

**“LESSONS FROM JUDICIAL SYSTEMS IN TRANSITION”**

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1. All judiciaries share certain common goals; namely to uphold the rule of law and ensure a high quality of justice in their respective countries, and in this way to guarantee international and domestic public confidence in their legal systems. Naturally, the judicial system of each nation seeks to achieve these goals while operating in a unique context, with particular challenges, resources and needs. Notwithstanding these differences however, there is a significant commonality in the conditions needed to maintain a high quality of justice. In particular, it is internationally recognized that a successful judicial system requires robust judicial independence, judicial integrity and

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competence, measures to facilitate access to justice, and a cost and time efficient process of dispute resolution.<sup>1</sup>

2. Depending on our economic, political and social context, these conditions will operate to a greater or lesser extent in judicial systems in our region. All judiciaries however, have much to learn from one another, as we seek to guard against the erosion of high standards, where such standards exist, and pursue reforms, where improvement is necessary.

3. In particular, I want to briefly consider the lessons that can be learnt from the experience of judicial systems in transition. By “transition”, I mean judicial systems pursuing reform in the context of significant economic and political change, or a recent history of conflict or autocratic rule. The experience of these judicial systems holds insights, both for judiciaries in stable democracies where the rule of law is well established, and for other judiciaries in transition or undertaking significant reforms.

4. First, the experience of such systems highlights the social, cultural and institutional barriers that can exist to establishing a

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<sup>1</sup> See for eg *Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region*.

fair and effective judicial system. For countries that are privileged not to face those barriers that experience is a lesson in safeguarding the conditions that underpin the effective operation of the administration of justice.

5. To take a significant example, many judicial systems in transition face direct challenges in relation to judicial independence and integrity, for example executive interference in individual cases, bribery of judicial officers, and corruption. Often these challenges occur notwithstanding the presence of newly written constitutional guarantees of independence. In the absence of a robust institutional separation of powers and a judicial culture of independence and integrity these formal guarantees can prove insufficient.

6. For countries with stable and independent judiciaries such as Australia, the lesson that can be drawn from these challenges is one of vigilance. Australia does not face direct challenges to judicial independence of the type often experienced in transitioning judicial systems, but we do face more indirect and subtle challenges. There is, for example, increasing public criticism of the judiciary, including by the governments of the

day. One recent example that springs to mind is of a government leader, who in telling the legal fraternity to leave its “ivory towers” also remarked that the separation of powers was “more of an American thing”.<sup>2</sup> The recent reforms in NSW, allowing the Executive some measure of control over judicial pay, provide another example.<sup>3</sup>

7. There is a temptation amongst both the judiciary and the Executive to be complacent about these relatively minor assaults on the separation of powers, in the belief that the independence and integrity of the judiciary in our country is fundamentally unassailable. The experience of other jurisdictions, which face direct and severe challenges to the same principles indirectly being undermined in our own jurisdictions, reminds us that this is not the case – that what we take for granted is fragile. It reminds us that we must be careful not to allow a gradual erosion of respect for the separation of powers to occur; as such a culture of respect is an essential condition of judicial independence.

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<sup>2</sup> “Campbell Newman tells lawyers to Leave Ivory Towers” (Brisbane Times) <http://www.brisbanetimes.com.au/queensland/campbell-newman-tells-lawyers-to-leave-ivory-towers-20131024-2w318.html>

<sup>3</sup> see *Statutory and Other Offices Remuneration Act 1975* (1976 No 4) s 6AB

8. Perhaps more positively, judicial systems in transition can provide valuable guidance to others pursuing justice sector and legal reforms. Significant transitions in the political, social and economic conditions of a country obviously carry great challenges. They also however provide an opportunity for large-scale positive reforms, including to the legal system, that may be impossible in the absence of such upheaval.
9. The obvious example is South Africa, which implemented far reaching legal reforms following the end of apartheid, including the drafting of a new Constitution and justiciable Bill of Rights, legislation de-linking magistrates from the Public Service, the establishment of a Constitutional Court, a broadening of the pool from which judges would be drawn and measures to improve the race and gender diversity of the judiciary.<sup>4</sup> Since that time, South Africa's Constitution has frequently been held up as a model for other nations undergoing political and legal transition.

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<sup>4</sup> Department of Justice and Constitutional Development, Discussion Paper on the transformation of judicial system in the Developmental South African State, (Feb. 2012)  
<http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf>

10. Similarly, the experience of judicial systems in our region in implementing significant judicial reforms holds valuable lessons for other nations, both in relation to outcomes and process.
  
11. First, reform initiatives can provide a model for judicial systems facing similar transitions. As Judge Tan Siong Thye of Singapore has put it “by sharing our experiences collectively, success formulas and stories can be emulated or adapted for use, without having the re-invent the wheel”.<sup>5</sup>
  
12. For example, the introduction in Nepal of an independent Judicial Council to monitor the ethics and professional competence of the judiciary and carry out investigations into complaints has, I understand, had some success in safeguarding the integrity and accountability of the judiciary. Reforms of this nature may be relevant to other nations facing similar challenges. The difficulties that have been faced in implementing reform programs can also provide valuable lessons to other jurisdictions interested in pursuing similar initiatives. Similarly, evaluation tools developed in the context of

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<sup>5</sup> Current Reforms in ASEAN Countries – Lessons and Experiences, Singapore’s Experience (ASEAN Law Association 10<sup>th</sup> General Assembly)

transitioning judiciaries, can be useful to other judicial systems in monitoring their own performance.

13. The Asia Pacific Judicial Reform Forum plays an important facilitation role in this context, not only by providing a platform through which information about reforms can be shared, but also by developing tools that can assist in successful judicial reform, informed by the experience of other nations, and by supporting partnerships that will assist judicial systems pursuing reform.

14. For well established and stable judiciaries, reform initiatives pursued by judicial systems in transition, and dialogue with the judges of countries undertaking them, provides a valuable opportunity for us to reflect on our own structures and processes. It allows us to question whether certain reforms or innovations may be possible and desirable in our own jurisdictions, notwithstanding the absence of a social or political catalyst for doing so.

15. For example, while Singapore has never been what one would typically think of as a “transitioning judicial system”, there

is no doubt, as was discussed by Judge Tan Siong Thye at a recent meeting of the ASEAN Law association, that the Singaporean legal system faced significant challenges in the decades following the country's separation from Malaysia and the withdrawal of British troops. The judicial reforms that were implemented in the 1990s to respond to these challenges transformed the judicial system from one described as "inefficient and inaccessible" to one recognized as world leading in efficiency and effectiveness. These reforms, which include technological innovations and the use of night courts, hold lessons for transitioning and established judiciaries alike.<sup>6</sup>

16. More broadly, looking to the experiences of judicial systems in transition can provide important lessons in relation to the broader *goals* that judicial reform should aim to achieve and the *methodologies* that are most effective. The Asia Pacific Judicial Reform Forum has done valuable work in this respect, including through the publication of *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience*.

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<sup>6</sup> see Current Reforms in ASEAN Countries – Lessons and Experiences, Singapore's Experience (ASEAN Law Association 10<sup>th</sup> General Assembly)

17. This book gathers experiences of judicial reform from a number of countries in our region. From these experiences several broader propositions about judicial reform can be drawn drawn, including that leadership by the courts and judicial ownership of the reform agenda is essential to the effective implementation of initiatives.<sup>7</sup>

18. Resources of this nature provide lessons not only about which particular reform projects are successful, but about how to pursue reform and for what ultimate purposes. They allow us to design methodologies for judicial reform that will be sustainable and effective. They also allow us to create a common vision for judicial development, which supports mutual understanding and can inform future directions for judicial systems in our region.

19. Such insights, which can only be gained through dialogue with judiciaries in transition, are of general importance. No judicial system, no matter how stable or well-respected, is perfect, and all judiciaries can and should strive for continuous improvement in the quality of justice in our respective countries.

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<sup>7</sup> see APJRF, “Searching for Success in Judicial Reform” <http://www.apjrf.com/content-document-pdf/Searching%20for%20Success%20in%20Judicial%20Reform.pdf>

20. The experiences and challenges faced by judicial systems in transition highlight the legal frameworks, procedural rules, and institutional, political and cultural conditions that support high quality justice. They provide both a theoretical framework and valuable practical lessons that can guide all judicial systems in our region as we seek to evaluate, protect and where necessary reform our systems. The Asia Pacific Judicial Reform Forum is to be thanked for providing the institutional support that makes exchanging these valuable insights possible.