the limited input of lay assessors into the judicial decision-making. Here lay assessors are limited to intervene in cases of serious crime or labour-law related trials. One judge and two assessors form a council, and they are required to decide the case together. The rights and obligations of the judge and his two assessors in the case are identical, but in practice the assessors follow the judge's interpretation of the law. Their assistance is, in practice, limited to specialized questioning. As our Czech reporter observes, if judge-craft is regarded as a technical exercise, then lay persons are not in a position to challenge the arguments of 'judges-experts' nor contribute much to the decision-making.

Lay members however might be thought to ensure an open and accessible trial. This applies to jurors in particular, who are typically not trained whereas lay judges in Europe generally are trained. In Denmark, in the context of oral hearings in criminal procedure, lawyers and the prosecution have to present cases in a way

[16] Tocqueville, *Democracy in America* at 286.

[17] L Appleman, 'The Lost Meaning of the Jury Trial Right' (2009) 84 *Indiana Law Journal* 397, 405.

[18] F Pakes, *Comparative Criminal Justice*, 3rd edn (Abingdon, Routledge, 2014), Ch 7.