IN THE SUPREMECOURT OF INDIA
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1018 OF 2021

IN THE MATTER OF:-

MADRAS BAR ASSOCIATION ....PETITONER

-versus-

UOI & ANR. ... RESPONDENTS

INDEX

Filed by:

MR. RAJ BAHADUR YADAV
Advocate

IN THE SUPREME COURT OF INDIA
Civil Original Jurisdiction
WRIT PETITION (CIVIL) NO. 1018 / 2021

IN THE MATTER OF:

Madras Bar Association ...Petitioner

Versus

Union of India and Anr. ...Respondents

COUNTER AFFIDAVIT ON BEHALF OF THE UNION OF INDIA

I, Arvind Saran, aged about 45 years, S/o. Shri Amarnath Saran Shrivastav, presently working as Director, Department of Revenue and having office at Room No. 48A, North Block, New Delhi 01, do hereby solemnly affirm and state as under:-

1. I am appointed as Director in the Department of Revenue, Ministry of Finance, i.e. the Respondent No. 2 herein and am authorized to file the present Counter Affidavit in reply to the Writ Petition. At the outset, I state that the contents of the Writ Petition, to the extent that they are inconsistent with the submissions made hereinafter, are incorrect and denied.

2. The Tribunal Reforms Act, 2021 ["hereinafter the **Reforms Act**"] is a culmination of a series of decisions of the Supreme Court and an equal number of statutes and rules in regard to the same matter, which is unprecedented in the history of the Supreme Court.

3. The Government of India is distressed by the fact that both laws and statutory rules made by Parliament and the Executive in areas of pure policy are being held to be void by invoking independence of the

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judiciary, when such laws and rules do not violate fundamental rights or any provision of the Constitution and is wholly within competency.

4. The Government equally believes that the Court striking down these pure matters of policy violates the separation of powers by the judicial wing of the State.

5. The four issues which are held to violate the independence of the judiciary, that is the independence of the Members and Chairperson of the Tribunals are the following:

(i) The prescription of a term of 4 years, though combined with the preferential right of reappointment, as a result of which the individual could continue up to the age of 67 years, if a Member, or 70 years in the case of a Chairperson, such recommendation for reappointment is by the Search-cum-Selection Committee ("SCSC") dominated by the judiciary.

(ii) The fixing of a minimum age of 50 years for appointment which would be applicable across the board for all members, including advocates, as well as for the Chairpersons. This prescription of 50 years was contrary to the direction that advocates need to have only ten years' experience for being eligible for appointment because the Constitution provides for advocates with 10 years' experience being appointed as High Court judges. The fact is that no single appointment of an advocate with 10 years practice has ever been made to a High Court in the last 75 years. The practice as set out in the judgment in ***Lok Prahari v. Union of India and Ors.*** (Judgement dated 20.04.2021 in WP (C) No. 1236/2019 at para. 22, reported in 2021 SCC Online SC 333) was that the incumbent should be between 45 to 55 years to be appointed a judge of the Supreme Court. This minimum age requirement of 50 years, across the board, was upheld by Justice Hemant Gupta in his dissenting opinion in ***Madras Bar Association v. Union of India and Anr.*** [passed in WP Civil No. 502 / 2021] (hereinafter referred to as "**MBA-IV**").

(iii) In ***Madras Bar Association v. Union of India*** ("**MBA-III**") [(2020) SCC Online SC 962], one of the directions was that appointments were to be made by the Government within 3 months of the receipt of the recommendation from the Search-cum-Selection Committee. The 2021 Ordinance stated that the Central Government shall take a decision on the recommendation of the SCSC '*preferably*' within 3 months. Though this was struck down by the majority in **MBA-IV**, Justice Hemant Gupta found that this was a perfectly legitimate provision. A similar provision in the Reforms Act, 2021 is now under challenge.

(iv) Last is the direction that the recommendations of the SCSC to the Government, that is the Appointments Committee of the Cabinet, should be of only one single name per vacant post with a waitlist available in case of exhaustion of the main list. Instead, the 2021 Ordinance required a panel of two names to be recommended, but this Hon'ble Court, in **MBA-IV**, was not prepared to accept this contention. Nevertheless, the Reforms Act provides in Section 3(7), for the same, i.e. the SCSC shall recommend a panel of two names.

6. Each one of the above matters is an issue of policy. The justification for the Parliament and the Executive to repeatedly assert its right to make laws relating to policy is that even if this right is denied to Parliament, as it has been done by invoking the principle of independence of the judiciary, a vital concomitant of legislative power would be lost to Parliament, violating the constitutional separation of powers.

7. The Government of India will be placing before the Court the authorities declaring the exclusive right of the Parliament and Executive to frame policy and execute the same. The Government will also demonstrate that the concept of independence of the judiciary has no relevance to the four issues of policy set out earlier. On the other hand, it is settled law that legislative policy can be invalidated only if

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it violates fundamental rights or any provision of the Constitution or is beyond legislative competence.

8. These are the areas where both Parliament and the Executive stand perplexed as well settled principles are not being followed since it is only if the policy decision taken by the Parliament violates any fundamental right or any provision of law, would the Court set aside such decision.

9. As a matter of fact, this Hon'ble Court should have upheld each and every one of the four aspects mentioned earlier by accepting the position that they were issues of policy, so that there may be comity between the three organs of state and there can be no confusion in the mind of Parliament. These issues cannot be traced to independence of the judiciary.

10. The judgement with which the Parliament is faced, i.e. **MBA-IV**, elaborately goes into the laws of England and as well as the United States to come to the conclusion, set out in paragraph 17, that "*it has been said that the doctrine of the supremacy of the Supreme Court is the logical conclusion of Coke's doctrine of control of the Courts over legislation*' by quoting from Willis on Constitution Law (1936 Edn, para 76). It is submitted that Sir Edward Coke telling King James I that the Courts of Justice alone can decide causes concerning the administration of justice as his Majesty was not learned in the laws of the realm of England, had nothing to do with the Constitutional environment existing today. The Indian Parliament with 534 elected representatives, including eminent lawyers, owing accountability to their constituencies and with their collective decision representing the will of the people of the country is a far cry from the times of King James I.

11. The judgement in MBA-IV has relied upon the statements of (i) Sir Edward Coke; (ii) Baron de Montesquieu; (iii) The separation of powers in the American Constitution; (iv) Alexander Hamilton; (v) The judgments of the United States' Supreme Court in ***Marbury v. Madison*** [5 US 137 (1803)], (vi) in ***United States v. Peters*** [9 US 115 (1809)],

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(vii) ***Brown v. Board of Education of Topeka*** [347 US 483 (1954)], (viii) ***Cooper v. Aaron*** [358 US 1 (1958)], (ix) ***Miranda v. Arizona*** [384 US 436 (1966)], (x) ***Dickerson v. United States*** [530 US 428 (2000)], (xi) ***Plaut v. Spendthrift Farm, Inc.*** [514 US 211 (1995)]; and (xii) an elaborate article titled "*The Case for the Legislative Override*".

12. The Supreme Court in MBA-IV was not justified in proceeding on the basis that by reason of separation of powers and the independence of the judiciary, in the United States, the judgments of the US Supreme Court were fully implemented. On the other hand, ***Brown v. Board of Education of Topeka*** (supra) itself still remains without fulfillment as an article written on the 60th anniversary of the judgment titled "*Brown v Board at 60*" by Richard Rothstein (published on 17.04.2014 in the Report of the Economic Policy Institute) states, for example, that:

> "*But Brown was unsuccessful in its purported mission – to undo the school segregation that persists as a modal characteristic of American public education today. [.....]*
>
> *In 1967, President Lyndon Johnson appointed Marshall to the Supreme Court where he spent the next 24 years in a fruitless struggle to prevent the perpetuation of school segregation, and indeed its exacerbation, after an initial rollback.*"

13. The various authorities cited ignore the real legal position. In the United States, judgment after judgment of the Supreme Court was disobeyed. The US Supreme Court had struck down as invalid a piece of oppressive Georgian legislation on Indians, i.e. Red-Indians, to enable complete destitution of the Indians' rights. Andrew Jackson, the second American President, refused to permit the decision to be enforced and he pointedly remarked:

> "*Well, John Marshall has made his decision. Now let him enforce it.*"

14. Similarly, Thomas Jefferson had said:

> *"Nothing in the Constitution has given the Supreme Court a right to decide for the Executive more than to the Executive to decide for them."*

15. When the ***Dred Scott*** decision [***Dred Scott v. Sandford*** 60 US 393 (1857)] was given by the US Supreme Court by Chief Justice Roger B. Taney holding that Congress had no power to abolish slavery as slaves were considered as 'property' and the property rights could not be taken away, Abraham Lincoln remarked:

> *"Beyond this, none is obliged to be bound by the judicial interpretation of the Constitution, when the interpretations lack claims to the public confidence."*

16. Things came to a head when, in the 1930s, the New Deal laws were promulgated by the President, Franklin D. Roosevelt, which provided for retirement benefits to workers, price control of commodities, municipal bankruptcy laws and laws relating to the working conditions of labour. All these were struck down by the Supreme Court, one by one.

17. The people, however, were not prepared to accept the Court's decisions, but, on the other hand, voted Roosevelt back to power. He then made his famous speech:

> *"The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it-reading into the Constitution words and implications which are not there, and which were never intended to be there.*
>
> *We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will*

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> *do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men*"

He later threatened,

> "*I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators*".

But, of course, Roosevelt had no need to carry out his threat as the judges themselves reversed their earlier views and upheld each one of the laws passed subsequently.

18. It is true that Justice Charles Evans Hughes had said, *"We are under the Constitution but the Constitution is what the Judges say it is."*. And Justice Harlan, in addressing law students said, *"I want to say to you, if we do not like an Act of Congress, we do not have much trouble to find grounds to declaring it unconstitutional."*

19. The judgment in **MBA-IV** has also relied upon, "*The Case for the Legislative Override*", an Article by Nicholas Stephanopoulos (10 UCLA Journal of International Law and Foreign Affairs 250 (2005)). The Article points out that both in Canada as well as in Israel, a number of judgments of the Supreme Court of the respective countries have been rendered inapplicable through laws made by their respective parliaments. But what is significant is that it is not stated that the Supreme Courts of the respective countries sought to re-instate the judgments by again seeking to strike down the laws which reversed the earlier judgments. Here, the author quotes (at Page 262) Janet Herbert,–

> "*any society that aspires to be democratic should resolve the most important of its social priorities through its elected legislatures rather than in courts*".

20. The Article relied upon further states that:

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> *"The final value implicated by the choice among judicial review arrangements is the quality of relations between the different branches of government. Judicial supremacy on constitutional issues may foster anger by the other branches at having their policies nullified, and provoke retaliation through constitutional amendment, court-packing, or outright disobedience. But greater legislative involvement in constitutional decision-making soothes this frustration and 'recognizes the need for dialogue and joint responsibility between legislatures and courts in protecting fundamental liberties'."*

21. If there is one single principle on which the exclusive jurisdiction of Parliament and Executive rests, it is in the realm of policy making. To this extent, because of the separation of powers, the Judiciary is excluded from this area of policy. It has to be recognised that for this purpose, the question of framing of a Bill to be presented to Parliament itself involves deep discussion and research, at different levels of the bureaucracy, the Minister and thereafter the Cabinet. Then comes the debates in the Upper House and the Lower House, when clause by clause is read and put to the house for debate by the elected representatives, and, finally, the Bill, if passed, becomes law. All this would be set at nought if a bench of the Supreme Court decides that the policy affects the independence of the judiciary and strikes it down, not because the policy violates any fundamental right or constitutional provision or is beyond legislative competence, but because, the Court's concept of 'independence' is violated.

22. By applying one's mind to either the provisions relating to tenure of 4 years, or minimum age of 50 years, or to the panel of 2 names to be recommended, or for the Central Government to take a decision on the recommendations '*preferably*' within 3 months, one is confused if one were told that all this relates to independence of the judiciary. It would be mere semantics if, in fact, it has no relationship to independence of the Members or the Chairperson of the Tribunals. Independence would be affected, only if the tenure, or terms and conditions, are such that

the Executive is able to control the will of the Member or the Chairperson of the Tribunal. With judicial dominance in the SCSC which recommends the continuance or re-appointment of members, whether for four years or five years, these fears are unfounded. In cases where the candidate should be at least fifty years of age as upheld by Justice Hemant Gupta (and for instance, the Companies Act, 2013 itself requires the members to be appointed to the NCLT must be atleast fifty years), the same is compared to the eligibility in the Constitution for High Court judges, where an advocate with 10 years' experience is eligible. This, however, fails to consider the judgment in ***Lok Prahari v. Union of India*** (2021 SCC Online SC 333), which expressly notes that the age profile for elevation to the High Courts is 45 to 55 years. It is difficult to understand as to how independence comes into the picture.

23. It is submitted that all these aspects relate to policy, and nothing but policy. To quote the dissenting opinion of Justice Frankfurter in ***Trop v. Dulles*** [356 US 86 (1958)], which was quoted with approval by the Supreme Court in ***Asif Hameed and Ors. v. State of Jammu and Kashmir and Ors.*** [1989 Supp (2) SCC 362]:

> *"It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."*

24. Equally, in the Connecticut Birth Control Case [***Griswold v. Connecticut*** 381 US 479 (1965)], the US Supreme Court held:

> *"...we do not sit [in rendering this decision] as a super legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions...*
>
> *... a jurist is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."*

25. Justice Harman in the case of ***Clean Air Foundation ltd. v. Government of KHSAR*** [Hong Kong] [(2007) HKCFI 757] notes:

> *"It has long been accepted that policy is a matter for policy makers and that to interfere with the lawful discretion given to policy makers would amount to an abuse of the supervisory jurisdiction vested in the Courts."*

26. What is significant is if the separation of powers entrusts to Parliament and the Executive the exclusive jurisdiction to decide as to what would be the best policy, which would be necessary in public interest, then the principle of separation of powers itself would stand violated if the Judiciary interferes with issues of policy and substitutes what it believes would be a better policy.

27. That policy is exclusively a matter for the legislature and the executive, and should not be interfered with by the judiciary, unless it violates fundamental rights or any other provision of the Constitution is well settled by the following judgments:

    (a) ***Narmada Bachao Andolan v. Union of India*** [(2000) 10 SCC 664]:

> *"229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of*

policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. ....."

(b) ***Rajeev Suri v. DDA*** [2021 SCC Online SC 7] held:

*"**192.** The Government may examine advantages or disadvantages of a policy at its own end, it may or may not achieve the desired objective. The Government is entitled to commit errors or achieve successes in policy matters as long as constitutional principles are not violated in the process. It is not the Court's concern to enquire into the priorities of an elected Government. Judicial review is never meant to venture into the mind of the Government and thereby examine validity of a decision. In Shimnit Utsch India, this Court, in para 52, observed thus:*

> *"52. ... The courts have repeatedly held that the government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The Government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the Government or public authority, change in policy must be in conformity with Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223] reasonableness*

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and free from arbitrariness, irrationality, bias and malice."

28. The most elaborate discussion on the relationship between the three organs of the State is found in the three-judge judgement in ***Dr. Ashwani Kumar v. Union of India*** [2020 (13) SCC 585] wherein it was held that:

> *"13. [.....] Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed [.....] that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. [.....]"*

29. The independence of the judiciary cannot be affected by the duration of the tenure of the chairperson/member of a statutory tribunal being fixed as 4 years, with the option of re-appointment, or 5 years. The question of the independence of the chairperson/member and/or the tribunal itself could arise only if the conditions of appointment of the chairperson or member would permit the Government to influence or control his/her will. To quote from "*Guidance for Promoting Judicial Independence and Impartiality*" issued in January 2002 by the Office of Democracy and Governance, US Agency for International Development, which states:

> *"Three arguments are generally advanced against increasing the length of tenure of judges: (1) shorter terms are necessary to weed out judges who are sub-standard; (2) shorter terms are necessary to ensure that the judiciary*

reflects the will of the people; and (3) long or life terms protect judges who are 'in someone's pocket'."

A copy of the article titled "*Guidance for Promoting Judicial Independence and Impartiality*" issued in January 2002 by the Office of Democracy and Governance, US Agency for International Development is annexed herewith and marked as **Annexure-A**.

30. What is most relevant is that any re-appointment of a Chairperson/member will take place only on the basis of a recommendation by the Search-cum-Selection Committees, in which the judiciary has a dominant voice. Hence, the claim of the independence of the judiciary being adversely affected by a fixed tenure of 4 years, but not by a fixed tenure of 5 years, has no substance or merit.

31. This would equally apply to the fixation of 50 years as the minimum age for appointment as chairperson or member of a statutory tribunal. The directive in **MBA-III** that advocates with 10 years of standing would be eligible for appointment was based on the fact that the Constitution permits the appointment of such persons as judges of the High Courts. Yet, this rule of 10 years has not resulted in a single appointment having taken place, till date, to any High Court, of a lawyer with only 10 years of professional standing. On the other hand, this Hon'ble Court, in ***Lok Prahari v. Union of India and Ors.*** (Judgement dated 20.04.2021 in WP (C) No. 1236/2019 at para. 22, reported in 2021 SCC Online SC 333), has observed that it is only lawyers falling in the age band of 45 to 55 years who are held to be eligible for satisfactorily discharging the functions of a judge of a High Court. It should be noted that the dissent by Justice Hemant Gupta specifically upholds 50 years. He also points out that the Companies Act, 2013 requires a minimum of 50 years for appointment of a member or Chairperson to the National Company Law Tribunal. It is submitted therefore that 50 years would be wholly within the competence of Parliament as a declaration of policy by the elected representatives of the people.

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32. It should also be remembered that to limit the experience to 10 years in the case of a professional like a lawyer without extending the same benefit to other professionals who are eligible to be appointed as members of the Tribunals like chartered accountants, environmentalists, and other technical experts such as those having professional experience in economics, business, commerce, finance, management, industry, public affairs, administration, telecommunications, investment, financial sectors including securities market or pension funds or commodity derivates or insurance, commercial matters in regard to railways, etc. would be *ex facie* discriminatory and would be liable to be struck down.

33. In this background it is submitted that neither the Executive nor Parliament can be deprived of their right to make laws declaring policy, as otherwise the constitutional requirement of separation of powers will stand violated by the judicial pronouncements. This is the very reason why the Parliament has no choice other than to assert its Constitutional right under the rule of law as otherwise even the dividing line between governance and judicial adjudication or decision-making would stand obliterated. This is the distressing position in which the Parliament would be driven to yield the Constitutional right to make laws for the country through deciding upon the policy, based on the will of the 534 elected representatives of the people which, in fact, reflects the will of the people.

34. The other two challenges pertain to the decision of this Hon'ble Court that only one recommendation against each vacant post will be made by the SCSC for acceptance by the Government. It is found in a few cases that there have been reports of corruption by the recommended persons and, in one case, the name of the counsel who was a conduit was also mentioned. The Government asserts that it has the right to reject a recommendation on valid grounds. The very fact that the waitlist is also being sent which according to the court is to be used only when the main list is exhausted would show that it would be prudent to have a panel of two names to prevent delay in appointments. Surely, since both the names are found suitable by the SCSC, even if

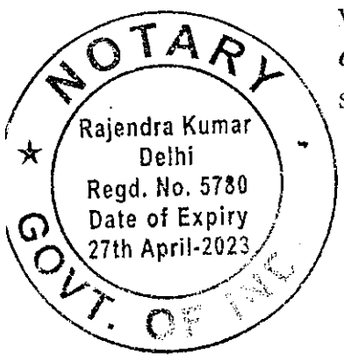
Government were to exercise a choice between the two, that amount of faith and trust between the three great wings of the State has to exist.

35. The Appointments Committee of Cabinet ("**ACC**"), which takes a decision on the recommendations made by the SCSC, is headed by the Prime Minister of the country. The Government functions through 53 Ministries, each one dealing with matters of great importance to the country. In matters of significance, the ACC would also have to be consulted to prioritise the multitude of issues important to the State, and thus the need not to have an inflexible 3 months. Even with pressing internal and external affairs of great importance coming in the way, 3 months may not be sufficient in some cases. The word 'preferably' used in Section 3(7) is a choice of Parliament and for the Court to object to it would not be conducive to good governance.

36. This Hon'ble Court in **MBA-IV** has held that the decision in regard to these four issues do not fall under Article 142 but would fall under Article 141 which is a declaration of law which is binding in nature. It is submitted that these findings of the Court really relate to factual issues as to whether 4 years is not an acceptable tenure affecting the independence of the judiciary, but five years will uphold the independence of the judiciary. Equally, whether ten years should be the experience for advocates alone and leaving the existing tenure to operate for the other categories mentioned earlier, so too the word 'preferably', or whether the panel of names recommended by the SCSC should consist of 1 or 2 names.

37. Article 141 states "*The law declared by the Supreme Court shall be binding on all courts within the territory of India.*" It has been held that it is only the *ratio decidendi* that would be binding and that too only on the courts.

38. In fact, in the case of ***Vishaka v. State of Rajasthan*** [1997 (6) SCC 241, para 16] the judgment itself states that the guidelines laid down will be law under Article 141. However, in ***Ashwani Kumar v. Union of India*** [2020 (13) SCC 585, para 29], it has been held that even if a subsequent law violates the guidelines laid down in *Vishaka* the



subsequent legislation cannot be held to be in violation of Article 141 of the Constitution.

39. The real problem arises because starting with ***S.P. Sampath Kumar v. Union of India and Ors.*** [(1987) 1 SCC 124], ***Union of India v. R. Gandhi, President, Madras Bar Association*** (hereinafter referred to as "**MBA-I**") [(2010) 11 SCC 1], ***Madras Bar Association v. Union of India and Anr.*** (hereinafter referred to as "**MBA-II**") [(2015) 8 SCC 583], ***Rojer Mathew v. South Indian Bank Limited and Ors.*** [(2020) 6 SCC 1], **MBA-III**, and **MBA-IV**, uniformly the Court has issued directions, which it describes as being mandatory in nature, in regard to all the four issues which have been set out earlier. In the clear teeth of the series of judgments which say that it is not open to the judiciary to compel Parliament to pass a law in accordance with the directions relating to policy, whether described as mandatory or not.

40. These directions can only be treated as recommendatory in nature. Not implementing these directions cannot be said to be in violation of the judgments of the Court. This is on the basis that the Courts cannot direct the legislature to make a law in a particular manner [*See Supreme Court Employees Welfare v. Union of India* 1989 (4) SCC 187]. In ***Dr. Ashwani Kumar v. Union of India and Anr.*** 2020 (13) SCC 585, this Hon'ble Court referred to its earlier decisions in ***Kalpana Mehta v. Union of India*** 2018 (7) SCC 1 and in ***SC Chandra v. State of Jharkhand*** 2007 (8) SCC 279 and held:

> *Thus, while exercising the interpretative power, the courts can draw strength from the spirit and propelling elements underlying the Constitution to realise the constitutional values but must remain alive to the concept of judicial restraint which requires the Judges to decide cases within defined limits of power. Thus, the courts would not accept submissions and pass orders purely on a matter of policy or formulate judicial legislation which is for the executive or elected representatives of the people to enact. Reference was made to some judgments of this Court in the following*

words : (Kalpana Mehta case [Kalpana Mehta v. Union of India, (2018) 7 SCC 1] , SCC pp. 47-48, para 43)

> *"43. In S.C. Chandra v. State of Jharkhand [S.C. Chandra v. State of Jharkhand, (2007) 8 SCC 279 : (2007) 2 SCC (L&S) 897 : 2 SCEC 943] , it has been ruled that the judiciary should exercise restraint and ordinarily should not encroach into the legislative domain. In this regard, a reference to a three-Judge Bench decision in Suresh Seth v. Municipal Corpn., Indore [Suresh Seth v. Municipal Corpn., Indore, (2005) 13 SCC 287] is quite instructive. In the said case, a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956. Repelling the submission, the Court held that it is purely a matter of policy which is for the elected representatives of the people to decide and no directions can be issued by the Court in this regard. The Court further observed that this Court cannot issue directions to the legislature to make any particular kind of enactment. ....."*

41. It has been held in ***Supreme Court Employees Welfare v. Union of India*** [1989 (4) SCC 187, at paragraph 51] that this principle will equally apply to subordinate legislation. Therefore, not following these directions to make a law in a particular manner would be solely within the competence and jurisdiction of Parliament.

42. The four aspects which is really the controversy involved in the present case has been held to violate the basic structure, independence of the judiciary by Justice Ravindra Bhat in **MBA-IV** in paragraph 9 in the following words:-

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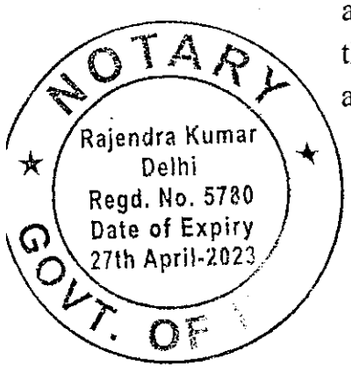
"In L. Chandra Kumar v Union of India [1997 (3) SCC 261] this court invalidated Section 28 of the Administrative Tribunals Act on the ground that it excluded jurisdiction under Articles 226 and 227, and was thus in conflict with the basic structure of the constitution, as judicial review was part of the basic structure:

[.....]

In Ismail Faruqui v Union of India [1994 (6) SCC 360] provisions of a Central enactment [the Acquisition of Certain Area at Ayodhya Act, 1993] [Section 4 (3)] which abated all pending legal proceedings was held to be unconstitutional because: it amounted to "an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional and invalid." It is therefore, too late in the day to contend that infringement by a statute, of the concept of independence of the judiciary - a basic or essential feature of the constitution, which is manifested in its diverse provisions, cannot be attacked, as it is not evident in a specific Article of the Constitution."

43. Justice Nageswara Rao on the other hand holds, in **MBA-IV** (at paragraph 22 at Pg.27-28), that the rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution and that violation of separation of powers would result in infringement of Article 14 of the Constitution, and that a legislation can be declared as unconstitutional if it is in violation of the principle of separation of powers, which stands violated by the provisions of the 2021 Ordinance in relation to the four aspects mentioned earlier.

44. It is submitted that the principle of basic structure in the Constitution can be used to strike down a constitutional amendment. It has been held in a series of cases including by two Constitutional Bench decisions and by a 7 judges bench of this Hon'ble Court that basic structure in the Constitution can only be used to test the validity of a Constitutional amendment but has no relevance when it comes to validity of a statue.

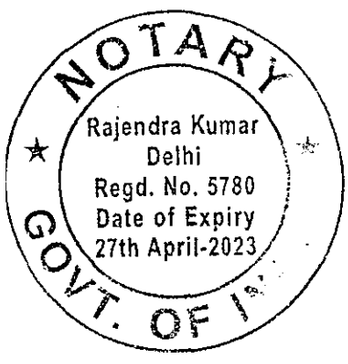


This has been held by a constitution bench judgment in ***Kuldip Nayar v. Union of India*** [2006 (7) SCC 1] which in paragraphs 106 and 107 holds that:

> *"106. The doctrine of "basic feature" in the context of our Constitution, thus, does not apply to ordinary legislation which has only a dual criteria to meet, namely:*
>
> *(i) it should relate to a matter within its competence;*
>
> *(ii) it should not be void under Article 13 as being an unreasonable restriction on a fundamental right or as being repugnant to an express constitutional prohibition.*
>
> *Reference can also be made in this respect to Public Services Tribunal Bar Assn. v. State of U.P. [(2003) 4 SCC 104 : 2003 SCC (L&S) 400] and State of A.P. v. McDowell & Co. [(1996) 3 SCC 709]*
>
> *107. The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners."*

45. In ***Indira Nehru Gandhi v. Raj Narain*** [1975 Supp SCC 1], a constitution bench held that:

> *"136. The theory of basic structures or basic features is an exercise in imponderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries. If the*



theory of basic structures or basic features will be applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be encroachment on the separation of powers."

46. Equally, the 7 judges in the ***State of Karnataka v. Union of India*** [1977 (4) SCC 608] also affirmed the same principle. It is therefore established beyond doubt that the principle of independence of the judiciary, which forms part of the basic structure, cannot be used to strike down a legislation.

47. The judgement in **MBA-IV** holds that once a mandamus is issued by the Court, it is bound to be obeyed by the Executive and the Legislature. This is not so. The judgement of the Supreme Court in ***Virender Singh Hooda v. State of Haryana*** [2004 (12) SCC 588] holds that

> *"67. [.....] A mandamus issued can be nullified by the legislature so long as the law enacted by it does not contravene constitutional provisions and usurp the judicial power and only removes the basis of the issue of the mandamus."*

48. In the present case one tries to find out what is the foundation, or the basis of the directions issued, in regard to the four aspects mentioned earlier. It has already been stated that these directives to mould the legislation so as to implement the directives of the Court in regard to these four aspects is tantamount to directing Parliament to legislate in a particular manner. It has therefore been stated earlier that these directions are *ex facie* beyond the competence of the Supreme Court and, to give it validity, one could only treat it as recommendations and not binding directives.

49. The next question would be how does Parliament remove the basis where none exists. The Court merely holds that, in its view, independence of the judiciary would require 5 years and not 4 years as the tenure, or an advocate with ten years' experience being made

eligible for appointment though that would not be the yardstick for the numerous other classes of professionals mentioned otherwise resulting in discrimination, or that a minimum age criteria of 50 years is invalid or a panel of 2 names will not be permitted, and the 3 months' time limit for making appointments after receiving the recommendations of the SCSC is inflexible. What is the basis or foundation other than the fact that the Court is entering into the impermissible area of judicial legislation or directing laws to be made in a particular manner.

50. It is only in the case of the ten years' minimum experience for advocates that the basis was provided by pointing out to the provision in the Constitution. But as pointed out, no single appointment has been made to the High Court of an advocate with 10 years' practice and on the other hand, the judgment of this Hon'ble Court in ***Lok Prahari v. Union of India and Ors.*** (Judgement dated 20.04.2021 in WP (C) No. 1236/2019 at para 22, reported in 2021 SCC Online SC 333) has held that 45 to 55 years should be the age profile for elevation to the bench. Juxtaposing the judgment in **MBA-III** of 10 years' experience against the age of 45 to 55 years in the ***Lok Prahari*** (supra) judgment, to select the average of 50 years would be the justification for overriding the judgment of this Court The second justification is that *ex facie* permitting ten years' experience for advocates but not for the other classes/categories of professionals for being eligible to be appointed would violate Article 14 resulting in ten years' experience for advocates being *ex facie* discriminatory for violating Article 14 and therefore being struck down by the Courts. If 10 years' experience for an advocate had been declared as the eligibility condition, when it was certain to be struck down, and hence the Reforms Act provided for a uniform age applicable to all the classes/categories of professionals, no question of violating the judgment in **MBA-III** would arise. It should also be noted that Justice Hemant Gupta had upheld 50 years and relied upon the requirement of a minimum age of 50 years for appointment to the NCLT.

51. In all the cases of validating laws there was some basis to be removed, as elaborated hereunder:

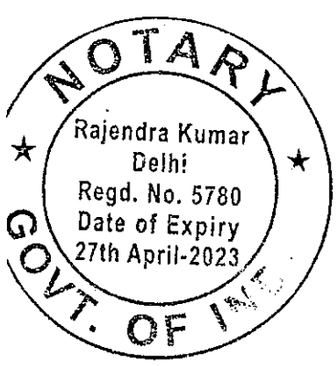
a. In ***Hari Singh and Ors. v. Military Estate Officer and Anr.*** [1972 (2) SCC 239], the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 gave two procedures to achieve eviction of unauthorized occupation, and when this was struck down as unconstitutional, the validating act removed one alternate procedure so that the basis did not exist.

b. In ***Misrilal Jain v. State of Orissa and Anr.*** [1977 (3) SCC 212], the absence of sanction of the President was responsible for the striking down of the Inland Waterways Act as the Bill was moved without the previous sanction of the President of India. Thereafter, the Orissa Legislature obtained the previous sanction of the President and moved the Bill. There was a basis to be removed.

52. Any number of judgments could be cited on this point. However, to prevent prolixity a note on decisions on validating legislations is annexed herewith and marked as **Annexure-B** hereto.

53. It would be noticed that in the present case, however much the Executive and Parliament sought to find a basis for the directions with regard to these four aspects, which have to be removed for overriding the judgment, one could not find such a basis. These were concepts which the Court believed would relate to independence of the judges and hence issued directions in that regard. But there was nothing which formed the basis of these directions other than the concept of independence of the judiciary. Would this mean that Parliament had no means of nullifying these directives since independence by itself is a concept which could not be removed by legislation and hence, substituting its policy in regard to these four matters was the only course open to Parliament by invoking the '*notwithstanding...*' clause. It is submitted that declaring policy in regard to these four issues was wholly within the competence and jurisdiction of Parliament.

54. The Court has held that violation of separation of powers will violate Article 14 of the Constitution relying upon ***State of Tamil Nadu v. State of Kerala and Anr.*** [2014 (12) SCC 696]. This Counter Affidavit has elaborately dealt with the position that the decisions relating to



these four issues emanated from the Court as directives to make laws in the manner so directed which, as already pointed out, is beyond the competence of the Courts. The Legislature on the other hand has, by law, set out these four aspects which individually relate to the policy of the State. It is this declaration of policy in regard to these four matters that the Court has interfered with, which a catena of statements by jurists and by this Court, has clearly held is beyond the competence of the courts. As already pointed out, it is therefore the Court which has gone against the principle of separation of powers by interfering with these policies laid down by the State. However, there is no violation of Article 14 because no reasoning whatsoever has been given for this significant statement of constitutional law as set out in the judgment in ***State of Tamil Nadu v. State of Kerala and Anr.*** (supra). This statement on Article 14 can only be treated as *obiter dicta*.

55. The Parliamentary law overrides the findings in relation to these four issues through the *non obstante* provisions which substitutes the policy decisions of Parliament on each one of these four issues. A list of validating judgments are annexed (*See* Annexure-B) where in each case there was some basis which had to be removed. For example, absence of sanction, or when two procedures would result in violation of Article 14, or when the height of the building exceeded the limit fixed and so on. In all these cases, there was a basis which could be removed. For example, by obtaining the sanction of the President, by removing one among the two procedures, or increasing the height to an extent which would be far more than the height of the building to be demolished, and so on. Here, there is no such basis which could be removed because it is only the mental process and perception of the judges which direct a law to be made with 5 years and not 4 years, or ten years' experience for an advocate, even though the other classes of professionals would have to have 25 years' experience, or the judges direction of a panel of one name as against 2 or the mandate that the law should require the appointments to be made within 3 months of the recommendation. In all these cases, there is nothing to be removed as a basis to render the provision valid.

56. If for any reason independence of the judiciary is treated as the basis, one could not phrase a provision by declaring that independence is removed which would *ex facie* sound antithetical. What is more, independence of the judiciary is not a ground which can be used for testing statutes. A series of Constitution Bench judgements and one of 7 judges have held that the basic structure theory can be used only for the purpose of testing constitutional amendments and cannot be used for invalidating statutes, including laws made by Parliament.

57. Even assuming that independence would be a ground, which has to be neutralized, it can only be through substantive provisions which would clearly declare independence of the members and chairperson of the Tribunals. The Reforms Act provides for a Search-cum-Selection-Committee ("SCSC") with the dominance of the judiciary which would make recommendations for appointments of the members and the Chairperson and also make recommendations for reappointment on a preferential basis of a member or Chairperson who has completed 4 years. Additionally, based on the suggestions made by the bench which decided **MBA-III** and **MBA-IV**, the salary of the Chairperson is now Rs.2,50,000/- equivalent to that of the Cabinet Secretary and for a member, is Rs.2,25,000/-, equal to that of a Secretary to Government of India. All allowances payable to these bureaucrats is payable to the members and Chairperson. The reimbursable HRA is fixed at a ceiling limit of Rs.1,50,000/- for the Chairperson and Rs. 1,25,000/- for the members. With all these safeguards being included based on the directions of the Courts, the independence is wholly protected. Nevertheless, to still claim that because of these 4 issues the independence stands compromised is wholly unacceptable to Parliament and the policy enunciated by Parliament.

58. Parliament has extended itself to accommodate the various views expressed by the Court in **MBA-III** and **MBA-IV** as set out above. The legislation on the four issues is the declaration on policy which Parliament, expressing the will of the people on matters of policy, has to protect.

59. The ground raised that the deletion of Section 184 and 185 can be done only through a finance act is not based on any authority.

60. In view of the above, the present Writ Petition ought to be dismissed.

अविहीन

DEPONENT

(अरविन्द सरन)
(ARVIND SARAN)
निदेशक (प्रशासन) / Director (Admn.)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi

VERIFICATION

Verified at New Delhi on this the 07th day of October, 2021 that the contents of the above affidavit are true and correct to the best of my knowledge and belief and nothing material has been concealed there from.

NOTARY
Rajendra Kumar
Delhi
Regd. No. 5780
Date of Expiry
27th April-2023
GOVT. OF INDIA

अविहीन

DEPONENT

(अरविन्द सरन)
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Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi

BEFORE ME
RAJENDRA KUMAR
NOTARY, DELHI-R-5780
GOVERNMENT OF INDIA
SUPREME COURT OF INDIA
COMPOUND, NEW DELHI
Register Pg./Sl. No.....
Mobile No.: 9899446209
07 OCT 2021

CERTIFIED THAT THE CONTENTS EXPLAINED TO THE DEPONENT EXECUTANT WHO IS SEEMED PERFECT TO UNDERSTAND & AFFIRMED DEPOSED BEFORE ME AT DELHI ON 07 OCT 2021 IDENTIFIED BY
IDENTIFY THE EXECUTANT/DEPONENT WHO HAS SIGNED IN MY PRESENCE.

IDENTITY THE EXECUTANT / DEPONENT WHO WAS SIGNED IN THE PRESENCE OF

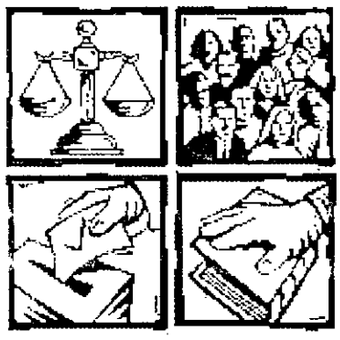
Annexure-A
26

OFFICE OF DEMOCRACY AND GOVERNANCE

"...promoting the transition to and consolidation of democratic regimes throughout the world."

GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY

Revised Edition



January 2002

Technical Publication Series

Office of Democracy and Governance
Bureau for Democracy, Conflict, and Humanitarian Assistance
U.S. Agency for International Development
Washington, DC 20523-3100

ABOUT THE TECHNICAL PUBLICATION SERIES

The USAID Office of Democracy and Governance Technical Publication Series was launched in March 1998. The series includes publications intended principally for USAID personnel; however, all persons interested in the sector may benefit from the series. Authors of individual publications may be USAID officials and/or other individuals from the public and private sector. The Office of Democracy and Governance reserves the right to review and edit all publications for content and format and all are subject to a broad USAID review process. The series is intended in part to indicate best practices, lessons learned, and guidelines for practitioner consideration. The series also includes publications that are intended to stimulate debate and discussion.

A list of other relevant publications and ordering information are included at the back of this document.

ABOUT THIS PUBLICATION

Judicial independence lies at the heart of a well-functioning judiciary and is the cornerstone of a democratic, market-based society based on the rule of law. In examining it, this study seeks to meet three objectives: (1) to test the validity of our current programmatic approaches to judicial independence; (2) to bring together experts in the field to address the most intransigent problems involved in promoting judicial independence; and (3) to produce a document that would help to guide our field officers.

Comments regarding this publication and inquiries regarding judicial independence and impartiality should be directed to

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Washington, DC 20523-3100

More information, including electronic versions of the DG Office's Technical Publication Series, is available from the DG Office's Intranet site at http://inside.usaid.gov/G/DG/ and USAID's democracy Internet site at http://www.usaid.gov/democracy/

ABOUT THE OFFICE

The Office of Democracy and Governance is the U.S. Agency for International Development's focal point for democracy and governance programming. The DG Office's role is to provide USAID and other development practitioners with the technical and intellectual expertise needed to support democratic development. It provides this expertise in the following areas:

- **Rule of Law**
- **Elections and Political Processes**
- **Civil Society**
- **Governance**

ACKNOWLEDGMENTS

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Gail is the DG Office's acting deputy director. She has a B.A. from Pennsylvania State University in English literature and a J.D. from Harvard Law School. Gail worked for a law firm in Hawaii before joining USAID in the Office of the General Counsel in 1979. Her USAID career has been split between general counsel and democracy officer positions. Assignments have included regional legal advisor for Central America (posted in Costa Rica), assistant general counsel for contracts, and head of the democracy offices in El Salvador and Honduras. Gail managed the judicial independence project for the DG Office, including authoring sections of this report and editing the technical papers and case studies.

International Foundation for Election Systems
The International Foundation for Election Systems (IFES) provides professional advice and technical assistance in promoting democracy and serves as an information clearinghouse on democratic development. IFES is dedicated to the success of democracy worldwide and the prospect that each person in every corner of the world is entitled to have a free and informed say in how he or she is governed. IFES recognizes that democratic governance is an evolving and dynamic process, created by and meeting the needs of the people it serves. IFES has worked in over 100 countries, lending its expertise in the following areas: elections, rule of law, governance, and civil society. IFES was the principal contractor on this judicial independence study.

Sandra Coliver
Sandy, IFES' former senior rule of law advisor (1999-March 2001), coordinated the judicial independence project and has managed or participated in rule of law programs around the world. She worked in Bosnia (1996-1998) with the United Nations, the OSCE, and the International Crisis Group. For five years she served as law program director of Article 19, the International Centre Against Censorship, headquartered in London. She practiced law in San Francisco and has taught courses on international law and human rights at Boalt Hall (U.C. Berkeley) and Washington College of Law. She currently is the executive director of the Center for Justice and Accountability, an NGO dedicated to holding human rights abusers accountable.

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Authors of the Regional and Country Studies and Concept Papers (continued)

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USAID's Office of Democracy and Governance and IFES offer additional thanks to Margaret Popkin and Edwin Rekosh, who not only wrote chapters on their regions of expertise (Latin America and Eastern Eurasia and Eurasia, respectively), but also helped to identify country contributors and conceptualize the project from its early stages of inception. The DG Office would also like to recognize the contributions of Louis Aucoin, William Davis, Giuseppe Di Federico, Stephen Golub, Mira Gur-Arie, Linn Hammergren, Erik Jensen, Russell Wheeler, and Jennifer Widner for not only writing articles for this buide, but also providing ongoing advice, and Richard E. Messick, Amb. James Michel, Tom Carothers, and John Blackton for their comments on various drafts.

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USAID PREFACE

USAID has been involved in its recent generation of rule of law programs for over 15 years. In many, promoting judicial independence is an explicit objective. Where it is not already an explicit objective, it almost inevitably will become one at some point. Judicial independence lies at the heart of a well-functioning judiciary and is the cornerstone of a democratic, market-based society based on the rule of law.

We had three primary objectives at the outset of the study that led to this guide. First, we wanted to test the validity of our current programmatic approaches to judicial independence. Were they working? Should some be emphasized over others? Second, we wanted to bring together experts in the field to address the most intransigent problems involved in promoting judicial independence. In my own experience, I found it relatively straightforward to shape programs that could incrementally improve the independence of the judiciary, but very difficult to overcome opposition to those reforms—opposition that with one deft and politically astute move could tear down years of progress. In many cases, it was even difficult to identify the exact sources of the opposition. From this process and the collective wisdom brought together through it, we hoped to improve our programming in this area.

The third objective, and of equal importance to us, was to produce a document that would help to guide our field officers. The reality for USAID and most other donors is that our field staff are expected to cover a variety of technical areas. Those involved in rule of law are unlikely to have expertise on all facets of the subject. The guide, therefore, was intended to be useful to field officers with varying levels of expertise, to provide basic education as well as new insights to those with more experience.

I think we succeeded on all three fronts. The information we got back confirmed that our programmatic approaches were generally valid. Although no dramatically new approaches emerged, some surprises surfaced in the contributions of our in-country experts, and some programmatic approaches not previously considered to be addressing the problem of judicial independence have now been added to the repertoire. We did not find any magic way to approach opposition to reform, but we focused increased attention on that issue and refined our thinking. Most importantly, we believe the study has resulted in a useful guide to developing judicial independence programs in an organized and conscientiously thorough fashion.

An added bonus was the relationships built through the process. This was a joint effort of IFES and USAID, with many other contributors participating. I would like to thank IFES, and especially Sandy Coliver, for devising the collaborative process that was in itself a rich and rewarding experience and for the effort dedicated to this project. I would also like to thank all of the many contributors. We will continue to count on them to help us improve not only judicial independence projects, but all of our programming in rule of law.

Gail M. Lecce

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Office of Democracy and Governance
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U.S. Agency for International Development

GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY

CONTENTS

EXECUTIVE SUMMARY

Achieving judicial independence in order to ensure impartiality in judicial decisions is a complex undertaking. There are various ways in which countries, with and without donor support, have sought to attain this goal. Much depends upon indigenous customs, expectations, and institutional arrangements. This guide is intended to promote an understanding of the issues and to assist USAID and other donors design and implement effective programs.

The guide is based primarily on input from experts in 26 countries. The conclusions drawn from the papers submitted by these experts were vetted in a series of roundtables, with the final results forming the core of the guide. The guide is divided into three main parts. Following the introductory section, Section II describes the key processes and institutional arrangements affecting judicial independence. Section III is comprised of regional and country studies that expand upon important differences in culture, history, and legal systems that affect judicial independence. Section IV develops specific themes.

Sub-section A of Section I recognizes the need to build support for reforms. Opposition to these reforms is often high, since so much is at stake. Many stand to lose. Often, the actors within the system fear the impact that reforms will have on them. At times, the vision for what the reforms should achieve, and how, is not widely understood or shared. At the same times, donors are often under pressure to show tangible results quickly. In order to sustain the reform process over time, it is essential for donors and their local counterparts to take the time to build support for reforms from the outset. The time and effort needed to do this are generally substantial, and almost always greatly underestimated.

A broad-based coalition that includes allies from both inside and outside the judiciary is essential. NGOs can play a special role as the voice of the people. Judges are natural allies whose ownership and commitment will be necessary to effective implementation of reforms. Conversely, if the judiciary is not brought into the process, or judges are made to feel attacked by reform campaigns, they can become effective opponents. An successful strategy will also build support within the political structure through alliances, as well as put pressure on it. Media support may be difficult to attract if owners have contrary vested interests, but enlisting some media champions of the reforms is important. Publicizing favorable polls can also help the cause. Overall, reform campaigns must be both strategic and sustained, which in many cases may require the identification of a civil society organization with an expert staff dedicated virtually full-time to the efforts.

Sub-section B describes the key points in the organization and structure of a judiciary that can make it vulnerable to interference and the strategies for reducing that vulnerability. There are historic differences between common law and civil law systems that have had an impact on the ways arrangements to ensure judicial independence have developed in each that need to be understood. In the past several decades, however, there has been convergence on many of the basic institutional elements supporting judicial independence.

The predominance of honest and qualified judges is essential. The method by which judges are selected and appointed is, therefore, often a key subject for reform. Civil code countries have commonly used judicial councils to ensure less executive branch, political party, or elite domination of judicial appointments. There is often a great deal of focus on trying to get the composition of the council right to achieve this goal. The consensus of our experts was that the transparency of the selection process the council uses is more important than its composition. Public vetting of candidates can be key. Nevertheless

there are ways the composition of the council can be enhanced. Participation of the public, through lawyers and law professors, can help reduce executive, partisan, or supreme court control. Inclusion of lower level judges can reduce excessive influence by the judicial leadership. Allowing each group to choose its own representative can enhance autonomy.

Civil law countries often use a merit-based selection process, including an exam, to select lower court judges. Adoption of this system can be an important step forward when compared to traditional political or personal processes, although there is little agreement on how to test for qualities relevant to being a fair and impartial judge. Improved selection processes must be reinforced by security of tenure. Appropriate promotion and disciplinary processes that are transparent, as objective as possible, and adhered to in practice are the primary mechanisms through which security of tenure is protected. The length of a judge's term is closely related to security of tenure. As judges near the end of their term in office, they are more vulnerable to outside influences. Whether a term is for life or a fixed period, it must be long enough to reduce this vulnerability.

There are two basic models defining the relationship of the judiciary to the rest of the government: (1) a judiciary dependent on an executive department for its administrative and budgetary functions; and (2) a judiciary that is a separate branch and manages its own administration and budget. Although there are clear examples of independent judiciaries under the first model, the trend is to give judiciaries more administrative control, to protect against executive branch domination. An adequate budget is generally necessary to protect judicial independence, especially where the custom is otherwise to supplement the judiciary's budget with outside resources. Although the structure of the judiciary is important to its independence, so is the structure affecting private lawyers. A bar that rigorously polices itself to prevent unethical or illegal practices among its members can make a strong contribution to a good legal system.

Sub-section C focuses on the role that the individual judge plays in promoting judicial independence. Judges who lack sufficient commitment to an independent judiciary or who do not have adequate training and skills are more vulnerable to outside influences. Training programs can, therefore, be influential. Training in ethics was particularly emphasized. There was also consensus among the contributors to the guide that deficient law school training was one of the most serious obstacles to development of an independent judiciary. The low status of the judiciary in many countries, reflected in low salaries and poor working conditions, was perceived to make it difficult for judges to maintain the sense of professional dignity needed to withstand corruption and other outside pressures. Improving benefits and conditions can therefore be critical. Judges associations have been an effective method of enhancing the professionalism of judges.

The importance of transparency to judicial independence is highlighted in nearly every approach outlined in the guide. Sub-section D describes additional ways in which transparency can be increased. The courts' organization and procedures, if transparent, can make interference in court operations more difficult. Good records management is essential, as is a mechanism to ensure that assignment of cases is party-neutral. Publishing judicial decisions can help to deter rulings based on considerations other than law and facts. Oral, adversarial, and public proceedings have increased transparency in criminal proceedings in many countries. Court monitoring by NGOs, academics, and the media can expose and deter abuses. Annual disclosure of judges' assets and income can provide an impediment to bribery.

A society's expectations of its judiciary play a critical role in fostering independence, as discussed in Sub-section E. Some courts have gained significant public respect by their decisions on important

constitutional issues against entrenched interests. Efficient court operations, including timely handling of cases, is important, as is enforcement of judicial decisions. Significant judicial reforms should be publicized to enhance the stature of courts.

Judiciaries in many countries in transition are struggling to break free from their historic domination by elites, the military, political parties, or the executive. However, no judiciary is completely free to act according to its own lights; nor should it be. Ultimately, the judiciary, like any other institution of democratic governance, has to be accountable to the public for both its decisions and its operations. Subsection F of Section I discusses the tension between independence and accountability.

I. INTRODUCTION

A. Purpose and Scope of the Guide

This guide seeks to

- Promote understanding of the issues surrounding judicial independence
- Assist USAID and other donors, in collaboration with their local counterparts, to design and implement programs that effectively strengthen judicial independence

There was a great deal of debate at the beginning of the work leading to this guide as to its appropriate scope. "Judicial independence" is generally used to mean that both the institution of the judiciary and individual judges are free from interference by other institutions and individuals. To Americans, the term often connotes more particularly our own arrangement of separation of powers among the executive, judicial, and legislative branches—an arrangement that differs in its specific attributes from the governance structures of many other countries.

However, the structural arrangement is not an end in itself, but a means to achieving other objectives, primary among them the impartial decision-making of judges. Principle 2 of the U.N. Basic Principles on the Independence of the Judiciary defines judicial impartiality as judges deciding matters before them "on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason." Regardless of structural variations, most governments share the goal of impartiality for their judiciaries.

The focus of this guide is judicial independence as a means toward achieving the goal of impartial decision-making. We are not advocating any specific model of governance arrangement. However, we will be discussing structural arrangements, since the structure inevitably affects the ability of judges to be impartial, although we have tried to avoid our own cultural biases in doing so.

We could not cover every aspect of judicial independence in this project. For example, the guide does not focus on prosecutors, even though they are part of the judiciary in many countries. Nor does it address special issues involving lay judges. However, many issues raised here are equally applicable to them. Although judicial impartiality entails an ability to decide cases despite biases, we do not address that subject specifically within this guide either. To do justice to it would require a study of far greater magnitude. Nor do we specifically address enforcement issues.

B. The Importance of Judicial Independence and Impartiality

Judicial independence is important for precisely the reasons that the judiciary itself is important.

Interference can come from various sources:

- The executive, the legislature, local governments
- Individual government officials or legislators
- Political parties
- Political and economic elites
- The military, paramilitary, and intelligence forces
- Criminal networks
- The judicial hierarchy itself

If a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined.

In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.

Even in stable democracies, the influence of the judiciary has increased enormously over the past several decades. Legislation protecting social and economic rights has expanded in many countries, and with it the court's role in protecting those rights. The judiciary has growing responsibility for resolving increasingly complex national and international commercial disputes. As criminal activity has also become more complex and international and a critical problem for expanding urban populations, judges play a key role in protecting the security of citizens and nations.

Judiciaries in countries making the transition to democratic governance and market economies face an even greater burden. Many of these judiciaries must change fairly dramatically from being an extension of executive branch, elite, or military domination of the country to their new role as fair and independent institutions. At the same time, the demands on and expectations of these judiciaries are often high, as views about citizens' rights, the role of the executive branch, and market mechanisms are rapidly evolving. The judiciary often finds itself a focal point as political and economic forces struggle to define the shape of the society. These judiciaries also face the serious crime problems that frequently accompany transitions, as well as enormous issues of corruption, both that carried over from old regimes, as well as corruption newly minted under changing conditions.

It would be unrealistic to think that the judiciaries can carry the full burden for resolving these complex problems. At their best, they have played a leadership role. At the very least, they need to complete their own evolutions and begin the task of confronting the multitude of problems before them.

C. Methodology

This guide has been based primarily on input from in-country experts. We first developed a questionnaire that focused on the programmatic approaches USAID has used in the past to promote judicial independence. The questionnaire was sent to experts in 26 countries. USAID had implemented rule of law programs in many of these countries, but not all. The questionnaire did not ask whether the USAID programs *per se* had been successful; rather, it asked whether the approaches described—common among reform efforts—had been or could be the right ones in each of these countries. In answering the questions, all of the respondents elaborated on the particular historical and cultural circumstances in their countries that had affected judicial independence.

Conclusions drawn from the papers were vetted in a series of roundtables. The first was held in Guatemala city with judicial reform experts and USAID officers from Central America and the Dominican Republic. Three others followed in Washington, DC, involving USAID, State Department, and Department of Justice staff; U.S. federal and state judges; contractors; non-governmental organization (NGO) representatives; experts who had responded to

the questionnaires; and other experts/ practitioners. The conclusions from that process form the core of this guide.

D. Organization of the Guide

The guide is divided into three main parts. Section II summarizes the key processes and institutional arrangements that affect judicial independence, in both positive and negative ways. It captures the findings and conclusions about reform efforts around the world from the regional and country papers and the expert vetting process.

Section III comprises six regional and country studies. The judiciary and judicial independence have developed differently in distinct legal systems (i.e., common law, civil law, *shari'a*, communist, and customary law) and as a result of cultural, economic, social, and political variations. Section III captures many of these differences. The papers on Latin America, Central and Eastern Europe, and anglophone Africa were written by experts with extensive experience in those regions. Each paper discusses the most important circumstances that influence efforts to revamp judicial structure and procedure in the region, and each highlights information from the country papers. Papers on France and Italy shed light on changes adopted in many of the countries in which we work and which reflect European traditions and thus look to the continent for new approaches. The paper on the United States expands our knowledge of judicial development in our own country and, together with the paper on anglophone Africa, explains the common law tradition.

Section IV is composed of four papers on specific themes relevant to judicial independence. Many of the basic concepts of these papers have been incorporated into Section II, but the papers provide greater detail and analysis.

II. KEY PROCESSES AND INSTITUTIONAL ARRANGEMENTS

As the different elements involved in judicial independence surfaced and were debated during the course of developing this guide, six different categories of approaches to strengthening judicial independence emerged. Section II is organized according to those categories:

A. Building Support for Reforms

B. Confronting Interference through the Institutional Structure

C. Developing Judicial Capacity and Attitudes

D. Increasing Transparency

E. Promoting Societal Respect for the Role of an Impartial Judiciary

F. The Tension between Independence and Accountability

G. Where to Start

Sub-section A recognizes the need to build support for reforms directed at increasing judicial independence. All donor-supported programs need to have local ownership and contribute to the will and capacity of local organizations to sustain reforms. Judicial independence is no exception. Sub-section A underscores that point while detailing some findings and strategies related specifically to judicial independence. Sub-section A is also where strategies for countering opposition to reforms are most explicitly addressed.

Sub-section B describes the key points in the organization and structure of a judiciary which can make it vulnerable to interference, and it also discusses strategies for reducing that vulnerability.

Sub-section C focuses on the role of the individual judge in promoting judicial independence and underscores the point that, in order for judges to apply the law impartially, they must first know and understand the law and, second, share an expectation that they will act independently. Although there are legitimate questions about the utility of substantive training absent a broader reform effort, our in-country respondents were emphatic that judges who are not well versed in the law are particularly vulnerable to outside pressures. Several specific suggestions related to the capacity and attitudes of judges emerged from the study.

The importance of transparency to judicial independence is a theme throughout the guide. Sub-section D underscores the critical nature of this issue and provides specific suggestions for increasing transparency, particularly in court operations.

Sub-section E discusses the vital role that a society's expectations of its judiciary play in fostering independence, and how to increase the respect for the judiciary needed to generate high expectations. The impact of two particular issues—constitutional review and compliance by government agencies with court decisions—is outlined in some detail. Sub-section E also discusses why independence and effectiveness—often assumed to be two entirely separate issues—are in fact closely linked.

Sub-section F touches briefly on the tension between independence and accountability, a subject which is elaborated upon much more fully in papers included in Sections II and III.

Finally, Sub-section G presents some ideas on where to start, drawn from the study.

A. Building Support for Reforms

Opposition looms especially large to reforms intended to strengthen judicial independence

and impartiality precisely because so much is at stake. An impartial judiciary will reduce the influence of government officials, legislators, political parties, and other powerful elites who are used to operating above or outside the law. The judicial hierarchy itself may stand to lose, particularly in many countries where higher court judges have the ability to exert undue and arbitrary control over lower court judges. Finally, those operating to advantage within the current system (i.e., judges and court personnel at all levels who benefit from petty corruption or who are too distrustful of new approaches, and lawyers who know how to win cases playing by the current rules) are likely sources of opposition to reforms. To further complicate the situation, sometimes the sources of opposition will be overt and obvious, but many times they will not.

There is often a second factor at play. Donors at times assume a shared vision and depth of understanding of reforms that simply do not exist or exist only within a small circle of local reformers. Some individuals may oppose reforms because they don't fully understand the effects they will have. For example, reforms to assure due process in criminal prosecutions may be opposed by those who fear increased crime. Judges may oppose a more independent role for prosecutors because they fear a diminution of their own role.

Donors are often under pressure to show tangible results quickly. Laws embodying reforms can sometimes be passed quickly. However, reforms can be overturned equally quickly down the road, or they can stall in the implementation stage, which is almost always lengthy, difficult, uneven, costly, and plagued by unanticipated consequences, as well as outright opposition. When this happens, there is a tendency for donors to become skeptical about the process and the lack of political will to support reforms, or for them to rely on *ad hoc* strategies to build support.

In order to sustain the reform process, it is important for donors and their local counterparts consciously to include from the outset components aimed at both educating affected groups and the public and building support for reforms. The time and effort needed to do this are generally substantial, and they are almost always greatly underestimated.

The following are some specific suggestions for building such support and countering opposition to reform:

- A compelling and shared vision of long-term goals will emerge most easily from participatory analysis of the problems.
- Coalition building is essential. The coalition should include allies from both inside and outside the judiciary, such as judges, politicians, executive branch officials, and members of professional associations, NGOs, advocacy groups, universities or law schools, business groups, and the media.
- NGOs will usually have an essential place in such a coalition, representing interests that can coalesce around the reforms. Even where a supreme court or ministry of justice is supportive of reforms, opposition may arise that official organizations are not in a position to counter. As the voice of the public, NGOs can play a special and effective role.
- Efforts must be both strategic and sustained. In many cases this will require the identification of a civil society organization with an expert staff dedicated virtually full-time to designing and implementing a strategy to support reforms and confront the opposition. Reform campaigns supported only by people who are employed full-time elsewhere and have

limited time to devote to the reform efforts have generally not been adequate to maintain momentum. Given economic realities in many developing countries, this may mean that donors need to include in their programs adequate funding to staff such organizations with respected local experts as well as provide technical assistance to help build the organizations' capacity. (See box on USAID support for such an effort in the Dominican Republic.)

- Judges are natural and essential allies in building support for judicial independence. Conversely, judges who are not brought into the process or who are made to feel personally attacked by reform campaigns can become effective opponents. Judges at all levels should be sought out and involved in the reform efforts. Their ownership and commitment will be essential to effective implementation. Suspicions they might have about the effects of changes need to be addressed at the outset. Once engaged, judges can improve the design of programs, since they are the ones who best understand how the challenges to impartiality can be addressed. The formation of judges associations can be an effective mechanism for involving judges in the process. While traditional judges associations have not tended to focus on promoting judicial independence, many of the newly formed groups, such as the Slovakian Judges Association, have a committed membership that has been at the forefront of reforms.

- It is important to identify allies among politicians. Ultimately, political support is indispensable, and an effective strategy will build support within the political structure through alliances, as well as put pressure on it.

- A media strategy is vital, although the media may not be a natural ally and the obstacles to building support in the media should not be underestimated. In many countries, the mass media are controlled by powerful elites who oppose judicial reform. Often, journalists, like the public, do not understand the role of the judiciary and do not know how to make it a marketable topic. Nevertheless, there are examples of successful efforts with the media. Seminars that have brought together judges and reporters in some countries have changed the minds of reporters about the benefits of reforms, as well as persuaded judges to make more information available to the public. Regardless of whether the media in general engages in the topic, the strategy for building support should seek to interest sufficiently at least one media outlet in the process so that it identifies the reforms as a key issue, provides lots of publicity, and calls for transparency.

- Absent success in establishing a media alliance, the strategy should include some other mechanism for mobilizing public opinion. The NGO allies may have to take on responsibility for these efforts directly.

- Polls and sectoral surveys of judges, and representatives of businesses and the public, which are carried out by credible organizations (sometimes on an ongoing basis), can be an effective tool for gathering information that can be used as part of a media strategy, for the direct public information efforts of NGO allies, or for coalition-building itself.

- Executive branch officials can be powerful and sometimes essential allies. The support of the minister of finance can be critical to reforms that have budgetary implications. The support of prosecutors and law enforcement officials is essential to reforms that affect criminal justice.

- Inter-institutional judicial sector commissions, which would include representatives of many of the organizations identified above, can provide effective fora for vetting reforms, building support, and coordinating reform efforts.

B. Confronting Interference through the Institutional Structure

There are key processes and institutional arrangements related to the judiciary that either lend themselves to or impede interference with judges' decisions. This sub-section discusses six. The first, addressed in Sub-section 1, is the appointment process. If the appointment process is designed to facilitate the exercise of influence by outside parties, as is true in many countries, it will be difficult to overcome that flaw with checks farther down in the system. The problem is particularly acute where judges also lack security of tenure, discussed in Sub-section 2. Sub-section 2 also addresses the use of promotion and disciplinary actions to interfere with independence and the difficulty of designing and implementing appropriate merit-based systems. Sub-section 3 discusses how the length of judges' terms may affect their ability to act impartially. Sub-section 4 discusses ways in which the organization and administration of courts can either encourage or discourage independence. Sub-section 5 focuses on the relationship of a judiciary's budget to judicial independence. Finally, Sub-section 6 addresses the effects that practicing lawyers can have.

RELEVANT DIFFERENCES BETWEEN CIVIL AND COMMON LAW TRADITIONS

In pre-revolutionary France, courts served as the right arm of the monarchy. They often exercised legislative as well as judicial authority and came to be seen by much of the public as a symbol of oppression and arbitrariness. At the same time in England, judges often protected landowners and citizens from the whims of the monarch. These differing histories have had an impact on the ways in which the judiciaries and arrangements to ensure their independence have developed in civil law and common law countries.

In England and most common law countries, judges have traditionally enjoyed more independence and power than their counterparts in many civil code countries. Common law judges have greater security of tenure and more autonomy over their budgets and internal governance. In addition, the judiciary has greater authority to make law since court decisions serve as binding precedent for lower courts.

In contrast, in France and a number of civil law countries, judges have been considered and treated more as high-level civil servants. France's 1958 Constitution refrains from according the judiciary the status of a separate branch of government. Instead, it places the judicial "authority" under the supervision of a judicial council whose membership includes the president and the minister of justice. At the same time, the constitution sets up the president as the ultimate guarantor of judicial independence.

In the past several decades, the differences between common and civil law systems have become less distinct. More and more civil law countries, like France, have passed reforms aimed at increasing the independence and power of the judiciary. Responsibility for judicial appointments, promotions, and discipline is now often shared among the executive, judiciary, and legislature. Often the private bar and public have a role in the process, as well. The trend is towards increased security of tenure and judiciary's control over its own budget, promotion, and disciplinary affairs. Accordingly, although the historic origins of a country's judiciary are still important to understanding it, the contemporary evolution is equally important.

1. *Selection and Appointment of Judges*

In many countries, problems with judicial independence begin at the point a judge is selected. Frequently, the process is politicized or dominated by the executive, a majority party in the legislature, or the judicial hierarchy, and it is designed to ensure the responsiveness of the judiciary to those either formally or informally responsible for the appointments. It is often essential, therefore, to revise the appointment process as a necessary step in strengthening judicial independence.

a. Common selection processes

Common law and civil law countries have traditionally followed distinct selection practices. In common law countries, lower court judges are usually selected from among experienced, practicing lawyers for specific judicial positions. They may be appointed by some combination of executive and legislative action or (less frequently) elected. Judges of higher courts are selected both from among practicing attorneys and judges of lower courts, but, in either case, the selection is by separate appointment or election rather than promotion.

Civil law countries have traditionally employed a "career" system. Recent law school graduates are selected through a merit-based process. They are usually required to take an exam, but the process may also include a review of their education, subsequent training, and practical experience. As with other civil servants, judges enter at the lowest ranks and are promoted as they gain experience.

However, there are many country-specific divergences from these two models. For example, in France, 20 percent of judges (generally at the higher levels) are recruited from among experienced lawyers and law professors. Recruitment from the private bar is also common in Spain. Many of Spain's former colonies in Latin America borrowed freely from other systems early in their development and did not follow classic civil law traditions for selection of judges.

Frequently, different procedures are used to select the judges of the lower courts and the judges of the highest courts (constitutional courts and supreme courts). Selection at the higher levels may be by legislative or executive appointment, while the lower levels enter through the traditional system of exams. These differences are generally perceived to be appropriate. Given that the highest courts exercise certain political functions, consideration of criteria other than objective merit—such as leadership, governance capacity, judicial philosophy, and political ideology—is reasonable, provided that a diversity of values is represented.

b. Regional trends

Prior to recent reforms, the selection process for judges in Latin America was generally non-transparent, was overtly controlled by the political parties, and placed relatively little emphasis on merit. In most countries in the region, judges of the supreme court were selected by the executive or legislature (usually dominated by the president's party) for short terms that virtually coincided with presidential terms.[1] Lower court judges, in turn, were named by the supreme court itself or also by the executive and/or legislature. Judges were removed and replaced for political reasons, often on a wholesale basis when government changed.

Because of the hierarchical structure of Latin American judiciaries, accentuated by the

[1] See Margaret Popkin's paper on Latin America in Section II.

supreme court's role in selecting lower court judges, improving the mechanism for selection of the supreme court has been considered essential to the success of efforts to increase judicial independence. Although many of the experts from the region surveyed still listed non-transparent selection and appointment procedures as a barrier to judicial independence, there have been marked improvements in these procedures in many Latin American countries in recent years. Many have adopted constitutional reforms that broaden participation in and increase the transparency of the process, through judicial councils or other mechanisms. Appointments are generally for longer terms, sometimes for life, or scheduled for terms that do not coincide with presidential elections. Changes in the selection process for lower court judges have also taken place, establishing or modifying judicial career laws to provide for more transparent, merit-based systems. In many countries, candidates are now recruited or screened by a committee or judicial council. In some cases, the impact of these reforms has been relatively rapid and dramatic.

SELECTION PROCESS OF THE DOMINICAN REPUBLIC: AN EXERCISE IN TRANSPARENCY AND CIVIC PARTICIPATION

Until 1997 judicial appointments were openly political in the Dominican Republic. A constitutional reform that resulted from a political crisis provided for Supreme Court judges to be appointed by the National Judicial Council (NJC); those judges in turn would appoint lower court judges. The law on the NJC established that any person or institution could propose candidates for the Supreme Court and established that the NJC could evaluate the candidates in public hearings. A civil society coalition published the ideal profile of Supreme Court justices and encouraged the NJC to publish the list of all candidates being considered. The coalition also pressed publicly for televised NJC selection hearings of the Supreme Court candidates. The NJC agreed to these terms. The 28 Supreme Court candidates were interviewed and voted on by the NJC on national television. The new Supreme Court then began a transparent process of evaluation of all sitting judges and opened all judge positions to a public competitive process. Only 32 percent of the judges were reconfirmed and 21 percent of the 2,666 aspirants were able to qualify. The new Supreme Court and other new judges selected by this process have initiated additional reforms that compound the improvement in the judicial system, including more efficient administration, better coordination among justice sector authorities, establishment of performance standards, strengthening of the prosecutorial function, and implementation of alternative dispute resolution.

The main source of interference with the judiciary in Eastern Europe, Eurasia, Africa, and parts of Asia has been from the executive. In Eastern Europe and the former Soviet Union, judicial councils began emerging in the 1990s as part of the reforms included in new constitutions and follow-on legislation. Candidates in those countries are now typically nominated by a supreme judicial council, then appointed by the president or the minister of justice. Despite these initial reforms, the process is still criticized in many countries as being excessively politicized, devoid of transparency, and controlled by the executive. Several countries have instituted more extensive reforms over the past several years, Hungary being the most successful. Applicants for judicial posts in Hungary, except for the president of the supreme court, are evaluated by the presidents of regional courts. The president of the supreme court is nominated by the president of the country, and then elected by a two-thirds vote of parliament.

In common law Africa, the president generally names the judges of the higher courts, based upon recommendations of a judicial commission. In a few countries (e.g., Zambia), the nominees must be confirmed by a

supermajority of one or both houses of the legislature. However, legislative approval often does not act as a check on executive domination because the legislatures are commonly controlled by the president. Additionally, in some countries the judicial commissions are comprised only of presidential appointees (including senior judges). As a consequence of these selection processes, judges in common law Africa have tended to favor the executive.

The process in Uganda provides a contrast. The Ugandan Judicial Commission, created in 1995, includes representatives of the supreme court, attorneys chosen by the Ugandan Legal Society, the public service commissioner, the attorney general, and lay people chosen by the president. This diversity seems key to its success.

c. Judicial councils

In many countries, judicial councils or commissions have been established to improve the process of judicial selection.[2] Although judicial councils exist in both civil and common law countries, they are a particularly prominent feature of legal cultures with a civil law tradition. The specific role that judicial councils play varies from one country to the next. In many, it goes beyond the selection process; in others, it may not include it. Nevertheless, since judicial councils often are important participants in judicial selection and have been adopted as part of reforms of the selection process in many countries, we include a discussion of their role, development, and operations in this sub-section.

In the context of the civil code tradition, judicial councils have their roots in France. As described more fully in Louis Aucoin's paper on France in Section III, organization of the judiciary was profoundly affected by the distrust generated by the judiciary's abusive alliance with the monarch and the legislature in pre-revolutionary days. Following the French revolution, the judiciary was not established as a separate branch, but rather as part of the executive, in order to maintain separation between the judicial and legislative functions. The judiciary was located within the ministry of justice, which played an administrative and oversight role.

Eventually dissatisfaction arose in France with executive influence over the judiciary. To address this concern, in 1883 a Superior Council of the Judiciary (CSM) was formed to provide oversight to the judiciary and to ensure some level of independence. Originally, the council was comprised solely of judges appointed by the president and charged only with conducting disciplinary proceedings. In 1946 the council was given a significant role in appointing judges, as well, and the authority to appoint council members was divided between the executive and the parliament. At that time, the council was composed of the president and the minister of justice, as well as judges, parliamentary appointees, and members of the legal profession. Over the years, both the power to appoint the members and the council's composition have shifted various times, and its role has gradually been expanded to provide ever greater distance between the judiciary and the executive.

Several other Western European countries followed suit in establishing oversight councils to try to ensure judicial independence. Many former European colonies have done the same, even in countries where the judiciary had not been established as part of the executive branch. In many countries of Latin America and Central and Eastern Europe, this trend has been

[2] In civil law countries, these bodies are generally called "judicial councils" or "high councils of the magistracy." In common law countries, they are generally called "judicial service commissions." Here, all will be referred to as councils, for the sake of simplicity. It is important to note, however, that these bodies do not always perform equivalent functions.

relatively recent, part of overall reform processes designed to increase judicial independence and improve judicial operations.[3]

Although protection of judicial independence is a common goal for most judicial councils, the specific problems councils are designed to address are often quite different. In many countries, the problem is executive, legislative, or political party domination of the judiciary. In others, the supreme court is perceived to have excessive control over lower court judges. Some countries are primarily concerned with the amount of time judges spend on administrative matters and want to improve the effectiveness and efficiency of the courts by transferring the managerial function to another body.

Given the differences in specific objectives as well as the contexts in which changes are taking place, judicial councils differ greatly with respect to three basic variables: (1) the role of the council, (2) the composition of the council, and (3) the manner in which the council members are appointed.

Some judicial councils have oversight or even primary responsibility for the full range of issues related to the judiciary, including administration of the court system. Others are focused primarily on appointment, evaluation, training, and/or discipline of judges, and they do not take on administration. Some councils are involved in the selection of judges of one level only—higher or lower. Others participate in the selection of all judges, although their role may differ with respect to higher or lower courts.

The membership of judicial councils often includes representatives of several different institutions, in order to provide an effective check on outside influence over the judiciary or to reduce supreme court control over the rest of the judiciary. The judiciary itself frequently has one or more representatives. In some cases, judges have become the dominant actors on councils. Often the executive has its own members. In some countries the legislature, private bar, and law schools may be included.

The power to appoint council members is often shared, further increasing the checks built into the system. In many cases, at least the legislature and the executive participate. In some countries, professional bodies (bar associations and law schools) nominate their own members to serve on the council. (It should be noted that in Latin America the role of the executive in judicial councils is much less prominent. In general, Latin American countries did not follow the French model of close executive oversight of the judiciary. Judicial councils in that region are, therefore, developing under somewhat different circumstances than in other parts of the world.)

There is a great deal of variation among countries in terms of composition and role of judicial councils, and there appears to be no clear answer for what works best. The context of each country determines the optimum arrangement, or even what will be politically feasible at a given time. In fact, many countries, including France, have changed their arrangements periodically as they seek better solutions or as the political circumstances change. Annex I to Margaret Popkin's paper on Latin America demonstrates some of the different make-ups and responsibilities in that region.

Although in most countries creation of a judicial council was a step forward in judicial independence, rarely have countries been completely satisfied with their councils, and sometimes problems have been severe. Giuseppe Di Federico notes in his paper on Italy in Section III that the dominance of the judges on

[3] See Margaret Popkin's paper on Latin America and Edwin Rekosh's paper on Eastern Europe and Eurasia in Section III.

the council in that country and the manner in which they are appointed have resulted in an evaluation and promotion process that gives very little emphasis to the quality of a judge's work, resulting in distorted incentives. In Venezuela, the council was highly politicized from the start and gave rise to what Venezuelans termed "legal tribes"—groups of lawyers and judges belonging to the same party or faction, each of which had a council member to guarantee their representation on the bench. Ultimately, the Venezuelan council was abolished. In other cases, the existence of the council has masked ongoing politicization or executive, legislative, or supreme court domination of court appointments.

d. Which selection process works best?

There was no consensus on which specific selection process works best. There are simply too many variations: the success of each is influenced by the history, culture, and political context of a country, and the immediate problem that is being addressed. What works in one place may not in another. Recognizing this, the best approach to assisting a country in reforming its judicial selection process is to help those engaged in the reforms to understand, analyze, and vet the possibilities, through the host of mechanisms available to do this—study tours outside the country, technical experts brought into the country, workshops led by civil society groups, etc.

Although there is no right answer to the question of the most appropriate judicial selection process, there are some principles to guide the process:

(1) Transparency. All the experts consulted for this study agreed overwhelmingly that the most important step that can be taken in reforming a judicial selection process is to build in transparency at every point possible. Some ways to accomplish this are

- Advertise judicial vacancies widely
- Publicize candidates' names, their backgrounds, and selection process and criteria
- Invite public comment on candidates' qualifications
- Divide responsibility for the process between two separate bodies, one that nominates, and a second that selects and appoints. (To be effective, the bodies must be truly independent from each other and the nominating body's recommendations must be given substantial weight, as when, for example, three or fewer candidates are nominated for each position and the appointing authority is limited to choosing from among those candidates.)

(2) Composition of judicial councils. Judicial councils can be effective by introducing additional actors into the process and thus diluting the influence of any one political entity. There is often a great deal of focus on trying to get the composition of the council right in order to achieve this objective. The consensus of our experts was that the transparency of the process the council uses is more important than the composition of the council. Nevertheless, there was general agreement on a few ways in which the membership of a judicial council can enhance its operations:

- Participation of the general public on the council; particularly lawyers and law professors, can help to (a) safeguard transparency, (b) reduce the risk of executive, partisan, or supreme court control, and (c) enhance the quality of candidate selection.

- Inclusion of lower-level judges, along with senior judges, can reduce excessive influence by the judicial leadership, which is often inclined to preserve the status quo.[4]

- Allowing representative members, especially judges, lawyers, and other members of the public, to be chosen by the sector they represent will increase the likelihood that they will have greater accountability to their own group and autonomy from other actors. In much of Europe and Latin America, this is the process followed. In anglophone Africa, the opposite is true—most council members are appointed by the president.

GEORGIA SELECTION PROCESS

The Supreme Court of Georgia administered a judicial qualification exam for lower-level judges for the first time in 1998, using a carefully controlled and monitored process that has been repeated successfully several times since. International observers monitored the first exam for cheating. Immediately after the exam, the answers were projected onto a screen, so that examinees could compare their results with the final outcomes. Successful applicants were then interviewed by the Council of Justice to fill existing vacancies. The process was widely covered by the Georgian media and regarded as fair and transparent even by those who failed.

There was no clear consensus on whether members of the legislature should be included on the council. Many Western, Central, and Eastern European countries do include members of the legislature on their councils, whereas only a few countries in Latin America do.

(3) Merit-based selection. Although merit should be a significant element in the selection of judges at any level, in civil law systems the term is generally understood to apply to the process of selecting entry or lower-level judges by evaluating them against specific criteria, often by means of an exam. This is a common approach in civil law countries.[5]

Use of a more objective, merit-based process can be an important step forward when compared to traditional political or personal processes. However, there is little consensus about how to test for the qualities relevant to being a fair and impartial judge. Most entrance examinations at best test only intelligence and knowledge of the law. There have been many efforts to develop tests for other traits, such as professional integrity, willingness to work hard, and deliberative decision-making, but no agreement on their success.

A few countries have developed a multi-step process with a training component. In Chile, as a result of 1994 reforms, a recruitment campaign encourages lawyers to apply for vacant positions.[6] Candidates are evaluated based on their backgrounds and tests of their knowledge, abilities, and psychological fitness, then interviewed. Those selected attend a six-month course at the judicial academy, and the graduates then receive preference over external competitors for openings.

[4] See Giuseppe Di Federico's comments on the problem of too much dominance by lower court judges, in his paper on Italy in Section III.

[5] In the United States, merit-based selection usually means nothing more than selection based on recommendations of a broadly based commission.

[6] See Margaret Popkin's paper on Latin America in Section III.

The process in Chile, which has been carried out with unprecedented transparency, appears to have yielded positive results. Good candidates have come forward, those chosen appear objectively to be the best qualified, and the judges themselves say they feel more independent because they know they were selected on merit, not because of friends or contacts. The obvious disadvantage of the process adopted by Chile is its expense. Few judiciaries have the resources to provide long-term training for applicants who may not ultimately be selected as judges.

Regardless of the specifics of the merit-based process adopted, transparency is again considered to be a crucial factor.

(4) Diversity. Although diversity is rarely taken into account in judicial selection, many experts agree that it is important. A judiciary that reflects the diversity of its country is more likely to garner public confidence, important for a judiciary's credibility.

2. Security of Tenure

Security of tenure means that a judge cannot be removed from his or her position during a term of office, except for good cause (e.g., an ethical breach or unfitness) pursuant to formal proceedings with procedural protections. Security of tenure is basic to judicial independence. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in their consideration of cases.

In France, security of tenure (*inamovabilité*), introduced in the 19th century, also includes protection against transfers or even promotions without consent—a concept particularly relevant to civil code countries with career judiciaries. The French model was subsequently introduced (although not rigorously observed) in Latin America and, in the 1990s, in countries of Central and Eastern Europe.

a. Performance evaluation, promotion, and disciplinary procedures

Appropriate promotion and disciplinary procedures that exist not only on the books but are adhered to in practice are the primary mechanisms through which security of tenure is protected. Many of the basic lessons that apply to appointment of judges also apply to promotion and discipline:

- Transparency is once again the overriding factor. The criteria for decisions should be published. Opportunities for promotion should be advertised and judges should be able to compete in a transparent process.
- To reduce the potential for abuse, decisions with respect to both promotions and discipline should be based on the most objective criteria possible. (However, establishing objective criteria is extremely difficult, as discussed below.)
- If the executive and/or legislative branches are involved in the process, they should not have excessive influence.
- Comments should be solicited from the public, lawyers, and law professors.
- Although not yet commonly used, a two-step process can increase transparency and reliance on objective criteria. One authority evaluates performance, and a separate authority makes the final decisions regarding promotion or discipline.

Performance evaluations and promotion. Performance evaluation procedures that are inadequate or that are not followed in practice

can result in improper internal or external influences affecting promotion decisions. Although everyone agrees that a fair evaluation process is an important element for protecting judicial independence, actually establishing appropriate criteria for advancement is very difficult. Virtually no consensus exists on how relevant factors—seniority, efficiency, quality of decision-making, and courtroom comportment—should be assessed or weighed.

A certain level of efficiency is always required of courts and becomes even more important as judiciaries experience dramatic increases in caseloads. Quantitative indicators are, therefore, often used, and warranted, but need to be given careful thought. For example, the number of cases decided during a given period of time can sometimes be misleading and encourage poor performance, such as neglect of difficult cases, attention to speed rather than justice, falsification of records, and manipulation of statistics. The number of decisions reversed on appeal can be a valuable indicator, but its utility can vary depending on the circumstances, such as access to laws and the decisions of appeals courts. More sophisticated information systems can overcome some of these problems, and automated systems allow generation of data (e.g., average time for disposition of a range of cases) that is often more useful.

Qualitative indicators are also necessary in an evaluation process, but open the door to those who are senior in the judicial hierarchy and responsible for evaluations exerting influence on junior judges. This is especially true when those who evaluate also have the power to give promotions or impose discipline.

Because of these problems, some reformers favor abolishing evaluations. However, as has occurred in Italy, the failure to evaluate performance or make promotions based on merit poses the risk of sacrificing professional standards in the name of judicial independence.[7] Developing performance evaluations in consultation with the judges to be evaluated may help to mitigate some of the inherent problems.

Disciplinary procedures. When disciplinary processes work correctly, they protect the integrity of the judiciary and its independence. However, disciplinary proceedings may be brought for political reasons or to punish judges who render decisions contrary to the views of their superiors. Substantive differences that should be resolved by appealing cases to a higher court may instead form the basis for disciplinary actions. Not uncommonly, disciplinary processes are bypassed entirely in removing judges from office.

A well-structured disciplinary procedure reduces the vulnerability to abuses that affects judicial independence. Judges subject to discipline should be afforded due process protections. Penalties should be proportionate to the offense. Judges should be removed from office only for official incapacity or misconduct that is serious and clearly specified (e.g., in law or in the oath of office).

The entity that has authority to discipline should be structured to exclude improper influences. Some experts recommend that it include substantial representation from the judiciary itself.[8] Others recommend an independent body in addition to the judiciary, such as an ombudsman's office. Retired judges and others of proven integrity often make good members.[9] Disciplinary bodies that regularly publish the

[7] See Giuseppe DiFederico's paper on Italy in Section III.

[8] See Universal Charter of the Judge, art. 11, adopted on November 17, 1999 by the General Council of the International Association of Judges, in Annex A.

[9] See International Commission of Jurists' Framework in Annex A.

number and bases of complaints received and their disposition, as many U.S. organizations do, enhance the transparency of the process.

Participants in this study warned that some caution needs to be exercised when a country first tries to crack down on judicial misconduct. Often judges have been punished for failing to comply with new codes of ethics when they were not adequately familiar with the codes or how they were to be applied. Codes need to be well publicized and discussed before they are used to discipline judges.

Members of the public should be able to file complaints against judges for official misconduct. However, steps need to be taken to guard against unhappy litigants using the process to harass judges who decided against them. The primary method for accomplishing this is to exclude complaints about the merits of decisions. Judicial conduct organizations operating in several U.S. states provide good examples of effective citizen complaint mechanisms, many of which incorporate public representatives into the process.

b. Additional issues related to security of tenure

Although most problems related to tenure are common to a variety of systems and circumstances, a few issues arise under more specific contexts and are worth noting:

- In some countries it is customary for the entire judiciary to be changed when the president of the country changes, even when the lower courts may have a career system with stated protections against removal. In these cases, problems with respect to security of tenure are usually part of broader systemic problems permitting executive domination or politicization of the judiciary.

- In several countries, especially in anglophone Africa, the president is authorized to employ judges for temporary periods, in order to take care of severe backlogs or when some action, such as elections, requires that a large number of cases be disposed of rapidly. However, the practice has been used by the presidents in some countries to control the judiciaries, since these judges serve at their whim. The *Latimer House Guidelines*, adopted by judges and lawyers from 20 commonwealth countries, recommend that temporary appointees also be subject to appropriate measures to provide security of tenure.

- In several countries of Central and Eastern Europe, judges begin service with a probationary term (generally three to five years), and only if their appointment is confirmed do they receive life tenure. Although a probationary period is reasonable, it does make judges vulnerable to those who can influence the confirmation process. To build in protection for judges subject to probation, the confirmation process should be transparent and based on merit. Additionally, the probationary period should be as short as possible, and probationary judges should not be assigned controversial cases.

3. Length of Tenure

Closely related to the issue of security of tenure is the length of a judge's term. As judges near the end of their tenures in office, they become more vulnerable to the influence of those who may affect their employment prospects. Additionally, judges looking ahead to their next jobs may shape their opinions accordingly, even absent overt external pressure.

There are two general approaches to judicial terms: life tenure and fixed terms. In the United Kingdom, Canada, and the U.S. federal system, judges serve for life, unless removed for cause. The same is true for France and most of Western Europe, and life tenure is increasingly becoming the standard in Central and Eastern Europe. (Some court systems have "life" tenure, but with mandatory retirement (e.g., age 60 or 70). Fixed terms are common in other countries and in many state and local courts in the United States.

As with selection procedures, the factors favoring fixed or life terms may be different for higher and lower courts. Although most European and Latin American countries now have life tenure (at least in law) for lower-level judges, they have often opted to continue fixed terms for judges of the supreme and constitutional courts. This needs to be understood within the context of the French civil code model. In keeping with historically based restrictions on letting judges "make law" in France, the judiciary originally had no authority to review the constitutionality of laws or executive acts. This restriction eased over the years, and special constitutional courts were created in France to exercise these powers. However, the review process was still considered quasi-legislative and political in nature. A fixed term (along with legislative confirmation of the court) was seen to enhance the likelihood that the court would command the trust of a wide band of the political spectrum and stay "in touch with changing values."[10]

In order to increase judicial independence, terms must be long enough to reduce the vulnerability of judges. Whether the solution is life tenure or fixed terms tends to depend on the historic and cultural origins of a judiciary. We are not advocating one over the other. Fixed terms may present problems in terms of protecting judges from inappropriate influences, which should be recognized and taken into account. However, life tenure can also have its problems, including its perceived lessening of judicial accountability.

Several examples exist for what may be considered an adequately long term. In Guatemala, a review by the U.N. Special Rapporteur on the Independence of Judges and Lawyers concluded that the five-year terms of the Guatemala Supreme Court were too short to provide the requisite security of tenure and recommended that they be increased to 10.[11] Terms of 10 and 12 years are common in Western and Central Europe.

Three arguments are generally advanced against increasing the length of tenure of judges: (1) shorter terms are necessary to weed out judges who are sub-standard; (2) shorter terms are necessary to ensure that the judiciary reflects the will of the people; and (3) long or life terms protect judges who are "in someone's pocket."

In general, these issues can be dealt with by establishing other protections consistent with judicial independence. The problem of sub-standard judges can be addressed by having more rigorous selection processes, probationary terms for new entrants, and procedures for removing judges who fall below certain clearly articulated standards. Even judiciaries with life tenure change over time as a result of retirements and new entries, thereby maintaining some currency with evolving social norms. With respect to the third argument, the experience has

[10] Linn Hammergren, "The Judicial Career in Latin America: An Overview of Theory and Experience," (World Bank, June 1999), unpublished paper, available from IFES

[11] See in Section III, Margaret Popkin's paper on Latin America, p.11, fn.15., discussing the report of the Special Rapporteur on the Guatemala Mission, Jan. 6, 2000, UN Doc. E/CN.4/2000/61/Add.1, at paras. 61-63.

been that short terms are more likely than longer terms to result in judges vulnerable to inappropriate influences. However, if a court has been politicized or subject to domination of the executive, it may be advisable to work towards a more comprehensive package of reforms, including changes in the selection process, rather than changes in tenure alone.

Two problems related to term of office are

- Fixed terms are often set to coincide with election of the president and legislature. In those cases, the problem with respect to terms is usually part of a larger basket of structural issues, including the selection process, that are intended to permit the executive and/or political parties to retain influence over the judiciary. Lengthening judicial terms can help to address this problem, since presidents nearly always have relatively short terms of office. Staggering the terms can further help to depoliticize the process. El Salvador, for example, established staggered nine-year terms for its supreme court as part of reforms introduced during the peace negotiations.

- When fixed terms are renewable (or permanent appointments are subject to periodic review and renewal), judges may feel constrained during their first term not to offend those who can influence their reappointment.

4. Structure of the Judiciary[12]

As we noted in the introduction to the guide, we are primarily interested in the independence of the judiciary from the perspective of the judges' ability to make decisions impartially, not the institution's structural independence from other branches of government. However, as also noted, the structural relationship of the judiciary to the rest of the government inevitably makes judges more or less vulnerable to interference.

As with all the other institutional issues related to the judiciary, there is no universally accepted approach. The two basic models are

- A judiciary which is dependent on an executive department, usually the ministry of justice, for administrative and budgetary functions

- A judiciary which is a separate branch of government and has the same degree of self-government and budgetary control over its operations as the executive branch has over its operations

However, there are many variations on these models, and many countries have tried different approaches at different times. The United States follows the second model, as do a few countries in Western Europe and many in Latin America. The first model has been dominant in Europe, including the United Kingdom.

Although the judiciaries of Europe have achieved high levels of independent decision-making under the first model, the trend around the world—including in Europe—has been for countries to transfer all or some of the responsibility for judicial administration and budget away from the executive. Administrative responsibilities have been vested in either a judicial council, the judiciary itself, or, yet another twist, a council within the judiciary. Both Italy and Spain have transferred substantial administrative powers from the ministries of justice to judicial councils, and France is considering such reforms. Among common law countries, judges in the United Kingdom and

[12] See William Davis' paper on court administration and Eric Jensen's paper on the context for judicial independence programs in Section IV.

Canada have been gaining increasing support for calls for greater institutional independence from the executive and legislative branches.

Responsibility for management of the judiciary developed along a similar path in the United States.[13] Until 1939, the federal courts were under the administrative responsibility of the executive branch—first the State Department, then the Departments of Treasury, Interior, and Justice. Until the early 20th century, the executive did little more than pay judges and staff and provide courtrooms and furniture. As the size and complexity of judicial operations increased, judges and others argued that secure salaries and tenure were no longer sufficient to maintain the judiciary's independence and, moreover, that the Department of Justice was an indifferent administrator. Although Justice usually made decisions in consultation with judicial officials, it could, and sometimes did, deny financial support in retaliation for decisions contrary to the interests of the executive branch.

In response to these concerns, Congress created the Administrative Office of the U.S. Courts, supervised by the Judicial Conference, which now includes representatives of all levels of the federal judiciary. Under this arrangement, the federal judiciary manages its own funds and operations. It also develops its own budget request, which is submitted to the Office of Management and Budget (OMB). By law, OMB must include the judiciary's proposed budget in the submission of the president's budget to Congress without change, although OMB is permitted to comment on it.

Although there are clear examples of independent judicial decision-making under executive branch administration, the trend away from this model demonstrates the concern that power over the budget and administration of the courts, especially when coupled with executive control over appointments, promotions, and discipline, allows inappropriate influence by the executive. This concern can be particularly acute in countries that have a history of executive domination of the judiciary, such as former communist states. Additionally, the relationship of the judiciary to other branches can influence the public's perception and expectations with respect to its independence. For example, Kenya's constitution is one of the few in anglophone Africa that does not clearly establish the judiciary as a separate branch. The Kenyan contributor to this study stressed that this situation has contributed to the perception of the judiciary as "a mere appendage of the executive."

While placing administrative and budgetary responsibility with the judiciary creates a framework that encourages substantive independence, it is by no means sufficient. Problems can arise when administrative authority is transferred without first, or simultaneously, developing the interest and capacity of judicial leaders to discharge their increased responsibilities effectively, with attention to the needs of the lower as well as the higher courts. For example, the lack of professional court management in the Basque region in Spain resulted in transfer of administration back to the ministry of justice. Throughout the commonwealth, administrative responsibility for the courts has traditionally rested with the chief justice and senior judicial officers. Where the chief justice has been independent, the responsibility for administration has tended to strengthen this independence. In the absence of such leadership, it is perceived to have been irrelevant.

[13] See Mira Gur-Arie and Russell Wheeler's paper on the United States in Section III.

a. Adequate budget[14]

It is generally difficult to make a direct causal link between an adequate judicial budget and judicial independence, but there are substantial indirect linkages. Severe under-funding nearly always has an impact on the judiciary, which is seen to affect its independence. Judiciaries with inadequate resources usually cannot offer the salaries, benefits, and pensions needed to attract and retain qualified candidates, and, in some cases, to diminish the likelihood of corruption. Judges in such judiciaries often lack access to basic legal materials—laws, judgments of higher courts, and commentaries—needed for consistent and well-founded decision-making. They may lack adequate methods for correctly recording oral proceedings, undermining the appeal process and transparency and accountability. Limited budgets result in inadequate physical working conditions that undermine respect for the judiciary both in the judges' own eyes and in the eyes of the public, and may inhibit a judiciary's ability to provide the security needed to stem intimidation. The capacity and attitude of judges, the security of judges, and the attitude of the general public toward the judiciary—all of which are dependent to a high degree on an adequate budget—are perceived to be essential elements in building judicial independence, as described more fully below.

The linkage between the judiciary's budget and independence is more direct when entities outside the judiciary supplement an inadequate budget. In several countries, local governments and even businesses provide judges such necessities and benefits as office space, discounts on education for their children, transportation, and housing. In return, these benefactors expect, at the least, sympathetic consideration of their cases.

Allocation of the budget within the judiciary can pose as much of a problem as the absolute size. Independence of lower court judges from their superiors is compromised when the distribution of resources within the judiciary is arbitrary, lacks transparency, or is used to punish lower courts that do not follow the instructions of their superiors. Presiding judges are often the ones to dispense the perks conferred by local authorities or businesses, thus increasing the dependence of judges on their court presidents.

Assuming that an adequate budget is an essential ingredient of judicial independence, what is adequate? Once again, there is no easy recipe for making this determination. What is adequate varies from country to country and is based, among other things, on the resources available to the government, the stage of development of the legal system, the size of the population, the number of judges per capita and of organizational units included within the judiciary's budget (i.e., judges, judicial council, prosecutors, police, public defenders, military courts, labor courts, and electoral courts), and the extent to which courts are being used, or would likely be used if they were perceived to be fair and effective.

Because of all these variables, comparisons among countries are virtually impossible. However, some examples can give a ballpark picture of current realities. In the Philippines, slightly over 1 percent of the budget is allocated to the judiciary. In Pakistan, the figure is .2 percent of the national budget and .8 percent of provincial budgets. Romania allocated 1.73 percent of its 2000 total budget to the judiciary. In Costa Rica, the government is required by the constitution to allocate 6 percent of its total budget to the judiciary; however, the judicial budget includes the judicial police, prosecutors, and other services. When these elements are

[14] See William Davis' paper on court administration and Eric Jensen's paper on the context for judicial independence programs in Section IV.

removed, the figure for judges and courts is closer to 1.5 percent. In most of anglophone Africa, governments devote less than 1 percent of their budgets to the courts.

The judiciaries of several countries, as in Costa Rica, receive constitutionally mandated percentages of the national budget. This model presents some positive features: it attempts to protect the judicial budget from political intervention; it has an educational value in suggesting what adequate support for the judiciary is; and it can provide a level of predictability. However, the practice also raises several concerns. First, several countries that have such legislatively required percentages simply do not comply with them, sometimes through manipulation. Unless the percentage is fully grounded in the budgetary realities of the country and has the full support of legislators responsible for the budget, it may be only symbolic. Second, once a minimum is fixed, it quickly becomes a maximum; it is often difficult to increase the amount when warranted. Third, fixed percentages can actually undermine transparency, efficiency, and consultative process with lower courts because the judiciary no longer needs to justify to the legislature what it does or how it spends its funds.

If a judiciary's budget is inadequate to meet its needs, funds generated by the judiciary can provide an alternative to augment those resources. The United States provides an example of this practice. Trial courts in the United States were at one time insufficiently funded through state and local governments. Facing popular resistance to increasing direct support to the judiciary, the courts, with legislative approval, instead instituted users fees. Potential measures for generating additional funds within the judiciary include raising filing fees, allowing earnings on court deposits to accrue to the judiciary, allowing awards of court costs to go to the judiciary, and allowing penalties and fines assessed by the court to go to its budget. However, all of these practices are controversial, and the latter can raise conflict of interest issues.

It is very common to hear complaints that a judiciary's budget is inadequate, and in many cases it is true. Nevertheless, claims about the need for increased resources should not be taken at face value. Increased budgets have not always resulted in improved performance or greater independence. There can be a variety of reasons for this. It is important for donors and their local counterparts to carefully analyze a court's budget and how it is used, as well as overall court operations, before becoming advocates for increased resources. Local public finance experts can often undertake such an analysis.

A common problem is poor allocation of resources within the judiciary, rather than or in addition to an overall lack of resources. High courts often have sumptuous physical facilities, high salaries, large staffs, and generous travel budgets while the lower courts lack paper and pencils. In those circumstances, it may be inappropriate to support increased budgets until allocations are defensible.

Frequently the institution and its resources are not well managed. Assistance to help the judiciary develop its management capacity may prove very useful. An important element involves helping the judiciary learn how to plan its operations over a reasonable time period, determine its financial needs, and develop responsible budgets. The judiciary's ability to present its financial needs in a professional and comprehensive manner enhances the likelihood that it will acquire necessary resources. The concept of having a professional administrator assume some management functions previously performed by judges is gaining acceptance in many countries.

b. Role of Private Lawyers and Bar Associations

Up to now we have discussed how arrangements within the structure of the judiciary itself can enhance judicial independence. However, the judiciary is only one side of the equation. The lawyers who practice in the courts can also have a major impact on judiciary operations. Lawyers can be leaders of reform movements. They can also be stubborn defenders of the status quo.

The legal representatives of powerful parties can be agents of corruption, conveying bribes or offering other forms of improper inducement. Lawyers may enjoy direct contact with high-ranking executive officials who can apply pressure on independent judges. When lawyers lose cases, they may make accusations of bias or incompetence, casting doubt on the credibility of the system as a whole.

A bar that rigorously polices itself to prevent or eliminate unethical practices can make a strong contribution to the judicial system. Although bar associations in many countries are themselves problematic, at their best they play an important role in upholding the professional standards of their members. By adopting codes of ethics, offering training programs for lawyers, reporting and assisting the public in reporting evidence of corruption, and establishing effective mechanisms for penalizing corruption and other misconduct by their members, bar associations can promote judicial independence. Participation by representatives of the organized bar in the design of reforms to enhance judicial independence can offer opportunities to avoid misunderstandings, reduce opposition, and broaden the base for reform.

C. Developing Judicial Capacity and Attitudes

All of the experts participating in this study agreed that the institutional arrangements of a judiciary are an essential element in promoting judges' independence. However, they were equally emphatic about the importance of the role the individual judge plays. Judges who lack sufficient commitment to the sanctity of an independent judiciary or who do not have adequate training and skills are more vulnerable to outside influence. The participants in the Guatemala roundtable particularly emphasized the impact that a well-structured training program on ethics can have.

Five approaches that focus on developing the capacity and attitudes of individual judges in order to enhance judicial impartiality are discussed below: training programs, access to legal materials, codes of ethics, the status of judges (incentives), and judges associations.

1. Training Programs

a. Continuing judicial education

Many judges in transitional democracies choose to conform with the expectations of their superiors because they lack training about what the law requires, or they are accustomed to accepting direction from senior executive branch or judicial branch officials. A variety of education programs can be appropriate. Many countries have permanent judicial schools or judicial training centers that are responsible for the training of entry-level judges as well as the continuing education of more senior judges, following the European model. USAID has often supported these centers.

A common issue with respect to judicial schools is sustainability, not surprisingly, given the restricted budgets of many judiciaries. Many Latin American countries have adopted a less costly model (pioneered by Costa Rica) in which the school has a very limited permanent staff. Most of the organizational work is done by committees of judges and members of the legal community, such as law professors. The training

is carried out by members of the group themselves or by contract. By incorporating judges in the process, including curriculum design, this model also assures that the training is relevant and judges buy into it.

A second issue with respect to continuing judicial education is content and orientation. European judicial schools have leaned toward approaches emphasizing legal theory. U.S. judicial training is generally very practical in nature, including advice in techniques for managing cases efficiently. In part, this is explained by the differing systems. In an adversarial system, the judge relies more on the lawyers to develop the legal theory of a case. In a non-adversarial civil law system, the judge is expected to master more fields of substantive law; most judges appreciate the impact that practical training can have on their ability to perform their jobs.

A third issue is who receives the training. Many initial donor-supported training programs are held in the capital city and, in some cases, are offered primarily to the judicial leadership. However, most of the population comes in contact only with the lower courts. For this reason, several contributors recommended that more programs should be offered to lower courts, especially outside the capital, where the courts have less access to training, materials, and modern approaches, and thus even more need for training. Of course, programs offered to lower court judges may face an even greater challenge of sustainability than those offered to the leadership, and it is important to reach those who can influence policy and help implement reforms. All of these factors should be considered in the design of judicial training programs. The long-term objective should be an indigenous capacity to provide practical training to entry-level and sitting judges at all levels, as well as court personnel, on a sustainable basis.

b. Judicial ethics and responsibility

Several of the in-country contributors emphasized that training in judicial ethics can have an important impact on a judge's ability to maintain impartiality. Even judges who intend to act impartially may not know what the correct choice is in some circumstances. This is as true in the United States as in other countries. Judges in many countries face the additional challenge of living in a culture where there is a strong expectation that one helps out family and friends. Ethics training can help judges to make choices in unclear situations and can strengthen their ability to resist cultural pressures. Very few of the experts we surveyed believed their countries had effective ethics codes and training programs in place. Some points emerged on designing this training:

- Given that ethical norms are difficult to convey and apply in the abstract, the most effective training is to work through exercises based on practical problems judges often confront.
- Seminars on ethics involving visiting foreign judges have been well received in many countries, especially where the visiting judges make clear that they struggle with the same issues.
- A positive approach may yield better results. One U.S. judge noted that, while judges may take offense when foreign experts talk to them about curbing corruption, discussing common ethical concerns with foreign colleagues may be perfectly acceptable.
- Such programs can have greater impact if there is on-going contact between the foreign and in-country judges.

c. International law and human rights

Training in international law can play a role in helping judiciaries exercise their independence

from the executive and legislative branches and provide checks on abuses of authority by those branches. For example, judges in Argentina who attended seminars on international and regional law took Argentina's international legal duties into account in decisions limiting the application of amnesty laws.[15] The top courts of several anglophone African countries have invalidated laws and challenged executive actions on the basis of international law.[16] Statements of principles concerning judicial independence adopted by international conferences of senior jurists have also been influential, especially in the commonwealth. Specific, practical advice on how to apply international law in the national courts will usually enhance the effectiveness of such training.

d. Study tours

Study tours outside the country allow judges to escape an outlook shaped by their own culture and can be particularly effective in generating a new vision of how a judiciary can operate independently. To achieve their objectives, they must be carefully planned to demonstrate specific issues and should include regular opportunities for participants to discuss their observations and impressions. Study tours are even more beneficial if follow-up communication is planned, through periodic meetings that foster the development of a collegial or mentor relationship or an exchange of materials. Study tours can also play an important role in encouraging courageous reformers to continue their efforts.

e. Governance capacity of the judiciary

A judicial system that executes its normal functions in an orderly manner builds public confidence and respect that, in turn, may lead to executive and legislative branch support for greater autonomy and resources. Training programs directed at the management and operational skills of judicial employees can, therefore, contribute in an important way to judicial independence. Training in leadership skills will often be a critical element of such capacity building.

f. University legal education[17]

USAID and other donors have often been reluctant to include law school activities as major components in their rule of law programs. In part, university education has been viewed as too long-term and indirect an approach to rule of law problems, particularly for donors who are looking for demonstrable results within a limited timeframe. Additionally, public universities can be difficult partners. Many are uninterested or opposed to making reforms in curricula or teaching methods. Problems within the law school may be only a small manifestation of much larger issues with respect to the overall administration of the university.

However, there was emphatic consensus among the contributors to this guide that deficient university law training is one of the most serious obstacles to the development of a truly independent judiciary. Each of the regional experts and many individual country contributors identified weaknesses in law school education as significantly contributing to problems of judicial independence. The significant substantive and procedural legal reforms that have taken place in many countries in recent years have also created new needs for curriculum reform in law schools. As a consequence, both donors and universities have

[15] See Margaret Popkin's paper on Latin America in Section III.

[16] See Jennifer Widner's paper on anglophone Africa in Section III.

[17] See Edwin Rekosh's paper on Eastern Europe and Eurasia in Section III.

increased their interest in international cooperation.

At the most basic level, inadequate law school education may result in a deficient pool of applicants for entry-level judicial positions. Although training for judges can be a valid approach to improving their capacity, it usually cannot make up entirely for poor law school training. Moreover, to the extent that judicial training programs have to try doing so, they are incurring costs that should not be theirs, further stretching limited judicial budgets.

In addition to learning skills, law students should be acquiring the values and ethical attitudes they will carry with them throughout their careers. U.S. and other universities include specific ethics courses in their curricula and place a great deal of emphasis in other courses and activities on developing ethical attitudes and respect for the rule of law. Such courses are equally important in most countries where donors are financing rule of law programs.

Another method that has proven successful in transforming attitudes (as well as developing substantive legal skills) is clinical legal education. Students provide legal services in actual cases to people who would not otherwise have access to counsel, and they receive training in lawyering skills in a parallel classroom component. Clinical education allows students to experience first hand the crucial importance of impartial and dedicated judges. It also gives them the opportunity to work closely with disadvantaged groups who are often otherwise outside their range of experience. These skills and experiences can be critical to shaping future generations of judges and lawyers who are equipped to develop, respect, and work with a strong, independent judiciary. Donors have supported dozens of clinical legal education programs throughout Europe and Eurasia at relatively low costs. Many of the participants in those programs have joined or started public interest law NGOs; several have become judges.

2. Access to Legal Materials

In order to base decisions on legal reasoning, judges need to have access to laws, the decisions of higher courts, and other jurisprudence. Knowledge of judicial decisions, in particular, can be important to the perception of impartiality. Judges need to reach similar decisions in similar cases if they are to be regarded as fair and impartial. This is true in both civil code and common law countries. Even though case decisions of higher courts may not be binding on lower courts in civil code jurisdictions, they do inform lower court decision-making and, therefore, are important to promoting consistency and the appearance of fairness. Widespread use of telecommunications technology often enables legal materials of all kinds to be more readily available at low cost.

3. Codes of Ethics

Many countries have adopted codes of ethics as part of a judicial reform process. Codes of ethics are valuable to the extent that they stimulate discussion and understanding among judges, as well as the general public, on what constitutes acceptable and unacceptable conduct. They may also inspire public confidence that concrete steps are being taken to improve the integrity of the judiciary.

Because debate and discussion of ethical issues are among the most important results of a code of ethics, the process of developing a code can be as important as the final product. Ideally, a code should be drafted by the judiciary or a judges association, with extensive input from lawyers, civil society leaders, and others who have experience with the courts. If there is a national judicial commission in a country, it may be an appropriate task for that organization. Judicial ethics codes should not be drafted by the legislature or the executive branch.

Guidance in drafting can be sought from several models (e.g., the European Judges Charter and

the American Bar Association's Model Code.) However, as with all issues discussed in this paper, the specifics of judicial ethics will be determined by local context. What appears to be clearly ethical or unethical in one country may be murky in another. For example, the apparent freedom of many European judges to engage in politics or the system of judicial elections in a number of U.S. states, would be unacceptable in other countries.

Most civil code countries already have laws that define crimes that are applicable to judicial performance. The judiciary's organic laws and regulations also define parameters of behavior. If an ethics code is introduced, the issue of how it fits within the existing legal framework must be addressed.

Additionally, the judiciary will need a mechanism to interpret the code and to keep a record of those interpretations that will be available to others seeking guidance. Judges should not be left solely responsible to determine how the general words of a code apply in particular situations. Enforcement will also need to be addressed. Most of the experts we surveyed did not believe that codes were being effectively enforced in the countries that already have them.

Although codes are meant to have a positive effect on judicial independence, contributors to the guide flagged some potential abuses. First, codes have at times been used to punish judges who did not yet fully understand the details of the code and what behaviors were prohibited. Second, they have also been used to punish judges considered "too independent." Both problems occurred most often when a code was adopted without extensive discussion among judges and the public at large. Accordingly, contributors urged that ethics codes not be used as the basis for discipline until they are widely known and understood. This generally does not leave a vacuum with respect to discipline, since the judge's oath of office is usually adequate to support disciplinary proceedings.

4. The Status of Judges

A theme echoed by this guide's contributors was that a judicial career is poorly regarded in many countries. The low status of judges is almost invariably reflected in low salaries and poor working conditions. Under these circumstances, it is more difficult for judges to maintain a sense of professional dignity. Although the relationship among self-respect, independence, and impartiality of decision-making is somewhat intangible, the general perception is that judges who do not respect themselves as professionals are less likely to withstand corruption and other outside pressures.

The question is: How to increase the self-respect of judges? Clearly, part of the answer lies outside the individual judge—with the attitude of the general public toward the judiciary. That issue is discussed more fully below.

In terms of affecting the attitude of the judges themselves, salaries and benefits are key factors. The relationship of salaries to judicial independence is not as straightforward as one might expect. There seemed to be a clear consensus among the judges participating in this study that respectable salaries are a necessary element of judicial independence. At the most basic level, it is difficult to reduce petty corruption among judges unless they are able to support the essential needs of their families. Increasing salaries where they were previously extremely low also seems to be the fastest way to improve the status of the judiciary, increase judges' self-respect, and attract a broader pool of qualified applicants who are assumed to be more inclined and equipped to uphold the integrity of the office. Several countries have increased salaries in the past few years and made judicial positions more attractive, including Bulgaria, Georgia, Guatemala, Kyrgyzstan, Romania, and Uganda.

However, it is unclear whether increased salaries decrease the temptation to accept bribes, especially among judges who are already steeped in a culture of corruption and who may have taken the job in the first place because of its potential for exploitation.[18] A recent World Bank study (not specifically on judiciaries) concluded that there was no evidence that increasing salaries without taking other measures leads to significant reductions in corruption. Rather, reducing corruption appears to be much more closely linked to increasing transparency and meritocracy in hiring, promotions, and discipline.[19] It may be important, therefore, to make salary increases part of a package that includes these other aspects of reform.

Pensions are an equally important component of a benefits package. A comfortable pension (if coupled with life tenure) increases the likelihood that judges will remain on the bench until the end of their careers. This in turn increases the incentives to resist bribes, assuming there is a credible risk of detection and discipline. When money is allocated to increase judicial salaries, consideration should be given to paying the largest increases to judges who have served for many years or to increasing pensions.

Other incentives can also be important to building self-respect among judges, such as adequate physical conditions, increased opportunities for continuing education, and decreased administrative responsibilities.

5. *Judges Associations*

Judges associations in many countries have primarily been employee unions, established to lobby for better benefits. In those cases, they have rarely been agents for reform. In other countries, however, they have been key players. At their best, judges associations can contribute to transforming judicial attitudes by

- Enhancing a sense of professionalism, collegiality, and self-esteem among judges, which is particularly important in countries where the profession has been held in low regard
- Developing and being persuasive advocates for a code of ethics (They can adopt their own informal codes and other mechanisms of self-regulation, and heighten awareness of ethical issues, including through publications and continuing legal education.)
- Sustaining training efforts, by providing an institutional base and by developing and disseminating training materials and other publications
- Developing judicial leadership and advocating for reforms

GUATEMALA'S JUDICIARY

In October 1998, the Guatemalan judiciary opened its first clerk of courts office in Guatemala city. In the previous year, 1,061 case files had been "lost" in seven of the 11 Guatemala city trial courts alone. As a consequence, many accused remained in jail without a trail, while others escaped prosecution altogether. In the year after the new office and records management system went into effect, only one case file was lost, and the person responsible was identified and prosecuted. Other features of the new system were equitable and transparent case assignment, that eliminated judge shopping and reduced congestion in overloaded courts; automatic enforcement of procedural time limits; and generation of reliable data that permitted effective planning.

[18] See Eric Jensen's on the context for judicial independence programs in Section IV.

[19] Vinod Thomas *et al.* The Quality of Growth (World Bank and Oxford University Press, Sept. 2000). Chap. 6, full text may be downloaded: http://www.worldbank.org/html/extdr/qnality/

D. Increasing Transparency

Throughout the guide, the importance of transparency has been highlighted as a key ingredient in reducing improper influences and fostering independence. This sub-section describes five additional ways to increase the transparency of court operations and the judicial process.

1. Transparency of Court Operations

Increasing efficiency is a primary goal of programs designed to modernize court administration. However, an equally important goal is to increase the transparency of a court's operations. The organization and procedures of a court can either create a transparent operation with built-in checks that will greatly increase the difficulty of interfering with court decisions, or they can do the opposite—facilitate such interference.[20]

Transparency begins with the organization of the court. In much of Latin America, trial court organization had not changed for several hundred years. In the most common model, each judge had his or her own staff responsible for handling all facets of a case, resulting in units that were virtually courts unto themselves. Although this arrangement may give a good judge better control of staff support, it is very open to abuse. Particularly in a written system, one judge or one clerk can easily alter or delete documents that will change the outcome of the case, with little likelihood of being caught. In recent years, the creation of common support functions and records management has begun to spread. The result is decreased opportunity for bribery, intimidation, or manipulation.

Good records management is also essential to reducing improper influences. In a court with poor records management, it is not uncommon for files in controversial cases to be "lost," as well as for documents to be altered. With no case file, the prosecution or civil litigation cannot go forward. This is a relatively common occurrence in court systems with record management systems that are so disorganized that no one person can be identified as responsible if something happens to the case file. A good records management system will keep track of who has responsibility for the case file at all times, and it will create a secured filing space for records that are not in use.

The initial assignment of a case to a particular judge is another critical step in a court's procedures. Often there is no standard procedure for registering and assigning cases to judges. Absent clear procedures, it is easier for bribery or more subtle forms of influence to determine the assignment—to a judge who is favorable or to a judge who has been bribed to ensure the outcome. Using a mechanism such as random assignment of cases greatly reduces the opportunity for inappropriate influences at this stage. Although random assignment may create claims that judges with insufficient expertise and experience are assigned cases they cannot handle, the U.S. federal court system's answer has been that the costs of a steep learning curve are worth (1) the benefits the curve provides the system in the aggregate, and (2) the protections afforded by random assignment.

2. Publishing Judicial Decisions

In many countries, judges, except at the highest levels, do not state the reasoning behind their decisions, either orally or in writing. If decisions are written down at all, they are often no more than a few sentences. Even decisions by appellate courts tend to be brief, particularly in civil law systems. They often simply relate the facts and cite the applicable statutes and perhaps a few relevant cases.

[20] See William Davis' paper on court administration in Section IV.

Even when decisions are recorded, they may not be published, so that only the parties to the case have access to them. If decisions are published, they may not be indexed and, therefore, not readily accessible.

Requiring that judges state the reasons for their decisions in published opinions deters rulings based on considerations other than law and facts. Published decisions also improve consistency in the law and public understanding, which in turn is likely to increase public support for the judiciary. Publication can also serve as an incentive to judges who take pride in thoughtful legal analysis. Publishing the names of judges along with their decisions was considered a very significant reform in Poland.

However, the benefits of publishing opinions are tempered somewhat by other considerations. In many cases, the parties are the only ones who care about the reasons for a decision, and publishing all decisions can overwhelm the system. Judges who are too focused on thoughtful legal analysis may cause unnecessary delay in cases that simply need a resolution. A balance should be reached. It may not be feasible or desirable, particularly given resource constraints, to publish all decisions. At a minimum, however, courts should be obliged to (1) present the parties a statement of the decision sufficient to explain it, and (2) publish the criteria they use to determine whether to publish opinions.

3. Criminal Procedure Reforms that Increase Transparency

Over the past decade, many countries in Latin America have followed the lead of several Western European countries in reforming their criminal procedure codes to move away from the written, inquisitorial method that is part of the civil law heritage. New codes have introduced procedures that are oral, adversarial, and public. A few countries in Central and Eastern Europe (including Georgia and Russia) are also contemplating such reforms.

Under the prior systems, all testimony, including the statements of witnesses, was written and included in a case file. Decisions were based solely on this written file. Judges were not required to hold hearings or even necessarily meet with parties. The judge was the central actor in the process and had multiple roles, which included directing (or even carrying out) the initial investigation, making the decision to prosecute or not, determining guilt, and imposing the sentence. In many countries, a single judge was responsible for all of these phases in a case. There was no opportunity for the opposing lawyers to cross-examine witnesses; the judge had primary responsibility for developing the case. Judges were not required to articulate or write down the reasons for their decisions. Defendants were often unaware of the reasons for the judge's rulings. Because the procedures were entirely written, the public had very little opportunity to observe or monitor a case as it progressed.

The lack of transparency and concentration of functions in the judge posed serious threats to judicial independence. Such features made it possible, and in fact easy, for trial court judges to act arbitrarily or improperly. They also afforded no protection against intimidation to judges who wanted to act honestly. The fact that all decisions were based on a written file also permitted judges to delegate significant responsibilities to support staff, who were potentially even more susceptible than the judges to improper influences.

An additional concern with respect to the old codes was that defendants had few rights or protections and were routinely held in pre-trial detention, often for years, before being convicted or released. Finally, appellate review, in which the courts were permitted to review the facts of the case as well as legal issues, provided

little check on arbitrariness and corruption, but rather simply added another layer of decision-making that lacked transparency.

These criminal procedure reforms launched in the past decade were designed to better protect rights of suspects and victims, ensure impartiality and accountability, and increase effectiveness of the system. An additional goal was to increase the speed of trials. (In the new codes' early years, procedures may not be more efficient since prosecutors are often reluctant to use plea-bargaining. However, as prosecutors gain more experience and confidence in plea-bargaining, the procedures should be speedier than under the prior written systems.)

Although the new codes vary substantially, common features include the following:

- Evidence is presented orally with the parties present, and the public is invited to observe.
- The parties have the opportunity to present their own evidence and examine the evidence of the opposing party.
- Judges are required to deliberate and render their decisions immediately following the presentation of evidence at a continuous trial. They must provide reasons for their decisions, and these reasons must be stated within a short time—generally no more than two weeks—of the announcement of the verdict, to facilitate timely appeals.
- Appellate courts may review questions of law only, not facts. (Reformers in Latin America felt strongly about the importance of this reform, especially where trial courts have the opportunity to hear witnesses and assess their credibility.)
- In some countries, most of the investigative functions and the decision whether to prosecute have been shifted to prosecutors independent of the judiciary.

Proposals to extend similar reforms to civil procedure codes are under consideration in several countries.

4. Scrutiny of the Courts by Civil Society, Academics, and the Media

External monitoring of courts can be a powerful tool for enhancing the independence of the judiciary. As transparent procedures are built in, effective monitoring becomes more feasible, compounding the impact of the original reforms. It is much easier to monitor a court system that has structured, transparent practices than one that is either intentionally opaque or merely disorganized and chaotic. The statistics generated by good case tracking and information systems not only allow courts to better manage their operations, but they also enable outside watchdogs to observe trends and identify questionable aberrations. When supporting the establishment of these systems, it is important to help courts develop the confidence to allow public access to as much information as possible.

Human rights organizations, bar associations, and legal service providers are among the groups that commonly engage in court monitoring. At times, even a governmental organization taking the lead in justice reform may monitor the court's operations. Academic organizations often play a slightly different role, carrying out independent research about the judiciary that may look at factors relating to independence in greater depth. Contributors to this guide strongly

encouraged support for this type of academic research and stressed its long-term potential.[21]

Media scrutiny of courts can also play a positive role, but is somewhat more difficult to approach. Investigative journalism projects have not always been successful. Even when journalists are well trained and media is independent from government control, the owners, with their own biases and connections, often control content. Additionally, media outlets may simply be unwilling or unable to commit the funds necessary to investigate stories.

As an alternative, support was given in the Philippines to an organization whose specific goal was to document and expose cases of corruption, including within the judiciary. Careful research by this group, the Philippine Center for Investigative Journalism, led in one case to the resignation of a supreme court justice. However, donors need to keep in mind that under some circumstances, donor support, especially when it is a single donor, may taint the credibility of research and lead to claims that it was motivated by a foreign agenda.

5. *Disclosure of Judges' Assets, Income, Benefits, and Membership in Associations*

Although judges often balk at the invasion of privacy that disclosure of their private finances entails, it is almost uniformly considered to be an effective means of discouraging corruption, conflicts of interest, and misuse of public funds. Applicable laws generally require disclosure of judges' assets and liabilities when they are appointed and annually thereafter, so that unexplained acquisitions of wealth or potential conflicts can be challenged. Here again, civil society groups and the media play a key role in ensuring that these laws are enforced and the information disclosed is accurate, timely, and comprehensive.

E. Promoting Societal Respect for the Role of an Impartial Judiciary

This far in the guide, we have discussed several concrete measures for enhancing judicial independence and impartiality. All are important. However, one long-time observer of courts around the world points to a less tangible factor as the most important one affecting judicial independence: the expectations of society. If a society expects and demands an honest judiciary, it will probably get one. If expectations are low, the likelihood that the judiciary will operate fairly is equally low.

All the reforms discussed in this guide can help the judiciary develop public respect and reinforce changing expectations. We discuss below four additional issues that are particularly relevant to building respect for an independent judiciary.

1. *The Power of Constitutional Review*

The power of constitutional review is the authority of courts to declare laws and executive actions unconstitutional. Although judiciaries in most countries exercise some degree of constitutional review, specific arrangements vary. In most common law countries, including the United States, all ordinary courts have the authority to declare laws or acts unconstitutional, but they may rule on constitutional issues only as they arise in specific cases. Most civil law countries concentrate review power in a single constitutional court, but many allow laws and issues to be reviewed in the abstract. There is also variation in who can ask for constitutional

[21] See Margaret Popkin's paper on Latin America in Section III, and Stephen Golub's paper on civil society in Section IV.

review—individuals, ombudsmen, officials, legislators, or the court itself.

In many countries making a transition to constitutional democracy, the judiciary has long been seen as a tool of the state and continues to be viewed with skepticism, if not disdain. Constitutional cases are often high profile cases that pit one political faction against another. If in these cases a judiciary is able to rule effectively to uphold constitutional principles, it can send a powerful signal to society. Judiciaries have gained enormous respect with such rulings, as seen in Central and Eastern Europe in the 1990s.

Bulgaria provides a good example. After the 1994 electoral victory of the Bulgarian Socialist Party, the constitutional court ruled against attempts by Parliament to roll back the reintroduction of private property and freedom of the press. The non-communist political forces as well as the general public came to perceive the court as the last institutional barrier capable of stemming the tide of neo-communism. The court gained in stature and, in large part owing to the public's support, was able to fend off attempts to cut back its power.

However, in several countries, governments have refused to comply with decisions of the constitutional court (e.g., Slovakia and Belarus) and substantially reduced the court's power (e.g., Kazakhstan and Russia). This illustrates the dilemma constitutional courts often face: Should they make the legally correct decision and face the prospect of non-compliance and attacks on their own powers, or should they make a decision that avoids controversy, protects them, and possibly enables them to have an impact in subsequent cases? Bold moves by constitutional courts can be instrumental in building democracy and respect for the courts themselves. However, the local political environment will determine the ability of the courts to exercise independent authority in these high stakes situations.

As a final cautionary note, the establishment of a constitutional court has not always contributed to strengthened judicial independence. In Zimbabwe, a proposal to establish such a court was clearly intended to interfere with judicial independence. The proposal would have removed the power of constitutional review from the supreme court and transferred it to a new constitutional court whose composition would have been open to considerable political manipulation. As with all aspects of the judiciary, constitutional courts are open to abuse.

2. *Effectiveness of the Judiciary*[22]

We have diligently tried to stay on the topic of judicial independence in this guide, and not stray too far afield into the many other important issues related to judicial reform. However, at some point in the discussions leading to this document, the group collectively agreed that in the real world it is impossible to isolate the fairness and impartiality of the judiciary from its effectiveness. As we stated at the beginning, no one will think a judiciary is good if it processes cases efficiently, but those cases are not decided impartially. In fact, that is the hallmark of many judiciaries operating under undemocratic regimes. By the same token, the general public will not give much credence to a judiciary that decides cases fairly but fails to move forward the bulk of its caseload—ordinary cases affecting ordinary people—in a timely way; cases that languish almost invariably deny someone their rights. Given the interrelationship among fairness, efficiency, and public support, it is often important to work on the effectiveness of a judiciary at the same time donors help to address issues directly related to independence.

[22] See William Davis' paper on court administration in Section IV.

Judicial effectiveness is an enormous topic of its own. Below we note briefly some basic issues.

a. Governance structure

The judiciary needs to have a governance structure that allows it to manage its operations effectively. Some of the possible governance structures and their potential effects on judicial independence were described above. These governance structures should be considered not just from the perspective of independence, but also from the perspective of effectiveness. For example, in some cases where judicial councils have been given the task of administering the court system, they have been ill prepared to carry out the role. Concerns of this nature have arisen in Bolivia, Colombia, and Venezuela.

b. Leadership

To be either independent or effective, a judiciary must demonstrate strong internal leadership. Reform programs have often foundered for lack of leadership within the judiciary or lack of continuity in that leadership. When undertaking broad reform programs, it is often important for donors and internal reformers to work with a judiciary to develop its leadership capacity.

c. Managerial capacity and administrative and operations systems

Although we tend to think of judiciaries in terms of the principles they protect, the operational processes needed to arrive at that end require effective management techniques. Many cases involve extensive documentation and several steps before reaching conclusion. Criminal cases with oral proceedings require choreography just to ensure that everyone shows up for trial—police officers, witnesses, defendants, prosecutors, and other supporting actors. And many courts these days are balancing increasing caseloads. In order to work effectively, a court system needs strong managerial capacity at every level—budget, personnel, court operations, congressional and executive relations, public relations, and strategic planning.

Equally important are the administrative and operating systems themselves. The document-intensive and time-sensitive operations of a court require good record and case flow management. Resources—budgetary, human, and equipment—must be used effectively and be part of a system that anticipates future needs. Very few developing countries have either the systems or management capacity required to operate a modern day court system, with its many demands and heavy caseloads, efficiently and effectively.

d. Budget

Finally, a court system needs an adequate budget if it is going to operate well. Issues with respect to budget are discussed above.

3. Enforcement of Judicial Decisions

The issue of enforcement is similar to the issue of efficiency. If decisions cannot be enforced, the judiciary will lose credibility, regardless of whether it has worked honestly and fairly. Moreover, the inability of courts to compel compliance may discourage judges from making difficult decisions: Why make enemies if their rulings are not going to be enforced?

Enforcement mechanisms are often weak in developing countries, particularly where the state previously dominated the judiciary and private transactions were limited. In civil cases, where one private party is trying to collect against another, enforcement can be fairly complex. It often involves both the judiciary and institutions outside the judiciary. Additionally, the legal structure to support enforcement of judgements—e.g., laws relating to attachment of

property, forfeiture of assets, and liens—may need to be developed.

The timing of donor support for enforcement mechanisms presents an added complication. If courts are to have credibility, enforcement capability has to be established parallel with improvements in other areas. However, donor support for enforcement of decisions by courts that are not yet perceived to be acting fairly and impartially is extremely problematic.

Executive branch compliance with judicial decisions is a subcategory of enforcement that deserves special attention. There are a variety of different kinds of claims that can be made against the government. Some are for violations of constitutional and statutory rights, such as due process or non-discrimination; others are for monetary compensation. Claims against the government usually start in an administrative tribunal, with unsuccessful claimants having the right to appeal to the courts. Failure by government agencies to comply with court judgements against them has an especially deleterious impact on respect for the courts. If government agencies routinely fail to comply with court orders, donors should consider this a ripe area for policy dialogue with the executive branch.

4. Publicizing Judicial Reform

It is not unusual for the public to be unaware of some of the reforms that are taking place in the judiciary. Often only high-profile cases come to the attention of the general public, and very few courts in transition countries have developed a legitimate public relations capacity. As steps are made to improve the caliber and impartiality of judges and the performance of the courts, it is important to keep the public informed. This not only builds support for the judicial system, it also helps to communicate and reinforce the notion that citizens have a legitimate interest in the status and effectiveness of the courts.

F. The Tension between Independence and Accountability

Judiciaries in many countries in transition are struggling to break free from their historic domination by elite groups, the military, political parties, or the executive. However, it is appropriate to end on the note that no judiciary in the world is completely free to act according to its own lights; nor should it be. Ultimately, the judiciary, like any other institution of democratic governance, has to be accountable to the public for both its decisions and its operations.[23]

Accountability operates at various levels. Although a court must be free to decide cases impartially, if its opinions begin to stray too far from public sentiment, a correction will usually be called for, whether by demands for changes in the law or more subtle pressures on the judicial system to select judges deemed more responsive to popular opinion. At the administrative level, the judiciary has to be accountable to the public for how it spends its funds and manages its operations.

The unique nature of the judiciary makes designing effective accountability mechanisms complicated. Accountability mechanisms cannot interfere with either a court's adherence to impartial decision-making or its responsibility for safeguarding the rights of minorities. Additionally, individual judges are intended to reach decisions independently even within the structure of the judiciary. Hierarchical systems of supervision, common for maintaining accountability in executive agencies, are therefore problematic in a judicial system.

[23] See Linn Hammergren's paper on judicial independence and judicial accountability in Section IV, as well as Mira Gur-Arie and Russell Wheeler's paper on the United States and Giuseppe Di Federico's paper on Italy in Section III.

As there will always exist a certain tension between accountability and independence, the timing of each provides some degree of relief. Independence addresses freeing the judiciary from prior control of its decisions. On the other hand, accountability focuses on having mechanisms in place by which the judiciary as an independent body is required to explain it operations after the fact. Since greater transparency is often the key to both, enhanced measures of accountability can often actually help to reinforce independence.

G. Where to Start

We have described above a number of different programmatic approaches to enhancing judicial independence and, more particularly, the impartiality of the judiciary's decision-making. This is a complex area that requires a long-term effort. Problems of judicial independence are generally embedded in a country's history and culture and are not easily eradicated. Often changes in the judiciary will need to go hand-in-hand with broader societal changes. Also, the stakes are high—a situation that often makes opposition to reform difficult to overcome.

It is equally clear that the specific models that work well in one country may have little in common with the models that work well in another country. For example, the U.S. model for appointing federal judges, in which the president names all judges with legislative concurrence, is quite alien to many civil law countries that have worked to reduce the overly politicized nature of judicial appointments. Election of judges, still a practice in some states in the United States, would seem even more alien. Yet, most judiciaries in the United States are considered to be impartial. In Canada, executive branch administration of the courts does not appear to infringe on judicial independence. The same arrangement has been rejected in other countries.

The guide lays out several different areas that, in most cases, need to be addressed by those undertaking judicial reform. We have not drawn a road map for programs addressing judicial independence; no such clear guidance for sequencing of activities emerged from the study. As with all programs, specific activities will depend on country circumstances. We were, however, able to define a few general principles for where to start:

1. As in any development cooperation activity, strategy formulation should begin with an analysis of the local conditions—the desired results, the degree of receptivity to change, the will of potential leaders to build the necessary institutional and human capacity, the adequacy of resources, and the commitment of international donors. A participatory analysis, involving a broad range of stakeholders, should seek to establish long-term goals, articulate a compelling vision to communicate those goals, identify realistic program objectives, and establish accountability for implementation.

2. Donors should aim to encourage and support local reform efforts. Reforms that are externally driven are difficult to sustain. Donors should give priority to issues and activities identified by local reformers, while also ensuring that local reformers have access to information needed to build a coherent reform program.

3. Success can build momentum for additional success. It may make sense to start with issues that can be addressed effectively, and for which there is support, rather than starting with the most difficult issues immediately.

4. Donors are likely to encounter the least resistance to offers to provide training to

judges and court staff and to improve court administration. Such programs may be useful activities with which to start so as to develop good working relationships with in-country counterparts. Moreover, these programs can have substantial impact, especially if they help to identify and strengthen reformers within the judiciary and increase the transparency of court operations.

5. Donors are likely to encounter greatest resistance to activities that clearly reduce the influence of one official or power group. However, certain circumstances present especially good opportunities for substantial breakthroughs: (a) following the removal of a corrupt regime, when the incoming government pledges to make changes, and popular sentiment can be mobilized to demand genuine reforms; and (b) as part of a peace process.

6. Not infrequently, program design questions are framed in terms of "either/or." Should the donor proceed with a program addressed to the official sector in the face of weak support, or focus solely on civil society? If the judicial leadership is not reform-minded, should programs first be aimed at transforming the leadership, and only thereafter at improving court operations? The approach recommended here is to avoid these "either/or" baseline judgements and instead determine what is feasible, and with whom, at a particular time based on the specific circumstances of the country, while paying attention to the long-term objectives. Care should be taken, of course, to ensure that donor support does not strengthen anti-reform elements within the judiciary, for example, by increasing their prestige.

7. Donors should try not to accede to pressure to create unrealistic expectations about how fast judicial independence can be accomplished. In most situations, judicial independence will need to be a long-term goal that will require a sustained effort on the part of reformers and donors.

III. REGIONAL AND COUNTRY STUDIES

A. Judicial Independence in Common Law Africa

by Jennifer Widner

Until recently, when the subject of courts in Africa arose in conversations with Americans, the first question people often asked was: Why do the courts matter at all in Africa? The image was of a continent in which law played a very small role in the resolution of disputes. The headlines in *The New York Times* seemed to confirm that, as did Robert Kaplan's famous *Atlantic Monthly* article which foretold "The Coming Anarchy." Law and courts seemed unimportant in the face of natural resource disputes, leadership struggles, and group antagonisms.

The perception of African friends and colleagues in the 1980s and 1990s was quite different. They argued that Africa was at a "critical juncture," a "critical moment," when courts and law did matter to many people. In two thirds of the countries of Africa, people could express their views about government and policy more freely in the mid-1990s than at any time since independence. The political changes of the 1990s meant that more people could speak openly about policy, join associations, form their own businesses and own their own farms, and choose among different candidates for public office. The courts were important for building and protecting this new space.

Ordinary people led the way. Although there were no broad, cross-national studies of court use in Africa, three surveys administered in the mid-1990s suggested that, whatever people thought about the quality of institutional performance, a surprisingly high proportion of households took disputes to magistrates courts for a hearing. Conducted in Botswana, Tanzania, and Uganda Tanzania in 1996, these broad-based residential surveys revealed, as expected, that the most common kinds of conflicts that arise in communities were usually taken first to local councils or customary fora for resolution. At the same time, the surveys showed surprisingly heavy use of magistrates courts. In Tanzania, a World Bank-financed research team polled adults in a national survey and asked how many had used the magistrates courts in the previous year; six to eight percent of residents had done so. Contemporaneous surveys in Uganda and Botswana asked whether a member of the household had been a party to a case in the magistrates courts during the previous five years and found that between 14 percent answered affirmatively, in some districts, and that 45 percent did so in areas that were more subject than others to land competition.

People brought court cases on a wide range of matters. Land featured importantly among the cases on court dockets, but it was not the only issue people brought for adjudication. In Uganda and Zimbabwe, communities took disputes about the order of succession in local kingships to judges for resolution. Limits on women's capacities to make household decisions, buy and sell property, inherit land and buildings, and win custody of children were tested in courts, with varying outcomes across countries. Tension between city folk and their rural relatives played itself out in suits about whether the right to bury the dead resided in the nuclear family or the clan back home.

As courts have become important to ordinary people, not just outsiders, the independence of the judiciary has featured more importantly in discussions among ordinary people and between donor countries and African political elites. Both ordinary people and outsiders worry about the judiciary's independence and the kinds of independence that come from separation of powers. They look closely at whether there are partisan efforts to influence the outcomes of

particular cases. They monitor "party detachment," or removal from exceptional influence by socially powerful litigants.

This article is about judicial independence in common law Africa. It briefly describes the main features of legal systems in the countries of Africa that are part of the common law tradition—mainly anglophone Africa, and it situates these in context. It then portrays some of the main challenges to judicial independence in these settings, the principal remedies, and some ways foreign donors appropriately may support local initiatives to build independent courts.[24]

1. Features of Legal Systems in Anglophone Africa and Their Context

The legal systems of common law Africa, or anglophone Africa, share many familiar features with the U.S. system.

a. Structure

At the lowest level, new governments operate primary courts with limited original jurisdiction to hear petty civil cases and misdemeanors. In many countries, they can apply customary law as well as the statutes and precedents that together constituted "state law." The magistrates who preside do not have law degrees, and in most countries representation by legal counsel is not allowed. People have to represent themselves. A second level magistrates court handles cases involving slightly more money or more serious crimes, usually those carrying potential sentences of up to two years. "Magistrates Grade II," as they are usually called, have slightly longer training, but they need not have university degrees. At the third level, magistrates usually have to be lawyers. The courts over which they preside have original jurisdiction in civil cases involving still more money and in criminal cases carrying penalties up to 10 years in prison. These courts also accept appeals from the lower levels. Counsel can be present.

Responsibility for managing the magistrates courts varies across countries and over time. In some counties the judiciary does not have full control over appointments, pay, and tenure at the lowest levels, while in others it does.

The high court is a court of unlimited civil and criminal jurisdiction, whose judges almost always have law degrees and have sometimes practiced privately before joining the bench or have served as judges in other jurisdictions. Most high courts hold sessions both in the capital and on circuit. Alternatively, they create high court stations in important secondary towns, to increase accessibility.

The court of appeal, which sometimes serves as a supreme court, constitutes a fifth tier. In most instances, courts of appeal initially had a regional basis, as they had in the colonial period. For instance, in 1962, the Eastern African Court of Appeal became the Court of Appeal of East Africa, an organ of a regional organization, the East African Community. Each country determined separately whether its decisions constituted binding precedent or persuasive authority, but whichever choice a country made the court's law reports were widely read and followed by lawyers after independence.

Administrative responsibility for the courts typically lies with the chief and a team of senior judicial officers. In most countries the court has no administrative support equivalent to that provided by the Federal Judicial Center or

[24] The data used in this article are from a questionnaire administered by IFES on behalf of USAID in Kenya, Malawi, Nigeria, Uganda, Zambia, and Zimbabwe, as well as the author's own research in Botswana, Tanzania, and Uganda.

Administrative Office of the U.S. Courts in the United States. The day-to-day operation of the court falls to the chief registrar and subordinate court registrars, the counterparts of the clerk of court in the United States.

In most countries, English is the official language of the courts, although Tanzania uses both English and Swahili.

b. Lay participation

In most parts of Africa there are no juries, although Malawi is experimenting with juries in capital cases at its highest levels. Lay participation at lower levels exists, however. "Assessors" often sit with magistrates at the primary court level. They may have a vote in how a case is decided, as they do in Tanzania, or their role may be more limited. At the upper levels of the court assessors appear more often in a capacity equivalent to an expert witness.

c. Legal pluralism

Deep legal pluralism is part of the context in which courts work in Africa. That is, several different types of law operate side-by-side. The state law embraces the constitution, statutes and administrative rulings, and the past decisions of judges (precedent). The state law is based on English statutes and decisions in place at the time reception statutes were passed during the colonial era or on codes developed in India and Queensland and copied in Africa (the evidence codes, penal codes, etc.). Independent governments have modified specific legislation, but the basic structure remains largely intact. In some parts of the continent (e.g., Botswana, South Africa, and Zimbabwe), the Roman-Dutch civil law existed earlier and has become part of the common law.

State law exists alongside customary and religious laws, which are now mainly limited to matters concerning the family, inheritance and succession, or other aspects of personal law. People may opt out of them in several ways, depending on the country. Usually courts will employ the kinds of choice-of-law rules used in international trade disputes to decide which law to apply in the event people from two different systems bring a dispute to court.

Customary courts operate informally or formally alongside state courts. In some instances elders or elected officials mediate disputes or apply customary law in fora whose decisions are non-binding. In other cases, as in Botswana, the customary courts operate formally, and there is appeal to the state court system.

Pluralism may complicate efforts to build independence by focusing the attention of many ordinary people away from the state courts toward other fora. There is no strong evidence pointing in this direction, however.

d. Resource scarcity and the courts

Resource scarcity affects African courts and judicial independence in several ways. For example, it makes it harder to monitor the day-to-day activities of judges and clerks. It means that judges often throw cases out of court when poorly trained and equipped police forces fail to investigate adequately—thereby angering officials and ordinary citizens alike. It may mean it is harder to fill posts with well-trained people who will not abuse their positions.

One of the most important effects of resource scarcity centers on the lack of legal materials. In a common law system, the law includes the constitution, the statutes, and judges' decisions. Decisions appear in law reports, which should be published annually if not more often. Without funding, law reports lapsed in many parts of Africa throughout the 1980s and 1990s. They are only now becoming available again. Coupled with a lack of availability of statutes, this lacuna means that many magistrates and judges have

relied on their old class notes from law school for their knowledge of the law, with predictable results. It also means that it is often impossible to monitor the quality and uniformity of decisions.

2. *Avenues for Partisan Political Influence*

Currently there is considerable variation in the degree of independence courts display among common law African countries. Courts in Botswana, South Africa, and Zimbabwe have typically anchored one end of the spectrum. Generally these courts have maintained a high level of independence, in the view of litigators. They have sometimes ruled against the government in very sensitive high profile cases. "Executive-mindedness" has afflicted some levels of the bench in some periods, but these courts long struggled with some success against this attitude. Corruption, which undermines party detachment, may be a problem at the lowest levels of the court, but it has not seriously eroded the legitimacy of the upper levels. Courts in Tanzania and Uganda, and (reportedly) Nigeria and Ghana display higher levels of independence from partisan influence in particular cases than they used to, although commentators are quick to point to some continuing problems. The records of Malawi and Zambia are a bit ambiguous. Kenya has arguably become more vulnerable than it once was, although it is often difficult to measure these trends.

Surveys administered as part of this project reveal considerable consensus about the major challenges to judicial independence in these systems. Some difficulties are hard to spot and surfaced infrequently in written conversations. They appear toward the end of the list.

a. Constitutional issues

Local commentators feel that the clarity of the constitution in providing for independent courts affects the degree to which politicians and ordinary people see the judiciary as a separate branch of government. Most recent constitutions clearly state that there are three branches of government and vest judicial power exclusively in the courts. By contrast, the Kenyan constitution does not do so as clearly as it might, and one of the lawyers surveyed for this project indicated observed that, "consequently... the judiciary is more frequently perceived as a mere appendage."

In some countries ruling parties have attempted to amend constitutions in ways that oust the jurisdiction of the court or make the court vulnerable to partisan influence in sensitive constitutional cases. Trying civilians in courts martial runs counter to rule of law norms, but it happens occasionally. Alert lawyers can bring cases to the ordinary courts to have the cases removed from the courts martial and to strike down these practices as unconstitutional, but lawyers are not always willing to take such actions. Litigation of these cases by public interest law groups or by teams of lawyers from several firms may make it more difficult for governments to retaliate against the bar for making applications of habeas corpus in these instances or for taking other action. None of the commentators interviewed for this study considered ouster of jurisdiction in this form a major problem today. It appeared more the exception than the rule.

The creation of constitutional courts has sometimes proven problematical in African contexts. It is important that these courts be part of the judiciary and share all protections guaranteed the high court and court of appeal. For example, the Mugabe-sponsored constitutional proposal in Zimbabwe, in 1998-1999, would have created a constitutional court whose members would be subject to political manipulation, had it passed.

b. Appointment procedures

Constitutionally enshrined appointment procedures attract considerable concern as a threat to judicial independence. The general rules regarding appointment and tenure usually appear in a country's constitution, sometimes amplified by a judges act, judiciary act, or other subsidiary legislation. Some political influence is generally acceptable in the appointment of judges to a country's highest court, although there is often an expectation that appointments will command trust from a wide part of the political spectrum.

Some kinds of appointment processes enhance the probability that judges will be of independent mind in their decisions. In most countries, including the United States, the president nominates candidates for these positions, and a supermajority in the legislature, or one house of the legislature, must confirm the choice. In Africa, presidents usually nominate not only the chief justice but also the judges of appeal or supreme court justices and judges of the high court, and in only a few countries is there any legislative check (for example, Zambia). Even where a legislative check exists, when party competition is limited, this requirement may be insufficient to produce someone in whose character people generally place trust. The legislature may "be in the pocket" of the head of state and rubberstamp the president's decision. The individual so appointed may feel beholden to the executive.

In Africa, many countries employ a judicial services commission to generate a slate of candidates from which the president can choose. In some countries these slates constrain the president's choice to a particular list of nominees, while in others they are merely advisory. In some instances the commissions are made up only of presidential appointees (including senior judges), while in others they include representatives of the private bar chosen by the membership of these organizations. It is generally believed that bar participation reduces the risk of partisan control, enhances the quality of candidate selection, and reduces the degree to which appointees feel beholden to the governments who nominated them. Even when the makeup of these commissions creates the possibility of executive influence, group decision-making may be generally fair, as it appears to be in Zimbabwe.

It is important to point out that these rules merely increase the probability that a judge will decide cases on the basis of the law, not out of a desire to reward those who appointed him or her either through partisanship or through executive-mindedness. Procedures that give opposition parties some say or procedures that limit the powers of the sitting president in the appointments process do not in and of themselves guarantee independence.

The appointment of temporary judges, or "judges of assize," attracts concern in some countries. High numbers of vacancies, severe backlogs, and the prospect of waves of election petitions after national electoral contests may lead courts to appoint temporary judges. In some instances the courts encourage retired judges to resume these temporary posts. In other cases, the president and the chief justice select people for these posts, with none of the checks and safeguards that attend regular appointments. Coupled with the absence of security of tenure for the occupants of these posts, this kind of selection may increase the probability that judges of assize will be executive-minded or partisan. Repeated, heavy use of temporary judges is a sign of potential trouble, although it may be necessary to meet the demands created by sudden and unanticipated surges in litigation.

Court registrars, equivalent to U.S. clerks of court, have important responsibilities for managing the docket. They may assist in assigning cases or take major responsibility for

that function. They oversee the registry where cases are filed. In some countries upper court registrars are senior magistrates who are judges-in-the-making. They may share security of tenure with judges or be subject to removal only for cause by a vote of a judicial services commission. In other cases, registrars appear to have less protection. At least one commentator thought it was important to extend constitutional protections of tenure to the registrars of the high court and court of appeal or supreme court.

c. Financing

Judges and lawyers often complain that courts that render judgments against government find themselves without adequate finance. There is probably truth to these allegations, but there are so many other problems that complicate courts' financial situations that it is often hard to draw clear causal inferences.

Courts in Africa rarely have adequate funds to carry out their operations, and they account for a small fraction of expenditure—usually less than one percent of the budget. Until recently all fees and fines collected by the courts were remitted to the central government. To ease financing problems, some governments now allow the judiciary to keep court fees.

To protect court budgets from political manipulation, the standard practice internationally is to make core expenditures (judges' salaries, some basic operating expenses) part of the consolidated budget. That means these funds are dedicated for these particular purposes, and the executive may not reallocate the monies. Typically a representative of the judiciary helps make the case for the budget to the legislature.

Practices in African countries vary. Some make the budget part of the consolidated fund, while others do not. Some allow a representative of the judiciary to help present the budget to the legislature, while most place the ministry of justice in charge of this function. Many judges complain that ministries of justice cut back the court's appropriation requests for political reasons even before the budget goes to the legislature, and that executive disapproval of the courts is given force in this way. Certainly best practice suggests that judiciaries should be able to play a more active role in explaining the budget to the legislature and in presenting a clear picture of needs, even if there is not yet strong party competition at the legislative level.

Even strong protections cannot guarantee an adequate budget. Under-financing can happen even when governments are sympathetic. Many African governments have moved to cash budgets under pressure from international financial institutions. A government cannot release more funds from the treasury than in collects, and these rules apply on a monthly basis. As a result, the judiciary may receive inadequate funding to maintain month-to-month operations if national tax collection does not meet expectations. The more difficult the country's own financial situation, the less easy it is to monitor whether the treasury is trying to engage in political manipulation of the courts or whether the treasury simply cannot pay the courts what they were promised.

d. Assignment of cases

Fear that partisanship may enter the judicial process through the assignment of sensitive cases to pro-government judges are pronounced in many African countries right now. This issue is an old one in the history of courts worldwide. To alleviate these concerns, many judicial systems find a way to take individual decision-makers out of the picture by randomizing assignment in some way. The cost may be a loss of expertise, when cases are handed to judges who have little background with the issues they raise. As a result, some courts form subject-specific divisions (i.e., civil and criminal; or

criminal, commercial, family, constitutional, and other civil) and randomize assignment within those divisions, rotating judges between divisions every year or two. They also use formulas to estimate the work a particular case will create, so as not to overburden some judges while leaving others with time on their hands.

Currently most African courts assign cases deliberately, or systematically, instead of using some form of random assignment. The reasons may be pragmatic, but there is always a risk that this practice will promote partisan influence or corruption. This concern has arisen in Malawi, for example. In Kenya, the chief justice assigns constitutional cases and many civil disputes to particular judges. The duty judge assigns other matters. Writes one commentator, "In the early 1990s, [the office of the duty judge]...was grossly abused.... One or two judges who were designated duty judges for a very long time consistently allocated to themselves all politically sensitive cases and proceeded to dismiss all of them." More recently Kenya's courts have rotated the duty judge position on a monthly basis, thereby alleviating some of the problem the commentator notes.

e. Executive-mindedness

Usually when we talk about judicial independence the focus is on partisan influence in particular cases. But many commentators worry that executive-mindedness, or a predisposition to favor the government, as a greater threat. The roots of this predisposition lie partly in heritage and partly in the management of financial opportunity. Unlike most African countries and unlike the United States, England has no written constitution, although it has long treated several important historical documents as a source of constitutional principles (and it now has a bill of rights, incorporated through legislation from European and international documents). Judges could not use judicial review in the same way judges have used powers of judicial review in the United States and other parts of the world. Moreover, there was a strong tradition of deference to the legislature. As a result, the training of many African judges has not embraced the kinds of interpretive strategies that would help them strengthen the separation of powers.

In many countries, low pensions mean that judges must look for additional sources of income after they leave the bench. Because governments continue to be among the major employers, some judges may watch what they say on the bench in order to preserve their future options.

Exposure to decisions from other jurisdictions and training, as well as better pension systems, appear to alleviate these problems. Donor encouragement has been helpful in attacking these issues in several countries, although commentators continue to observe some conservatism on the bench.

f. Judicial comportment

Judges must not only render impartial judgments, but must also project the appearance of fairness. It is very easy for a fine judge to appear partisan by mixing with politicians on social occasions or by offering advisory opinions to government.

In the small social whirl of most African capitals, judges and politicians often do encounter one another, but this practice can engender public dismay. Several commentators interviewed for this study suggested that judiciaries should give thought to what kinds of appearances and practices are acceptable and which ones compromise appearances of fairness. Our Malawian contributor expressed particular concern in this regard. Few African countries have judicial codes of ethics that provide guidelines. The Tanzanian court borrowed its guidelines from the code of conduct the

American Bar Association developed in the United States, and one could imagine such a document providing grist for discussion elsewhere.

In the United States, advisory opinions are taboo at the federal level, although statements to non-political academic and legal audiences generally are acceptable (and are read by government officers). Abstract statements about how the court understands the law, detached from the facts of a particular case, can be misleading and can appear to compromise the separation of powers.

But there is another side to the story. At the state level in the United States and in the British legal tradition more generally, some sorts of advisory opinions are often considered acceptable (and historically the courts were required to provide such). The European Court of Justice and International Court of Justice may also issue some sorts of advisory opinions. African chief justices often consider advisory opinions helpful in cultivating understanding of rule of law issues in the executive branch or legislature.

The issue of advisory opinions has caught the attention of some of the commentators interviewed for this study. The Malawi commentator thought that all phone calls and contacts between judges and the executive ought to be recorded and monitored; he strongly believed that these contacts compromised judicial independence. Although this recommendation would seem too strong, it does appear that establishing guidelines for the issue of such opinions would be an important part of confidence building exercises and of public education. Courts might usefully convene legal scholars, practitioners, and members of the executive and legislature to discuss the practices used in other countries and the issues at stake.

g. Orchestrated criticism

In the old days, governments displeased by a court's actions sometimes sent armed personnel to intimidate a judge or magistrate. These actions now attract such strong international criticism and offend public sentiment so greatly that they are comparatively rare. Several commentators interviewed for this study suggested that the action has shifted instead to what they call "orchestrated public criticism."

The phenomenon has three dimensions. One is deliberate action by ruling parties to instigate criticism of judges in particular cases, or the courts in general, by using party-funded NGOs as mouthpieces. Although this practice is apparently observable and it is surely unpleasant for the judges involved, there would seem little that anyone could reasonably do in an open society to stop this kind of behavior. Indeed, it would seem inappropriate to do so. The best a court can do is to ensure that law reports are available to the public and to issue press releases that explain the reasoning in particular cases—or explain the rationale behind an institutional change. The Zimbabwe courts have used this latter option, to varying effect.

A second dimension is partisan efforts to generate false accusations against judges and magistrates who rule against the government and to pay journalists to disseminate the charges without hard evidence. One commentator from Zambia said he thought that the chief justice of the Zambian court had been subject to such pressures. Writing for a panel of the supreme court, the chief justice had struck down a provision of the country's Public Order Act for being vague and over-broad. The legislature tried to re-instate the provision and a journalist made public a charge that the chief justice had raped a court employee. Later the journalist admitted he had been paid by a press assistant in the government to do so and that the whole matter was political.

Throughout the region, heads of state comment on the substance of particular matters before the court and indicate what they think the outcome of the case should be. This practice violates rules about comments on cases *sub judice*, but heads of state are either unaware of these rules or do not intend to respect them. They prejudice the outcomes of these cases, as a result, and they can compromise the appearance of independence in the court too. That is, a judge may decide based on the law and the facts that a complainant's case against the government has no merit. But if that judgment comes after public statements by the head of state about the "right" outcome of the case, the popular impression is that the court is under partisan control.

h. Measures that politicize the judicial process

The integrity of the courts suffers if aspects of the judicial process that lie outside the judiciary proper become politicized. The contributors to this study expressed concern about the partisan use of the police and public prosecutors to harass critics or opponents. Arrest of journalists for violating sedition laws, their placement under remand for weeks, and the threat of bankrupting lawsuits are sometimes used to silence opposition. As the trial date approaches, the defendants are then released when the prosecutor drops the charges. The courts, as well as the police, fall under the pall of suspicion.

Courts have some limited ability to control police and prosecutors when they do these sorts of things, separate from their ability to hear complaints brought by injured parties. Criminal defendants have to come before a magistrate or judge for a preliminary hearing within a short period—usually 48 hours. The court can enforce this requirement, and judicial personnel can make prison visits to see that this rule wins respect. It can also initiate case flow management committees to ensure that bad scheduling does not interfere with the transport of prisoners to the court for trial, and it can dismiss cases when the government asks for repeated adjournments (postponements) for no good reason.

There is a more difficult issue in many jurisdictions. Laws control what a prosecutor must show in order to avoid dismissal at the preliminary hearing. In many African countries, legislatures have gradually nibbled away at measures that require presentation of a summary of the evidence—evidence that a magistrate or judge could use to dismiss charges in frivolous cases. Re-invigorating these laws could help remedy the situation.

What courts cannot do is compel the prosecution of politically protected defendants. That is, people who commit crimes and have strong political backing may find that prosecutors drop charges against them. Courts can do nothing under these circumstances, and the fairness of the judicial process is clearly compromised.

i. Substantive law and judicial independence

Finally, participants in this study point out that the content of the law—the substantive law—may make a difference in popular impressions of the court's independence. Judges are required to enforce the laws on the books, whether they think them appropriate or not, and enforcing laws people think are unacceptable can damage the reputation of the judiciary for fairness.

But this causal relationship depends on many things. In the apartheid era, courts in South Africa managed to moderate the effects of laws that are out of line with norms embedded in constitutions or treaties and covenants, depending on the status these had within the country. They tried to reach to similar cases in other countries to narrow the application of rules they consider unjust. The institution acquired greater integrity as a result, or at least certain justices and certain levels of the court did.

The lesson for the rest of Africa appears in some of the project participants' comments. That is, judicial training, knowledge of comparative law, access to law materials from other parts of the world, and facility with international norms all can make a difference even where the substantive law is unattractive.

3. *Corruption and Problems of Party Detachment*

Independence means independence not only from partisan political pressure but also from socially powerful litigants. The main way that the socially powerful influence the judicial process is through corruption; corruption figured importantly in the comments of participants from Kenya, Malawi, Nigeria, Uganda, and Zambia. As a general rule, observers consider corruption most troublesome at the lower levels of the court, in the magistracy. But there are instances of corruption in high courts and courts of appeal from time to time.

Low levels of remuneration usually attract attention as the main source of corrupt behavior, and such comments figured importantly in the information this project received. But some caution is important.

- In many countries, judges have moved to new pay scales and are now paid more than other civil servants. We expect to see lower levels of corruption at the top, if economic concerns are some primary motives. These changes, however, have left the magistracy largely un-touched, and that is the part of the judiciary where the problems are usually the most severe.

- Several observers remarked that, even with the pay upgrades, private practitioners earned more than judges, so the temptation to charge extra remained. Although one can understand that this differential may make it harder for judiciaries to attract talented senior personnel, nowhere in the developed democracies are judges paid more than good private practitioners, and corruption is not rampant in those settings. Norms do appear to make a difference.

Codes of conduct provide an important set of guidelines for judicial personnel and magistrates, whose education often has not included any background in such matters.

Some of the corruption problems take place in court registries, where clerks set up schemes to extract money from litigants "on behalf of the judge," without the judge being aware of the request. Reducing the numbers of points at which clerks are in a position to issue a permission or perform a service could help reduce these problems.

There is also a risk that charges of corruption can be misused to discredit an honest judge or magistrate who is handling a sensitive case. One project participant recommended establishing an independent Judicial Ombudsman to help deflect public criticism and to help investigate allegations of corruption so that misuse of corruption charges becomes less of a problem and so that corrupt officers can be fired.

B. Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia

by Edwin Rekosh[25]

1. Introduction and Background

This article will assess efforts to strengthen the judicial independence in eight countries of Eastern Europe in order to offer some lessons learned. The countries are Bulgaria, Georgia, Hungary, Poland, Romania, Russia, Slovakia, and Ukraine.

Although somewhat crude, a number of generalizations can be made at the outset regarding contextual differences in history, politics, and legal culture among the countries studied, which affect their potential for judicial independence. Three of the countries—Georgia, Russia, and Ukraine—were once part of the Soviet Union. The creation of a socialist legal system in the Soviet Union influenced significantly counterpart legal systems in the former Warsaw Pact countries, but the resulting hybrids nonetheless constituted less radical departures from European liberalism. Furthermore, liberal institutions were more highly developed in some countries than in others prior to the ascendance of state socialism. The degree to which liberal traditions were either retained or rejected in each country is significant because it corresponds to the readiness of political and professional elites to embrace changes that bring about the restoration or creation of liberal institutions, such as an independent judiciary. These differences are far more telling than the shared rhetorical consensus among donors and target country elites.

Despite the common Soviet legal system, there are important differences that distinguish Georgia from Russia and Ukraine. Perhaps because intellectual and professional elites in Georgia feel stronger ties to European traditions or perhaps because of the relative ease of carrying out successful reforms in a small country, judicial reform has been much easier to achieve in that country than in Russia and Ukraine.

Among the former Warsaw Pact countries, Hungary and Poland have the strongest liberal traditions. Although Bulgaria, Romania, and Slovakia can also show strong support among intellectual and professional elites for the development of liberal institutions such as an independent judiciary, Hungary and Poland have legal cultures that are significantly more conducive to reform.

2. Civil Law Tradition

Despite these differences, a significant number of factors are shared to varying degrees by each of the countries studied. For instance, each country's legal system is based on civil law rather than common law. Moreover, most of the countries had substantial experience with continental-style civil law systems prior to adopting the socialist legal system. As a result, standards of judicial practice prevalent in common law countries—even some viewed by Anglo-American lawyers as inherent to judicial independence—do not necessarily pertain. For example, the lawmaking function of the judge is significantly less important in civil law systems

[25] This article is based on the author's own research and experiences, as well as upon excellent country studies, prepared in response to a joint USAID and IFES questionnaire administered in the following countries: Bulgaria, Georgia, Hungary, Poland, Romania, Russia, Slovakia, and Ukraine. In the body of this chapter, each of these country studies will be cited as "[country] report," except in the case of Russia, for which the author relied on Peter H. Solomon, Jr. and Todd S. Foglesong, *Courts in Transition in Russia: The Challenge of Judicial Reform* (Boulder: Westview Press 2000), and which will be cited as "Solomon and Foglesong." The author thanks Columbia law students Philip Webb, for his able research assistance, and Natalya Scimeca, for her unstinting editorial assistance.

since precedent plays a less formal role than in common law systems. Consequently, judges in civil law systems are more likely in their rulings to defer to legislative or executive authority and less likely to go beyond the application of positive law. Moreover, judicial reasoning is often considered to be no more than the simple application of logic since the judge's role, theoretically, is to deductively apply legislated rules rather than interpret and develop rules inductively from particular cases. One result is less written justification for judicial decisions and hence less transparency than in common law systems.

Additionally, prosecutors in civil law countries enjoy a status similar to judges. In France and Italy, for example, judges and prosecutors both belong to the professional category of magistrates. Likewise, Bulgaria and Romania have adopted a magistrature system in which both judges and prosecutors are considered part of the judicial branch. One explanation for this classification can be found in the theoretical differences underlying the inquisitorial approach (civil law) and adversarial approach (common law) to truth seeking. In the functioning of an inquisitorial system, there is less need for a separation between the judicial and prosecutorial functions.

3. *Legacies of the Socialist Law Tradition*

The civil law variant currently found in Eastern Europe is heavily influenced by the socialist law tradition, which distorts some of the typical features of civil law systems in ways that inhibit judicial independence. In the socialist legal system, the state was arguably based on law, but laws and other norms did not have democratic legitimacy since they were elaborated by a single-party state. Moreover, law was only one of numerous instruments of state control, and it was not the most important one. (Solomon and Foglesong, p. 4) Lastly, because of the lack of separation of powers, there was little need for judges to be independent decision-makers. On the contrary, loyalty was valued far more highly than independence.

a. The procuracy

The procuracy (*prokuratura*)—a more extensive and powerful institution than a prosecutor's office—was the principal legal arm of the communist state, and judges were effectively subordinated to procurators. Indeed, the procurator was responsible not only for conducting the prosecution, but also for monitoring the "legality of the proceedings." (Solomon and Foglesong, p. 6).

As a legacy of the procuracy's former power and importance, the post-socialist reformed procuracy continues to employ many of the most capable and influential legal professionals. Accordingly, it has engaged in much political obstruction to reform, since procurators often perceive changes intended to strengthen the judiciary and improve its independence as threats to their power and prestige.

b. Methods and patterns of judicial reasoning

According to Ewa Letowska, a Polish legal scholar, judge on the Supreme Administrative Court, and first ombudsman of Poland, "[T]he courts [under socialist law] were not only bound by the statute but also by every normative act....The system of law was not a system of statutes only, but one of acts created by the administration, too. The courts asserted they were not allowed to exercise control over the executive even if it issued unconstitutional law." (Poland report) Consistent with this approach, judicial reasoning in post-socialist countries, compared with other civil law countries, tends to be even more reliant on strict interpretation of positive law and less willing to address inconsistent, illogical, or unconstitutional

outcomes produced by literal application of the law. As Jan Hrubala, a former judge in Slovakia, wrote, "In spite of the democratic changes in the society, certain representatives of the judicial profession continue to behave as if the judges were no more than civil servants whose obligation is to fulfill the will of the current power holders and to accept without reservation the decisions of state administration officials." (Slovakia report)

c. Low status of judges

Because of their relatively unimportant role in the socialist legal system, judges held a low status in society. They were considered civil servants, performing an almost clerical function. One indication of their low status is that the majority of judges in the Soviet Union were not privileged enough to have their own apartments (Solomon and Foglesong, p. 7). Similarly, most observers consider the fact that a large majority of judges in socialist legal systems were women as further evidence of this low status rather than a sign of gender equality. Although the status of judges has improved considerably in the last 10 years, for the most part, they do not yet enjoy a status comparable to their western counterparts. Many of the individuals who became judges when it was a low status profession continue in their positions, doing little to enhance the public perception of overall judicial competence. Especially in Ukraine and Russia, many judges continue to work in dilapidated courtrooms and offices. Judges in each of the countries studied, including the most prosperous (such as Poland), suffer from grossly inadequate resources and working conditions—signs that they and their functions continue to be underappreciated.

d. Executive interference and telephone justice

Interference in individual judicial decision-making was so common under socialist law, especially in the Soviet Union, that the term "telephone justice" was widely used to refer to the particular phenomenon of judges deciding cases based on instructions received by telephone from a government official. The jurisdictional competence of courts was narrowly circumscribed under socialist law, and, even on those matters brought before them, judges generally deferred to procurators. As a result, executive authorities controlled many judicial functions.

This has led to a continuing tendency for the executive to intervene in judicial decision-making. In Poland, for example, the leader of the then ruling Solidarity political party recently conducted "disciplinary conversations" with Constitutional Tribunal judges who had issued decisions contrary to the interests of his party. (*Gazeta Wyborcza*, June 3-4, 2000) Moreover, former Polish president Lech Walesa once phoned the president of the Supreme Administrative Court to demand assurances about a particular case's outcome, prompting the judge's resignation. (Poland report) In Romania, executive interference seems to have had tangible effects. The Supreme Court overruled its own jurisprudence concerning nationalized property in 1994, following public criticism by the ex-communist Romanian president and an extraordinary appeal by the general prosecutor. The Supreme Court reversed itself a second time in 1996, reverting to the earlier jurisprudence after an anti-communist government was elected for the first time. (Romania report)

Executive influence is exercised in other ways as well. In many Eastern European countries, the judicial council, which oversees the appointment, promotion, and discipline of judges, is itself effectively controlled by the executive through the appointment of members to the council. In Bulgaria, members of the Supreme Judicial Council are meant to serve five-year terms. Since the council was established in 1991, however, only one council has served its full term in office, as two out of

three attempts by the government to end the council members' terms in office and hold early reelections have succeeded. The Bulgarian Constitutional Court upheld the constitutionality of these actions in 1991 and 1999, when the majority of the court had been appointed by the party seeking early re-elections. But it found a 1994 attempt to be unconstitutional, when the majority of the court had been appointed by what was then an opposition party. (Bulgaria report)

The composition of judicial councils is also affected by other sorts of more subtle executive influence. Several countries allow prosecutors and/or other executive officials, such as the justice minister, to sit on or appoint council representatives. In some countries such as Slovakia, the presidents of courts hold positions in state administration as well as judicial positions, creating potential conflicts of interest.

e. Centralized control

Another product of the socialist legal system is a strong ethic of centralized control that continues to impact judicial independence. In Ukraine, for example, the legal system still provides an avenue for prosecutors to "protest" *pomylka* (mistakes) committed by courts and for higher courts to routinely subject lower court decisions to *cassation*, or *de novo* review of facts and law. These procedures do not *per se* violate principles of judicial independence, but they do substantially inhibit the development of an independent judiciary when implemented by individuals and institutions steeped in the tradition of strong, centralized control. According to one Ukrainian lawyer, Serhei Safulko, "the judge lies 'between two fires,' between what he believes is good law and the orders handed down from the high courts." Moreover, to some extent, according to Safulko, the hierarchical control is self-imposed:

> In most cases when there is no pressure from the outside, judges perform their professional duties impartially. However, judges, especially in district (city) courts, will often consult judges of higher courts, in particular the *oblast* courts. They ask these judges['] advice on how to rule correctly in this or that case and almost always follow the advice they get, even if it is wrong. (Russia report).

Additionally, in Ukraine, the Soviet practice of discussing data about the "stability of sentences" (or the extent to which appeals are successful) at judicial conferences continues to operate as a means of controlling individual independence. (Russia report) While Ukraine appears to have much stronger traces of centralized control than the other countries studied, the related practice of awarding judicial promotions primarily based on the rarity of successful appeals to a judge's decisions continues in many of the other countries as well.

4. Recent Reform Efforts

a. Selection and appointment of judges

In Eastern Europe a judicial council typically nominates candidate judges for appointment by the president or, in some cases, by the justice minister. The principal measure of reform in the selection and appointment of judges has been to insulate this process, to varying degrees, from the executive. Yet, among the countries studied, only Hungary has achieved what appears to be a complete insulation of the appointment process from executive influence. In Hungary, the presidents of regional courts evaluate applications to judicial posts and ultimately appoint judges. Regional self-governing judicial councils may offer only non-binding opinions on candidates. The only exception to this process for the ordinary courts is that the president of the Supreme Court is elected by a two-thirds vote of Parliament upon the nomination of the president of the republic. (Hungary report)

Poland utilizes a less elaborate form of transparency and safeguard against cronyism in the selection of judges. Candidates for judicial posts are announced by the general assembly of the respective court, and a candidate-judge may not be selected for any given post unless there are at least two candidates. Yet, the system is not flawless, as personal connections can be instrumental in the earlier stages of a judicial career—completion of a judicial apprenticeship is required to serve as a judge in Poland, and applicants for apprenticeships who have family contacts in the judicial profession are unofficially favored. (Poland report)

The current system in Slovakia, as of this writing, is somewhat exceptional. The Council of Judges created in 1995 has solely advisory responsibilities, and judges are currently appointed in Slovakia by Parliament upon the nomination of the government. However, the Slovak government, following an election victory by pro-democratic forces, has prepared a judicial reform package that, at the time of writing, would recreate the (or create a new) judicial council, to be named the High Council of Justice. The High Council of Justice would recommend candidates to be formally nominated by the president of Slovakia, who was chosen above the justice minister and prime minister to carry out this function because the president is directly elected and has been widely perceived as a neutral political figure in Slovakia, who lacks close ties to political parties. (Slovakia report)

Several states have yet to initiate significant reform in this area. In Russia and Ukraine, bureaucratic procedures continue to create many opportunities for executive interference. In those countries, judicial qualification commissions screen candidates at the local level, examining their educational qualifications. Russia follows an elaborate and perhaps overly bureaucratized procedure. The judicial qualification commissions, which are composed solely of judges, recommend local candidates for appointment by the regional legislatures. The regional legislatures, in turn, forward approved candidates to the Supreme Court, which makes recommendations for nomination by the president of the Russian federation. (Solomon and Foglesong)

Ukraine uses a similar procedure, in which judicial qualification commissions include law professors, representatives of local departments of the Justice Ministry, local officials, and judges. In addition to judicial qualification commissions, local court presidents, and Justice Ministry officials interview the candidates, and the head of the regional department of the Justice Ministry recommends candidates to the minister of justice. The minister of justice may return a candidate's application to the region, effectively ending the candidacy, or may recommend the candidate for appointment by the High Council of Justice. (Russia report)

The processes in Russia and Ukraine have been criticized for being politicized and opaque. The Ukrainian system is particularly problematic since the judicial qualification commissions include local executive authorities, and the Justice Ministry has several opportunities to vet candidates before the High Council's formal approval process begins. (Russia report)

b. Georgia's written exam for judicial appointments

Another critical reform to the judicial selection process that aims to improve the independence of the judiciary is to employ objective merit-based criteria and to publicize the selection procedure in order to enhance public confidence in the judiciary. A remarkable example of reform that was supported by foreign donors is the written examination-based selection process instituted in Georgia through a 1997 Law on the Courts of General Jurisdiction, which applies to all sitting judges, as well as new appointees.

(For a description of the positive impact this process has had on judicial independence in Georgia, see Mark K. Dietrich, *Legal and Judicial Reform in Central Europe and the Former Soviet Union—Voices from Five Countries* (Washington, DC: World Bank 2000), pp. 7-8, hereinafter "Dietrich paper.") The Supreme Court of Georgia administered the judicial qualification exam for the first time in 1998, and it has been offered five additional times between 1998 and September 2000.

The structure of the examination process resulted from collaboration between the California State Bar and the Georgian Council of Judges. With USAID support, ABA CEELI arranged for a bar examination expert from California to travel to Georgia to work with the president of the Georgian Supreme Court in order to create an objective examination-based selection procedure which would be fairly administered and perceived as unbiased by both examinees and the general public. (Dietrich paper)

First, the Council of Judges appoints the members of an examination commission to administer the exam in a manner that guarantees the confidentiality of test-takers' identities. The exam, which tests for substantive knowledge of Georgian law, is conducted in two parts: a computer-graded, multiple-choice portion consisting of 100 questions with a mandatory pass rate of 75 percent; and an essay portion administered the following week. The first examination was printed in California and placed on a Lufthansa plane in San Francisco under the observation of the German consul-general to the United States. The German ambassador to Georgia met the plane in Tblisi and transported the examinations in his limousine to the German embassy, where they were held until examination day. CEELI and the Council of Justice had mobilized international observers to monitor the examinees for cheating on the examination day. Immediately after the examination, the answers were projected onto a screen, and the examinees, who had retained carbon copies of their answer sheets, could compare their answers to the correct ones. The pass rate for the first exam was only 47 out of a total of several hundred examinees; no sitting judges in the group passed. (Dietrich paper)

Following the examination, successful examinees were invited to apply to the Council of Justice for existing vacancies. After council members interviewed each candidate, the council voted on whether he or she should be nominated for the president's final approval. (Dietrich paper)

The entire examination procedure was widely covered by the Georgian media, which were also invited to observe the examination itself. The process was widely regarded as fair and transparent, even by those who failed the exam, and the public was pleasantly surprised to learn that many well-connected individuals failed. Yet, the Constitutional Court subsequently held that sitting judges who had failed the exam were nonetheless entitled to serve the remainder of their 10-year terms; this issue remains a subject of intense public debate.

5. *Judicial Career Path*

The judicial career starts at an early age in Eastern Europe, as it generally does in continental Europe. Young law graduates may begin a judicial career immediately after finishing their undergraduate legal education, receiving a judicial appointment after a one- to several-year apprenticeship. However, because of the historically low status of judges, the best young law graduates in Eastern Europe have tended to be attracted to other legal careers, such as working for the state as a public prosecutor or engaging in the newly-lucrative private practice of law. This has changed somewhat in recent years, as judicial salaries have increased and the market for private attorneys has tightened. The

increased independence of judges has also made the position more attractive. According to an informal survey in Bulgaria, the main motivations for law graduates to seek judgeships were affinity for the legal profession, independent status of judge, and opportunities for professional development. Yet, even in countries where this is true, the judicial career is still often seen as a stepping stone—a good way to spend several years learning the practice of law and making contacts in order to transition into a more lucrative position as a private attorney or other legal professional. (Bulgaria report)

In other countries, as in Ukraine, where judges' starting salaries are disproportionately low and there is little judicial independence, law students continue to consider a judgeship "the lowest position available in the legal profession." (Russia report) Even in Hungary, where salaries are competitive for entry-level judgeships and judicial prestige has increased, raises throughout the judicial career come slowly, and there is a high drop-off rate among the most competent judges, who easily find lucrative jobs in private practice. (Hungary report)

a. Raising salaries

One simple reform that can have a direct effect on the attractiveness of a judgeship, at least in the early stages of a legal career, is to raise salaries. In Romania, in 1997 some one third of the 3,600 judgeships were vacant. Salaries have increased significantly since then, and applications to a newly established mandatory nine-month training program at the National Institute of Magistrates have risen to 4,000 applications for 120 places. (Romania report) Where the turnover rate will stabilize, however, remains to be seen. It may well be that higher salaries are attracting ambitious young law graduates, as in Bulgaria, who nevertheless see the judgeship as a stepping stone rather than a permanent career. Slovakia's newly proposed constitutional amendment, which would raise the minimum age for post-apprentice judges from 25 to 30, may be one way to break that pattern.

b. Making pension plans more attractive

Another approach for both attracting and retaining high-caliber judges, which appears to have borne fruit in Poland, is to devote significant resources to pension plans for judges. Salaries for judges in Poland have risen significantly, and judges are paid slightly more than prosecutors of equivalent rank, but one of the strongest incentives to serve as a judge is that they qualify for a pension higher than any other legal professional: 75 percent of their last salary. (Poland report) As a result, judgeships probably attract individuals who value long-term job stability over immediate financial gain, presumably reducing the stepping stone syndrome. [See Richard E. Messick, Public Sector Group, World Bank, *Donor Sponsored Support for Judicial Reform: A Critical Appraisal* (May 1998), unpublished paper, available from IFES.] Similarly, the new reform package in Slovakia would allow pensions to reach as high as 10 times a judge's last salary.

c. Reforming the promotion system within the judicial system

As with the selection process, the executive appears to have an inordinate degree of control over the promotion of judges in some of the countries studied. In Ukraine, for example, promotions are based on evaluations conducted by the MOJ, primarily taking into account the number and kinds of cases the judge has heard and the number that has been over-turned—although the promotions themselves are decided by the judicial qualification commissions. In Russia, evaluations of judicial qualification commissions are presented to regional legislatures for decision. The resulting politicization of the process is evidenced by

deputies who "assumed the right to criticize judges' actions and dictate results in particular cases." (Solomon and Foglesong, p. 8)

In some countries, executive control over the promotion process is more subtle. In Romania, for example, judges are evaluated by the presidents of their courts, and promotions are approved by the Higher Council of Magistrates, but the MOJ retains a role in proposing the promotions to the Higher Council. The Justice Ministry in Bulgaria may also express its opinion about judicial promotions to the Supreme Judicial Council.

One general problem with the promotion systems used in Eastern Europe is that they are based on few objective criteria and appear to rely mostly on personal and political connections. (Bulgaria report) In countries where judicial reform is progressing well, however, this may be changing. The reform package in Slovakia would require that each judicial post be advertised publicly, as is the practice in Poland, and would also create a system of mandatory evaluation every five years, based on explicitly defined criteria. Hungary has already adopted a system of regular evaluation based on criteria elaborated by the National Council of Justice (the Hungarian equivalent of a judicial council), according to a 1997 Law on the Status and Remuneration of Judges. After a first evaluation at the time of appointment to an indefinite term, judges must undergo two more evaluations during the following six years. (Hungary report)

6. Disciplinary Action for Judicial Misbehavior

The possibility of removing judges from office varies significantly from country to country. In some countries, ordinary judges are initially appointed to a probationary term of three to five years before becoming eligible for an indefinite term (Bulgaria, Hungary, Russia, Slovakia, and Ukraine). A proposed Slovak constitutional amendment, however, would eliminate the probationary period for judges, rendering all judges irremovable. This already applies in Romania and Poland. In Georgia, all judges are appointed to renewable 10-year terms, which was the practice in Russia between 1989 and 1992. In many cases, judges appointed to higher courts are subject to definite terms, as is the case with the Romanian Supreme Court, and the Polish, Russian, and Ukrainian Constitutional Courts.

Judges in most of the countries are subject to criminal prosecution, with minor limitations. The Supreme Judicial Council can lift the criminal immunity enjoyed by Bulgarian judges if the council is satisfied that there is sufficient evidence of serious, deliberate offense. (Bulgaria report) In an effort to crack down on corruption, the Ukraine Parliament amended the Law on the Status of Judges in fall 1999, removing barriers to the prosecution of judges for criminal acts. (Russia report)

In most of the countries, non-criminal discipline is administered by the judicial council, or in Russia and Ukraine by the judicial qualification commissions. The proceedings can usually be initiated by the MOJ or a president of a court. Especially in Romania, critics target the dominant role of the executive branch in the process. The High Council of Magistrates, one third of whose members are prosecutors, conducts disciplinary hearings upon the proposal of the MOJ and administers disciplinary sanctions to judges. In contrast, prosecutors are subject only to hierarchical discipline within the procuracy. (Romania report) The procedure in Bulgaria is similar in that non-criminal disciplinary hearings are also administered by the judicial council, where disciplinary action was recently taken against a judge who had failed to write a single decision in two years. (Bulgaria report)

In Slovakia, disciplinary hearings are initiated by the presidents of the courts and conducted by panels of judges appointed by the presidents of the courts. A disciplinary panel can propose removing a judge because of an intentional crime or "serious failure," subject to the approval of Parliament. But relying on judges to discipline their colleagues has proved problematic. For example, in one recent incident in which a notoriously corrupt Slovak judge was arrested and later convicted of bribing a Czech judge in a transnational case, the majority of his colleagues signed a "social guarantee" submitted in the Czech criminal proceeding, attesting to the corrupt judge's good reputation. (Slovakia report) Undoubtedly, it would have proved fruitless to rely on the president of the relevant court to convene a disciplinary panel in this case. He was present at the same restaurant (in the Czech Republic) where the bribe negotiation had been recorded, although he sat at a distance and was not convicted in the Czech criminal proceeding. This is an especially flagrant example—known in concrete detail only because of the unusual circumstances leading a Czech judge to cooperate in the criminal prosecution—but critics argue that it exemplifies a pervasive practice. (Slovakia report)

The proposed Slovak reform package would shift authority to approve a judge's removal from parliament to the president of the republic, the elected officer perceived as least beholden to partisan politics. It would also shift the selection of disciplinary panel members to the High Council of Justice, which the new reforms are to create.

Georgia is also taking steps to reform its system, having recently established a new disciplinary procedure in a law adopted in February 2000. According to this procedure, the Council of Justice—the governing body for the judiciary—initiates disciplinary proceedings based on citizen complaints, as well as proposals by court presidents and the Council of Justice itself. Although only four out of twelve members of the Council of Justice are necessarily judges, disciplinary sanctions may be appealed to the Conference of Judges, a wholly self-governing body of judges. Providing a mechanism for citizens to address complaints directly to the Council of Justice is a particularly innovative reform.

a. The problem of corruption

Corruption is widespread in the societies of Eastern Europe and can certainly be found in the judiciary as well. According to the Anti-corruption Action Plan of Coalition 2000, an NGO in Bulgaria, "[The Bulgarian judicial branch] receives a low mark on trust both from the public at large and from other state institutions. It is popularly believed to be slow, inefficient, and corrupt." (Bulgaria report) According to Jan Hrubala, "Some people [in Slovakia] think that if you or your attorney don't have any friend at the court, you cannot win the case." Although corruption may be less pervasive among judges than among prosecutors and investigators (Bulgaria report), a recent opinion poll found that members of the judiciary and the health profession were the most corrupt elements of Slovak society. (Slovakia report) According to former prosecutor Monica Macovei, corruption in the Romanian judiciary is notorious as well, but appears to be especially prevalent among the lower courts because there is little opportunity in the Romanian appeals process to contest the facts that were established in there. As a result, a corrupt outcome at the first instance based on falsified facts is unlikely to be over-turned on appeal. (Romania report)

Yet, Ewa Letowska argues that public perception of corruption is exaggerated with respect to judges, except perhaps regarding a narrow subset of cases concerning commercial matters of substantial monetary value. She claims that corrupt clerks and dishonest lawyers have an equal interest in promoting the idea that judges

are corrupt. (Poland report) This appears plausible since there is little opportunity for individuals to bribe a judge directly; in most cases, lawyers are likely to be intermediaries. There are also substantial opportunities (and sometimes a requirement) for individuals and lawyers to bribe clerks for the purpose of calendaring and file access. Indeed, among the most pervasive areas of corruption in Poland are matters where only court clerks—not judges—are involved, such as registration of companies or land. (Poland report)

Corruption has a negative impact on judicial independence in two, contradictory ways. First, a climate of corruption creates a multitude of channels for improper influence on judicial decision-making. At the same time, disciplinary mechanisms intended to curb corruption can be potentially misused for political purposes.

b. Efforts to reduce judicial corruption

A number of efforts have been made to minimize corruption among judges. By far the most often voiced suggestion has been to increase judicial salaries; indeed, fighting corruption has been a principal justification for substantial salary increases throughout the region, although Russia and Ukraine may be exceptions. As previously discussed, the salary increases have helped enhance the attractiveness of a judgeship, and they have perhaps reduced the plausibility of self-serving justifications for corrupt behavior, although there is little solid evidence as to whether the raises have been effective in actually curbing corruption. The reform is based on the premise that many judges accept bribes because they cannot afford to maintain a decent standard of living; it may well be the case, however, that judges continue to accept bribes in order to improve their standard of living even once their basic needs are satisfied.

In Georgia, salaries have been increased and a new procedure for ensuring the selection of competent judges based on objective criteria has been adopted (as discussed above). As part of a comprehensive reform meant, in part, to weed out judicial corruption, the Council of Justice has also adopted a code of judicial conduct, which is not legally binding, but is subject to disciplinary responsibility. As mentioned previously, Georgia adopted a law on disciplinary responsibility in February 2000, providing a procedure for citizens to make complaints about the ethical conduct of judges, including corrupt practices, directly to the Council of Justice.

In some states, such as Bulgaria and Slovakia, non-governmental judicial associations have adopted voluntary codes of judicial conduct, which have received a great deal of support from USAID though ABA CEELI. A new code, to include the establishment of a disciplinary commission, is currently being drafted in Bulgaria. (Bulgaria report) A draft judicial ethics code is also pending in Ukraine's parliament.

If Slovakia is representative, judges are divided over the need for ethical codes. Some feel that the drafting of an ethical code is an important step toward improving the unsatisfactory state of judicial ethics. Others feel there is no need for a special code of judicial ethics since the general, informal ethical norms in society also apply to them. Still others think that existing procedural guarantees and laws are sufficient. Yet others regard the mere discussion of judicial ethics as inherently threatening to their effectiveness as judges, apparently favoring the corruption endemic to the status quo. (Slovakia report)

Some voices in the region, such as Coalition 2000 in Bulgaria, have called for the more progressive step of establishing an independent commission to investigate corruption. Yet, the creation of the National Council for Action against Corruption and Organized Crime in Romania in 1997 and the creation of special agencies within the Romanian General

Prosecutor's Office and the General Police Inspectorate in 1998 are perceived to have had little effect. (Romania report)

There have been criminal prosecutions of judges in the region for corruption, although the number appears to be quite low. In June 2000, the Romanian MOJ requested the investigation and prosecution of six judges, and the general prosecutor approved initiation of three of them. In 1999, 21 judges and prosecutors in total were investigated, resulting in the prosecution of four judges and two prosecutors. (Romania report) Meanwhile, in Bulgaria, roughly six investigators and prosecutors have been prosecuted, but no judges. (Bulgaria report) Lastly, although there have not been any prosecutions for corruption to date, Ukraine adopted a law in 1999 lifting the criminal immunity of judges in order to fight corruption.

Even before legal professionals begin their careers, corruption's effects can already be felt. Universities throughout the region too often thrive on corrupt practices (e.g., accepting bribes for admissions and grades, and other forms of influence peddling)—a phenomenon that receives scant attention by donors. One critical way to fight the persistent culture of corruption is to address it at this stage—where it can permanently affect future lawyers and judges during the formative years of their professional values. Clinical legal education programs can provide a strong counterweight to complacency toward corruption in higher legal education.

7. Assignment of Cases

The predominant practice in Eastern Europe is for court presidents to have sole discretion in assigning cases to the judges on their court. This tends to affect judges' impartiality in a number of important ways: providing avenues for corruption; providing greater opportunities for executive interference; and reinforcing the ethic of strong hierarchical control. As a result, executive authorities interested in influencing political cases as well as individuals seeking pecuniary advantage may efficiently achieve their intended results on an on-going basis by establishing informal relationships with relevant court presidents. A cooperative court president has the unrestricted authority to assign any particular case to a politically compliant or corrupt judge. Indeed in Bulgaria, high profile, political cases are often retained by the president of the court to be decided himself or assigned to the vice president. (Bulgaria report)

In Poland, court presidents use a random method to assign cases, but the system is not well known, resulting in significant public suspicion about corruption in the assignment process. (Poland report) Meanwhile, in Slovakia, there is no systematic method for assigning cases, although some court presidents do use random methods. However, several court presidents in Slovakia have assigned cases involving highly politicized prosecutions for defamation of state officials repeatedly to the same judges, raising suspicions about independence. (Slovakia report)

8. Budgetary Issues

a. Under-funding

The judiciary in Eastern Europe is chronically underfunded. In Poland, one of the more prosperous countries studied, only about two thirds of the amount requested by court presidents is actually provided in the budget. Moreover, the financial fortunes of the judiciary vary to some degree with the political winds. In Bulgaria, where prior judicial reforms appear to be coming under increased political pressure, the 2000 budget for the judiciary declined by 27 percent compared to 1999, while funds for most governmental departments stayed the same or increased. (Bulgaria report) The chronic shortfall in funding for Bulgarian courts, which covers important court administration expenses such as heating, equipment, and support staff, is

generally made up from court fees, although this creates strong disincentives for appointing expert witnesses or counsel for indigent defendants, since they are also paid out of court fees. (Bulgaria report)

The comments of Jan Hrubala are representative, "Judges often work in substandard offices, poorly and inadequately equipped, in dilapidated buildings with falling plaster, and do not have adequate access to professional literature....Certain courts are almost unable to function because of staffing problems." (Slovakia report) According to a study of Polish courts undertaken by the Helsinki Foundation for Human Rights, a Warsaw-based NGO, only 36 percent of judges have their own offices, with the remainder sharing space with up to six others; 60 percent of judges have no computer; 38 percent share a computer with at least a dozen others; 50 percent of courts have no library; and an additional 20 percent have libraries identified as inadequate. [L. Bojarski and J. Swaton, *Monitoring of the Material Conditions of District Courts*, (Warsaw: Helsinki Foundation for Human Rights 1999), on file with author, hereinafter "Bojarski and Swaton"]. One of the most significant problems in infrastructure is the lack of qualified secretarial assistance. Judges throughout the region spend an extremely large portion of their time on clerical matters, which interferes with the general efficiency of the courts and prevents judges from spending adequate time to ensure the quality of their decision-making.

b. Judicial discretion over budgets

Equally important as the amount of financial resources available to the judiciary is the degree of control over formulating the budget and spending it. In Russia and Ukraine, control of the judiciary through financial levers, especially at the local level, is much more pronounced than in the other counties. In Russia, funds allocated to courts in the state budget have often failed to materialize. As a result, Russian courts have looked to local governments, and sometimes private sources, to fill the gaps, yielding opportunities for the exercise of inappropriate influence. (Solomon and Foglesong, pp. 37-39)

A similar situation exists in Ukraine. In a 1999 newspaper article, Vitaliy Boyko, the president of the Supreme Court of Ukraine, wrote:

> Miserable financial conditions from the state budget compel chief judges of the courts and other judges to search for additional "sources" of financing both from the budgets of local governments and from outside sponsors. The courts seek help for such basics as electricity, heating, telephones, the repair of buildings, etc. And when disputes arise between citizens and local bodies of power—the dissatisfied party understandably will have doubts about the impartiality of the court and the legality of the final court decision. The public will have these doubts even if the court's decision is true and based on good law. (*Holos Ukrainy*, November 24, 1999)

A draft law to reform the Ukrainian judicial system would create the State Court Administration under the auspices of the Congress of Judges to administer the judicial budget; however, the law has met with political deadlock. (Russia report) A similar initiative in Russia, to lay budgetary and administrative authority over the courts in a judicial department of the Supreme Court is part of the moderate reform agenda. (Solomon and Foglesong)

In many of the countries in the region, the ministry of justice controls the budget for the courts, providing opportunities for inappropriate external control of the judiciary. In Hungary, however, a 1997 judicial reform created the

National Council of Justice as the supreme representative of the judicial power and also vested it with responsibility for drafting and supervising the portion of the state budget concerning court administration. The council—two thirds comprised of judges—submits a budget for court administration each year to the government. The government may make adjustments, but when it presents the state budget to parliament, it must indicate clearly the council's original proposal and give reasons for any deviation. (Hungary report)

In Bulgaria, the Supreme Judicial Council prepares and controls the budget, which is submitted to the parliament by the Council of Ministers (i.e., the cabinet). Additionally, the Justice Ministry can make reasoned proposals and objections. (Bulgaria report)

In Georgia, control over the budget for court administration resides in the Logistics Department of the Supreme Court. First, a draft budget is prepared with the input of court presidents and then presented to the Council of Justice for approval. Once approved, the president submits it to Parliament together with the overall state budget. The housing of the Logistics Department in the Supreme Court has been criticized for distorting the relationship between the Supreme Court and lower courts. As a result, the entire department likely will be transferred to either the Council of Justice (elected or appointed by the judiciary, the president, and the parliament in equal thirds) or the Conference of Judges (a self-governing entity elected from among judges). (Georgia report)

In Poland, while the MOJ controls the budget for most of the ordinary courts, the Supreme Court, Supreme Administrative Court, and the Constitutional Tribunal each directly propose their own budgets to the Ministry of Finance and Parliament, bypassing the MOJ. This change resulted from a 1997 campaign for the autonomy of court administration, which was otherwise unsuccessful. (Poland report) Likewise, in Slovakia, only the Constitutional Court has control over its own budget, and the current judicial reform package would extend similar budgetary control only to the Supreme Court.

The greatest consequence for judicial independence probably comes from control over benefits that directly impact judges' lives, such as housing. Privileges such as housing were a commonly-used instrument of social control during the communist period. In Romania, Russia, and Ukraine, housing and other benefits are still subject to the whims of local government. In addition, executive authorities in many countries may unduly influence the courts by exerting control over matters that directly impact working conditions, such as court maintenance and the hiring of assistants.

9. Training

Many observers believe that Eastern European judges have insufficient knowledge and inadequate training to carry out their duties effectively and with confidence. Many judges retain old habits that interfere with the development of an independent judiciary, such as social conformity or expecting directives from above. Additionally, they often have difficulty reasoning from the higher principles that are contained in constitutions and international treaties, and they are largely unaware of basic ethical concepts and how to apply them in practice. In Poland, for example, judges did not think it improper for a judge's spouse to be a bankruptcy trustee in the same district in which the judge worked, resulting in the National Council of the Judiciary passing a resolution to that effect. (Poland report)

There are various options for improving the training that Eastern European and Eurasian judges receive. One expert has suggested that Ukrainian judges would benefit greatly from

more exposure to Western colleagues, whether through informal training or otherwise. (Russia report) That may indeed be an important element in building judges' self-esteem and confidence, and elevating the status of judges, as well as providing the moral support of an international peer group.

A number of countries in the region, such as Bulgaria and Georgia, have established judicial training centers. These centers perform a necessary function by educating judges in substantive areas of the law that are undergoing rapid change in Eastern Europe. However, the extent to which such training can influence the kind of behavior and attitudes that impede fundamentally judicial independence is less clear. Such initiatives can probably have the greatest impact on judicial independence when they focus on ethical training or on applying the constitution or international human rights treaties within domestic law. Training in ethics can help buttress efforts to reduce corruption. The application of constitutional and international human rights principles can provide a counterweight to executive demands for legal interpretations favoring excessive governmental discretion. Generally, with respect to these areas, an undergraduate law degree does not provide sufficient knowledge and training.

In Romania, the National Institute of Magistrates, modeled after the French *Ecole de Magistrature*, was established in the early 1990s with the strong support of USAID through ABA CEELI. Participation was voluntary, and it suffered from lack of interest by judges; it had virtually ceased to exist by 1996 when its founder became minister of justice. Revived shortly thereafter, its fortunes have been reversed, with a Justice Ministry decision in early 2000 requiring that candidates for judgeships complete a nine-month training at the institute. As mentioned previously, at the time of writing, there were 4,000 applications for 120 spaces. Georgia intends to follow a similar path, transforming its judicial training center into a School for Magistrates, which will administer a mandatory training program for judicial candidates. Based on a belief that the most effective teachers for judges are their senior colleagues, Georgia also intends to conduct a training-of-trainers program for judges. (Georgia report)

In the long run, however, the most effective way to improve judges' capacity for independence is to reform university-level legal education. The highly theoretical and didactic style of teaching law in the region does little to develop the legal reasoning and critical thinking abilities of judges. Moreover, the most critical stage in the development of a lawyer's or judge's professional values is during and immediately following university education. Law schools need to teach ethics to future legal professionals, but ethics is most effectively taught on the basis of concrete examples drawn from real world experience. Clinical legal education—in which students provide legal services to underrepresented clients under the close supervision of qualified attorneys and professors—offers the advantage of injecting the facts and circumstances of actual cases from the real world into law school teaching. Within clinical programs, well-trained teachers not only improve students' practical skills and reasoning abilities, but they can also help produce ethical lawyers and judges.

A number of donors have been instrumental in helping to launch a clinical legal education movement in Europe and Eurasia. The Soros network of foundations has been especially active, currently supporting clinical programs at more than 60 universities throughout the region. Each clinical program typically includes several sections, or classes, on topics ranging from criminal and civil law to political asylum, not-for-profit law, and domestic violence. Soros support ranges from approximately $15,000 to $30,000 per year, with an average of 40 to 50

students participating in each program per year. The students—many of whom will begin a judicial career directly after graduation—undergo what is likely to be the most transformative experience they have in law school, at a cost that roughly amounts to a modest $500 per student.

10. Extent of Judicial Review

In general, judicial review supports the judiciary's independence because it empowers courts to critically assess executive and legislative action on the basis of constitutional or international human rights principles. The legal systems in Eastern Europe have widely adopted judicial review of legislation, and to a lesser extent, of executive regulations and actions. Each of the countries studied here has established a constitutional court, generally following the French and German models. Their competence varies considerably. The Hungarian Constitutional Court can invalidate any law, based on complaints made by any individual about that law's confliction with the constitution, or upon its own initiative. Other constitutional courts engage in judicial review only upon a complaint lodged by the president or prime minister, by a portion of the parliament, or by the ordinary courts.

Additionally, some countries, such as Poland, have provided mechanisms for extensive review of administrative decisions through a supreme administrative court. Review of administrative decisions and actions is also provided by the institution of the ombudsman, which was especially well received in Poland, but has been established in many other countries in the region as well. Hungary has established several subject-specific ombudsmen, known as commissioners, including a commissioner for data protection and freedom of information who, among other things, takes action on complaints regarding refusals by the state administration to provide information.

International law provides an additional level of judicial review. Most, if not all, of the countries in the region are monist systems, in which international human rights treaties are self-executing and do not require implementing legislation. Moreover, many of the constitutions explicitly recognize international human rights treaties as part of the domestic law of the country and further give priority to the treaties in cases of conflict with other laws. (See, eg, the Romanian Constitution, articles 11 and 20). Lastly, the European Court of Human Rights in Strasbourg provides ultimate judicial review for matters falling within the scope of the European Convention on Human Rights and Fundamental Freedoms.

Judicial review has a particularly direct bearing on the independence of the judiciary in Poland. Articles 178 and 179 of the 1997 Constitution contains concrete guarantees for judicial independence. Article 179 guarantees irremovability, and Article 178 provides that

> (1) Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.
>
> (2) Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.
>
> (3) A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges. (Polish Constitution, Adopted by National Assembly on 2 April 1997, confirmed by Referendum in October 1997.)

Furthermore, the Constitutional Tribunal has competence to decide whether these conditions are met in practice, upon request of the National Council of the Judiciary. Indeed, independence

of the judiciary has been the subject of several Constitutional Tribunal decisions in Poland. A 1993 decision attacked the Act on the Structure of the Law Courts, objecting to the excessively intrusive role of the Justice Ministry in appointing and dismissing court presidents as well as the vagueness of disqualification criteria and the lack of procedural guarantees or involvement of disciplinary courts. A 1994 decision stressed that financial security of judges is an important factor in strengthening judicial independence. (Poland report)

11. Procedural Transparency and Public Access to the Judicial Process

Greater transparency is critical for securing judicial independence in Eastern Europe. Transparency is an effective means for creating accountability without reinforcing opportunities for executive interference from outside the judiciary or strong hierarchical control within the judiciary. Moreover, transparency fosters greater public confidence in the judiciary, setting up a virtuous circle of positive reinforcement.

Several of the reforms described earlier have included measures to improve transparency. For example, the newly established judicial qualification examination in Georgia is a model of how transparency in the selection of judges can ensure fairness and build public confidence in the judiciary. In other countries, vacant judicial posts have been advertised, and individual candidacies have been publicized. Where random methods of assigning cases are used, such as in Poland, greater transparency regarding case assignments might help improve public perceptions about corruption and fairness in the judicial system.

One area that is particularly problematic involves the practice surrounding the publishing of the written justifications for judicial decisions and even the final decisions themselves. In Ukraine, for example, both judgments and transcripts of proceedings are written by hand, and they are available only to the litigating parties. Indeed, the 1992 Law on the Status of Judges requires the "confidentiality of the judicial decision-making process." It also protects the "secrecy of court decisions and prohibition to disseminate them" and further states, "[A] judge is not required to give any explanations concerning the essence of cases he or she has considered or is considering now, as well as to make them available for anybody to view, except in cases and in order envisaged by the law." [Law of Ukraine on the Status of Judges (*Zakon Ukrainy, Pro Status Suddiv*), arts. 11, 12, Verkhovna Rada Decree no. 2863-12, December 15, 1992; *Holos Ukrainy*, February 10, 1992, p. 3; amended February 2, 1993, as translated in Russia report.]

Other countries are somewhat more transparent regarding judicial decision-making. In Bulgaria, for example, judicial decisions are not confidential, but only excerpts of some opinions are published in the official bulletin. In Slovakia, written opinions are required in every case, but when published, the names of the judges are omitted.

In Poland, published opinions include the judges' names. Every [illegible] of the Polish Constitutional Tribunal and the Administrative Division (but not the Civil and Criminal Divisions) of the Supreme Court is published, as well as some courts of appeals opinions. Dissenting opinions are not published, although the names of dissenting judges are included. One Slovak expert has asserted that published opinions at higher instances and for the most significant cases are important and, furthermore, that judges should be obligated to explain why their outcomes differs from those of other judges in similar cases. Yet, judges tend not to justify their decisions, even if they appear to contradict a Supreme Court ruling intended to harmonize the law. (Slovakia report)

Unlike high court decisions, regional and district court opinions are not published. Written judgments are issued in Polish courts of first instance only when one of the parties announces the intention of appealing or when there is a dissent. Generally, no reasoning is recorded in writing, and it would likely not be feasible given backlogs. (Poland report) This is supported by Jan Hrubala's observation that the Slovak requirement that opinions be written in even minor cases is a primary cause for huge backlogs in the Slovak courts. (Slovakia report) According to Ewa Letowska, Polish courts of appeals do not assess the reasoning of lower courts. They operate deductively, and, since the common assumption is that there is only one way to interpret the law, appeals court judges would consider the first instance judge to have been correct or incorrect. (Poland report)

12. Civil Society—Supporters and Watchdogs

a. Non-governmental judicial associations

One helpful civil society-based approach to fostering an independent judiciary is the creation of voluntary, membership-led, non-governmental judicial associations. USAID has supported the creation of such associations through the activities of ABA CEELI, and strong non-governmental judicial associations already exist in Bulgaria, Georgia, Poland, and Slovakia. There are also a large number of professional associations that include judges as well as other legal professionals. Yet, in Russia and Ukraine, the interests of judges are represented by corporate bodies that are not voluntary and do not have independent legal personalities.

Slovak judges established one of the region's first judicial associations, with the support of CEELI, and it has been a brave voice for independence of the judiciary during times when Slovak politics have been dominated by anti-democratic forces. (Slovakia report) A judicial association was founded in Bulgaria in 1997, again with assistance from CEELI, and its activities have included adopting a voluntary judicial code of conduct, establishing a judicial training center, and submitting amicus-style briefs to the Constitutional Court regarding cases interpreting independence of the judiciary and the code of criminal procedure. (Bulgaria report) In Poland, the voluntary association of judges, *Iustitia*, cooperates with media by freely providing information through interviews and press conferences, educates judges, and builds public awareness of problems of the judiciary. For example, *Iustitia* took a public stand in 1998 when the under-secretary of the MOJ stated that "judges are to execute acts, not to criticize them." (Poland report) The resulting public debate largely strengthened awareness of the potential menaces to independence of the judiciary.

b. Other external actors

Judicial associations can function as advocates for an independent judiciary especially by educating the public about judicial issues. This can be accomplished partly through the media, which play an especially important role as liaison between the judiciary and the public. With Georgia's new judicial qualification examination discussed earlier, the media brought the details of the process to the attention of the public, which ultimately helped cultivate public support for the judiciary. The media can also compensate for deficiencies in official transparency, such as Slovakia, where the media sometimes publish the names of judges who are not cited in the officially published opinions. (Slovakia report) Investigative journalism can also be extremely effective—especially in curbing corruption—although an important obstacle to this strategy is the widespread availability and use of criminal sanctions for defamation of state officials. The resulting suits have generally ended with acquittal in Poland (Poland report), but they frequently result in

criminal penalties in some of the other countries, such as Romania. (Romania report)
Moreover, the media must be well-educated in order to ensure that their coverage of issues concerning judicial independence is used constructively to bring about reform, rather than merely promoting populist rhetoric about the courts being responsible for rising criminality. In educating the media, however, there are a number of obstacles. Journalists lack knowledge and understanding of the law and do not appear to be interested in acquiring it. Furthermore, judges are unprepared to work with the media and seem unwilling to assist the media in presenting judicial information objectively and truthfully. (Slovakia report)

To some extent private attorneys can also hold judges accountable when judicial independence is threatened by corruption or inappropriate procedures, although they themselves tend to have a vested interest in maintaining the lack of transparency and informal practices that foster corruption. Human rights advocates note that their presence in a courtroom appears to have a mitigating effect on judges who might otherwise bow to executive pressure. NGOs could enhance that effect by gathering examples of both bad and good practices and disseminating them to the public. Moreover, NGOs can play an important role in both holding courts accountable and advocating on behalf of the judiciary. The court monitoring project of the Helsinki Foundation for Human Rights, the results of which were described earlier, is a good example. (See Bojarski and Swaton)

13. General Recommendations

From a comparative assessment of reforms in the area of independence of the judiciary undertaken in Europe and Eurasia as well as an analysis of continuing problems, a number of general recommendations can be made.

a. "Less traveling, more learning"

In some countries, such as Ukraine, it is important for judges to have more exposure to western colleagues in order to provide moral support and improve self-esteem, which are necessary for independence. However, training should probably be more focused on areas that are directly relavant, including constitutional law and reasoning, international law, court management, and ethics, in order to ensure that the training correlates with improved independence. Ideally, judges should be trained by more senior judges, and training-of-trainers programs should therefore be supported.

b. Addressing reform from the bottom up

Top-down institutional reform is subject to inconsistent progress and long delays due to political blockages. As a result, a significant portion of foreign donor assistance to support institutional reform bears only meager results. More donor assistance should be devoted to civil society actors, who have clearer and stronger political will. Donors can support the development of court watchdog groups and programs and their efforts to increase the effectiveness of judicial associations. NGOs that rely on litigation strategies to achieve their social objectives should also be supported as a means of building pressure for reform. In general, donors should use their funding to support the institutional reform objectives of civil society actors.

c. Focusing on small-scale institutional reforms

A complementary donor strategy, as another alternative to a comprehensive top-down institutional reform, would be to support small-scale institutional reforms devoted to enhancing transparency—thus facilitating the activity of court watchdog groups and programs and improving public confidence in the judiciary.

Examples include the development of explicit, publicly disseminated objective standards for the appointment and promotion of judges; increased publication and distribution of judicial opinions; greater transparency with respect to case assignments, calendaring, and filing practices; and an annually updated register of magistrates' income and property. Strategies as simple as providing modern equipment for transcribing court proceedings can have a major impact.

d. Informed, educated media

Media can play both a constructive and a destructive role in the effort to improve judicial independence. Investigative journalists can help uncover corruption and other improper influences on judicial decision-making. At the same time, media can contribute to an erosion of public confidence by perpetuating stereotypes of an ineffectual judiciary. Foreign donors can have an impact on the role of the media by ensuring they are properly trained in coverage of legal matters and sensitized to the importance of judicial independence.

e. Fighting corruption

A key strategy for fighting corruption would be to streamline the administration of courts, especially at the local level. Long delays, lack of transparency, and disorganized filing systems provide enormous opportunities for corruption. At the same time, encouraging the development of disciplinary boards which adjudicate citizen complaints about unethical behavior combined with encouraging a few prosecutions or disciplinary decisions of high level judges could have a tangible effect on curbing corruption. Finally, in order to help reduce the overall culture of corruption, it is important to address the corruption often endemic to the legal educational system itself, where it easily infects the values of future legal professionals. The creation of clinical legal education programs and other public interest projects can provide a counterweight to the self-interested and corrupt behavior that is too frequently the norm in university life.

f. Reforming legal education

Supporting the reform of university-level legal education will be the strongest guarantee of an independent judiciary in the long term. Training opportunities that occur later in life are no substitute for a solid educational foundation acquired during formal legal studies. In particular, law graduates should be better trained in legal reasoning and critical thinking skills. More developed clinical legal education programs hold the promise of enhancing the effectiveness of current teaching methods as well as introducing important ethical dimensions of legal practice into the classroom.

C. Judicial Independence in France
by Louis Aucoin

1. Introduction

The civil law system is one of France's great legacies. As Napoleon stated, "My true glory is not that I have won 40 battles; Waterloo will blow away the memory of those victories. What nothing can blow away, what will live eternally, is my civil code." Accordingly, France's experience with judicial independence—the history of the institutions created to strengthen independence, efforts to balance independence and accountability, recent reforms, and current debates—is likely to be of interest to reformers in countries following some variant of the civil code tradition. The legacy is likely to be relevant, even where vast differences exist between the economic situation and social, political, and philosophical traditions of France and other countries of interest.

This is so for a few reasons. First, the mistrust of judges, prevalent in France, is likely to be found in most civil law countries, many of which have inherited the French tradition. Second, France has established the *Conseil Supérieur de la Magistrature* (CSM) as the principal institution charged with oversight of judicial independence, and many civil law countries have established judicial councils for this purpose.[26]

Although France has adopted relatively few reforms concerning judicial independence, it has debated the issues extensively; the debates themselves have had a beneficial effect in holding the judiciary and the MOJ up to greater public scrutiny and in educating the public about the competing values. Moreover, the various reforms that have been debated may well be appropriate for other countries.[27] A major explanation of the French resistance to reform and modernization of its judicial system is the consciousness within France of the influence, at least historically, of its system throughout the civil law countries of the world. Innovative and effective proposals may not receive the resistance outside of France where the factor of cultural pride has much less significance.[28]

Currently, in France, there is a widespread, popular frustration with the level of corruption in the French system. Scandals have involved complicity on the part of individuals in government in a host of affairs including, *inter alia*, insider trading and other less than arms-length transactions. There has been a great deal of press and scandal around the issue of illegal funding of political parties, implying widespread partisan corruption, again involving government

[26] In France, the mistrust of judges is so great that the constitution does not even accord the judiciary the status of a separate branch of government. Instead, the constitution refers to a judicial "authority," which is clearly subordinate to the executive and is subject to its oversight. There is, nevertheless, recognition of the necessity for guaranteeing the judiciary's independence. To this end, Article 64 of the constitution charges the president of the republic with the responsibility of being the guarantor of judicial independence, and Article 65 provides for the creation of a specialized institution, called the CSM, to assist the president in providing that guarantee. All countries of the world that follow the French tradition have such an institution.

[27] France has become notorious for lengthy study of sweeping, comprehensive, proposed reforms of its judicial system, which frequently generates huge tempests of debate, publicity, and discussion with minimal results in the long term. Civil code reforms have been discussed since 1945, but significant reform efforts have only been successful in a few areas such as nationality, family law, property law, or bio-ethics. The MOJ commissioned a comprehensive study of reform of its Code of Criminal Procedure and Criminal Code in the early 1990s resulting in the famous Delmas-Marty report, which recommended sweeping reforms, only the most rudimentary of which were adopted against significant opposition.

[28] For instance, in the early 1990s, the Delmas-Marty commission, which was appointed by the minister of justice, prepared a comprehensive report recommending numerous sweeping reforms. Although only a very few of the report's recommendations were adopted, it has provoked wide study and even reform in other countries.

complicity. The judiciary has been criticized for its failure to successfully bring alleged perpetrators of these scams to justice. It has been widely suggested that the reason for the judicial failure is the indirect political influence that political parties still have over the judiciary in spite of reforms instituted in the latter half of the 20th century in an attempt to insulate the judiciary from just that.

This latter perception has led to comprehensive proposals for reform of the judiciary, begun under the auspices of President Jacques Chirac in 1997 and which have been championed by the former minister of justice, Elizabeth Guigou and her successor, Marylise Lebranchu.[29]

This article will examine the history of the various refinements of the institutions charged with assuring judicial independence, including a detailed analysis of the reforms currently proposed and a description of the outcome of those efforts. It will also describe the judicial career established in France so as to provide a sense of how these two elements contribute generally to judicial independence. The article will conclude with a recommendation section in which certain of the reforms in France, chosen from those which have been adopted and those which have been proposed, will be analyzed for their potential application in other systems.[30]

[29] Marylise Lebranchu replaced Elizabeth Guigou as minister of justice on October 18, 2000.

[30] This is perhaps the appropriate juncture at which to point out that administrative judges of the Council of State (*Conseil d'Etat*) are considered to be part of the administration and are educated at the *Ecole Nationale de l'Administration*. Consequently, none of the rules regarding the ordinary judiciary, discussed in this report (*inamovabilité*, life tenure, ethics, discipline, etc.) apply to them.

2. *Institutional Guarantees of Judicial Independence*

The first step in France to create some institutional guarantee of judicial independence was taken in 1883. In that year, Parliament granted jurisdiction to a special chamber of the Court of Cassation (France's supreme court) to sit in judgment of other members of the judiciary in disciplinary proceedings. The special chamber consisted of all of the members of the Court of Cassation sitting in plenary session, and this special chamber was referred to as the CSM. This measure was designed to insure that members of the judiciary, as opposed to the executive, would pass judgment on members of the judiciary in disciplinary matters.

It should be noted that the French judiciary includes "sitting judges" and "standing judges," (magistrats assis/magistrats debout) the latter category referring to prosecutors. In common law countries, by contrast, prosecutors are not considered to be part of the judiciary. The authority in matters of discipline granted to the CSM in its embryonic form in 1883 related only to discipline of sitting judges. The nomination and discipline of the standing judges were left entirely to the minister of justice. The MOJ was to retain this exclusive authority through 1993.

In 1946, the new constitution required the president to share the power to appoint members of the CSM with Parliament and granted it a significant role in the appointment of judges. The CSM instituted by that constitution was composed of 14 members, which included the president, the minister of justice, six members appointed by a two-thirds majority of the National Assembly (they could not be members of that body), two members chosen by the president from the legal profession who were neither members of parliament or of the judiciary, and two judges (one standing, one sitting) selected from within the ranks of the judiciary to serve for six years.

The Constitution of 1958, which established France's Fifth Republic, restored some of the president's involvement in the work of the council. Article 64 clearly established the president as the guarantor of judicial independence and reaffirmed the concept of "*inamovabilité*".[31] (See the discussion of the judicial career, below.) Apparently, the drafters of that constitution felt that the role assigned to the CSM in both the discipline and nomination of the judiciary was sufficient to prevent inappropriate executive influence over the judiciary. Power to appoint CSM members, which the president shared with Parliament under the Constitution of 1946, was granted exclusively to the president, under Article 65. According to an enabling law, six of the CSM's nine members had to be judges, chosen from a list established by the bureau of the Court of Cassation. Another member had to be chosen from the Council of State (France's highest administrative court), and two other members were to be chosen from outside of the judiciary.

In addition, since 1958, the council has a significant role in the appointment of the judges of the Court of Cassation and of the chief judges of the Court of Appeal. The council proposes candidates for those posts, who are then appointed by the president. While technically the president could refuse to appoint a candidate proposed, this scenario remains more theoretical than real since the president will always in these cases be limited to appointing a candidate proposed by the council. Prior to 1993, all the remaining judicial appointments were made in accordance with a procedure whereby the minister of justice would propose the appointment, and the CSM had the authority to give non-binding advice with respect to this appointment.

[31] The first constitutional reference to *inamovabilité* is found in the Constitution of 1814, Article 58. More recently, it was mentioned in the Constitution of 1946, Article 84.

An amendment adopted in 1993 widened and reinforced the council's jurisdiction, enlarged its membership, and, for the first time, granted it an advisory role in both the nomination and discipline of the standing judges. In addition, it required the president to share his power to appoint the council members with Parliament. According to the amendment introduced in 1993, the council now proposes not only the appointments to the Court of Cassation and the chief judges of the Court of Appeal but also the appointments of the chief judges to the *tribunaux de grande instance*, the latter being France's major trial courts. Thus, all of these judges are nominated by the president based on the proposal of the council. In addition, the council's role was strengthened in this area in that its advice on review of the nominations by the minister of justice of the lower sitting judges became binding.

In addition, since the 1993 amendment to Article 65, the council includes

- The president
- The minister of justice
- Three prominent citizens who are neither judges nor members of Parliament, nominated by the president of the republic, the president of the National Assembly, and the president of the Senate, respectively
- One judge from the Council of State, who is to elected by the general assembly of the Council of State
- Five standing judges (prosecutors)
- Five sitting judges

The council is comprised of two separate sections—one with competence for judges, and one for public prosecutors. The section with competence for judges includes only one

prosecutor, and the section with competence for prosecutors includes only one judge.

The 10 judges and prosecutors are selected from within the judiciary itself in accordance with an enabling law, which was adopted in 1994. The law provides that these members are elected by their colleagues according to a complex procedure.[32]

Thus, as a result of the 1993 amendment, the executive's role in the appointment of all of the most important posts within the judiciary has been severely curtailed, and the minister of justice's role with respect to the remaining appointments has been subjected to an important control by the CSM. In addition, the 1993 amendment requires the president to share his power to appoint members of the CSM with the presidents of the National Assembly and Senate.

Moreover, the Law on the Status of the Magistracy (*Statut de la Magistrature*) establishes a further limitation on executive power. It provides for a particular composition of the CSM when it sits as a disciplinary body over sitting judges. It requires the president of the republic and the minister of justice to recuse themselves. In addition, Article 65 provides that these proceeding should be presided over by the chief justice of the Court of Cassation. Under the terms of that law, the power to initiate disciplinary proceedings belongs to the minister of justice, as well as, since a 2001 reform, to the chief judges of Courts of Appeal and of superior appeal tribunals.

There is no doubt that the reforms of 1993 were ground-breaking. They are evidence of France's preoccupation in the modern era with improving the independence of its judiciary.[33] There are several factors which contribute to this preoccupation. One factor is clearly the increased power of the judges associations,[34] which have increasingly and vociferously insisted on judicial independence. However, in the view of Antoine Garapon, a former judge and leader in this movement, the increasing power of the media, the phenomenon of *cohabitation*, and the influence of the European Union have all played a role as well.[35] The media in France, as in many other countries of the western world, has increasingly exposed the perceived injustices of French society and focused unprecedented attention on them. France is in its third period of *cohabitation*, and this has lead to vastly heightened scrutiny of all executive actions by executive officers from opposing political parties. It is, thus, much harder to keep executive attempts to influence judicial affairs away from the watchful eye of the political opposition. Finally, France's membership in the European Union and in the Council of Europe—through the influence of their respective courts, the European Court of Justice, and the European Court of Human Rights—has affected its judiciary and judicial

[32] The procedure is set out in the Law on the CSM of February 5, 1994 (L.94-100 Articles 1-4).

[33] While this report will confine itself to a discussion of the proposed reforms relating to judicial independence, the proposals also included major reforms of criminal procedure. These proposals were being presented in the form of amendments to existing laws. The package thus included a proposed constitutional amendment dealing exclusively with judicial independence and six amendments to statutes which covered both subjects.

[34] For the purposes of this study, the notion of "judges association" is defined broadly to refer to organizations formed by judges to, *inter alia*, represent their interests, promote their professional training, and protect their judicial independence. Such organizations include unions.

[35] "*Cohabitation*" is the term the French use for the situation where the president shares executive power with a prime minster and cabinet from the opposing political party. This phenomenon occurred for the first time in 1986.

independence. French lawyers and judges have been exposed to different, more reverent, attitudes toward the judiciary, paving the way for greater openness to judicial independence.

Consequently, it is not entirely surprising to observe that, even subsequent to the 1993 reforms, France was still not satisfied with the status of the independence of its judiciary. So intense was the controversy on this issue that Chirac appointed a commission in 1997 to study additional reforms to improve judicial independence. As a result of this inquiry, a whole new series of laws and yet another constitutional amendment were proposed and scheduled for a final vote in January 2000.

These proposals included three major areas of reform. First, the proposals, had they been adopted, would have expanded the composition of the CSM to include an additional seven members, all of whom were to be chosen from outside of the judiciary and the other political branches. The council would have retained its 10 members of the judiciary (five sitting judges and five standing judges), and the composition would have been increased to 23, including the president and the minister of justice.

Second, in addition to increasing the number of members external to the judiciary, the legislature, and the executive from three to 10, the proposed amendment made provisions about those 10 members—two were to be appointed by the president of the republic; two by the president of the National Assembly; two by the president of the Senate; and four by the vice president of the Council of State, the chief justice of the Court of Cassation, and the chief justice of the Court of Accounts, acting together. Third, the amendment provided a significant increase in the CSM's authority with respect to both the appointment and discipline of the standing judges.

However, on the eve of the vote on the constitutional amendment, which was scheduled for January 24, 2000, the debate concerning these reforms had become very politicized and unfortunately very partisan. The president, who was convinced that the reforms would need broad support beyond partisan considerations, postponed the vote and the reform was temporarily abandoned.

Nevertheless, authorities consider that the formulation of these proposals and the debate surrounding them have had a profound influence on the political climate as it relates to judicial independence. The public is now more informed and attuned to this issue than ever before, and judges are benefiting from a newfound respect for their independence in French society. Moreover, the power of the judges associations, which had always been behind the proposed reforms, has become part of the political landscape in France.

Thus, the evolution of the CSM and the factors promoting that evolution, which have been described in this section, together with the evolution of the oversight of the judicial profession, described in the next section, operate together to define the status of the independence of the judiciary in contemporary France.

3. The Judicial Career

In addition to the law dealing with the function, composition, and role of the CSM, there is also a considerable body of law in France relating to the judicial career, and much of that law seeks to protect judicial independence. Article 64 of the constitution provides for the protection of the independence of judges in the exercise of their profession through the principle of *inamovabilité*. According to this principle, judges are protected against political actions of removal and can only be removed following disciplinary proceedings or following formal proceedings in which they are determined to be unfit mentally or physically. This is a principle which is found in many other legal systems of

the world. The protection provided by the principle is reinforced in France by the fact that judges are appointed for life and, therefore, do not need to cultivate the support of any political or other force in order to assure their tenure. In addition, the Law on the Status of the Magistracy, which implements these constitutional provisions, supplements the protection by providing that no judge can be transferred or even promoted without his or her consent. This protection recognizes that even transfers which amount to a promotion can be motivated by political reactions to judicial decisions. Judges, therefore, are not required to submit to the kind of political manipulation that could underlie such action.

The law contains detailed rules concerning conflict of interest for judges. According to these rules, judges cannot serve in a jurisdiction where their spouse is either a senator or representative of the National Assembly. They must reside in the jurisdiction where they serve. They are not allowed to hold regional office, nor can they sit in a jurisdiction where they have held office or practiced law in the last five years. (The prohibition is only three years where they have served as a member of the European Parliament.) When judges decide to undertake a private activity inconsistent with these rules, they must leave the bench and inform the minister of justice of their activities. This obligation to inform the MOJ of their private activities continues for five years after they have left the bench.

Judges can sometimes obtain dispensation from these prohibitions if they obtain the permission of the chief judge of their jurisdiction, who must make a determination that the activity in question will not compromise either the dignity of the judge or his or her independence. They are allowed under the same conditions to teach in areas within their competence. They can engage in scientific, literary, or artistic endeavors without encountering any conflict of interest. Also, once they have served at least four years on the bench, they are authorized to take a kind of "leave of absence (the status is referred to as "*détachement*") and accept appointment within the executive branch of government. After having opted for that status, they must seek reentry into the judiciary if they want to serve as a judge again.

Otherwise, they have a non-derogable duty to refrain from participating in any political activity which could be seen as compromising the reserve and objectivity which is essential to their role, nor can they demonstrate any hostility to the democratic and republican form of government guaranteed by the constitution. The statute also contains a general prohibition against any conduct which can be deemed to contrary to the honor and probity which is required of judges or which could be seen as bringing discredit to the judiciary. In addition, they are duty bound to maintain the secrecy of their deliberations and are strictly forbidden from violating this strict rule of confidentiality.

Judges are also forbidden by these ethical rules from engaging in any activity which would hinder the functioning of the judiciary. This general prohibition raises the question of their right to strike and to unionize. With respect to the right to strike, authorities are in disagreement. It would appear to violate the express terms of the statute, but at the same time, the right to strike is a constitutional guarantee in the French system. For this reason, the question remains undecided. However, no one has challenged the right of judges to form professional associations, and, in fact, judges associations have been one of the main forces behind recent reforms designed to enhance guarantees of judicial independence. In addition, of course, freedom of association is also a constitutional guarantee in the French system.

The MOJ can initiate disciplinary proceeding against any judge for any violation of these

rules. The disciplinary proceedings are conducted by the CSM, and they can lead to disciplinary sanctions that can range from a simple reprimand recorded in a judge's file to removal from the bench along with the withholding of retirement benefits.

While judges are, on the one hand, prohibited from engaging in activities considered to be incompatible with their role, they are, on the other hand, immune from prosecution on the basis of any of their professional activities. They can nevertheless be prosecuted for offenses which they might commit in their private capacity. The state must generally provide them with protection against threats or attacks and must compensate them with a state pension in any situation where they are injured as a result of the exercise of their role.

Candidates can come to the judicial profession through different routes. They all must have the equivalent of four years of higher education beyond the *baccalauréat*. The majority of judges are recruited on the basis of national competitive examinations, which determine their right to enter into a three-year program of study at the *Ecole Nationale de la Magistrature* (National Magistrates' School). The curriculum includes a period of apprenticeship that requires the candidate to perform and be evaluated in each of the typical judicial settings—trial judge, investigating judge, appellate judge, etc. The apprenticeship in the courts is supervised and evaluated by the faculty at the school. Upon completion of this educational program, a jury determines whether a candidate for the judiciary is qualified for service in that profession. A list of candidates so qualified is maintained by the MOJ. Candidates are then eligible for appointment by the CSM as described in the previous section. (Decisions of ineligibility upon completion of study are rare.) The recruitment through this route is governed by Chapter II, Section I of the Law of the Status of the Magistracy.

However, Section II of Chapter II sets out the conditions for recruitment of judges based upon professional experience. Candidates recruited through this route must be at least 35 years of age and have at least seven years of experience that is considered to be relevant. (For example, those who have worked as court clerks for this period of time are expressly eligible.) As part of the legal reforms proposed for vote earlier this year, the minister of justice had proposed to amend the law so as to enlarge the class of those who would be eligible for recruitment through this route. The law has not as yet come before Parliament, and it is not likely that it will be presented at any time in the near future. (See the discussion in the previous section.) Candidates selected through this route must participate in a probationary training period of indeterminate length, which is supervised by the magistrates' school.

In addition, the law also provides that judges can be recruited from academia and from the *Ecole Nationale de l'Administration* for a non-renewable period of five years. In that case, these candidates decide to take a five-year break from their other career (those who come from the *Ecole Nationale de l'Administration* would be otherwise destined for a career in the executive branch). Their status is also referred to as "*détachement judiciaire*," and their candidacies are also supervised by a promotion committee whose role is described below. Those who come to the judiciary through this route must undergo six months of practical training, again supervised by the magistrates' school. The school provides continuing legal education for all judges throughout their career, regardless of how they were originally recruited.

The statute also provides a procedure for the evaluation of judges after they have been appointed to the bench. All judges are evaluated every two years by the chief judge of the Court of Appeals of their jurisdiction. The results of the evaluation must be communicated to them,

and they have the right to contest them. Files are kept on all of the judges by the MOJ. The entire judicial corps votes in secret ballot to create an electoral college composed of members from within their ranks, and the electoral college, in turn, selects the members of the promotion committee. Where a judge challenges the evaluation, the promotion committee conducts an investigation and writes a report to the file. Judges are given free access to their files, and it is illegal for the file to contain references to their religious, political, or union affiliations. In the exercise of their functions, the CSM and the promotion committee also have access, for disciplinary and promotion purposes, to the individual files of judges. Based upon this review of the judge's performance, the promotion committee compiles lists of judges who are eligible for promotion. Promotions of judges, whose names are on the list, are decided annually by the minister of justice and the promotion committee acting in concert.

In addition, quite apart from the disciplinary, evaluation, and promotion procedures discussed above, there exists the Judicial Inspection Service, which operates out of the MOJ. Members of this service inspect the functioning of the courts throughout France in order to insure that they are operating efficiently and in accordance with established standards. Members of this service, the chief judges of each jurisdiction and the chief prosecutors are empowered under Article 44 of the Law on the Status of the Magistracy to issue informal reprimands against individual judges without these reprimands leading to any sort of formal disciplinary proceeding. It is significant to note, however, that the director of the Judicial Inspection Service is a member of the promotion committee, so his or her knowledge of a judge's performance can be a factor in promotion considerations.

Finally, in connection with promotion, it should at least be mentioned that, since prosecutors are considered to be part of the judiciary, standing judges (prosecutors) can be assigned to posts as sitting judges and vice versa.

4. Recommendations

This section will review those aspects of the reforms discussed for their potential as models for the enhancement of judicial independence elsewhere. Potential reforms of those institutional guarantees of judicial independence relating to judicial councils will be discussed separately from those relating to the judicial career.

a. Judicial councils

The evolution of the refinements relating to the role, authority, and composition of the CSM in France reveals a concern with two potential evils with nefarious consequences for judicial independence. On the one hand, reforms have attempted to address the dangers of excessive executive influence over the appointment and discipline of judges. On the other hand, they have addressed the potential conflict of interest which can arise when the discipline and appointment of members of the judiciary are overseen by a CSM whose composition is dominated by members exclusively from within its ranks.

These reforms of the CSM suggest recommendations for reformers elsewhere. First, in order to reduce the opportunity for all inappropriate political influence over the judiciary, the power to appoint members of judicial councils should be shared by all three branches of government. Secondly, the judicial councils should retain the lion's share of the appointment power for all of the most important judicial posts, and the role of the executive in this process should be secondary.

In addition, a few miscellaneous observations, relating to the reform of the CSM, bear mention.

It is interesting to note that the proposed reforms would have required that the power to appoint members of the council be shared with the chief judge of the Court of Accounts. Traditionally, the power of appointment of members of independent institutions is shared by the chief judges of the State Council, the Court of Cassation, and the Court of Accounts. It should also be noted that the enabling law serves to limit inappropriate executive influence not only over the appointment of judges, but also over their discipline. It provides that, when the CSM acts as a disciplinary body, the minister of justice and the president of the republic must recuse themselves. This removes an opportunity for disciplining to be influenced by a desire to punish a judge for lack of political loyalty. For this reason, this institutional measure is also to be recommended, especially in those countries which follow the French tradition.

However, as noted above, the French have become concerned not only with inappropriate executive influence over the nomination and discipline of judges. They have also become concerned with the inappropriate influences which might result from the dominance of members of the judiciary on the CSM. Had it been adopted, it would have addressed the issue of judicial dominance on the CSM by providing a majority of non-magistrates. It would also have served to reduce the opportunity for any inappropriate political influence coming from the other branches as well. Moreover, since it required that the external members be chosen from outside of the executive, legislative, and judicial branches, it is clear that it would have provided for a significant involvement of civil society on the council. This latter feature, in particular, recommends itself as a potential model for a few reasons. First of all, it clearly addresses the concerns relating to judicial dominance, and secondly, it provides for an indirect way in which the judiciary can be held accountable to the society at large without affecting decisional independence.

b. Judicial career

The constitutional protection of *inamovabilité*, taken together with life tenure and the requirement of consent even for promotions, are all features that recommend themselves for adoption elsewhere. Apart from these recommendations, which are derived from this important constitutional guarantee, the following subjects, addressed by the Law on the Status of the Magistracy in France, suggest further recommendations for inclusion in similar statutes in other civil law countries:

Ethical rules. The overarching goals to be achieved in the establishment of a disciplinary code are relevant to any system, but the specifics of their implementation can end up being quite country specific. The Law on the Status of the Magistracy is the place where they should be found, and the provisions relating to this subject in France do attempt to ensure that judges will remain independent from any inappropriate personal, financial, and political influences. These should be the overarching goals to be achieved in any system.

The French law addresses one problem unique to that system but which may nevertheless be relevant in some other countries, namely the accumulation of several posts of professional responsibility in the public or private sector. To avoid the conflicts which can arise in this connection, the rules are quite specific in prohibiting judges from taking on almost any professional responsibility outside of the judiciary, including work in the private sector. However, an exception is made for educational activities and research related thereto. This exception is desirable in that judges ought to be encouraged to participate particularly in the education of their colleagues. Consequently, this exception is one which should be recommended in other systems as well.

The provision of the law thatgrants disciplining authorities wide discretion in determining

whether a judge has engaged in conduct which could be deemed as inhibiting the proper functioning of the judiciary could easily be subject to the criticism of overbreadth. Countries wanting to achieve the same goal might consider narrowing the focus of such provisions to include reference to specific behavior which would have the nefarious effect to be avoided. At a minimum, these provisions should specifically address the question of the judges' right to unionize and to strike, which is an issue not addressed in the French statute.

The right to unionize is of even greater importance than the right to strike since it is clear that the judges associations in France and elsewhere have been one of the preeminent forces behind judicial reform generally and behind reform relating to judicial independence in particular. In fact, the development of judges associations, in addition to being sanctioned by the law, should be encouraged by donor countries since it is clear that they have had a very positive effect in the countries where they have been allowed to exist.

The right to strike is admittedly more problematic and will, to a certain extent, be country-specific since there are differences with respect to the importance and even the existence of the right. Some French authorities have suggested that the right should be specifically provided for by a statute that would also assure the continued functioning of the essential elements of the judicial system. This approach could be recommended in other countries where it is feasible.

Recruitment. Some of the civil law countries which have followed the French model have adopted a system that allows only for internal recruitment of judges. Judges are recruited exclusively on the basis of competitive examinations and completion of certain educational requirements. Such a system operates generally to prohibit the recruitment of those who have distinguished themselves in legal practice and serves to construct a judiciary composed essentially of career bureaucrats. France has modified its system so that judges can now be recruited in both ways, although the majority of judges are still recruited on the basis of competitive exams and education at the *Ecole Nationale de la Magistrature.*

One of the statutory amendments proposed as part of the recent reforms discussed above would have widened the possibility of recruitment through the alternate route. The literature dealing with these methods of recruitment suggests that such a reform is desirable. The influx of professionals who have distinguished themselves in practice is one method of addressing the problem of ineffective and inefficient tenured bureaucrats—a problem which arises frequently as a result of recruitment through the traditional method. This observation would suggest that countries desiring to strengthen the independence, competence, and efficiency of their judges would do well to create two or three routes of judicial recruitment, allowing for both internal and external recruitment.

Education. The appropriate educational requirement for judges in a given system is yet another issue which is quite country-specific and depends largely on the resources available. In France, judges who are recruited through the traditional method discussed in the previous section must complete three years of education at a specialized magistrates' school. This kind of specialized judicial education has its advantages, particularly in civil law countries where the specialization of the judiciary is common. It ensures that the new members of the judiciary come to their posts with both the requisite substantive and practical knowledge.

The problem is that such an educational program is expensive and resource intensive, so that many countries will not be able to afford it.

However, it may be worthwhile to consider abridged versions of the French model that are within the means of the country. The clinical/ practical segment of the magistrates' school is one which recommends itself in particular since it provides the opportunity for recruitment of judges who have been professionally trained to practice their profession in accordance with the highest standards of practice.

At the very least, some form of continuing legal education for judges should be maintained. This education should be centered either at a magistrates' school as in France or in some judicial center where judges can be required to update their knowledge of the law so as to reduce the opportunity for decisions that can easily be challenged on appeal. This feature admittedly addresses the issue of judicial accountability more than it does the issue of judicial independence, but training in ethics as part of any version of these educational programs could serve to address the issue of judicial independence as well.

Promotion. Perhaps the most important features in the French system relating to promotion are the existence of a promotion or advancement committee and the official list for advancements. These features appear to be effective ways of keeping the promotion procedures impartial. They could certainly serve as models for consideration elsewhere. Another related feature of the French system which can and does serve as a model in certain other countries is the Judicial Inspection Service. This unit primarily serves the role of making judges accountable in their work, but, since the head of the Judicial Inspection Service is a member of the promotion committee, knowledge gained in the performance of the role of this service also plays a role in promotion considerations. This is a feature which could also serve as a model as a method of insuring both impartiality and accountability in promotion decisions.

There is an issue in connection with these recommendations that must also be taken into consideration. In France, the Judicial Inspection Service operates out of the MOJ, even though it is not under its direct control. While this does not seem to pose a problem in the context of France, this arrangement could create an opportunity for excessive executive interference in the affairs of the judiciary in developing countries where traditions and institutions are not so entrenched. Such interference could, in turn, compromise judicial independence. One suggestion as a remedy to this problem would be to make the Judicial Inspection Service answerable to the judicial council.

D. Judicial Independence in Italy A Critical Overview in a (Non-systematic) Comparative Perspective[36]

by Giuseppe Di Federico

I. Introduction

For those interested in judicial reform with a special concern for judicial independence, the Italian case might be of interest for the following reasons:

- Among the civil law countries with a consolidated democratic system, Italy is certainly the one where judicial independence has acquired the highest recognition both in terms of the amplitude of the law provisions formally intended for its protection and in terms of the way in which those provisions have been interpreted.
- The Italian case shows that when the value of judicial independence is pursued as an end in itself at the expense of other important values (e.g., accountability and guarantees of professional competency) a series of negative consequences ensues. In particular, Italy's experience shows that the very provisions intended to protect judicial independence, when carried too far may turn out to be self-defeating, i.e., detrimental to judicial independence.
- Italy is the only democratic country where public prosecutors enjoy the same guarantees of independence as judges.

In the following pages, I shall briefly describe how judicial independence is protected in the area of judicial personnel management (from recruitment to retirement). Special reference will be made to the structure and policies of the *Consiglio Superiore della Magistratura* (the Higher Council of the Magistracy, hereafter CSM). In particular, I shall briefly indicate how decisions are taken concerning some of the issues that bear crucial relevance for the protection of judicial independence (e.g., recruitment, career, extra-judicial activities, discipline, and salaries). Finally, I shall deal briefly with some relevant features of the role of the MOJ.

This article will address only the "ordinary judicial system," comprising around 92 percent of all Italian career magistrates. Ordinary justice in Italy deals with all criminal cases and the great majority of civil cases. In any case, the career magistrates of the other judicial systems (i.e., administrative courts and courts of accounts) do enjoy guarantees of independence similar to those of the magistrates of the courts of ordinary justice.[37] The Constitutional Court, composed of 15 members, operates within a fully autonomous, self-regulating structure

[36] This paper is based upon empirical research conducted over the past 35 years by the author, mainly with funding of the National Research Council of Italy. Bibliographical references have been kept to a minimum, almost exclusively limited to the literature in English. Most of the research results used in this writing are published in Italian and can be found in the web site: www.irsig.bo.cnr.it.

[37] There are, however, two aspects of the administrative justice system that have to be taken into account in assessing its independence. The first is that a minority of the judges of the higher court (*Consiglio di Stato*) are appointed by the executive; the second is that the judges of one of the sections of the *Consiglio di Stato* do not perform judicial functions temporarily, but have instead the official task of advising the executive on legal matters.

separate from the ordinary and administrative courts.[38]

Two caveats for the reader:

a) The term "magistrate" has a different meaning in different countries. In Italy as well as in France, it is used to include both judges and public prosecutors. In both countries they are jointly recruited and can move from one position to the other even recurrently in the course of their careers.[39]

b) When in this article I maintain that, on the basis of our research data, one aspect of the working of the judicial system derives from or is induced by another, I do not mean that there is a simple cause-effect relation between the two. What I mean is that our research data show that one of the two aspects (or changes introduced in that aspect) is certainly a major factor influencing the occurrence or characteristics of the other. For most of the relations described hereafter, I could suggest several other sources of influence—internal or external to the judicial system.

2. *The Higher Council of the Magistracy*

In order to protect judicial independence, the Italian constitution, enacted in 1948, provides that all decisions concerning judges and prosecutors from recruitment to retirement (e.g., promotions, transfers, discipline, and disability) be within the exclusive competence of a council composed prevalently of magistrates (i.e., judges and prosecutors) elected by their colleagues. More specifically, it provides that two thirds of the members must be magistrates and that one third of the members be elected by Parliament among law professors and lawyers with 15 years of professional experience. It further provides that the CSM be presided over by the president of the republic—*de facto* only a symbolic presidency—and include among its members the president of the Supreme Court of Cassation and the general prosecutor of cassation. The elected members of the judiciary are renewed *in toto* every four years. At present there are 33 members of the CSM.

The first CSM came into existence only in 1959 (11 years after the constitution's enactment). Since then, its role has progressively expanded far beyond that of managing judicial personnel. Its influence on the internal functioning of courts and prosecutor's offices is in many ways remarkable. The CSM has also acquired considerable influence on the decisions of the executive and legislative powers concerning all matters affecting the magistrates and the judicial system. The expansion of the CSM's role beyond the formal boundaries provided by the constitution has at times generated conflicts with the other powers, including the president of the republic.

[38] Their term of office is nine years: five members are appointed by the president of the republic, five are elected by the magistrates of the higher courts, and five are elected by Parliament with a qualified majority. Doubts related to the full independence of the judges of the Constitutional Court have been recently advanced in two respects: (a) with reference to their system of appointment, and in particular with respect to the powers of the president of the republic (whose term of office is seven years) to appoint in full autonomy one third of the judges; and (b) because immediately after leaving the Constitutional Court judges often undertake a political career in the ranks of one of the political parties or are appointed as ministers or heads of important public agencies. Proposals for reform have been recently advanced: they would prohibit for a number of years after the termination of judges' service their election to legislative assemblies or appointment in public agencies.

[39] In the United Kingdom and the United States the term "magistrate" is used instead, to indicate only judges having specific functions. In Spain it is used to indicate a specific level of the career of judges.

For reasons that will become clear, while considering the modifications in the career system, it is important to underline a specific aspect of the evolution of the CSM that concerns its composition. From 1959 to 1968 the higher ranks of the magistracy were greatly over-represented and were elected only by their peers. From 1968 no higher ranking magistrate can be elected to the CSM without the electoral support of the lower ranking magistrates. It is worth noting that no other higher council of the magistracy of continental Europe (i.e., in France, Portugal, and Spain) has such a prevalence of members elected by the magistrates, nor an electoral law that makes those members so prone to the corporate expectations of the lower ranks of the judiciary (see Table 1).

3. Recruitment

As in other countries of Continental Europe, in Italy the recruitment of career magistrates takes place, usually once a year, on the basis of national competitive examinations opened to law graduates of "good moral standing". The recruitment model is basically the same as that adopted for the entrance in the higher ranks of national ministerial bureaucracies.[40]

The CSM decides on the admission of the candidates to the competitions and appoints the examining commissions, which are presided over by a high ranking member of the judiciary, and are composed for the most part of magistrates and some university law professors. Previous professional experience is not required nor is it in any way evaluated in the process of selection. Applicants for the entrance examinations are selected on the basis of their general institutional knowledge of several branches of the law as tested by written and oral exams. Our research data show that the exams are far from "measuring" accurately the actual knowledge of the candidates. In civil law countries of western Europe, the recruitment of judges through public competitions is considered to be the best way to guarantee a non-partisan selection and, by the same token, also conducive to a better protection of judicial independence. In some of those countries, like Italy, it is the only system of recruitment of career judges; in others, like France and Spain, it is largely prevalent (in France, for example, around 20 percent of the career magistrates is recruited from amongst the legal or paralegal professions).

The great majority of the successful candidates enter the competition between the ages of 23 and 27. In the last decades the number of applicants for the entrance examination in the magistracy has increased enormously. Recurrently there are more than 10,000 applicants, and more than 5,000 of them actually show up for the written examinations. (The number of positions available are, on average, around 200 for each competition.) Our research data show that the increase in the number of candidates is due mainly to two causes: to the fact that salaries and career developments in the judiciary have become far more advantageous than those of the other sectors of public service; and due to the constant visibility given by the media to the role played by quite a few members of the judiciary in the last 35 years or so (mainly magistrates exercising investigative functions) in the "fight" against terrorism, organized crime, and corruption. Our data show that in the last 20 years there has been a constant increase in the number of newly recruited magistrates who desire to be assigned to investigative functions.

This model of selection—in Italy as well as in other continental European countries—is based on the assumption that the magistrates thus recruited will develop their professional

[40] G. Di Federico, "The Italian Judicial Profession and its Bureaucratic Setting," *The Judicial Review. The Law Journal of Scottish Universities*, 1976, pp. 40-55

competence and will be culturally socialized within the judicial structure where they are expected to remain—and indeed usually remain—for the rest of their working lives, ascending a career ladder whose steps are based on evaluations which in various ways take into account seniority and merit.

4. Initial Training and Continuing Education

The system of recruitment briefly described above bears implications for initial training and continuing education, which are quite different and more complex than those of the systems where recruitment occurs among experienced lawyers and is intended to fill a specific vacancy in a specific court. Instead in Italy, as well as in other continental European countries, young law graduates without previous professional experience are recruited to satisfy indistinctly the functional needs of the entire court system of the nation. Furthermore, in Italy as well as in France, they are also expected to satisfy the functional needs of prosecutors' offices. In other words, newly appointed magistrates are expected to fill indiscriminately the several kinds of vacancies existing at the lower level of jurisdiction throughout the country; these are in fact quite different from one another. In other words, these magistrates are expected to perform, depending on their assignment, a great variety of judicial functions that require rather different professional qualifications and training.

Thereafter, they may ask to be transferred from one court or prosecutor's office to another and, when promoted, be assigned to fill still different vacancies at the higher levels of jurisdiction. The task of providing adequate institutions to insure not only an effective initial training and a satisfactory continuing education but also specific programs for those who are transferred to a different judicial function, becomes in such a system quite complex. In several European countries (such as France and Spain) specialized schools with a permanent staff have been created in the last decades, not yet in Italy. The nature and content of programs of initial training and continuing education are decided from time to time by the CSM.

5. Career

Let us now consider briefly the evolution of the career system. In Italy as in all the other countries of civil law tradition having a similar system of recruitment (France, Spain, Germany, Portugal, etc.), recurrent evaluations of professional performance of the magistrates are provided for. They serve a variety of basic functions: first, to verify that the young magistrates have actually acquired the necessary professional competence, and thereafter to choose among them those that are most qualified to fill the vacancies at the higher levels of jurisdiction. Last but not least, they ensure that magistrates maintain their professional qualifications throughout their many years of service (usually 40-45) and until retirement (compulsory retirement age is now 72).

Traditionally and until the mid-1960s, seven evaluations of professional performance were found along the career ladder, but only two of them were highly competitive and selective (i.e., one in order to become a magistrate at the appellate level, and one to become a magistrate at the cassation level). Professional performance was evaluated by examining commissions composed of higher ranking magistrates on the basis of the written work of the candidates (opinions, pleadings, etc.).

The three successive steps of the career (representing a mere 1.18 percent of all positions available in the entire judicial structure) would as a rule be acquired, short of disability or maximum age retirement, on the basis of seniority in the rank of magistrate of cassation. The first of those three further career

steps ("magistrate of cassation with superior directive functions"), led to promotion to a limited number of positions such as those of president of appellate court, of appellate prosecutor general, of president of a section of the Court of Cassation, or of general advocate of cassation. The other two steps involved promotion to the top positions of prosecutor general of the Court of Cassation and first president of the Court of Cassation.[41]

Our research data show that prior to the mid-1960s approximately 55 percent of the magistrates would terminate their career at the age of 70 as appellate magistrate and that a good number of those would reach that level of career only during the very last years before retirement. During the late 1950s and early 1960s, this career system was widely criticized by a large majority of the magistrates (above all by those who had still to go through the very selective competitive steps of the career) on the ground that professional evaluations based on the written opinions of the candidates and placed in the hands of a limited number of higher ranking magistrates hindered (internal) judicial independence and induced among the lower ranking magistrates a diffused conformism with the judicial interpretations of a "conservative" judicial elite that had entered the judiciary (magistracy) during the fascist regime.

The laws regulating promotions were radically changed by Parliament between 1963 and 1973 under pressure of the CSM, in response to the powerful Association of Magistrates, and with the support of the leftist parties (most notably of the numerous parliamentarians of the Communist party). The new laws did require that evaluation of professional performance be maintained for all the steps of the existing career, but left to the CSM wide discretion in defining how to decide on the matter. By then the system for the election of the magistrates in the CSM had already been changed as described above, making two thirds of the council extremely responsive to the career expectations of their colleagues. The result has been that those new laws regulating the career of the magistrates have been interpreted by the CSM with such extreme self complacency as to amount to a *de facto* refusal to enforce any form of professional evaluation. So much so that promotions "for judicial merit" to the highest ranks are granted even to those magistrates that take prolonged leaves of absence to perform other activities in the executive or legislative branches of government.

At present and for the past 30 years, the evaluation of candidates having the minimum seniority requirements to compete for promotion at the different levels of the judicial hierarchy of ranks is no longer based either on written or oral exams, nor on the evaluation of their written judicial work, but on a "global" assessment of their judicial performance decided by the CSM. All candidates having the required seniority are, short of serious disciplinary or criminal violations, promoted. Those promoted in excess of the existing vacancies nevertheless acquire all the economic and symbolic advantages of the new rank, but remain *pro tempore* to exercise the lower judicial functions of their previous

[41] In the bureaucratic judiciaries, organizational roles are ordered according to a hierarchy of ranks to which differential degrees of material and psychological gratification are attached. There is a very specific relation between the hierarchy of ranks and the jurisdictional hierarchy of courts in the sense that judges promoted to a higher rank must be assigned to courts that are higher in the jurisdictional ladder, or else be assigned to lower jurisdictional courts and functions only in a supervisory capacity (e.g., of president of a lower court). This system still obtains in countries of western continental Europe (like France, Spain, Portugal, and Germany), but has been substantially altered in Italy.

rank.[42] In fact most of them will never acquire the higher judicial position formally connected with their new career ranks. In other words, the young law graduate by simply passing an entrance examination, where his or her general knowledge of various branches of the law is tested, can rest pretty much assured that the mere passing of time will lead him or her in 28 years and with no further checks of professional qualifications to reach the peak of the judicial career, which until the mid-1960s was reserved for only a little over one percent of the magistrates. While only some 100 magistrates reached the upper level of the judicial career until the mid-1960s (and they all occupied the high judicial positions formally connected to their high career rank), now there are constantly more than 2,500. (Of course, most of them still exercise their judicial functions at the lower levels of the jurisdictional ladder.[43])

As a rule, when substantive changes are introduced in one of the basic functional components of an organization, other changes—often unintended—automatically follow in their wake. Judicial organizations are no exception. The changes introduced in the career system brought about quite a few relevant modifications in the personnel management system of the magistrates (judges and prosecutors). We will mention here only those that most directly affect judicial independence (i.e., the radical lowering of guarantees concerning the professional qualifications of the magistrates, the higher discretion of the CSM in decisions that deeply affect the expectations of judges and prosecutors, and the surge of extra-judicial activities).

6. *Evaluation of Professional Qualifications and Independence*

In civil law countries that recruit young law graduates with no previous work experience—and that therefore have a system of judicial career—professional qualifications are guaranteed by recurrent, substantial evaluation of professional performance during the 40 to 45 years of service. Such a system still obtains in various forms in civil law countries of western Europe, such as France, Germany, and Spain. In Italy, however, those evaluations, although still required by the law, have been *de facto* eliminated by the CSM, whose composition and electoral system is such as to favor the corporate career expectations of the magistrates (see above). After recruitment, professional skills development, refinement, and updating are pretty much left to the initiative and goodwill of the young graduate for the entire period of his or her career. The modifications of the judicial career introduced in the 1960s and early 1970s in the name of better protecting judicial independence have, therefore, resulted in a radical lowering of the citizens' traditional guarantees with regard to the professional qualifications of their judges and prosecutors. It has often and rightly been stated that high standards of professional qualifications are not only a precondition for competent exercise of the judicial function, but also the best personal antidote against improper external influence on professional behavior. In this sense, one can correctly state that the radical lowering of the traditional guarantees of professional

[42] Thus one of the basic traditional characteristics of western continental judicial bureaucracies, summarily described above has been radically changed in Italy.

[43] In the early 1960s the law provided for 6,882 ordinary career magistrates, and the number of judicial or prosecutorial positions reserved for those that reached the top of the career was 102. The last increase in the number of magistrates provides for 9,109 of them (in addition there are around 10,000 honorary magistrates) and the number of positions reserved for those that have reached the top of the career is 112. This means that over 2,000 of those that have already been promoted to the highest ranks of the career still occupy judicial or prosecutorial positions of a lower level. It also means that most of them will never be assigned to a judicial or prosecutorial role corresponding to their high career rank

qualifications caused by the elimination of any substantial form of evaluation of professional performance during the 40 to 45 years of service has *per se* brought about also the substantial lowering of one of the main institutional guarantees of independence.

The recurrent, detailed evaluations of professional performance in the course of the life-long judicial career had, in many ways, great relevance in all decisions concerning transfers from one court to another and also for role assignment in the various court and prosecutor's offices. The *de facto* abolition of the detailed evaluations of professional performance, once recurrently made in written form during the course of the entire career, has enormously increased the discretion of the CSM in reaching its decisions in those matters—matters that are as a rule emotionally loaded for the magistrates who, from time to time, compete to be assigned to a more desirable location or to an important office. Our research data clearly show that in the course of the past 30 years Italian magistrates have progressively realized that their aspirations in those matters must of necessity be cultivated through personal ties with the decision-makers and that, no less important, their behavior should not contradict the expectations of the decision-makers. The few magistrates who, with their behavior or utterances, have patently ignored those expectations have seen their requests in those matters patently disregarded by the CSM.

In the managing of relations between the CSM and the magistrates, a special role is played by colleagues elected to the CSM in the electoral lists of the four factions of the National Association of Italian Magistrates (ANMI). For this very reason almost all magistrates become members both of the ANMI and one of its factions. To be a member in good standing of one of the factions of the ANMI might also be crucial in obtaining the needed support in another area where the decisional discretion of the CSM is, due also to the lack of a detailed code of conduct, quite high (i.e., in disciplinary proceedings).

7. Independence and Extra-judicial Activities

Extra-judicial activities are rather numerous in Italy—certainly more numerous and threatening for judicial independence and the proper working of the division of powers than in other countries having a long established democratic system. Extra-judicial activities performed on a full- or part-time basis by Italian magistrates in the last 30 years number in the tens of thousands. Just to give an idea of the extent of the phenomenon, let us first consider the type of activities to which the ordinary magistrates may be destined on a full-time basis (meanwhile they are placed on leave of absence by the CSM). I shall begin with those off-the-bench activities that bring the magistrates to operate more directly and visibly in partisan politics. Such a phenomenon was rather limited until the 1970s: at each national election just a few magistrates (2 or 3) were elected to Parliament. Since then, the phenomenon has constantly grown. In the general election of 1976, 12 magistrates were elected to Parliament, most of them as candidates of one of the two major parties, i.e., the Communist party and the Christian Democratic party. In the last national elections of 1996, 50 members of the ordinary magistracy participated in the electoral race as representatives of various parties, and 27 of them were elected (10 senators and 17 deputies). Two others have recently been elected to the European Parliament. In the last 10 years, two magistrates have been elected president of regions (another one was recently defeated for that very job); furthermore, in the same period we have had several magistrates/ministers, magistrates/undersecretaries of state, mayors of small and large cities, magistrates elected in the regional and municipal assemblies, and magistrates in charge of various branches of

local governments. In the early 1990s a member of the magistracy was also elected national secretary of a political party (the *Partito Social Democratico*). Other positions to which the magistrates are recurrently destined full-time are those needed to fill all the executive jobs at the Ministry of Justice (at present 136) and to serve in other ministries as heads of cabinet, heads of the secretarial units of ministers and undersecretaries, members of the legislative departments of various ministries, consultants to parliamentary commissions, consultants to European or other international organizations, and so on (altogether 248 as of March 2000). Then there are part-time extra-judicial activities. These include consultants to local and national governments, and study commissions and teaching appointments (918 such extra-judicial activities have been authorized by the Higher Council of the Magistracy in the last 13 months). Only recently another kind of extra-judicial activity, and a very lucrative one, i.e., arbitration, has been cancelled only for the ordinary magistrates (but not for those in the administrative courts).

The foreign observer will certainly be struck not only by the number and kinds of extra-judicial activities that are allowed in Italy but also by the confusion between the magistracy and the political class that ensues therefrom—a confusion that is far from fully revealed by merely considering the rather high number of magistrates who are active in party politics (in assemblies or executive agencies at the international, national, and local level) for at least two reasons. Firstly, the number of magistrates that entertain relations with the various political parties to obtain those very much sought after positions is far higher than that of those who are successful. Secondly, because a good many of the extra-judicial activities of lesser relevance are obtained under the more or less direct sponsorship of the various political parties. Recurrently they become—or are in any case sought and perceived by the magistrates as—intermediate steps for the acquisition of the political credit and party support needed for the attainment of more gratifying extra-judicial positions.
No less surprising for the foreigner is to learn that at the end of their mandate as party representatives (in the parliament, in the executive, etc.) the magistrates return to their judicial activities. It is even perfectly legitimate for them to judge a political leader of a party fiercely opposed to the one that the judges themselves had represented for many years in the immediate past.[44]

The possibility for Italian judges to play prominent roles as representatives of political parties—and thereafter go back to their judicial functions—or to acquire a vast array of extra-judicial activities that are bestowed upon them through the benevolence of external sources is certainly a very limited phenomenon in countries of Anglo-Saxon tradition. Apart from other important considerations (e.g., the adoption of detailed codes of judicial conduct regulating the matter and their concrete enforcement in the United States), the very structure of the judiciaries of those countries precludes the phenomenon of extra-judicial activities from assuming a dimension of any size. In those countries judges are, as a rule, recruited among experienced lawyers to fill a specific vacancy in a specific court. Their destination to other activities—and especially full-time activities—would immediately and

[44] The most evident case occurred November 2000 when a judge of the Court of Cassation, Pierluigi Onorato, who had serveed for many years an MP for the Communist party, wrote an opinion in which a notoriously anti-communist politician, Marcello Dell'Utri, was sentenced. It is certainly of interest to note that the opinion written by the former communist MP ruled that, in addition to other penalties, the anti-communist MP Dell'Utri be dismissed from his position as member of both the European and Italian Parliaments.

most visibly raise the question of the efficient functioning of their courts.[45]

The relation between courts and judges is rather different in most civil law countries. As we have already said, in Italy and other western continental European countries, magistrates are recruited, predominantly or exclusively, from among young inexperienced law graduates, just like any other corps of civil servants. Furthermore and no less important, they are recruited to satisfy indistinctly the functional needs of the entire network of the courts of the nation (in Italy as in France they are also expected to satisfy the functional needs of prosecutors' offices) and they are at each level of the career functionally interchangeable. It is quite normal that they—like other civil servants—be available for any functional need of other public institutions. So, when the magistrates obtain full-time functions other than the judicial ones, they are not formally taken away from a specific position in a specific court—as would be the case in common law countries—but instead they are taken indiscriminately from the entire corps of the magistracy and in case of need can be replaced by transferring to that judicial office either one of the newly recruited young magistrates or, in the case of a higher court, by transferring a magistrate already in service. In the latter case, however, the procedure and conditions under which the CSM can transfer a magistrate are strictly regulated by the law in order to respect another constitutional provision intended to protect judicial independence, i.e., the principle of "immovability."

The phenomenon of extra-judicial activities is quite common in countries where judges and prosecutors are recruited (jointly or separately) just like other civil servants serving in the various national bureaucracies. In fact the phenomenon of magistrate/parliamentarians is present, although in a much more limited form, also in France and Spain, where magistrates may also be assigned to full- or part-time service in other public agencies. The question thus arises: Why has the phenomenon of extra-judicial activities, and in particular of those that are more evidently political in nature, taken on far greater dimensions in Italy than in other countries of continental Europe, starting from the early 1970s?

The main causes of such a phenomenon are, once again, to be traced mainly to the two closely related changes that have occurred in the composition of the Higher Council of the Magistracy and in the career system—changes that have greatly differentiated, from the early 1970s, the career system of the Italian magistrates from those still obtaining, in various forms, in countries like France, Spain, Germany or Portugal. As pointed out above, since the 1970s promotion to the different levels of the judicial hierarchy of ranks is no longer based either on written or oral exams, nor on the evaluation of written judicial work, and promotions "for judicial merit" to the highest ranks are granted by the CSM even to those magistrates who take prolonged leaves of absence to perform other activities in the executive or legislative branches of government. This has opened up the possibility of acquiring rewarding extra-judicial appointments—be they part- or full-time—without any prejudice to the development of a full fledged judicial career,

[45] In this regard let me recall as an example that when U.S. President Truman appointed Justice Robert Jackson to the post of U.S. prosecutor at the Nuremberg War Crime Trials, Chief Justice Harlan Stone harshly and recurrently complained not only because that appointment endangered the credibility of the Supreme Court, but also because of the manifold negative consequences on the proper and efficient operation of the Supreme Court deriving from the protracted absence of one of its members.

and it continues to inspire an increasing number of magistrates.[46]

8. *Salaries and Independence*

Through a complex combination of judicial initiatives, judicial decisions and powerful pressures on Parliament, prosecutors, and judges obtained (in 1984) salaries, pensions, and retirement bonuses that are by far the highest in public service. It has furthermore been approved that the increases in their salaries, pensions, and substantial retirement bonuses be based on an automatic mechanism that year after year increases—to their advantage—the difference between their economic status and that of other sectors of the public service. These measures were, once again, requested, justified, and obtained as a means to further guarantee the independence of judges and prosecutors from possible, even indirect pressures from the legislative and/or executive branches of government. The very satisfactory level of salaries, retirement benefits, pensions, and automatic mechanisms for their future pay increases were also advocated to foster among magistrates the sense of security, present and future, that is thought to be a necessary prerequisite for an independent and detached exercise of the judicial ad prosecutorial functions.

9. *Independence and Efficiency*

Among the nations of the European Union, Italy has always received, year after year, by far the highest number of monetary sanctions for the violations of Article 6, Paragraph 1 of the European Convention on Human Rights, which requires that judicial proceedings be terminated in a reasonable time. Civil proceedings that last more than 10 years tend to be the rule rather than the exception. The number of criminal proceedings lasting 10 years and more are also numerous and increasing. (In 1998 alone the number of criminal proceedings that was terminated under the statute of limitation amounted to more than 130,000.) It seems reasonable to assume that various aspects of the Italian judicial system contribute to that unenviable distinction. In particular, two of them are intended to protect internal independence: (a) the elimination of any substantial form of professional evaluation in the course of the career; and (b) the continuing policies of the CSM aimed at minimizing the powers and means of supervision and coordination of the heads of courts and prosecutor's offices with regard to the work of the magistrates.

However much those two aspects of the Italian judicial system might be relevant for the very poor performance and inefficient working of the Italian courts and prosecutor's offices, others are

[46] Some of the promotions that were decided by the CSM in the first years of the 1970s eliminated any doubt and any residual restraint that the magistrates might have entertained on the matter and vividly portrayed to them the advantages of looking for and acquiring prestigious and lucrative extrajudicial appointments. Oscar Luigi Scalfaro—later to become president of the republic—and Brunetta Bucciarelli Ducci were among the very few magistrates that until then had been elected to Parliament. They were elected respectively in 1946 and 1948 when they were young magistrates at the bottom of the judicial career. They had then always been re-elected as MPs. Until the early 1970s they had not progressed in their judicial career. In 1973 they were promoted by the CSM retroactively "for judicial merit" step by step up to the top of the judicial career without having performed judicial functions for a single day in more than 25 years. The advantages for the two magistrates and for those that later followed in their footsteps were not only those of the acquisition of a socially prominent position, but also others of a less immaterial nature: until 1993 the members of the judiciary elected to Parliament would receive a double salary and a double pension, i.e., both those of an MP and those of a magistrate. At present they still receive, in due time, the additional pension, the additional exit bonus, and the many other fringe benefits that are granted to the former members of Parliament. Naturally I could proceed to illustrate also the nature and material advantages of many other extra-judicial activities of our magistrates, but it would take too long and certainly be beyond the scope of this article.

equally relevant. The lack of managerial skills places first: The heads of courts and prosecutor's offices, as well as the magistrates holding executive positions at the MOJ, are not chosen on the basis of their professional capacities in management, this not being within the realm of the legal culture. The same power structure of courts, prosecutor's offices, and MOJ is such as to keep all decisions concerning the operations of the judicial system exclusively in the hands of the magistrates. Our extended experience in consulting and experimenting in the field of court technologies clearly shows that any attempt to formally assign even a minimum of decisional autonomy to non-judicial personnel possessing the knowledge and professional skills needed to modernize court management has always been rejected in the name of judicial independence. However, this resistance to the introduction of modern managerial methods and skills in the courts may also be found in more or less radical form in countries other than Italy. This resistance seems to be an integral component of the judicial culture. In the course of my experiences and interviews with judges of "Latin Europe," for example, I have always had the very distinct impression that, even unwittingly, they firmly and emotionally believe that any organizational mechanism directed at stimulating and verifying their personal productivity is incompatible with the proper exercise of the judicial function and irremediably in conflict with their independence.

10. The Ministry of Justice and Independence

In many countries the MOJ's role is often suspected of representing an actual or potential threat to judicial independence. In the political systems of western continental Europe, the minister of justice is formally responsible before parliament for the proper functioning of the judicial system. *De facto* the actual role varies considerably from one country to another. It is, therefore, worth considering the minister's actual powers in Italy. The Italian constitution explicitly assigns to the minister of justice two tasks: (a) the organization and functioning of the services of the justice system, and (b) the prerogative of initiating disciplinary proceedings against magistrates. Like colleagues of other countries of western continental Europe, the Italian minister of justice is in charge of preparing and managing the budget of the entire judicial and jail system. He or she also has the responsibility for recruiting most of the non-judicial personnel of the courts and of the prosecutorial offices. (Once assigned to a court, non-judicial personnel are hierarchically subordinate only to the magistrate heading that court) Over 130 full-time magistrates are in charge of all the executive positions (high, intermediate, and low) at the MOJ, even of those executive positions in charge of very specialized technical decisions (e.g., construction and maintenance of courts and jails, or planning and implementation of modern technologies in the courts and prosecutor's offices). The investigations that the minister may need in order to promote disciplinary proceedings before the CSM are to be conducted exclusively by the magistrates of the ministry. However, in most cases the general prosecutor of the Court of Cassation initiates the disciplinary proceeding, and the investigations are then conducted by the magistrates of his or her office. The prosecutorial function in disciplinary matters is in any case reserved to the magistrates of the general procuracy. Worth noting is that for several decades the minister of justice has been quite reluctant to initiate disciplinary proceedings whenever there has been even the slightest possibility that his or her initiative might be criticized by his or her political opponents or by the ANMI as an attempt to intimidate the magistrates.

There is a widespread conviction among the magistrates—a conviction that has proven to be successful so far—that all the executive positions in the ministry must be strictly

maintained in their hands as a guarantee that the MOJ will not take initiatives detrimental to judicial and prosecutorial independence. Even when assigned by the CSM to serve at the MOJ, magistrates remain under the full authority of the CSM regarding matters of discipline, promotions, and future destinations or role assignments as magistrates. As a consequence, in conducting their activities at the ministry they are much more concerned with fulfilling the expectations of their professional association and of their colleagues who have been elected as members of the CSM than the expectations of the minister. The CSM has repeatedly shown its determination to disregard the requests or aspirations of those very few magistrates who did not conform to its expectations while serving at the MOJ.

Indeed, the role of the Italian minister of justice is much weaker than that of his colleagues in other countries of western continental Europe in many other respects as well. To illustrate this point, a summary comparison with the role of the French minister of justice might suffice, limited obviously to those aspects that are more closely related to judicial independence:

1. In Italy the CSM is self-activating for all its decisions except for those concerning discipline (for which the CSM acts as judge). In contrast, the section of the French CSM (See Table 1) that decides on the judges may, concerning most of its decisions, act only at the request of the minister of justice.

2. In Italy the minister of justice is not a member of the CSM. In France the minister of justice is the vice president of the CSM and presides over all the meetings except for those in which the presidential role is performed by the president of the French republic.

3. In Italy all of the activities related to initial and continuing education of the magistrates are fully in the hands of the CSM. In France the *École Nationale de la Magistrature* is connected to the MOJ and the minister himself chooses its director from among magistrates of his or her trust.

4. In Italy public prosecutors are totally independent of the minister of justice. All decisions concerning public prosecutors from recruitment to retirement are taken by the Italian CSM. In France prosecutors are hierarchically subordinated to the minister of justice, with regard to their promotions, transfers, role assignment, discipline, and so on. The section for prosecutors of the French CSM has only advisory powers. Furthermore the French MOJ has the responsibility to issue directives to the prosecutors in the area of criminal initiative and priorities. In Italy, in contrast, such policy matters are *de facto* totally in the hands of the prosecutors themselves.

In sum one can say that the powers of the minister of justice in France *vis-à-vis* the working of the network of courts and prosecutor's offices are recognized to be an integral part of the democratic system of constitutional checks and balances. In Italy, instead, the minister of justice's powers are not only far more limited from a formal point of view, but are also informally very much curtailed by the prominent role played by the magistrates in the day-to-day working of the ministry.

II. Concluding Remarks

One of the most visible evolutions of the modern democratic state is the increasing political

relevance of the judiciary.[47] The spread of legislation protecting a wide range of social and economic interests of the citizens has generated ever increasing occasions for them to resort to judges for protection of their rights. There are very few areas of vital interest for citizens that have remained untouched by judicial decisions.[48] Moreover, the dangerous evolution of criminal activities (from those in the metropolitan areas to those that have acquired an international dimension) has made judicial repression of crime ever more important. For this and other reasons the workload of the courts has increased considerably, and the work of judges has become far more complex. Such developments have, among other things, further increased the need for professional excellence, independence, efficiency, and accountability. These values, while all equally important for the proper working of the judicial system, are difficult to combine at the operational level.

Several lessons may be drawn from Italy's experience with judicial independence:

1. The relation between judicial independence and effective evaluation of professional qualifications in countries where judges are recruited for a specific judicial position from among experienced lawyers is different from that existing in countries where judges are recruited from among young graduates on the basis of their theoretical knowledge of the law. In the latter countries, the need to insure the development and refinement of professional skills can hardly be attained without evaluating, recurrently, professional performance on its merits in the course of a life-long service. At the same time, by doing so, those who are entrusted with the power to evaluate judicial performance might indirectly influence the judges under evaluation to conform to the (more or less well-perceived) expectations of the evaluators.[49] Neither should the guarantees of professional qualifications be sacrificed in the name of judicial independence (as in Italy), nor should the value of independence be sacrificed by too strict a control on the content of judicial decisions. One of the main functions assigned to the judicial councils of "Latin Europe" is certainly that of protecting both of those values conjointly. The composition of those councils and the ways in which their members are chosen (different from country to country, as shown in Table 1) seem to be relevant elements of their proper functioning.[50]

2. Professional excellence reinforces judicial independence and makes a judge less prone to external influence. This is certainly an additional reason to favor the creation of agencies for judges' initial and continuing education.

[47] C. Neal Tate and Torbjorn Vallinder (eds.). *The Global Expansion of Judicial Power*, New York University Press. 1995.

[48] This phenomenon is illustrated in many books and articles. See Lawrence M. Friedman, *Total Justice*, Russel Sage Foundation, New York 1985; Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism*, Dartmouth Publishing Co. Aldershot 1999.

[49] G. Di Federico, "The Italian Judicial Profession and its Bureaucratic Setting," *The Judicial Review, The Law Journal of Scottish Universities*, 1976, pp. 40-55

[50] The French Presidential Commission on Judicial Reforms appointed in 1997 (known as "Truche Commission") proposed that, in order to avoid the prevalence of corporate leanings, the majority of the council's members should not be magistrates. The reform of the Spanish Council of 1985 provided that all the 12 members representing the judges should no longer be elected by their colleagues but instead by Parliament.

3. In varying degrees and different ways, the MOJs of western continental Europe are conceived as part of the checks-and-balances mechanisms intended to insure court efficiency and accountability, and also to guard against the perils that the corporate leanings of a bureaucratically recruited judiciary, if left to itself, may result in the lowering of the guarantees of professional qualifications. The French MOJ is certainly intended to perform such a role. Complaints are sometimes voiced in various European countries that such a role of the MOJ may endanger judicial independence. It is difficult to say if, and to what extent, those complaints are substantiated by facts. However, a radical lowering of the powers of the minister of justice, such as that which has taken place in Italy, certainly does not seem to be, *per se* and without other institutional adjustments, the best solution to foster a proper equilibrium among the values of professional excellence, accountability, efficiency, and independence.

4. The Italian case also shows the importance of establishing a detailed code of judicial conduct to better protect the substance and image of judicial independence, and to provide an adequate "border maintenance" between the judiciary on the one hand and the other powers (legislative and executive) on the other. A detailed code of judicial conduct is not only important to avoid the possibility that, through the acceptance of extra-judicial appointments, participation in partisan activities, or improper behavior in or outside the court, the independence and impartiality (actual and/or perceived) of the judge might be compromised.[51] It is also a protection of judicial independence because a detailed code of ethics, by severely restricting the discretionary powers of those in charge of judicial discipline, relieves the judges from the fear that they could be sanctioned for the content of their judicial decisions.

5. Judicial discipline may prove more effective in strengthening judicial accountability when procedures are established to provide avenues of participation for the citizens.[52]

6. Organizational and technological modernization of the courts may be important in promoting a functional equilibrium among the values of independence, accountability, and efficiency by rendering fully transparent the inner workings of the court system, and less discretionary the evaluation of work performance.

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[51] A good model to be adapted to the local needs could be the code of judicial ethics of the American Bar Association. For an annotated presentation see J. M. Shaman, S. Lubet, J. J. Alfini, *Judicial Conduct and Ethics*, Michie Law Publishers, Charlottesville, VA. 1995. For the code adopted in Canada see Canadian Judicial Council, *Ethical Principles for Judges*, website www.cjc.ccm.gc.ca

[52] For the mechanisms that may be employed to link judicial accountability to the citizen's expectations, without encroaching on judicial independence, one may look at the experiences of the various judicial conduct organizations operating in various U.S. states. Such organizations permit participation in various ways: (a) by allowing the citizens to file their complaints; (b) by including citizens' representatives in the panels that promote investigations, conduct the hearings, and decide on minor sanctions; and (c) by informing the citizens who have filed complaints of the outcome of the disciplinary proceeding or of the reasons why their complaints could not be considered.

In this paper I have dealt with judicial independence with reference to the Italian judicial system where judges and prosecutors belong to the same corps and where, unlike other democratic countries, prosecutors enjoy the same guarantees of independence as the judges. However "independence" does not and cannot have the same meaning and implications when used with reference, respectively, to judges and prosecutors—due to the different functions that they are expected to perform. That is why in democratic countries the guarantees of independence for the judges are, as a rule, quite different from those that concern the prosecutors. To discuss such differences and to illustrate in detail the negative consequences that might occur for the proper functioning of the judicial system, as in Italy, when they are not properly taken into account would be complex and, in any case, outside the scope of this paper.[53] Suffice it here to recall that judicial independence is thought to be a necessary (though not sufficient) condition to insure some of the basic characteristics of the judge's role, i.e., his or her being a passive agent who impartially adjudicates a controversy, submitted to him or her by conflicting parties, after having given each party an equal chance to present the reasons in their favor. It is, therefore, necessary to create the best conditions to avoid that the judge's decisions be unduly influenced from within or without the judiciary. Furthermore, in a democratic system the same legitimacy of the judge's role depends not only on being impartial but also on appearing impartial and independent.

The functional characteristics of the prosecutors' role are rather different. Far from being passive agents, they play a role that is by its very nature essentially active. Actually their primary function is to initiate and conduct criminal action, to act as a party in judicial proceedings, and, in many countries including Italy, to supervise or direct the police during the investigative phase. Unlike the judge, the prosecutor is not supposed to be passive, neutral, or impartial in the judicial process.

The difference between the judge and the prosecutor with regard to internal independence is also quite evident. The efficient and effective performance of the prosecutor often requires that his or her activities be hierarchically coordinated with those of other members of his or her office or with prosecutors belonging to other prosecutors' offices. Obviously any such coordination regarding the substance of the judges' activities and decisions would be a clear violation of their independence. In other words, while it would certainly be a violation of judicial independence if the president of a court should authoritatively instruct the judges of his or her court on how to deal with and adjudicate the cases pending before each of them, the same behavior on the part of the head of a prosecutor's office would instead be considered legitimate and even necessary for the effective performance of the office, and regularly occurs in democratic countries, both in Europe and elsewhere.

Some of the main differences between judges and prosecutors with regard to internal independence are equally evident. In all countries the number of criminal violations is such that a good many of them cannot be effectively prosecuted. The definition of the priorities to be followed then becomes an integral and important part of the choices that need to be made both for the effective repression of criminal phenomena and to insure that all citizens be treated equally in relation to criminal

[53] For the negative consequences connected to a conception of prosecutorial independence as coterminous with judicial independence, see Giuseppe Di Federico, "Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective," *British Journal of Criminology*, Summer 1998, pp. 371-87.

law.[54] Due to the great political relevance of such choices, in most democratic countries they are in various ways, and with different degrees of transparency, defined within the democratic process, and they become in various ways binding for the prosecutors.[55] In this respect the external independence of prosecutors does not entail that they should not receive binding instructions of a general nature from without their corps and should not be held responsible for following those instructions, but rather that they should not receive and be bound to follow *ad hoc* non-transparent instructions with regard to specific cases, so as to avoid that such instructions be unduly used to influence the conduct (actively or by omission) of public prosecution for partisan or discriminating purposes.[56]

Before closing I must confess a constant feeling of uneasiness while writing this article, i.e., that it may be misunderstood or, worse, be used for purposes that may run against my own intentions and beliefs. Particularly so because this paper is destined also to serve as a reference for those that operate in countries where judicial independence is either disregarded or at an early stage of development. In no way does this paper underestimate the crucial importance of a fully independent judiciary for the proper functioning of a democratic community. However independence is an instrumental value and not an end in itself. It is primarily intended to create the most favorable conditions under which the judge may decide in an impartial way, *sine spe ac metu* (without fear or hope). And it is my firm conviction that those interested or actively engaged in judicial reforms should be made aware that measures adopted with the intention to promote judicial independence should not in any case gravely undermine other values equally important for the proper functioning of the judicial system, such as the guaranties of professional qualification and performance, short of generating—as in the Italian case—serious dysfunctional consequences.

[54] In some countries—for example England and the Netherlands—prosecutors are not only instructed on the priorities to be followed, but they are also provided with a list of cases for which prosecution is not in the public interest. For an analysis that deals with this and other aspects of the prosecutorial systems in England and Wales, Scotland, Holland and Germany, see Julia Fonda, *Public Prosecutors and Discretion: A Comparative Study*, Oxford University Press, Oxford 1995

[55] *ibidem* A French reform commission (*commission de reflection sur la justice)*, established in 1997 by Chirac, was officially asked, among other things, to explore the possibility of a new set-up in which public prosecution would no longer be subject to the MOJ. On this point the French reform commission, presided over by the president of the Court of Cassation, gave a clear cut answer: "...the judicial policies of a nation must, in a democracy, be maintained among the responsibility of the executive in the person of the minister of justice and, as a consequence it [the commission] has decided against total autonomy for public prosecution".

[56] For example, in 1993 the French Parliament approved a law (art. 3, Loi 93-2) that provides for the MOJ to give such instructions only in written form. In England, the attorney general is formally empowered to terminate criminal initiatives. In recent times such a power is *de facto* open to public scrutiny, has been used only on very rare occasions, and has not generated criticisms when used.

TABLE 1: Judicial Councils in France, Italy, Portugal, and Spain

	Italy*	France**	Spain***	Portugal****
No. of members	33	12	21	17
Presidency	President of the republic	President of the republic	President of the *Tribunal Supremo*	President of the *Tribunal Supremo*
***Ex officio* members**	President of the Supreme Court of Cassation General prosecutor of the Court of Cassation	Minister of justice (as vice president)		
Number of Members from Outside the Judiciary	**10** law professors or lawyers elected by Parliament with a qualified majority	**3** appointed members: 1 by the president of the republic 1 by the president of the Chamber of Deputies 1 by the president of the Senate	**8** Jurists elected by Parliament	**8** appointed members: 7 appointed by Parliament 1 appointed by the president of the republic
Number of Members of the Judiciary, Elected or Appointed	**20** Elected by their colleagues (†)	**7** elected members 1 judge of the *Conseil d'Etat* elected by his colleagues 5 judges and 1 prosecutor elected by their colleagues	**12** judges elected by Parliament	**7** judges elected by their colleagues **1** judge appointed by the president of the republic

**Consiglio Superiore della Magistratura* -
(†) As judges and prosecutors belong to the same corps and as the council decides on matters concerning both judges and prosecutors, the active and passive electorate coincide.
***Conseil Superieur de la Magistrature* : Judges and prosecutors belong to the same corps but there are two different sections of the council, one for the judges and one for the prosecutors. The section here represented decides on matters related to the judges
****Consejo General del Poder Judicial.*
*****Conselho Superior da Magistradura.* In addition, Portugal has also established a different council for prosecutors, i.e., the *Conselho Superior do Ministerio Publico*

E. Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective[57]

by Margaret Popkin

1. Introduction

The struggle for judicial independence in Latin America remains an ongoing process, but important developments have taken place in recent years. With the exception of Costa Rica, all the countries included in this study have recently undergone a process of democratic transition after the end of authoritarian rule or, in the case of El Salvador and Guatemala, following an internal armed conflict.[58] Not all of Latin America has moved in the same direction nor have all the steps taken yielded positive results. Moreover, new challenges to judicial independence have arisen in the form of massive crime waves, drug trafficking and the efforts to end it, and, in the case of Colombia, frequent threats against judges by the different parties to the armed conflict. Executive efforts to increase control over the judiciary have been undertaken in recent years in Argentina, Panama, and Peru, and concerns have been raised about potential executive intervention elsewhere. Despite the clouds on the horizon, there is substantial consensus that, in many countries throughout the region, judiciaries now have a greater degree of external independence—most notably from the executive and the military—than ever before.

a. Historical background

At the time of independence in Latin America, most countries chose European models for their constitutions that reflected the authoritarian structures then prevalent on the continent. Following revolutions, wars, and reforms in Europe, these authoritarian structures were substantially modified. Most of the Latin American countries, however, did not follow this course. Instead, executive domination remained the rule; the judiciary was a subsidiary branch, often under the overt control of the executive branch and charged with ensuring that nothing would disturb those with political or economic power. Judges were underpaid and lacking in prestige. In many countries, corruption was also pervasive. As a Dominican leader said in 1988, "Justice is a market where sentences are sold."[59]

[57] Most of the information about recent developments in different countries comes from the excellent papers prepared by the different country experts in response to a series of questions. The authors whose contributions are reflected in this paper are Victor Abramovich (Argentina); Eduardo Rodríguez (Bolivia); Juan Enrique Vargas and Mauricio Duce (Chile); Fernando Cruz Castro (Costa Rica); Eduardo Jorge Prats, Francisco Alvarez Valdez, Félix Olivares, and Victor José Castellanos (Dominican Republic); Francisco Díaz Rodríguez and Carlos Rafael Urquilla (El Salvador); Yolanda Pérez and Eleazar López (Guatemala); Jesús Martínez (Honduras); Jorge Molina Mendoza (Panamá); and Jorge Bogarín (Paraguay). The discussion was further enriched by the contributions of additional country experts who attended the July 2000 regional meeting in Guatemala.

[58] Argentina returned to civilian rule in 1983. Bolivia's military dictatorships ended in 1982 with the resumption of civilian rule. After 18 years of military rule, General Augusto Pinochet turned over the reins of government to his democratically elected successor, but only after making a series of constitutional changes designed to maintain his control over various aspects of government including the judiciary. Honduras ended a lengthy period of military domination in the early 1990s. The 1996 Guatemalan Peace Accords ended 36 years of armed conflict. The 1992 Salvadoran Peace Accords ended almost 12 years of armed conflict that followed decades of military rule. The December 1989 U.S. invasion of Panama ended 21 years of military rule. General Alfredo Stroessner's 35-year rule in Paraguay ended in 1989.

[59] Victor José Castellanos, report on judicial independence in the Dominican Republic, prepared for this study, July 2000, p. 5, citing a 1988 ILANUD study of the administration of criminal justice in the Dominican Republic.

The period of dictatorship and brutal repression that took place in many countries during the 1970s and 1980s was followed by an unprecedented decision to examine the institutional failings that had permitted such atrocities. Thus, first in Argentina, followed by Chile, El Salvador, Honduras, Haiti, and Guatemala, fact-finding bodies (usually known as "truth commissions") examined the history of human rights violations and the conduct of different state institutions and consistently found that the judiciary had failed to protect the citizenry from arbitrary detentions, torture, and official killings.

- Argentina's Truth Commission concluded that during the period when the military carried out massive disappearances "the judicial route became an almost non-operational recourse."

- According to Chile's Truth and Reconciliation Commission, in 1975, despite the notorious human rights situation then existing in Chile, the president of the Supreme Court attributed Chile's reputation for human rights abuses to "bad Chileans or foreigners with political interests."

- In El Salvador, the Truth Commission found that "[t]he judiciary was weakened as it fell victim to intimidation and the foundations were laid for its corruption; since it had never enjoyed genuine institutional independence from the legislative and executive branches, its ineffectiveness steadily increased until it became, through its inaction or its appalling submissiveness, a factor which contributed to the tragedy suffered by the country."

- The Honduran commissioner for human rights found that during the 1980s the judiciary routinely failed to conduct investigations or process habeas corpus petitions in cases of forced disappearances.

- The Historical Clarification Commission for Guatemala (CEH) concluded, "The justice system, non-existent in large areas of the country before the armed confrontation, was further weakened when the judicial branch submitted to the requirements of the dominant national security model. The CEH concludes that, by tolerating or participating directly in impunity, which concealed the most fundamental violations of human rights, the judiciary became functionally inoperative with respect to its role of protecting the individual from the state, and lost all credibility as guarantor of an effective legal system. This allowed impunity to become one of the most important mechanisms for generating and maintaining a climate of terror." The commission ascribed many of the shortcomings of the justice system to a lack of judicial independence.

The failure of the Central American judiciaries to protect human rights may have been less surprising than the abdication of the Argentine and Chilean courts, which were stronger institutions. Despite its corporate strength, a compromised judiciary that saw its role as defending the country from subversion and upholding national security did not—and in many cases could not—protect individuals from state abuses. The Chilean Supreme Court explicitly supported the military after its September 1973 coup against elected president Salvador Allende. Judges who were identified with the Allende government, some 10 percent

of the judiciary, were quickly purged.[60] Moreover, the highly authoritarian, vertical nature of Latin American judiciaries meant that the few judges who tried to exercise their independence and question state actions were quickly brought into line. This sorry history weakened whatever public legitimacy the judiciary might have enjoyed, regardless of its institutional strength.

In 1990, responding to the Supreme Court's role in permitting human rights violations under Augusto Pinochet's rule, Chile's new democratic government immediately sought to introduce reforms that would have created the National Justice Council and changed the composition and functioning of the Supreme Court. These proposals elicited a strong negative reaction from the judiciary as a whole, which saw them as a threat to its independence. The reforms were sharply criticized by the opposition; only the legislators from the governing party supported them. The second democratic government under President Eduardo Frei chose a different and far more successful strategy for justice sector reform. This renewed reform effort focused on criminal justice and sought consensus for reforms in the legal, judicial, and political spheres. The new strategy greatly increased the possibility for change, including for some reforms rejected earlier.[61]

b. Overview of principal challenges to judicial independence and impartiality

In recent years, as military leaders have for the most part receded from the scene, reforms have been introduced throughout the region to improve methods of judicial selection, enlarge and, in some cases, protect from political control the budget of the judiciary, increase judges' salaries, and establish or reform judicial career laws. In some countries, judicial councils have been formed or reformed to play a role in judicial selection and, to varying degrees, in judicial governance. Latin American countries are also facing the challenge of making judges accountable to ethical and professional standards without impinging on their independence.

These reform efforts have achieved some important advances, but they have also encountered a series of obstacles and limitations. Moreover, in a number of countries in the region, including Argentina, Guatemala, and Honduras, judges still find that those with political and economic power continue to wield or try to wield undue influence over their decisions. In Panama, despite the advances in judicial independence heralded by the end of military rule in 1989, a recent president sought to take control of the Supreme Court by creating a new Supreme Court chamber, which then required the appointment of three new Supreme Court justices. His successor, from an opposition party, dissolved the newly created chamber, thereby eliminating the positions of the three new justices. Even in El Salvador, which has significantly enhanced judicial independence in the wake of the peace accords, "the majority of the justices on the Supreme Court do not feel completely independent of political power, issuing sentences that in some cases limit the reach of law because of the possibility that the ruling might prove disturbing..."[62] Powerful political actors likewise expect that that the Supreme Court of Justice will not adopt resolutions contrary to their interests.

[60] Juan EnriqueVargas and Mauricio Duce, report on judicial independence in Chile, prepared for this study, July 2000, p. 2

[61] Vargas and Duce, p. 7.

[62] Francisco Díaz Rodríguez and Carlos Rafael Urquilla, report on judicial independence in El Salvador, prepared for this study, July 2000, p. 2.

Judges in Colombia and Guatemala still face serious threats of violence. In 1999, Guatemalan NGOs convinced the U.N. rapporteur on the independence of judges and lawyers to visit Guatemala and to investigate the threats to judicial independence reflected in the lack of progress in sensitive cases and the prevalence of threats against judges and prosecutors. The rapporteur found that concerns regarding threats, harassment, and intimidation of judges "are real" and concluded that the Supreme Court "failed in its duty to the judges concerned," having "never made a public statement decrying the threats, harassment and intimidation."[63] He made a return visit to Guatemala in May 2001 because of escalating attacks and threats against judges. Colombia, currently the only country in the region with a recognized armed conflict, also faces the very serious challenge of providing security to judges, prosecutors, and witnesses for crimes attributable to the military, paramilitary groups, drug traffickers, or guerrillas.

Judges do not enjoy job stability in many countries in the region, including some countries that claim to provide judicial tenure. While judicial salaries have improved markedly in most of the countries studied, they remain far too low to attract qualified professionals in others. In some countries, salaries have been greatly improved at the top of the judicial pyramid, but remain meager for lower court judges who carry out the bulk of the judiciary's work. Legal education is desperately in need of reform and, for the most part, has not kept pace with reform efforts. Donor coordination continues to pose problems. The press has little understanding of judicial independence and often undermines the judiciary by blaming it for the state's failure to control crime.

As Jorge Bogarín of Paraguay points out, the transition to democracy and the subsequent reforms in the justice sector are all very recent. Thus it is hardly surprising that no branch of government is yet able to meet citizens' expectations. A culture of corruption remains entrenched in the judiciary, among other institutions, and the judiciary is still seen as inefficient in a context of impunity. The Paraguayan judiciary, however, now includes a number of highly respected law professors and, for the first time, powerful politicians and military officers have faced prosecution.[64]

Resistance to reform arose from many sectors that prefer an easily controlled judiciary. "The Supreme Court of Justice has become a favorite target of those who find the rule of law to be a threat to their private interests. The Dominican political class, and especially the conservative sectors, do not yet accept that the state's use of power is subject to obedience to the constitution and the laws and that the judiciary has the duty and the capacity to control it."[65]

Supreme courts have themselves been reluctant to democratize the judiciary and recognize the need to allow each judge to decide the case before him or her based solely on his or her interpretation of the evidence and the applicable law. While supreme courts acknowledge that they are overburdened with administrative duties to the detriment of their adjudicative responsibilities, they have been resistant to reforms that would have them relinquish their

[63] Report of the U.N. Special Rapporteur on the Independence of Judges and Lawyers, Param Coomaraswamy, submitted in accordance with commission resolution 1999/31, Addendum: Report on the Mission to Guatemala. E/CN.4/2000/61/Add.1. Jan. 6, 2000, par. 142.

[64] Jorge Bogarín, report on judicial independence in Paraguay prepared for this study, Sept. 2000.

[65] Eduardo Jorge Prats, Francisco Alvarez Valdez, and Félix Olivares, report on judicial independence in the Domican Republic, prepared for this study, July 2000, p. 6.

administrative, disciplinary, or appointment power over the rest of the judiciary. This article looks at some of the reforms that have been undertaken to date in different countries in the region, how they came about, and—to the extent possible—their results.

Although different reforms are necessarily listed individually, it is critically important to keep in mind the intimate relation among different reforms designed to strengthen judicial independence and to combine and sequence reforms in ways that will maximize their potential impact. Thus training will have little impact if those trained cannot put what they have learned into practice without running afoul of the dictates of their superiors in the judicial hierarchy. Changing the membership of the Supreme Court will not resolve the problems of internal independence if the lower courts remain completely subject to the court's control. Similarly, at the same time that reforms are introduced to enhance judicial independence, judicial accountability must be kept in mind. Thus, if the judiciary is to have full control over its budget, mechanisms must be put into place to prevent waste and ensure transparency in the use of funds. As the country experts emphasized, ensuring judicial impartiality through, for example, criminal justice reforms that move toward a more adversarial system requires that prosecutors and defense counsel adequately fulfill their roles.

When considering the appropriateness of particular reforms, it is essential to remember that they cannot be considered in isolation and that, in all likelihood, additional reforms will be needed to make them effective. Because of the complexity of the reform process and the need to involve different justice sector institutions in developing and implementing reforms, it may be useful for donors to encourage the creation of inter-institutional judicial sector commissions with high-level representation from institutions such as the supreme court, the judicial council, the public ministry, the public defender's office, the human rights ombudsman, and the MOJ. Coordinating commissions can help coordinate reform efforts and also assist in donor coordination.

2. *Judicial Selection and Security of Tenure*

In recent years, most of the countries included in this study have developed new mechanisms for selecting justices for their supreme courts and have lengthened their terms of appointment, also ensuring that their terms no longer coincide with presidential elections. Many countries have moved to develop or improve merit-based systems for selecting lower court judges and enhance their job stability.

a. Judicial councils

Efforts to improve judicial selection procedures have, in a number of cases, included the establishment of judicial councils or other entities charged with recruiting, screening, and/or nominating candidates for the supreme courts, some or all of the lower courts, or both. Based on a European model designed to strengthen judicial independence, these institutions have widely varying compositions and mandates in different countries in the region. In terms of their role in the judicial selection process, the transparency with which they carry out their duties seems to be at least as important as the composition of the council.

In some countries, judicial councils are completely subsidiary to the supreme court. In others, they are partially or completely independent entities, with representation from other branches of government and/or the legal and academic communities. [Table 2 shows the composition and function of judicial councils that have been established in the countries included in this study; Table 3 shows the selection procedures for supreme court and

lower court judges in the different countries.] Some countries, such as Argentina, have both federal and provincial judicial councils. Some judicial councils, to varying degrees, play a role in judicial governance.

In practice, judicial councils have often reflected the same politicization they were designed to help reduce, created new bureaucracies, and generally failed to live up to expectations. Nonetheless, councils have helped to diversify the input into judicial selection and, in most cases, increased the likelihood that professional qualifications will be taken into account. While Venezuela's council has been abolished and there have been proposals to disband those in Colombia and Ecuador, other countries—including several of those examined in this study—are trying to establish or consolidate their councils and improve their effectiveness.

Costa Rica and, more recently, Guatemala have established councils that are simply administrative appendages of the supreme courts. These bodies play an important role in judicial recruitment and screening, as well as carrying out other responsibilities related to the administration of the judicial career. Recent constitutional reforms in Honduras call for the creation of a judicial council whose members will also be appointed by the Supreme Court.[66]

El Salvador's Judicial Council, initially dominated by the Supreme Court, was given greater independence from the court and increased responsibilities, based on constitutional reforms agreed to during the 1991 peace negotiations.[67] Under the most recent (1999) version of its law, the council has six members; none are drawn from the judiciary itself. Neither the executive nor the legislative branch is represented on the council, which is dominated by representatives of civil society (the academic community and legal profession). The council is involved in the selection process for both the Supreme Court and lower courts; it also carries out regular evaluations of judges and runs the Judicial Training School. While its independence may contribute to tensions with the judiciary, the current council has moved to improve its technical capacity and enhance the transparency of its actions.

Paraguay offers a mixed model: its recently established Judicial Council includes representatives of all three branches of government, as well as two lawyers admitted to practice and two professors from law faculties. The Paraguayan council is involved in the selection of Supreme Court justices and lower court judges. According to Jorge Bogarín, the new system represents a significant advance over the prior system of judicial appointment by the executive branch.

Other countries have established councils with a far more political composition. In the face of widespread criticism of the judiciary's lack of independence, the Dominican Republic established its Judicial Council headed by the country's president; its other members are the president of the Senate and another senator from an opposition political party; the president of the Chamber of Deputies and another deputy from a different political party; the president of the Supreme Court; and another Supreme Court justice selected by the entire court. Unlike the councils in the other countries included in this study, the Dominican council both screens candidates and ultimately selects new Supreme Court justices; it has no other functions.

Argentina's new Judicial Council appears to suffer from its highly political composition and

[66] INECIP, *Asociacionismo e Independencia Judicial en Centroamerica* (Guatemala, 2001), p. 53-54

[67] The Salvadoran Judicial Council was first included in the 1983 Constitution, but implementing legislation was not enacted until 1989. The council's implementing legislation has been rewritten twice since the peace accords, with the current law dating from January 1999.

bureaucratic structure. It has 20 members including the president of the Supreme Court, members of the federal judiciary, legislators, lawyers in federal practice, representatives of the scientific and academic communities, and one delegate of the executive. The Judicial Council was created in the framework of Argentina's federal judiciary to assist in the appointment and removal of federal judges, but has been slow in carrying out these duties.

- Argentina and Bolivia have enacted laws transferring judicial governance to their Judicial Councils. In Argentina, the Supreme Court rejected this reform as unconstitutional. The Bolivian council has assumed these responsibilities; the council is seen, however, as a huge new bureaucracy that does not seem to be particularly efficient.

b. Supreme courts: Selection procedures and tenure

Because of the hierarchical structure of Latin American judiciaries and the supreme court's role in judicial selection in many countries, improving the mechanisms for supreme court selection may be essential to other reforms aimed at increasing judicial independence. Changing supreme court selection mechanisms usually implies constitutional reforms, which require a certain degree of societal consensus about the need for change. The experiences of El Salvador and the Dominican Republic suggest, however, that the impact of such reforms can be relatively rapid and dramatic.

The procedures for selecting supreme court justices have improved markedly in a number of countries. Rather than an unfettered selection by the national congress or the executive for short terms that virtually coincided with presidential periods, most countries have moved to make the appointment process more transparent and to involve different sectors in it, whether through judicial councils or other mechanisms. Appointments are generally for longer terms, with some countries providing life tenure for supreme court justices.

Countries that have adopted a permanent career system for the ordinary judiciary may still provide only renewable terms for the supreme court. Linn Hammergren ascribes this difference to the "overtly political nature of the court's decisions and a consequent desire to keep it more in touch with changing values."[68] In some countries, such as Ecuador, vacancies on the Supreme Court are to be filled through "cooptation," with the court itself selecting its new members. While protecting the process from the political branches of government, this practice may perpetuate a conservative corporate mentality as supreme court justices tend to select others who share their views.

During the negotiations to end El Salvador's civil war, the parties to the negotiations—the Salvadoran government and the Farabundo Martí National Liberation Front guerrillas—included the justice system as one of the topics on the negotiating agenda. One of the achievements of the Salvadoran accords was an agreement to undertake constitutional reforms that changed the formula for electing Supreme Court justices, who formerly were elected for five-year terms by a simple majority of the legislature immediately after a new president took office. The new constitutional provisions called for nominations for Supreme Court justices to come from the newly reformed Judicial Council and from the results of an election carried out by the representative bar associations. Instead of five-year terms for the entire Supreme Court, justices now serve for staggered nine-year terms, with the election of

[68] Linn Hammergren, "The Judicial Career in Latin America: An Overview of Theory and Experience," (World Bank, LCSPR, June 1999); unpublished paper, on file with the author and with IFES.

one third of the court (five magistrates) every three years. Since the reform went into effect in 1994, each time that the legislature has appointed magistrates, it has also selected the new Supreme Court president. Two thirds of the deputies in the Legislative Assembly must agree on the selection of each justice.

Although the judiciary in El Salvador was thoroughly discredited during the war years for its abject failure to protect human rights, this kind of substantive constitutional change was only possible because of the peace process carried out under U.N. auspices. The first Supreme Court selected under the new formula (in 1994, more than two years after the peace accords had been signed) was selected on a far more pluralistic basis with greater attention to professional qualifications. Still, several highly qualified candidates were effectively vetoed under the new voting formula because they were perceived as being too close to one of the leading political parties. Choosing a candidate who would be acceptable to a sufficient spectrum of political parties often seemed to be the key consideration. The post-war Supreme Courts, while still subject to a range of criticisms, have demonstrated greater independence than their predecessors, on occasion striking down legislation and executive actions as unconstitutional.

In Paraguay and Bolivia, judicial councils provide lists of candidates to the legislature for appointment to the Supreme Court.

A new requirement in Chile that at least five members of the 21-member Supreme Court must come from outside the judicial career has not succeeded in breathing fresh air into the judiciary, according to Vargas and Duce. They note that the reform has been completely undermined because the Supreme Court itself selects the candidates and looks for those with the most affinity to the existing court. Large law firms now commonly become involved in the selection of judges and maintain close relations with judges or groups of judges. Based on slates of five candidates selected by the Supreme Court, the MOJ appoints Supreme Court justices, who must now also be confirmed by a two-thirds majority of the Chilean Senate. Chilean justices have permanent tenure, with mandatory retirement at the age of 75.

Until 1997, powerful economic interests and political parties in the Dominican Republic totally dominated the judiciary. The Senate designated judges by simply dividing positions along party lines and selecting judges based on party loyalty rather than professional capacity. In the wake of the fraudulent 1994 elections and ensuing political crisis, negotiations resulted in a constitutional reform that included basic principles to permit the establishment of an independent judiciary. As in El Salvador, the political opportunity for substantive constitutional reforms paved the way for significant advances in achieving judicial independence, including the creation of the Judicial Council to appoint Supreme Court justices.

The council in the Dominican Republic is responsible both for screening and appointing new members of the Supreme Court. During the council's first selection process in 1997, the country's president (who also presides over the council) was the only member of his political party on the council.[69] Because of his minority status, he opened up the process and sought the support of civil society. The council's implementing legislation established that any

[69] The seven members of the National Judiciary Council are the president, who presides over the council; the president of the Senate and another senator from an opposition political party; the president of the Chamber of Deputies and another deputy from a different political party; and the president of the Supreme Court and another Supreme Court justice selected by the entire court.

person or institution can propose candidates for positions on the Supreme Court and authorized the council to undertake evaluations of the candidates, including in public hearings. The Judicial Council's first selection process was characterized by broad citizen participation in presenting and objecting to candidates who were interviewed in public sessions. According to the Dominican Republic experts who contributed to this study, "The active participation of civil society, proposing and objecting to candidates, and the unprecedented television broadcast of the evaluation and final selection to the entire country permitted a selection that, although not completely free of political influences, was quite good." Given the highly political composition of the council, however, there is no guarantee that the next selection process will be as transparent.

In Argentina, despite reforms in the system of selecting other judges, Supreme Court justices are still proposed by the executive to the Senate, which must approve their nominations. During President Carlos Menem's administration, the number of justices on the Supreme Court was increased and the majority of the court's members had strong ties to the government. Former partners of the president's law firm, his personal friends, and even the former minister of justice were appointed as Supreme Court justices. The court, with this "automatic majority" could be relied on to validate controversial executive actions.[70]

In Panama, the selection process remains overtly political: the president nominates Supreme Court justices who must then be ratified by the legislature. In Honduras, criticism of the highly politicized judiciary has resulted in a constitutional amendment (ratified in April 2001) that requires the formation of a broad-based nominating board to propose candidates for the Supreme Court and lengthens justices' terms from four to seven years so that they will no longer coincide with presidential and congressional terms.

In Guatemala, civil society organizations have sought to make the selection process more transparent. When the U.N. special rapporteur on the independence of judges and lawyers visited Guatemala in 1999, he emphasized the urgency of improving the transparency of the selection process.[71] Guatemala relies on a postulation commission, comprised of a university rector, law school deans, representatives of the Lawyers Association, and members of the judiciary. This commission sends a list of 26 candidates to the Congress, which must appoint the 13 Supreme Court magistrates. A similar process is used in the selection of appellate magistrates. In late 1999, after the special rapporteur's visit and a civil society campaign setting forth criteria for the selection of justices, a Supreme Court selection process was undertaken for the first time since the 1996 peace accords and was carried out with a significantly greater degree of transparency and attention to professional qualifications.[72] Guatemala still limits the terms of all judges, including Supreme Court justices, to five years.[73] The U.N. special rapporteur concluded that five-year terms are too short to provide

[70] Victor Abramovich, report on judicial independence in Argentina, prepared for this study, July 2000, p. 2.

[71] See Report of the Special Rapporteur on the Independence of Judges and Lawyers, *supra* note 7, par. 61-63.

[72] See Gabriela Judith Vázquez Smerilli, *Independencia y Carrera Judicial en Guatemala*, Ideas y documentos para la democratización del Sistema de Justicia (Guatemala: Instituto de Estudios Comparados en Ciencias Penales, 2000), p. 43-46.

[73] A constitutional amendment that would have increased their terms to seven years was included in the package of constitutional reforms proposed in 1999; all of them failed to pass a May 1999 referendum.

justices and judges with the requisite security of tenure and recommended that these be expanded to 10-year terms.

As these examples illustrate, through varying formulas Latin Americas countries have sought to create more transparent systems for the nomination and appointment of supreme court justices. In most cases, the country experts consulted felt that these reforms had improved the transparency of the process, improved the quality of the court, and increased political pluralism in the selection process. Impressed with the recent experience of the Dominican Republic, some advocated a similar public evaluation process, followed by an immediate selection in order to diminish the influence of political and other extraneous influences. Because supreme courts are inherently political, an objective, purely merit-based selection process is generally neither feasible nor desirable. Nonetheless, it is important that political and professional criteria be discussed openly and publicly and that there be clear political responsibility for the actual appointment. Regardless of the particular model involved, selection methods should be transparent and based on objective criteria, with opportunity for input and comment from the legal profession and civil society in general.

c. *Lower court judges: Selection and tenure*

Traditionally in Latin America, the legislature, the executive, or the higher courts have named lower court judges on a largely political basis. In Paraguay, for example, the executive named judges for five-year periods, which coincided with presidential elections. Appointments and promotions depended entirely on the executive. Even reforms designed to create a system less vulnerable to political manipulation frequently maintained the same problems, sometimes through informal rules that divided judgeships among parties or factions or gave appointing authorities (e.g., Venezuela's judicial council) the right to a certain number of lower-level appointments. To move away from these arbitrary practices, countries have established judicial career structures in which judges are supposed to enter through a merit-based competitive process, often right out of law school, and work their way up, step by step, based on seniority and their relations with their superiors. The inherent drawback of this model is that, by promoting the development of a strong corporate identity, it breeds insularity and limits the independence of lower court judges, whose chances for promotion depend on their superiors.

Country experts who contributed to this study repeatedly emphasized the problems for judicial independence inherent in continuing hierarchical control of lower court judges by the supreme court. With judges beholden to, and often in fear of, their superiors in the judicial hierarchy, true judicial independence cannot be achieved. This means moving away from a conception of judicial power as something delegated by supreme court justices to their colleagues in the lower judicial echelons. As the Chilean experts emphasized, some reform efforts may have inadvertently reinforced these vertical structures by further concentrating disciplinary and administrative authority in its Supreme Court.

Recent reforms throughout the region have sought to establish or reform judicial career laws in order to provide for more transparent, merit-based selection systems. In many countries, candidates to serve as judges are now recruited and screened by some kind of committee or judicial council. The transparency of the selection process and the involvement of different sectors in it are more important than which entity is given appointment power.

Procedures for judicial selection. Efforts throughout the region to move away from judicial selection that depended on political

contacts and cronyism remain very much a work in progress. However, as described below, experts involved in this study noted significant improvements in the judges selected through new procedures in several countries, including Chile, El Salvador, and Paraguay. Judicial councils introduced in Argentina and Bolivia have moved slowly to fill vacant positions. Other countries, including Panama and Honduras, have yet to undertake or implement reforms necessary to yield significant changes.

Training programs for judicial candidates, merit-based selection, and transparent procedures. A 1994 reform in Chile created a sophisticated system for the selection of judges. The process now begins with a recruitment campaign to encourage candidacies for vacant positions. Candidates are then evaluated competitively based on their backgrounds, tests of their knowledge, and abilities as well as psychological tests. Finally, they are interviewed. Those who complete this stage successfully enter a training course at the new Judicial Academy, which lasts six months and is divided equally between seminars and temporary assignments to courts. The students receive scholarships for this program. The final stage is the actual selection of new judges by the MOJ. Those who have completed the academy receive preference over external competitors. Academy graduates are not obliged to seek judgeships, but, if they do not, they must reimburse the value of their scholarship.

According to Vargas and Duce, this new process has been carried out with an unprecedented transparency that has yielded very positive results. Good candidates have come forward to participate in the selection process, and those chosen appear objectively to be the best qualified. The training they have received in the courts has been eminently practical, but with sufficient time for reflection. Distinguished magistrates and academics have served in the training process. The vast majority of academy graduates have gone on to enter the judicial career. Most important, graduates say that they feel more independent, as they understand that selection was based on their own merits, through a competitive process, and not on friends or contacts.[74]

A somewhat similar process is followed in Guatemala based on the 1999 Judicial Career Law that requires the judiciary's Institutional Training Unit to evaluate candidates with tests and personal interviews. Those who rank highest may take a six-month training course. Successful course completion makes the candidate eligible to be named by the Supreme Court to positions in the judiciary. This training course has been criticized, however, for its methodological weaknesses, notably its attempt to overcome the deficiencies of five years of university training in six months, rather than focus on developing judicial aptitudes and capacity.[75]

The new Judicial Career Law in the Dominican Republic requires aspirants to successfully complete theoretical and practical training programs at the National Judiciary School. Those who have not completed the requisite training can only be named judges on a provisional basis. In November 2000, after considerable delay, the Supreme Court promulgated the required regulations for the judicial career and in April 2001, 454 judges were sworn in to the judicial career, having completed the requisite training and evaluation requirements.

[74] Vargas and Duce, p. 8.

[75] See interview with Yolanda Perez, cited in Fundacion Myrna Mac/Programa de Investigacion y Analisis, "Informe sobre el Grado de Cumplimiento de las Recomendaciones del Relator sobre Independencia de Jueces y Abogados," (2001), unpublished report on file with the author.

Nomination of candidates by independent judicial councils. In some countries, judicial councils that are not subsidiary to the supreme courts are tasked with nominating candidates for positions in the lower courts. Councils in Argentina and Bolivia have introduced merit-based recruitment and screening procedures. However, critics complain that, to date, the procedures have taken too long, leaving vacancies throughout the court systems.

The Argentine Federal Judicial Council assists in the appointment and removal of federal judges, preparing slates of three candidates to fill lower court judgeships. It selects new judges through public competitions, with juries designated to review the candidates for different openings and then send slates of three finalists to the council's plenary. Juries consist of a judge, a lawyer, and a law professor—all from different jurisdictions than the vacancy to be filled. This selection committee evaluates the candidate's background and reports the results of the personal interview and the written examination. The plenary can review this written material as well as assess the finalists in a public hearing to evaluate their aptitude, appropriateness, and democratic vocation. Any modification of the selection commission's resolutions must be adequately explained and publicized. The plenary must adopt its decision by a two-thirds majority of the members present; there is no appeal from this decision. Judicial appointments are indefinite, subject only to the requirement of "good conduct." The names of the candidates are to be made public, so that any objections to their candidacy can also be raised. "The challenge for the new system of appointment is not only that it be less politicized and more independent, but also quicker and more efficient than the old system, avoiding prolonged vacancies in the courts."[76] When the council began to function, 41 federal courts lacked judges; this number subsequently more than doubled. Faced with this growing number of vacancies, the government was considering the proposal of legislation that would permit temporary appointments.

In Bolivia, it took more than two years after the council's creation to fill the Supreme Court's vacancies and fill over 200 vacant or expired judgeships.[77] By August 2000, only 50 percent of all judges had been named under the new provisions.[78]

Whenever a judicial vacancy arises in El Salvador, the Supreme Court asks the council to provide slates of three candidates qualified for appointment. Until recently, however, the Supreme Court—without consulting with the judicial council—frequently transferred, promoted, or named to permanent positions judges who had temporary appointments. The council has the Technical Selection Unit (UTS), which maintains a register of eligible attorneys based on annual selection procedures, with continual updates. From this register, the UTS selects seven or eight of the best qualified candidates—based on such factors as academic qualifications, seniority, merit rating, experience, vocation, and aptitude—and forwards the names to the council as a whole. The council applies teh same factors in choosing three from this group and then forwards this list to the Supreme Court for its selection. In practice, the selection process has remained deficient. Until recently, inappropriate influence in the selection of candidates was common, including a pre-selection of candidates who were then accompanied by two names designed to

[76] V. Abramovich, p. 8.

[77] See Linn Hammergren, "The Judicial Career in Latin America," p. 10.

[78] Eduardo Rodriguez Veltze, information submitted as part of this study, Aug. 2000.

serve as "filling" and the suppression of negative information about candidates. Limited communication between the council and court about selection criteria has hampered efforts to improve the process. According to Francisco Díaz, the current council has taken steps to improve the selection process.[79]

Transitional measures to replace politically appointed judges. Recent constitutional reforms in the Dominican Republic gave the Supreme Court (instead of the Senate) authority to appoint judges. The reforms led to an attempt to replace most of the country's roughly 500 judges within a period of about one year. The Supreme Court justices chose to open the competition for these positions to all lawyers who met the statutory requirements, including sitting judges, and to submit all candidates to an evaluation before the entire Supreme Court in sessions open to the public. This system and the reality that some 3,000 candidates participated resulted in a rather superficial evaluation that consisted of asking each candidate some three or four questions. Given the need to renew the entire judiciary in a relatively short time and the lack of an established system for vetting potential judges, this minimal form of evaluation may have been a reasonable measure under the circumstances.

Judicial career laws subject to manipulation in practice. The existence of laws that establish procedures for selecting judges may not be reflected in the realities of judicial selection. For instance, in Honduras, despite having a judicial career law in effect, judicial appointments and transfers have routinely depended on arbitrary, political factors. The former president of the Supreme Court, who was delegated by the entire court, named, transferred, and dismissed judges, taking into account the political affiliation of the judge and the proportion of power acquired by the different political parties in the presidential elections. Although judges were appointed for an indefinite period, in practice they remained in office as long as the president of the Supreme Court or a particular justice of the Supreme Court determined that they should stay.[80] Initiatives currently under way to improve the transparency of judicial selection include the creation of a tribunal for selection of sentencing judges, which will be composed of representatives of the (appellate) judiciary, the bar association, and the national university's law school.[81]

In Panama, judges are appointed by their immediate superior in the judicial hierarchy. Thus, the full Supreme Court names the district judges who then name the circuit judges, who are charged with naming the municipal judges. Although candidates are selected through a competitive process, the naming bodies are presented with the entire list and are under no obligation to pick the best qualified, permitting arbitrary selection. The result is that the person chosen in Panama "owes and professes absolute and perpetual allegiance to the person or persons who selected him or her."[82]

Judges in Costa Rica are selected on a competitive merit basis. The Supreme Court must choose one of the three candidates who receive the highest ratings in the testing and evaluation process. Until 2000, the Supreme

[79] See Díaz and Urquilla, p. 6-7.

[80] Jesús Martínez, report on judicial independence in Honduras, prepared for this study, June 2000, p. 6.

[81] See INECIP, *Asociacionismo e Independencia Judicial en Centroamerica*, p. 34.

[82] Jorge Molina Mendoza, report on judicial independence in Panama, prepared for this study, June 2000, p. 3.

Court had expanded the size of the slates it received from the Judicial Council from three to as many as seven, thereby reserving itself a wider range of choice.[83] The court has also relied heavily on temporary judges, thus circumventing the statutory requirements and undercutting the notion of job stability. In 1999, more than 50 percent of the judges were reportedly appointed on a temporary basis.[84] This practice ended in 2001; the Supreme Court now selects judges from the three most highly rated candidates.

Tenure. While in many countries supreme court justices are appointed for specific terms, other judges are likely to be appointed for indefinite terms that are supposed to ensure job security as part of a judicial career. The reality is often quite different because higher courts have total disciplinary control that may be exercised for political or other arbitrary reasons. In Paraguay, judges must be confirmed twice after five-year terms before they enjoy tenure. The Paraguayan constitution establishes that judges cannot be removed from their positions, transferred, or demoted during the period for which they are named; even promotions require their consent. The constitution of Guatemala, however, still provides that judges are to be appointed for terms of only five years, which, in some cases, can be renewed.[85] The Latin American countries that provide secure tenure usually impose a mandatory retirement age for judges. For example, although the new career law in the Dominican Republic provides tenure for judges,[86] justices of the peace face mandatory retirement at 60, first instance judges at 65, appellate judges at 70, and Supreme Court justices at 75.

Moving away from appointments for short terms that coincide with presidential and congressional elections is clearly desirable. If selection procedures have been improved sufficiently, permanent tenure may be appropriate. In any case, providing judges with job security and protection against arbitrary non-ratification and involuntary transfer are key elements for enhancing judicial independence.

Conclusions and Recommendations. Purportedly objective, merit-based selection systems can, of course, be subject to manipulation. Some of the salient qualifications (e.g., integrity, dedication, and willingness to work hard) are not easily measurable, and opportunities for exercising influence may still abound. Critics maintain that requiring the appointing entity to select judges based on slates of nominees chosen by other entities merely leads those interested in obtaining positions as judges to curry favor and pledge loyalty to those in charge of putting together the lists and making the final selection, particularly in cases where appointments are for limited terms and re-appointment will be necessary.[87] Increasing job security could diminish the tendency for judges to feel that they must remain loyal to those who selected them. Some critics recommend simply requiring that the highest-scoring candidate in a merit-based selection be appointed.

[83] See Fernando Cruz Castro, report on judicial independence in Costa Rica, prepared for this study, July 2000.

[84] Francisco Javier Dall'Anese Ruiz, "Resumen sobre la Independencia Judicial Centroamericana," in Patricia Frances Baima, ed., *Libro Blanco sobre la Independencia del Poder Judicial y la Eficiacia de la Administración de Justicia en Centroamèrica*, (San José, Costa Rica 2000), p. 27.

[85] Constitution of the republic of Guatemala, Article 208.

[86] After a 1998 attempt to limit the interpretation of tenure guarantees in the new judicial career law, the Supreme Court upheld the broad principle of job security, "consolidating permanent tenure as the principal underpinning of judicial independence." Prats, Alvarez and Olivares, p. 3.

[87] See, e.g., Dall'Anese Ruiz, "Resumen sobre la Independencia Judicial Centroamericana," in *Libro Blanco* p. 26.

In any event, a transparent process, in which interested sectors have the opportunity to examine and comment on the qualifications of the candidates should increase the likelihood that professional qualifications will be considered. Appropriately designed mandatory training programs can be useful tools, although they may be prohibitively expensive. It is important to keep in mind that theoretically improved judicial selection methods do not always function optimally in practice, as they depend to a large extent on the willingness of the naming body to forsake purely political considerations and cronyism. While moving towards an objective, merit-based process is likely to constitute an improvement over the thoroughly arbitrary or politicized system it replaced, the results of initial reforms should be carefully monitored, and greater efforts should be made to share experiences with different models in this area, both within the region and outside.

It may be useful for donors to encourage systematic and serious studies of the effectiveness, efficiency, and impact of new methods of judicial selection and judicial careers in general. National and regional studies are needed in order to better understand how specific judicial career models actually operate, their deficiencies or vulnerabilities, and whether there are measures that could overcome these. Comparative studies could also explore different models for separating administrative responsibility for the judiciary from the jurisdictional role, in order to allow high courts to devote themselves to their judicial duties and to increase the internal independence of the judiciary.

3. Evaluations, Promotions, Transfers, and Discipline

Judicial evaluations may be carried out by the supreme court or its delegates, by a judge's immediate superior, or by a body independent of the judiciary such as a judicial council. Evaluations may be designed to monitor performance for disciplinary purposes or as an element in decisions about promotions. They can also be, but rarely are, used to detect weaknesses, promote improved performance, and provide incentives. The Supreme Court of the Dominican Republic, for example, has begun to maintain statistical information about the courts to design strategies to enhance court efficiency and evaluate judges. The Dominican experts suggest that it would be important also to review the number of decisions revoked by higher courts and the reasons for these revocations.

In most countries that seek to evaluate judicial performance, only quantitative factors are considered. It remains unclear whether qualitative evaluations are feasible or desirable. There is little consensus about how judges should be evaluated and by whom. Many countries do not have any systematic evaluation system. Reflecting their more political role and selection mechanisms, supreme courts are not included in evaluation systems and have separate disciplinary mechanisms.

International assistance can be helpful in the development or improvement of systems for monitoring and evaluating judicial performance and for disciplinary systems. Discussions aimed at clarifying the purposes of evaluations—e.g., to identify problems and help set priorities for training, or to contribute to decisions regarding promotions and discipline—may be helpful in determining the kind of monitoring and evaluations needed. Attention should also be given to determining who should carry out the evaluations and under what auspices.

a. Promotions

Many of the problems that have plagued the processes for appointing lower court judges have also compromised promotion processes; thus,

several of the reforms introduced into the selection process also apply, or should apply, to the process of promotion. One common deficiency has been the lack of notice to sitting judges of opportunities for promotion. Some countries have sought to remedy this situation. For instance, in Guatemala, new regulations require the council to (a) circulate a bulletin advising sitting judges of openings, (b) evaluate the professional accomplishments and conduct of those interested in promotions, and (c) determine their eligibility for a different level or category. Similarly, in the Dominican Republic, when a vacancy occurs in the judiciary, judges in positions immediately below are called on to compete for the position. Only when none of these judges is selected is the Supreme Court to turn to lawyers who meet the legal requirements for the position.

b. Disciplinary mechanisms and due process guarantees

Judicial discipline is usually handled by a different institution than routine evaluations, although in some countries evaluations may serve as a basis for discipline. Decisions to remove judges generally are handled by the entity responsible for appointments, while lesser forms of discipline may be imposed by a different body.

Many disciplinary mechanisms violate judges' rights to due process or interfere with their independence.[88] Disciplinary systems have frequently been used for political reasons or to punish independent judges who issue decisions contrary to the views of their superiors in the judicial hierarchy. Involuntary transfers, often to remote parts of the country, or even promotions without consent can be forms of discipline and maintaining hierarchical control.

To improve due process protections, Guatemala's new Judicial Career Law establishes that the Judicial Discipline Junta (under the Supreme Court) will be in charge of disciplinary actions, except for the removal of judges. The offenses that can lead to disciplinary action are now set forth in the law. The junta's initial resolution should be based on a hearing at which the judge's representative can be present, as well as the complainant, witness, and experts. This resolution can be appealed to the Judicial Council.

In Bolivia, responsibility for judicial oversight and discipline is now assigned to the independent Judicial Council, which does not provide due process guarantees to judges accused of malfeasance. According to Supreme Court Justice Eduardo Rodriguez, the council has failed to distinguish adequately between disciplinary and criminal proceedings. Without a system to resolve complaints against them quickly and effectively, judges become discouraged, sometimes deciding to leave their positions rather than defend themselves in prolonged disciplinary proceedings that can adversely affect their professional standing. Judges, particularly those in the district courts, have expressed concern about pressure from the council either because of largely unfounded complaints from unhappy litigants or for excesses in disciplinary control that tend to invade the judge's jurisdictional ambit.

In the Dominican Republic, the new Supreme Court's eagerness in disciplinary matters and a lack of regulations for judicial inspections led to automatic suspensions of judges accused of corruption—without any due process guarantees, raising concerns about the balance between independence and discipline. Indeed, the

[88] For instance, the president of the Constitutional Court of Guatemala informed the U.N. special rapporteur that, out of 35 petitions for *amparo* received from judges since 1986, 19 had been granted because the Constitutional Court found that the judges had not been given the opportunity to defend themselves. Coomaraswamy report, par. 99.

Dominican experts from the NGO sector note that many sanctions seem to be based on ideological criteria, with judges sanctioned who have granted provisional release on bond or writs of habeas corpus.[89] One positive step taken is that transfers and promotions now require the consent of the judge to avoid past practices of sending judges to faraway provinces as punishment.

c. *What body is responsible for judicial evaluation and discipline?*

The constitution of Paraguay provides for a jury for judicial disciplinary proceedings made up of two Supreme Court justices, two members of the Judicial Council, two senators, and two deputies who must be lawyers. This recently formed entity has already received a substantial number of complaints that have led to the removal of judges found to have been involved in corruption, crimes, or poor performance of their duties.

Reforms in El Salvador have sought to remove responsibility for evaluating judges from the Supreme Court. Under the current system, the Judicial Council carries out periodic evaluations of all judges' administration of their courts, including compliance with time limits, and can recommend the suspension or removal of those whose performance is found to be unsatisfactory. The Supreme Court retains the power to impose discipline, relying on its Judicial Investigation Unit, which does not necessarily use the same criteria as the council. This somewhat overlapping system has resulted in inefficiencies and has been the subject of significant criticism. The Supreme Court does not necessarily act on the council's disciplinary recommendations; when it does, it initiates its own investigation and, depending on the results of this process, decides whether or not to impose a sanction. In an attempt to institute greater transparency, the most recent version of the Judicial Council's law requires that its evaluations be shown to the individuals evaluated.

In its first year (1999-2000), Argentina's new Judicial Council carried out four impeachment proceedings, which led to the removal of two judges, the resignation of another during the proceedings, and the restoration of a fourth judge to his tribunal because the accusation could not be substantiated. In August 2000, 77 cases remained under investigation; 12 of which were considered extremely important, and 108 had been dismissed following preliminary studies.[90] Although the council is still in its formative period, it has been criticized for moving slowly and because some members of the council are not regarded as sufficiently independent. Two of the senators who serve on the council are currently under investigation in a corruption scandal themselves. Council members have been inclined to protect judges loyal to the former government and, overall, little has been done to clean out the judiciary.[91]

Chile recently reformed its system for evaluating judges and judicial employees and developed a system that seems to address many key concerns. Previously, the Supreme Court had reserved the right to evaluate all judges, thereby accentuating its control over the entire judiciary. The reform established that the evaluation should be done by the immediate superior of a judge, as the person most familiar with the judge's actions. Criteria for evaluations have been specified, and a file has been established for each judge so that his or her background can be taken into account during the annual

[89] Prats, Alvarez and Olivares, p. 16.

[90] Abramovich, p. 7.

[91] Additional information from V. Abramovich, Oct. 13, 2000.

evaluation. The views of those who use the system are now taken into consideration through mechanisms that allow them to reach the evaluating body in a timely fashion. The old system did not effectively distinguish among judges; more than 95 percent of them received top ratings. Instead, it served as a means to punish some judges through an expedited system with fewer guarantees than the disciplinary system. In addition to expanding the number of rankings and the different aspects to be evaluated, judges are now given information about their different rankings, the reasons for these, and the aspects that need improvement in the eyes of the evaluators. The reforms also established a new right to appeal the findings of the evaluators. To give the evaluations more importance, a direct link was established between evaluations and promotions. Thus, a better-evaluated judge receives preference over a less-well evaluated one.

Despite all these well-intentioned reforms, the evaluation system remains arbitrary. Problems with the system have led to the growth of a movement that urges an end to the evaluation of judges. On the one hand, proponents of abolishing evaluations argue that the judicial role is not one that lends itself to objective evaluation. A more serious objection is that the evaluation system inevitably impinges on judicial independence. According to this view, the evaluations have no other goal than to reward those individuals who identify with the organization's culture and redirect those who are not in line with it.[92]

Assistance should focus on making disciplinary systems more effective, fair, and transparent.[93] A key step is to remove the handling of complaints and discipline (though not necessarily evaluation) from immediate superiors. An operationally independent office should handle these matters, whether it is located within the judiciary, the judicial council, or elsewhere. Citizen education about the role and responsibilities of judges should include information about how to lodge complaints when judges fail to fulfill their duties. At the same time, steps should be taken to ensure that judges are protected from frivolous or unfair attacks by unhappy litigants who seek to use the disciplinary system as an alternative appellate process or simply for revenge.

d. Supreme court disciplinary proceedings

Disciplinary proceedings against supreme court justices are usually carried out by the supreme court itself—raising questions about the impartiality of the disciplinary body—or by the legislature through impeachment proceedings.

The Supreme Court of Costa Rica investigates reported misdeeds by its members. The suspension or revocation of the appointment of a Supreme Court justice requires a two-thirds majority vote of the 22 members of the court. The Supreme Court cannot directly revoke the appointment of a sitting justice, but can forward its findings to the Legislative Assembly. As Fernando Cruz points out, this self-evaluation by members of the same tribunal does little to ensure transparency, impartiality, or accountability.

Like its Costa Rican counterpart, the Dominican Republic's Supreme Court judges its own members when they are accused of misdeeds. The Dominican experts emphasized the need to create a more impartial system for judging Supreme Court justices, while avoiding the risk of subjecting them to political persecution for their actions.

Chile's legislature has the power to bring "constitutional accusations" or impeachment proceedings against members of the Supreme

[92] Vargas and Duce, p. 11.
[93] See Hammergren, p. 31.

Court for serious dereliction of duties. Since the restoration of democracy, five impeachment proceedings have been brought, one of which was successful. While these cases have promoted discussion of the need for judicial independence, the quantity of cases also suggests that impeachment proceedings may be a recourse for sectors unhappy with judicial rulings.

4. Ethics

The experts involved in this study emphasized the need to find ways to instill and enforce judicial ethics. Many countries do not have a code of ethics for judges, although such codes are currently under consideration in a number of countries. Several of the experts suggested that donors should encourage the development of ethics codes for the judiciary. In this area, the United States can provide a number of useful examples. Experts at the Guatemala meeting suggested that appropriate training on ethical issues could be very helpful.

In some countries, special bodies have been established to address alleged ethical violations. In Panama, an attempt to establish a special body for this purpose outside the judiciary was rejected as unconstitutional by the Supreme Court as an unjustified alteration of the constitutionally established vertical control by the hierarchical superiors of judges. This council included the president of the Supreme Court, the presidents of the Supreme Court's different chambers, the attorney general, the state counsel (*procurador de la administración*), and the president of the National Lawyers' Association.

In Chile, where judicial corruption has reportedly increased in recent years, and a Supreme Court justice was removed from office after being accused of corruption, the Supreme Court decided to create the Commission of Ethics for the Judiciary, made up of five of its members. This commission has imposed sanctions on judges involved in corruption cases and initiated the process that culminated in the recent removal of a well-respected judge on Santiago's appellate court. Referring to this case, the president of the Supreme Court has made it clear that corrupt practices will not be tolerated within the judiciary. It is too soon to say whether this public pronouncement of zero tolerance and the court's action in this case will help to limit corruption. The ethics commission is also considering the creation of a judicial ethics code, which would be important in clarifying the unacceptability of certain conduct (ranging from inappropriate, not transparent, or actually corrupt) that has long been tolerated inside the judiciary. Vargas and Duce suggest that one problem with the Supreme Court's anti-corruption initiative is that, by not including any lower court judges, it reinforces the hierarchical control of the judiciary, even though corruption actually afflicts all levels of the judiciary.[94]

Some potential ethics problems can be avoided by improving the transparency and other aspects of the selection process. The Dominican Republic's new Supreme Court made a notable effort to select judges whose career reflected moral and professional rectitude. The court has also made it clear that it would not tolerate corrupt actions by judges or other personnel in their courts. An incipient but efficient system of judicial inspection has permitted the detection and sanction of occasional cases of corruption.

Requiring explicitly grounded judicial decisions is an important tool in avoiding corruption. Decisions that demonstrate the necessary correlation among the evidence, the arguments, the legal basis, and the ruling are less likely to be the product of outside influences.
The Argentine contributor to this study has suggested that knowing who the justices are and what they think about important societal issues,

[94] Vargas and Duce, p. 27.

based on an analysis and statistical breakdown of their decisions, would contribute enormously to making the justices accountable for their decisions. He noted the positive precedent of U.S. press coverage of the Supreme Court, including stories about decisions and the court's composition (often warranting front page coverage), analyses about the significance of the Supreme Court's decisions, and statistics about the conformation of its majorities after each session. Well-respected NGOs should also be encouraged to monitor the actions of the judiciary and related institutions (e.g., judicial councils).

Other potential tools include public access to information about the judiciary, including judicial decisions (with appropriate exceptions to protect legitimate privacy interests), the judiciary's expenses, its use of its budget, the personal background of judges, statistical information, and sworn disclosures of judges' assets and incomes—although the manner in which this is done needs to be balanced against concerns about the heightened risk of kidnapping or other criminal targeting of judges if full public disclosure is required. While some experts in Latin America maintain that delving into a judge's finances and personal life impinges on judicial independence, others believe that the U.S. system that requires judges to make full financial disclosures to avoid conflicts of interest or even the appearance of such conflicts—is a necessary, if unpleasant, requirement.

5. Training

Lack of adequate training makes judges depend on their superiors, as they seek to avoid having their decisions overturned. Inadequate training produces insecurity, which leads to fear of public censure in the media and limits creativity. A number of experts emphasized that training should be—and rarely is—designed to change the attitudes of judges. In large part, this means educating judges about the importance of their role in society.

According to Honduran expert Jesús Martínez, "The most effective training to develop independent thinking in judges would be training that is not strictly academic or designed to consolidate their theoretical and practical knowledge—although that is indispensable—but training that is oriented towards the character, ethics, and conviction of a judge and the judicial role in society. This kind of program should precede any training programs to increase knowledge of the laws and their practical application, and before taking on judicial responsibilities."[95]

a. Continuing education

In Chile, the new Judicial Academy provides continuing education for judges. The workshops are carried out by different entities based on bids that set forth the content, methodology, materials, and academic level of the instructors. The methodology must be an active one; lectures are not acceptable. Judges and judicial employees are encouraged to enroll in these workshops; to be placed on the annual honor roll, a key factor in determining promotions, a judge must have taken at least one of these courses. Although the academy has received positive evaluations, its impact remains limited because there is little connection between its training activities and judicial policies.

In the Dominican Republic, the National Judiciary School's training programs have strengthened judicial independence by giving judges the necessary tools to analyze cases in depth from a legal and social perspective and to provide a basis for their decisions. The judiciary school has sought to establish cooperative

[95] Jesús Martínez, p. 16-17.

relations with other countries in Latin America. According to the Dominican experts, the school needs to promote training programs that help judges to resolve new issues and become sufficiently familiar with principles of law and human rights so that they can apply them in all the cases they face. Due to an inadequate system of legal education, the school also needs to help judges overcome the gaps in their education.

The experts involved in this study criticized training programs in a number of countries for their lack of impact on judicial practices, often because other reforms needed to be implemented to create the conditions in which the lessons of the training program could be applied. The results of training programs have been limited by turnover within the judiciary, failure to carry out essential reforms that would change judicial practices, and entrenched attitudes. Often those receiving training are unable to take advantage of what they have learned without institutional restructuring, access to information, appropriate equipment, etc. In some cases, donors have not maintained their training efforts for sufficient time or with sufficient continuity to achieve results. The judicial training schools that have been established throughout the region vary considerably in quality.[96]

The experts concurred that training remains essential, but, in general, needs to be better designed and focused, realistically coordinated with other reforms, and reinforced with more follow-up, policy reforms, and incentives—and possibilities—for applying lessons in practice. Moreover, training should explicitly address the role of judges and judicial ethics. The Guatemala regional meeting concluded that judicial independence should be the backbone of a strategic training plan. Participants emphasized that training should extend to all personnel (not just judges) at all levels. Training for those entering the judicial career should be designed differently from training for existing personnel. Adult education methods should be used: workshops, seminars, practical exercises, laboratories, and clinics. The trainers should be carefully selected and training plans carefully designed based on realistic training goals.

b. Law school education

A number of the experts involved in this study emphasized that deficient professional (law school) training is one of the most serious obstacles to creating a truly independent judiciary. Law schools should teach students about the role of judges. In his report on Guatemala, the U.N. special rapporteur on the independence of judges and lawyers noted that "for the long-term well-being of an independent and impartial judiciary," it is essential to address the reform of university legal education and the training of lawyers.[97]

University legal education needs to be brought up to date and coordinated with judicial reform efforts. As countries go through accelerated processes of transformation, many universities have difficulty keeping themselves up to date with the reforms.

c. Training in international law and dissemination of international decisions

Increasingly, Latin American constitutions and jurisprudence rely on international human rights instruments and decisions interpreting them. In Argentina and Chile, for example, courts have become increasingly willing to rely on

[96] For a discussion of the complexities of judicial training, see Centro de Estudios de Justicia de las Américas (CEJA) "Crisis en la capacitación judicial?" *Sistemas Judiciales, Año 1, No. 1.*

[97] Coomaraswamy report par. 153.

international jurisprudence, particularly from the Inter-American system. The Inter-American Court and Commission on Human Rights have issued a number of decisions that clarify the obligations of state parties to, *inter alia*, carry out serious investigations of human rights violations, prosecute and punish perpetrators, and provide reparations to victims. Focusing directly on the question of judicial independence, both the Inter-American Commission and Court have recently issued decisions calling for the award of damages and reinstatement of a Peruvian Supreme Court justice (as part of a purported purging of the other branches of government to overcome corruption) and three members of the Peruvian Constitutional Court (who ruled a law allowing Alberto Fujimori to run for president a third time to violate the constitution). The commission and court found that their arbitrary removal violated their rights to permanent tenure and due process.[98] In November 2000, shortly after Fujimori's departure, the three Constitutional Court magistrates were reinstated. Under Peru's interim government, the Supreme Court justice was also reinstated in compliance with the Inter-American Court's recommendation.[99]

Judges need to be aware of the provisions and relevance of international human rights instruments, both to their own rulings and to guaranteeing their independence. This requires education about relevant international human rights standards and jurisprudence and training in how to apply these in their decisions. Further incorporation of these standards into the jurisprudence and legal practice would contribute to strengthening due process guarantees, including the guarantee of independent and impartial judges. National and foreign universities can provide this kind of training. Human rights NGOs experienced in using international instruments and proceedings can be an invaluable resource in this area. Some of the Latin American experts noted that training programs in this area should give priority to judges outside the main urban centers.

Key decisions from the Inter-American Commission and Court on Human Rights should be better disseminated in countries, particularly to judges and lawyers. At the moment, it is often the executive branch that responds exclusively to the Inter-American Commission, so that even important resolutions may be virtually unknown to the domestic courts. Legal interpretations or reforms are also needed to facilitate the implementation of decisions from the Inter-American system. The judiciary, the legal community, and civil society as a whole also need to be familiarized with recommendations of truth commissions, the U.N. special rapporteur on the independence of judges and lawyers, and other national, regional, and international bodies that address issues related to judicial independence in their own countries. Systematic monitoring efforts can encourage compliance with key recommendations.

6. Budgets, Salaries, and Court Management

In almost all of the countries studied, the budget for the judiciary and judicial salaries has risen significantly in recent years. Some countries constitutionally guarantee their judiciaries a percentage of the national budget, which has strengthened their institutional independence from the other branches of government. However, larger budgets have not necessarily led to strengthening the independence or impartiality of individual judges.

[98] See Inter-American Commission on Human Rights, Report no. 48/00, Case 11.166, Walter Humberto Vásquez Vejarano (Perú), April 13, 2000; Corte Interamericana de Derechos Humanos, Serie C: Resoluciones y Sentencias, no. 71, Caso del Tribunal Constitucional, sentencia de 31 de enero de 2001.

[99] By resolution of the Consejo Transitorio del Poder Judicial, February 1, 2001.

a. Budgetary and administrative responsibilities

The budget for the entire Argentine judiciary—federal and provincial—increased more than 50 percent in the past six years, without any visible positive results. Justice sector officials suggest that reorganizing the system to improve its efficiency is more urgent than a budget increase for the judiciary.[100] In Chile, President Patricio Aylwin embarked on a five-year plan to double the judiciary's budget. The judiciary's budget has grown from $45 million in 1990 to $75 million in 1997.[101] These increases, however, have not been reflected in increased judicial productivity.

In Central America, the guarantee of a fixed amount of the national budget—six percent in the cases of Costa Rica and El Salvador—is seen as a key measure that has contributed to guaranteeing the judiciary's independence from the other branches of government. The Salvadoran peace negotiators introduced the constitutional reform that sets aside six percent of the national budget for the judiciary, equivalent to $101,628,701 for 2000. In Guatemala, a proposed constitutional amendment that would have set aside six percent of the budget for the judiciary was defeated along with the rest of the constitutional reforms presented in the May 1999 referendum. The Guatemalan constitution entrusts the Supreme Court with formulating the judiciary's budget and establishes that at least two percent of the national budget should go to the judiciary. In 1999, four percent of the country's budget was actually allocated to the judiciary.

Panama's constitution mandates that the joint budget of the judiciary and the Public Ministry cannot be less than two percent of the central government's regular budget. In fact, the budget never exceeds that amount, and the judiciary depends largely on foreign assistance to carry out activities. Paraguay's constitution establishes that no less than three percent of the country's budget should go to the judiciary.

Chileans have resisted efforts to establish a constitutional requirement for the size of the judiciary's budget. Vargas and Duce suggest that guaranteeing this kind of absolute autonomy in the name of judicial independence overlooks the need to establish an adequate system of checks and balances. Economic independence frees the judiciary of its obligation to carry out its functions with transparency, including justifying publicly what it does and how it spends its funds. Funding for the judiciary, they argue, should be based on the adequacy and utility of its programs and not on a simple formula entrenched in law.

In most of these countries, the Supreme Court proposes and administers the judiciary's budget. In some, this still involves difficult negotiations with the other branches of government, even where the judiciary's budgetary allocation is constitutionally guaranteed. In the Dominican Republic, although constitutional reforms established the principle of administrative and budgetary autonomy for the judiciary and gave the court the authority to name all administrative and other employees of the judiciary, budgetary independence remains illusory. The National Budget Office routinely modifies the budget prepared by the Supreme Court without consultation and without consideration of its actual needs and commitments. The budget proposed by the Supreme Court has been reduced by as much as 50 percent in the past three years and has constituted less than 1.47 percent of the country's annual budget.

[100] The 2000 budget for the Argentine federal judiciary is $645,500,000, some 1.31 percent of the overall budget. Another $147,700,000 is assigned to the Public Ministry.

[101] As a percentage of the national budget, the judiciary's share has grown from 0.59 percent in 1990 to 0.83 percent in 1997.

In Paraguay, although the judiciary prepares its own budget and is "guaranteed" three percent of the national budget, the Supreme Court president must still "negotiate" with the Treasury Ministry before the budget's "approval" by Congress. In Congress, he must again lobby the Budget Commission. Budget items already approved, are not released by the executive branch, which claims to have insufficient resources.

The Administrative Corporation of the Judicial Branch (CAPJ) was established to provide technical support to Chile's Supreme Court in administering the judiciary's budget. It functions under a board of directors on which five of the 21 Supreme Court justices sit. Individual courts have very small funds for minor expenses. Recent reforms eliminated the executive's involvement in the selection and promotion of judicial employees. The CAPJ now contracts support personnel and individual courts are responsible for supervising their work.

In Bolivia, the administration of financial and human resources is now the responsibility of the Judicial Council. The council currently absorbs some 30 percent of the judiciary's budget. Its administrative structure is complicated and centralized, and its salary levels are higher than those of judges—a situation that creates considerable friction.

Salvadoran participants in the regional meeting in Guatemala noted that judges face obstacles in removing court personnel who are not performing their duties properly or who may be engaged in corrupt practices. While the decision to contract non-judicial personnel is made by each judge or judges (in the case of multi-judge tribunals), once hired these individuals are subject to the Civil Service Law. In practice, this makes it very difficult for judges to exercise real administrative authority over their personnel. Thus, court staff may have greater job security and be subject to less oversight than the judges.

Ensuring increased budgets for the judiciary is generally seen as essential to enhancing judicial independence, although it is not sufficient to ensure independence and must be accompanied by measures to ensure transparency and accountability for the expenditure of resources. Likewise, enhancing the judiciary's control over its own budget is likely to protect it from outside political interference. However, restructuring the judiciary may be more important than budget increases for improving productivity. To ensure that resources are distributed equitably, it may be helpful to decentralize the judiciary's budget so that resources are appropriately assigned, based on the amount proposed by a budgetary department at each level of the judicial structure. It is also important to ensure that courts outside the major urban centers receive necessary resources.

b. Salaries

Increased salaries have made the judicial career more attractive in many countries. Since 1996, judicial salaries in the Dominican Republic have increased from 275 percent to 400 percent. In Chile, judicial salaries have increased significantly in recent years, particularly for Supreme Court justices. A new bonus system gives first instance judges and court employees the right to an annual bonus if their courts have met the annual performance standards set by the Supreme Court. (The law emphasizes the objective measurement of timeliness and efficiency in carrying out jurisdictional duties.) They individually rank in the top 75 percent of personnel evaluated at their respective level of the judiciary. In Costa Rica, judicial salaries are attractive for young professionals, but much less so for judges with 15 to 20 years experience.

In El Salvador, judicial salaries have risen appreciably in the post-war period although they have not kept pace with the steep increase in the cost of living. Prosecutors' salaries are comparable to those of lower court judges while

public defenders earn considerably less. Judges also receive other benefits such as an allowance for gasoline and many have a vehicle assigned to them. Retirement benefits are quite generous. Likewise, Guatemala's new Judicial Career Law has greatly increased the salary of judges. However, the U.N. special sapporteur voiced concern about Guatemala's failure to provide life and health insurance to judges.

A 1995 salary increase in Panama made the Supreme Court justices the best paid public officials in the country. Nonetheless, the trial court judges continue to labor with inadequate salaries that make them vulnerable to corruption.[102]

7. Effect of Criminal Procedure Reforms on Judicial Independence

Countries throughout Latin America are in the process of reforming their criminal procedure codes, moving away from a written, inquisitive system to an oral, adversarial process. The old systems were typically slow, with limited or no public access, and a lack of transparency. Under these systems, it was often unclear who was actually making decisions and on what basis. Typically, judges were never required to be in the presence of the parties involved in the case. The lack of transparency in judicial decisions and the delegation of responsibilities to judicial staff pose threats to judicial independence. Instead of decisions being made by judges, they could be made by judicial employees, who were likely to be more susceptible to outside influences. Moreover, in theory in many systems, the same judge could be nominally responsible for the initial investigation, the decision to prosecute, the determination of guilt, and imposition of a sentence.

The new oral system has been introduced in criminal, family, and juvenile courts in El Salvador. According to the Salvadoran experts, "The positive lessons and experience are that the implementation of the principles of orality, immediacy, and publicity is effective in strengthening judicial independence to the extent that it forces the judge to make a resolution at a public hearing based on evidence legally introduced during the proceedings, and oblige the judge to make a convincing justification of the legal basis for the ruling."[103]

Chile's written, inquisitive criminal justice system gives appellate judges an overly broad scope to review the actions of trial court judges. Appellate judges can review the lower court's application of the law and its evaluation of the facts. Moreover, the provision for automatic "consultations" permits the Appeals Court on its own initiative, in most cases, to review the lower court's decision—on the law and the facts—without any appeal having been filed. Rather than serving as mechanisms to protect the rights of the parties, these review procedures allow the higher courts to maintain control over the lower courts. The first instance judges find their independence undermined because the system rewards those who apply the criteria they think the Appeals Court will apply—whether or not they find this to be the correct interpretation for the particular case.[104]

The new criminal procedure code will leave the determination of the facts to the trial court, limiting the appellate courts' authority to review lower court rulings to the application of law. The appellate courts will no longer have authority to review lower court decisions on their own

[102] Supreme Court justices now receive $10,000 per month, while circuit judges earn $2,500 and justices of the peace only $1,500.

[103] Diaz and Urquilla, p. 15.

[104] Vargas and Duce, p. 22.

initiative. This reflects an understanding that the right to appeal is a protection for the parties and not a means of hierarchic control within the judiciary. These reforms should give trial court judges greater independence (from their superiors) to decide the cases before them.

Reformed criminal procedure codes are already in effect in Costa Rica, El Salvador, and Guatemala. Similar reforms have been approved and have recently been or soon will be implemented in a number of countries, including Bolivia, Chile, Ecuador, Honduras, and Paraguay. These reforms imply major changes for judges that should contribute to strengthening judicial impartiality. The criminal justice reforms in the region are designed to improve efficiency, better protect the rights of suspects and victims, and ensure impartiality and accountability. The new oral proceedings are public, with the parties present and with all evidence presented before the judge, thus limiting opportunities for corruption and the delegation of judicial functions. A single judge is now limited to involvement in one phase of the proceedings. According to the reforms, judges are required to deliberate and render their decisions immediately following the concentrated presentation of evidence at trial. Judges are to provide a reasoned basis for their decisions, although this does not have to be fully articulated when the verdict is announced.

Reforms in criminal procedure codes free judges from the responsibility of directing criminal investigations. Under the old systems, public opinion and politicians pressure judges, holding them responsible for maintaining public security and controlling crime. Thus, judges often made decisions about pretrial detention and release on bond based on public pressure rather than an independent application of relevant law.[105] According to the Chilean experts, transferring responsibility for criminal investigation to prosecutors should free judges to act more independently.[105] However, experience in El Salvador and Guatemala suggests that judges under the new system may still be blamed for releasing criminals and failing to stop crime, and that the new laws will also be blamed.

In Guatemala, the lack of reasoned decisions by judges under the new system has resulted in the annulment of decisions in important cases, with a huge cost to the government. The trial in the Xamán massacre case will have to be repeated. The case against former civil patrol leader Cándido Noriega was retried three times. The concern about the lack of basis for judicial decisions is so great that a constitutional reform was proposed to include the obligation to provide a reasoned basis for judicial rulings.[106]

El Salvador was one of the first countries in the region to implement a criminal procedure code calling for oral and concentrated presentation of evidence before judges. The law's requirements for public hearings and transparency have reduced opportunities for external pressure on judges. Salvadoran Judge Sidney Blanco suggests that the new code is contributing to cleaning out the judiciary; judges unwilling or unable to adapt to new procedures have tended to leave the judiciary on their own.[107]

[105] Ibid., p. 23

[106] Yolanda Perez and Eleazar Lopez, report on judicial independence in Guatemala, prepared for this study, June 2000, p. 17.

[107] Blanco made this point in a presentation on how judges have been affected by the new criminal procedure code. See Due Process of Law Foundation and Fundación Esquel, *Implementando el Nuevo Proceso Penal en Ecuador: Cambios y Retos*, p. 79 (Washington, DC 2001).

8. *Building and Sustaining Strategic Alliances for Reform involving Civil Society, Reform-minded Judges, Key Politicians, the Media, and Academics*

In most countries in the region, civil society organizations have not played a major role in promoting judicial independence. Nor have donors traditionally sought to work with civil society organizations on this issue. International assistance in this area has centered on projects with supreme courts and judicial councils.

In recent years, however, civil society groups have begun to play a growing role in promoting greater judicial independence by, for example, advocating key constitutional and legal reforms; more transparent procedures for judicial selection, evaluations, and promotions; and oversight mechanisms for these processes. This involvement has ranged from critiques and single-issue campaigns to long-term strategic efforts involving multiple sectors.

The experts at the Guatemala meeting concluded that efforts to promote judicial independence are most likely to be successful when they build upon strategic alliances among various interested groups, including members of civil society organizations (e.g., lawyers associations, advocacy NGOs, academics, and business groups), reform-minded judges, politicians, and representatives from the media.

a. Civil society-led strategic alliances

A review of some recent civil society strategies suggests ways in which civil society involvement can be useful, and in some cases decisive, to efforts to strengthen judicial independence.

The Dominican Republic offers an example of the significant contribution a strategic alliance of civil society representatives, judges, key officials, and politicians can make in assuring the adoption of necessary reforms and their adequate implementation. In 1990, lawyers and busines leaders founded the Institutionality and Justice Foundation (FINJUS) to help promote judicial independence, the establishment of a genuine rule of law, and the consolidation of democracy through the clear definition of rules and institutional roles. Between 1990 and 1994 the lawyers and business leaders involved in founding FINJUS sought to place the issue of judicial reform on the public agenda. An electoral crisis in 1994 led to a constitutional review, which created the opportunity to pass specific constitutional reforms designed to strengthen judicial independence. FINJUS spearheaded an alliance of civil society representatives, politicians, and judges committed to judicial independence and the reform process that played a key role in proposing and selecting Supreme Court justices, securing recognition of all judges' rights to job security, and establishing the jurisdiction of the courts in the sensitive area of constitutional control.

During its first selection process in 1997, the new Judicial Council initially declined to hold public hearings with the candidates for the Supreme Court. The civil society groups held their own televised interviews. Subsequently, the council decided to televise its own public hearings and its actual selection process for the new members of the Supreme Court.

When the legislature passed a law that would have ended security of tenure for judges, civil society groups organized the "week of judicial independence" and, with USAID support, brought in foreign experts for a series of

presentations on judicial independence.[108] International assistance has been key in helping to determine priorities and bring a regional vision, allowing Dominicans to learn about the experiences and achievements of neighbors in the region.

FINJUS and its allies have helped to build and maintain the momentum for reform through various means. They have used the mass media, their own publications, and public seminars and other fora to explain critical issues to the public such as the importance of strengthening the independence of judges. Temporary and permanent networks and alliances have given sustainability to the process; other sectors and organizations have been encouraged to support efforts to strengthen judicial independence. The National Judicial School and FINJUS have agreed to work together to promote analysis, discussion, and proposals on issues related to the consolidation of judicial independence and democratization.

Diverse civil society organizations in Guatemala have grouped together as the Pro-justice Movement and have played an important role in ensuring a more transparent selection process for Supreme Court justices and for members of the Constitutional Court. This initiative has focused on promoting discussion of the qualifications that should be considered for nomination and selection as well as the transparency of the actual selection process. Guatemalan NGOs were also instrumental in bringing the U.N. special rapporteur on the independence of judges and lawyers to Guatemala. He produced a comprehensive report, documenting the threats to judicial independence in Guatemala and making a series of recommendations. The Guatemalan government made a public commitment to work toward the implementation of these recommendations. Nine months later, however, a leading Guatemalan NGO found that very few of his recommendations had been even partially carried out.[109]

In Argentina, Poder Ciudadano spearheaded an effort to form a civil society commission to monitor the activities of the Judiciary Council. The monitoring team seeks to detect weakness and strengths, detailing them in an annual report. It has also proposed mechanisms to increase the transparency of the council's actions. Thus, when the council was establishing its regulations, the monitoring group proposed eight basic principles, including guaranteeing access to information, implementing a system of judicial selection based on the capacity and credentials of the candidates, ensuring transparent administrative mechanisms, and guaranteeing citizen participation by making meetings public. The content of the regulations became a matter of public debate, and a coalition of NGOs presented a proposal for public hearings, which was ultimately accepted by the council.

[108] The experts included Rodolfo Pizo Escalante, Luis Salas, César Barrientos, Edmundo Orellana, and Eduardo Gauggel.

[109] Fundacion Myrna Mack/Programa de Investigacion y Analisis, "Informe sobre el grado de cumplimiento de las recomendacions del relator sobre independencia de jueces y abogados," p. 1. According to this study, only one of 32 recommendations had been fully implemented; 11 others had been partially carried out. The reasons for not carrying out the recommendations included lack of political will, lack of economic resources, need for additional time for implementation, need for constitutional reforms to implement some recommendations, reluctance of certain sectors to accept recommendations, and recommendations that were not appropriate to Guatemalan relaities.

Participants in the Guatemala regional meeting agreed on several points:

- Donors should try to identify a civil society organization that will be dedicated virtually full-time to designing and implementing a strategy to support the reforms and confront the opposition. This is an essential step. In their projects, donors need to include the time and money to identify an appropriate organization, or to support the creation of an organization if none exists. This entails ensuring necessary technical assistance, funding, and adequate staffing. Reform campaigns need sophisticated, experienced advocates who understand the issues and can credibly deal with opposition. Trying to carry out reform campaigns with people who are employed full-time elsewhere and who have limited time to devote to the reforms is simply not adequate to maintain momentum.

- Donors need to allocate more time to the process of building support for reforms rather than expecting to achieve concrete results immediately (roughly two years for creating understanding and building support). Otherwise, opposition results in delays, and questions will arise in turn about the political will in the country, potentially undermining the whole process. This leads to reliance on *ad hoc* strategies to build support, rather than well thought-out, effective ones. Even if the reforms pass, they may lack the local support and understanding to carry them through the implementation phase, which is always difficult, uneven, costly, and plagued by unanticipated consequences.

- Coalition-building is crucial to support reforms and overcome opposition to them. In particular, it is important to identify allies among politicians. It is also critically important to identify members of the judiciary, at all levels, who support the reforms and can be allies in reform efforts.

b. Working with judges at all levels of the judiciary

The Latin American experts emphasized that not only the structure of the judiciary but also the reform process need to be democratized. Reforms need to involve the judiciary as a whole, not just the top levels. To overcome judicial resistance to reforms that may be seen as a loss of judicial powers (e.g., reducing the hierarchical control over lower court judges, and transferring the responsibility for criminal investigations to prosecutors under criminal procedures reforms), the best strategy may be to work closely and implement reform initiatives in collaboration with judges at all levels—particularly those most receptive to change—so that they do not see the reforms as something imposed from outside. If there is a civil society organization spearheading the reform effort, it should try to create an alliance with judges to jointly call for institutional reform. In any case, it should avoid simply attacking the judiciary, so that judges do not feel personally attacked. Judges should be shown how the reforms are likely to improve their situation. Providing exposure to the experience of judges in countries that have already implemented changes may be illuminating in this respect.

Donors and the civil society groups they work with can encourage the formation or consolidation of pro-reform judges associations. While traditional judges associations have not tended to focus on promoting judicial independence, new groupings are increasingly taking on this issue. The Costa Rican Association of the Judiciary has already taken on a leading role in promoting and defending judicial independence. Its activities have

included bringing legal actions to defend judicial independence; organizing, in collaboration with international organizations, activities designed to critically evaluate judicial independence; and carrying out research and publishing an evaluation of the situation of judicial independence in Central America.

c. Mass media

A media strategy is also a vital component of any effort to build and sustain support for reforms. If possible, a media outlet should become sufficiently interested in the process that it regards the reforms as a key issue, provides lots of publicity, promotes debate, and calls for transparency. The coalition in the Dominican Republic was successful in establishing this kind of relationship with the media.

However, in most countries included in this study, the media are seen as having been largely unhelpful to the cause of judicial independence, in part because of a lack of understanding of the role of judges. Often judges are blamed in the media for failing to stop crime, particularly when suspects are released for lack of evidence or deficiencies in the investigation. Recent criminal procedure reforms have emphasized due process guarantees, the presumption of innocence, and the notion that punishment is reserved for proven criminal activity, not mere suspicion. Although pretrial detention is no longer to serve as advance punishment, the media has not adjusted to the new situation.

Moreover, *desacato* laws, which impose criminal penalties for publication of criticisms of public figures including judges, have limited the media's ability and/or inclination to play a watchdog role in many countries. For instance, in Chile, a recently published work of investigative journalism, *El Libro Negro de la Justicia*, which looked critically at the Supreme Court and some of its members, was the subject of a legal action by one of the criticized justices. As a result, all of the copies of the book were seized, the book was banned, and the author, charged with the crime of defamation, fled to the United States where she received political asylum. Despite these restrictions, one of the leading newspapers recently examined the conduct of some members of the higher courts, a focus that was instrumental in the unprecedented decision to remove a Santiago appellate court judge for irregularities and corruption.[110]

As the *desacato* laws are gradually being repealed, and investigative journalism begins to take root, the media are beginning to scrutinize the judiciary in some countries. Still, they could and should play a much more active role in promoting judicial independence and accountability.

In addition to monitoring the courts more closely, the media can and should play a more active role in publicizing the benefits of an independent and effective judiciary. To confront opposition to the reforms, the public not only needs to be provided with better information about the scope and advantages of the reforms, but it must be shown results in specific and well documented cases that illustrate the advantages of the reforms, in contrast to earlier practices. The best weapon to combat those who oppose reforms is a policy of publicizing "positive results" contrasted with the inefficient system being transformed.

The media also can sensitize public opinion and political players to the need to transform the structure of the judiciary not only in order to strengthen the independence of judges, but also as a strategy to prevent corruption.

[110] Vargas and Duce, 29.

d. Involvement of official oversight bodies

Many Latin American countries have created the office of human rights ombudsman to oversee official actions and guarantee citizens' human rights. In some countries, these officials have made judicial independence a focus of their work.

In Honduras, for example, the Office of the National Commissioner for Human Rights has taken up the issue of judicial independence, issuing a critical report in 2000. The government subsequently formed a "commission of notables," including the ombudsman, which developed and circulated a series of recommendations.

e. Scholarly scrutiny of the courts

Latin American experts repeatedly stressed the need to create full-time positions for law professors and encourage independent research about the judiciary in the university context or in prestigious academic centers. Some urged that donors consider funding projects to undertake empirical and legal analyses of judicial independence in individual countries, the circumstances and processes that limit it; and the reform strategies that have helped or are likely to help to strengthen it.

TABLE 2: The Role and Composition of Judicial Councils in Various Latin American Countries

Country	Judicial Council Composition	Council Selected by	Council's Role in Supreme Court Selection	Council's Role in Selection of Other Judges	Additional Council Responsibilities
Argentina*	19 members: S.Ct. pres.; 4 judges; 8 legislators (4 from each chamber; 2 from the majority party and 2 from the 2 leading minority parties); 4 lawyers in federal practice, chosen by election; 1 member of the academic community; 1 executive delegate	Judicial representatives are elected by federal judges; legislators are selected by the presidents of the two chambers, based on proposals from the different chambers	none	Selection of candidates for judgeships through merit-based public competition; preparation of lists of three candidates for executive selection	Administer judiciary's budget,* discipline of judges, initiate proceedings to remove judges, issue regulations on judicial organization and independence
Bolivia	5 members: S. Ct. pres. and 4 other members	Congress	Nominates candidates	Nominates candidates for lower courts	Administrative and disciplinary responsibility for the judiciary; runs training program
Costa Rica	5 members: 4 from the judiciary and 1 outside lawyer; S. Ct. president presides	Supreme Court	None	Merit-based selection, but S. Ct. not obliged to choose highest ranking	Delegated responsibility for various administrative matters
Dominican Republic	7 members: President; president of Senate; opposition party senator; president of Chamber; opposition deputy; pres. of S. Ct.; another justice		Recruits and screens candidates; appoints justices; can hold public hearings	None	
El Salvador	6 members: 3 lawyers; 1 prof. from the law faculty of the Univ. of El Salvador and 1 from the private universities; 1 lawyer from the Public Ministry	Legislature chooses from slates of 3 nominated by each sector represented	Proposes candidates to the legislature, half must come from an election by lawyers' associations	Proposes candidates on a merit basis; provides the Supreme Court slates of 3 candidates for its selection	Periodic evaluations of judges; runs the Judicial Training School
Guatemala	5 members: Pres. of S. Ct., head of judiciary's Human Resources Unit, head of Training Unit, 1 rep. of judges; 1 rep. of appellate magistrates	Judge and magistrate to be elected in their respective assemblies	To advise Congress of need to convoke Postulation Comm'n for selection of S. Ct. and appellate magistrates	In charge of merit-based entry system; training unit evaluates candidates; successful completion of 6-mo. course makes candidates eligible to be named by S. Ct.	Names and removes head of inst'l training unit; evalutes performances of judges and magistrates; defines policies of training unit
Paraguay	8 members: 1 S. Ct. member; 1 rep. of exec.; 1 member of each legislative chamber; 2 lawyers; 1 prof. from the National University's Law Faculty; 1 from the private universities		Proposes slates of 3 for Senate appointment	Proposes slates of 3 for appointment as judges or prosecutors by Supreme Court	

- This information refers to the council for the federal judiciary; Argentine has other councils for the judiciaries at the provincial level. The Supreme Court has not permitted the cou assume responsibility for budget administration.

TABLE 3: Responsibility for Nominating and Appointing Supreme Court and Lower Court Judges in 10 Latin American Countries

Country	Nominations for Supreme Court Justices	Responsible for Appointing Supreme Court Justices	Nominations for lower court judges	Responsible for appointing lower court judges
Argentina	Proposed by executive	President, with agreement of Senate	Judicial Council; juries to review qualifications; public competition	President, with agreement of Senate
Bolivia	Judicial Council provides a list of candidates	Congress elects by 2/3 majority vote	Judicial Council	2/3 vote of Supreme Court for superior district courts; superior district courts for lower court judges
Chile	Supreme Court prepares list of 5 candidates	Minister of justice designates; Senate ratifies by 2/3 majority vote	Recruitment through Judicial Academy; lists of 3 candidates prepared by the immediate superior tribunal in judicial hierarchy	Ministry of Justice
Costa Rica		Legislature	Judicial Council	Supreme Court
Dominican Republic	Anyone can propose; Judicial Council screens	Judicial Council		Supreme Court
El Salvador	Judicial Council (half of list to come from lawyers' association election)	Legislature by 2/3 majority vote	Judicial Council prepares lists of 3 candidates	Supreme Court
Guatemala	Postulation commission prepares a list of 26 candidates	Legislature selects 13	Judicial Council	Supreme Court
Honduras*		Legislature		Supreme Court
Panama	President nominates	Ratified by legislature		Immediate superior in judicial hierarchy
Paraguay	Judicial Council proposes 3-candidate slates	Senate	Judicial Council proposes 3-candidate slates	Supreme Court

*A constitutional reform ratified in 2001 establishes that a nominating board comprised of seven sectors must present Congress with a list of 45 candidates for nine positions on the Supreme Court. The first selection process with this new mechanism will take in January 2002.

F. Judicial Independence in the United States: Current Issues and Relevant Background Information

by Mira Gur-Arie
Russell Wheeler[111]

1. Introduction

Judicial independence has been a core political value in the United States since the founding of the republic. Alexander Hamilton, in urging ratification of the constitution of the United States, took as obvious the need for "a steady, upright, and impartial administration of the laws" by a judiciary of "firmness and independence." Liberty, he said, "would have everything to fear from [the judiciary's] union with" the legislature or the executive. (The Federalist: no 78)

"Judicial independence" means different things to different people. At the least it refers to the ability of judges to decide disputes impartially despite real, potential, or proffers of favor. It is perhaps most important in enabling judges to protect individual rights even in the face of popular opposition.

A belief in judicial independence, however, exists in the United States alongside an equally strong belief in democratic accountability. Government, James Madison wrote during the ratification debate, must derive "all its power directly or indirectly from the great body of the people." (The Federalist: nos. 37, 39) "Accountability" with respect to judges also has different meanings. Some believe that judges' decisions should reflect popular preferences. Others reject that proposition but still insist that judges' administration of the courts and use of tax dollars must accommodate public needs and wishes. At its core, the idea that judges should be democratically accountable means the public, directly or representationally, has a legitimate say in how the courts should perform.

The United States is a laboratory of efforts to adjust judicial independence and accountability to one another, with its federal judiciary of roughly 900 life tenured judges and 800 term limited judges, and the 28,000 judges of the 50 states, the District of Columbia, and Puerto Rico.[112] These 53 jurisdictions are all largely free to structure their judiciaries as they wish. The lesson from the U.S. experience is that there is no single set of provisions guaranteed to achieve an independent judiciary. Judicial independence takes various forms, shaped by different legal provisions, political traditions, and cultural expectations that have evolved over time and continue to inspire debate and self-reflection.

The provisions in the United States to promote judicial independence on the one hand and to promote democratic control of the judiciary on the other may be arrayed on a continuum. This paper describes the mechanisms employed in the United States to protect and balance independence and accountability. It is critical to

[111] The views expressed in this article are those of the authors and should not be attributed to the Federal Judicial Center or any other agency of the federal judicial system. John Cooke, Judges Paul Magnuson and Peter Messitte, Peter McCabe, Judge Fern Smith, and Sylvan Sobel provided helpful comments on an earlier draft.

[112] To simplify somewhat, state court judges generally have plenary jurisdiction over all matters except those that Congress consigns solely to the federal courts. Federal judges have jurisdiction over federal crimes, cases to which the United States is a party, cases involving federal laws, and cases between citizens of different states. There is another category of federal judges whom we do not treat in this paper at all, due to space limitations. These are the judges of courts established within the executive branch agencies, such as the judicial system of the armed forces, the U.S. Tax Court, and numerous "administrative law judges."

JUDICIAL INDEPENDENCE	BOTH	ACCOUNTABILITY
Served by secure tenure and salary and self-administration of the judicial branch	Served by prophylactic ethical and conflict-of-interest rules	Served by methods of judicial selection, discipline and removal, and legislative oversight

keep in mind that these mechanisms operate in an environment imbued with an underlying cultural presumption that public officials and private interests are not to tamper with judicial decision-making. This presumption, discussed in this article's final section, draws strength from a basic popular respect for the role of a judge. Selection of a competent, honest, and diverse judiciary is essential, both for maintaining this public confidence and for sustaining the institutional legitimacy of the judiciary.

2. *Measures to Protect Judicial Independence*

a. Secure tenure and compensation

The Declaration of Independence (1776) indicted King George III because he made colonial "judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries." Such a dependence, Blackstone taught, meant that, instead of deciding cases according to "fundamental principles," judges would likely "pronounce....for law, which was most agreeable to the prince or his officers." (Wheeler 1988: 8-9) Thus Article III of the U.S. Constitution (1787) vests the "judicial power of the United States" in federal judges, who "shall hold their offices during good behaviour," and "shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

For federal judges, tenure during "good behavior" is essentially life tenure; Supreme Court justices, court of appeals judges, and district judges may serve as long as they wish[113] (although a generous retirement system enables them to reduce their workload after 65 or 70 years of age[114]). Life tenure for federal judges has been regularly criticized but never seriously placed in jeopardy. Criticism came early in the century from those who believed federal judges too sympathetic to business interests and comes today from some who believe federal judges too sympathetic to minority interests and criminal suspects.

There have not been similar attacks on Article III's ban on reducing federal judicial salaries. Judges, however, have argued throughout history that their salaries are insufficient (Posner 1996: 21-31). Although federal judicial salaries today are no doubt in the top percentile of all salaries in the United States,[115] in many parts of the

[113] It is not uncommon for federal judges to serve well past their 70's. Three of the nine U.S. Supreme Court members are over 70 and one is over 80. Federal judges serving for "good behavior" may be removed from office by the legislative impeachment process, but that has occurred only seven times in the nation's history.

[114] Judges over 65 whose age and years of service total 80 may retire from office but retain the salary of the office (including any increases) as long as they perform a specified amount of reduced service, and, if they elect to provide no judicial service, may retain the salary they were earning at retirement. See 28 U.S.C. §371.

[115] Annual, pretax salary of a federal district judge in 2000 is $141,300. Court of appeals judges earn some $149,900 and Supreme Court justices $173,600. Magistrate and bankruptcy judges earn about 10 percent less than district judges. The average annual pay in the United States in 1999 was $31,908 (Bureau of Labor Statistics 2000). Salaries for state court judges are somewhat lower than federal judicial salaries. Nevertheless, the salaries of higher ranking state court judges place them well above the national median income. For an analysis of state court judicial salaries, see Survey of Judicial Salaries (National Center for State Courts 1999: Vol.25, No.2).

country beginning lawyers, at least in commercial practice, sometimes earn more than federal judges. Judges do not contend that Congress refuses to raise their salaries in retaliation for their decisions. They note, though, that refusal to allow judicial salaries to keep pace with inflation may contain the seeds of threats to independent decision-making (Williams v. U.S. 1999).

Although secure tenure and compensation are often described as the hallmarks of an independent judiciary in the United States, life tenure and irreducible salaries are formally bestowed on only about three percent of U.S. judges: the roughly 900 U.S. Supreme Court justices, court of appeals, and district court judges; and the judges of the state of Rhode Island. (Judges in two other states are tenured until age 70.) (Rottman 1995: tables 4 and 6). The over 800 federal bankruptcy judges and magistrate judges, both exercising judicial power on delegation of life-tenured federal judges, serve for 14- and 8-year terms respectively (28 U.S.C. §§152(a)(1) & 631(a)). Life tenure for state judges, while provided in the 18th century, quickly gave way to limited terms in an effort to promote judicial responsiveness to popular preferences. Today almost all state judges serve for terms, which range from 4 to 15 years,[116] and most must stand for some kind of popular election to retain their posts.

As we discuss later, these limitations on state judges' tenure have allowed voters to remove judges for unpopular decisions, but the limitations have generally not posed pervasive institutional threats to state judges' independent decision-making. Similarly, although almost all state judicial salaries are lower than those of corresponding federal judges—in some cases considerably so, we are unaware of the degree to which, if any, state or municipal legislatures have attempted to reduce the salaries of judges in retribution for decisions.[117]

The broader point is that, despite these differences in the federal and state systems, most judges in the United States are accorded significant professional respect and receive salaries higher than other public officials in their respective jurisdictions. Salary and professional status alone do not guarantee judicial independence, but, by enhancing the prestige of the judges, they make it easier for them to behave independently.

b. Self-administration of the judicial branch

It did not occur to those who established the federal and state governments in the late 18th century that separate and independent exercise of the judicial power needed anything more than separate and independent judges. The federal courts, from their creation in 1789 until 1939, were the administrative responsibility of, in turn, the Departments of State, Treasury, Interior, and Justice. State courts were the administrative responsibility of state executive agencies. Executive branch agencies, federal and state, developed annual legislative requests for funds to operate the courts and administered the funds granted, which, until the early 20th century, consisted of little more than paying judges and staff (when they were not paid directly by fees) and providing courtrooms and furniture.

As the size and complexity of the judicial operation increased, however, judges and others

[116] Data computed from Rottman, 1995, tables 4 and 8. The modal term for state appellate judges is 8 years and the average is 7.8 years. For judges of the major trial courts, the mode is 6 and the average 7 years.

[117] One scholar's review of empirical research on judicial independence suggests that the topic, at the least, has been little studied (Hensler 1999: 718).

argued that secure salary and tenure were no longer sufficient to enable the federal judiciary to defend itself from the other branches, and that state judiciaries, whose judges stood for re-election, were in even greater jeopardy. Federal judges complained both that the Justice Department was an indifferent administrator and that its control over judicial administration threatened the fact and appearance of judicial independence.

In 1939, Congress responded to these concerns by creating the Administrative Office of the U.S. Courts to assume from the Department of Justice responsibility for federal court budget and personnel administration and compiling statistical data on the business of the courts. More important, Congress directed that the Administrative Office be supervised by a council of federal appellate judges. [This organization, now the Judicial Conference of the United States, comprises 26 appellate and trial judges, with the chief justice as presiding officer (28 U.S.C. 331)].[118] State governments followed suit, starting in the 1940s, creating state court administrative offices, and generally providing for their supervision by the state supreme courts. Today, the importance of a separate judicial branch administrative entity to judicial independence is part of the conventional wisdom in the United States. Three areas illustrate why:

Court administration and jurisdiction. Before judicial branches had budget-preparation and administration responsibilities and administrative offices to execute them, executive branch agencies assessed the courts' financial needs, submitted those needs to the legislature for decision, negotiated with the legislature, and administered the funds provided. Although they usually did so in consultation with judicial officials, there remained the potential to deny the courts generally, and specific judges in particular, financial support in retaliation for decisions contrary to the pleasure of the executive branch, a major litigator in the courts. Although instances of such executive branch retaliation were rare (Fish, 1973: 122-23; Baar 1975: ch. 2), there was "an anomalous situation to have the legal representative of the chief litigant in the federal courts in charge of disbursements of much importance to the judges before whom he had his subordinates constantly appear" (Shafroth 1939: 738).

Under the current regime, judicial branches develop their own estimates of need and present them either directly to the legislature or to the executive for the ministerial task of incorporation, without change, into a government-wide budget document. The judicial branch also defends the request before the legislature and administers the funds granted.

The current procedures for judicial budgeting, however, hardly free courts from oversight and even some control by the other branches. The executive branch, for example, can influence judicial funding levels by its recommendations to Congress on fiscal policy. And, of course, Congress still determines the level of judicial branch funding. Legislators can use their funding power to show their approval or disapproval of how judges administer the courts and, although it probably happens rarely, to show their approval or disapproval of judicial decisions. Congress has other means to control the effects of judicial decision-making and, perhaps by the threat of such action, influence future decisions. Congress, for example, can limit the jurisdiction of the federal courts, as it did in 1995 to make it more difficult for

[118] The members are the chief judges of the 13 federal courts of appeals, a district judge from each of the 12 regional circuits, and the chief judge of the Court of International Trade. The conference makes policy for the administration of the federal courts, operating through a network of committees that examine such subjects as automation, criminal sentencing, and judicial salaries and benefits.

prisoners to obtain judicial orders directing changes in the administration of prisons or orders directing review of their convictions.[119]

Discipline. At the outset, federal and state governments had only one formal means of disciplining judges—legislative impeachment and removal. As the impracticality of that recourse became apparent, especially for resolving minor problems, and the threat grew that legislative or executive bodies would obtain broad authority to remove or otherwise discipline judges, judicial branches acquired, usually by statute, internal disciplinary mechanisms to deal with judicial unfitness. These means, along with impeachment, are discussed below. These disciplinary provisions reside within the judicial branch, providing for judicial control of discipline and protecting against legislative control over judges.

Education. Although most U.S. judges bring extensive legal experience to the bench, they do not receive formal judicial education before appointment; they learn on the job. When the judging was less complicated, judicial education could operate informally. Formal programs of judicial education within the judicial branch were created in the mid-20th century as judges faced more difficult case management problems and cases presenting complicated statutory schemes and complex scientific and economic evidence. Congress created the Federal Judicial Center in 1967 to provide orientation and continuing education for federal judges and the employees of the courts. Most state judiciaries also provide educational opportunities for judges and staff.

There has been controversy over whether some alternative, private judicial education programs, offered by organizations that appear to have policy preferences in respect to commonly litigated matters, are a threat to independent judicial decision-making. Supporters of such programs defend them against charges of bias and note furthermore that judges are in the business of hearing and weighing many different points of view. Critics argue that judges' practiced ability to receive information with skepticism may not help them recognize skewed information in highly complex and esoteric fields, and contend that, regardless, the appearance of private judicial education compromises public faith in judicial independence.

3. Measures to Prevent Conflicts of Interest and Promote Public Confidence

There is an array of prophylactic statutes and rules designed to promote judicial independence by protecting judges from potentially compromising situations and to promote accountability by requiring judges to disclose personal information that may lead to conflicts of interest. For example, a 1989 law limits the gifts that judges and other high government officials may accept and imposes caps on outside earnings (typically from teaching and book royalties) to 15 percent of their government salary (5 U.S.C. §§501-505). Federal judges and other public officials may accept no honoraria for giving a speech or writing an article—endeavors likely to involve a minimal expenditure of time. Paying judges in such situations could trigger suspicions of ulterior motives. Another law requires judges and other high government officers to file annual reports of their (and some family members') financial holdings, mandating that the reports be available for public inspection. In the case of judges, the reports' public availability helps implement another law (28 U.S.C. §455), which directs federal judges to disqualify themselves from cases in which they

[119] These statutes are codified at 28 U.S.C. §1915 and 2254.

have personal knowledge or a financial interest (defined as "ownership of a legal or equitable interest, however small," 28 U.S.C. §§ 455(a)(4) & (d)(4) (i.e., one share of stock)).

In addition to these federal statutory provisions, and similar provisions in the states, federal and state judiciaries have adopted judicial codes of conduct. The federal code has seven canons and detailed sub-provisions advising judges about the propriety of serving on boards and committees, holding membership in private organizations that may practice invidious discrimination, public speaking, associating with political parties, and the like. A committee of the Judicial Conference issues advisory opinions to judges who seek guidance on how the code applies to specific situations. Although compliance with the code is not mandated by law, almost all federal judges seek to conform their behavior to it, and violation of its provisions may subject judges to discipline by the circuit councils.

4. Measures to Promote Public Accountability

Provisions governing the judicial office that are most clearly intended to promote democratic accountability—concededly at some cost to judicial independence—are the methods by which judges obtain and retain office, and procedures for judicial discipline and removal. Legislative oversight also requires judges to justify some aspects of their behavior and caseload reporting requirements illuminate some aspects of judicial behavior.

Judicial selection. Some European and Latin American countries vest responsibility for judicial selection in councils of judges, executives and legislative officials, academics, and others. The goal is to limit the influence on the judiciary of the other branches of government. Judicial selection in the United States is making increasing use of commissions that have some superficial similarity to councils in other countries. In the United States, these groups are largely advisory and have specific rather than plenary jurisdiction for administration of the judicial system and its personnel. They play basically an advisory role, retaining substantial opportunity for participation by the people or their representatives.

Presidential appointment of federal judges. The constitution provides that the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States [including today federal appellate and district judges], whose appointments are not herein otherwise provided for, and which shall be established by law" (Art. II, sec. 2).[120] Congress has enacted no statutes to regulate the appointment of life-tenured judges and has adopted no age, professional, or training prerequisites. The country relies on the selection process to screen potential federal judges for quality and integrity.

Although federal judges are generally regarded as among the most independent in the world, political parties play a significant role in the process by which they are selected. In filling a vacant judgeship, the president receives suggestions from leaders of his party (mainly U.S. senators) in the region of the vacancy (and nationally for Supreme Court justices). Around

[120] Federal supreme court justices, court of appeals judges, and district judges all have the tenure and salary protections of Article III. They comprise roughly 900 of the 1,700 or so federal judges (including retired judges who still perform some judicial work). Bankruptcy and magistrate judges are selected, respectively, by the courts of appeals of their circuits and by the district judges of their districts, in what is referred to as a "merit selection" process because of formal requirements for review of qualifications.

90 percent of any president's judicial nominees are at least nominal members of his political party; in the most recent four presidential administrations, the percentage of judges who were active party members ranged between 73 percent (Carter) and 56 percent (Clinton) (Goldman and Slotnik 1999: 280). Government investigators, however, also scrutinize potential nominees' personal backgrounds. And since the 1950s, a special committee of the American Bar Association has undertaken detailed evaluations of each potential nominee's professional competence; potential nominees rarely survive a "not qualified" ranking. The Committee on the Judiciary of the U.S. Senate conducts its own investigation of each presidential nominee. After confirmation, federal judges almost universally honor the provisions of Canon 7 of the Code of Conduct for U.S. Judges that tell judges not to hold office in political organizations, endorse candidates, solicit funds, or attend political gatherings of any type.

Some commentators say that, because each president draws appointees almost exclusively from members of his political party, the judges so appointed are in effect party functionaries on the bench. This is a frequent charge of foreign observers, including those from countries with formal arrangements similar to those in the United States but where judges are traditionally heavily dependent on their executive appointers. There is, to be sure, a clear although relatively slight correlation between U.S. federal judges' prior political party membership and decisional tendencies. Carp and Rowland's analysis of their data set of over 57,000 published opinions of district judges appointed by Presidents Woodrow Wilson through William Clinton, confirms, not surprisingly, that decisions of judges who had been Democrats were more "liberal"[121] than the decisions of judges who had been Republicans, although the differences were slight.[121]

What do the differences suggest about judicial independence? There is little evidence that these contrasting decisional tendencies reflect judges' conscious efforts to discard controlling legal provisions in favor of the wishes of their appointing presidents or former political parties. Rather, judges, when confronting the relatively small number of cases in which the precedents and evidence are not dispositive, fall back on other factors to make decisions. It is not surprising that their decisions are influenced by the same outlooks on life and the law that influenced their party preferences before they became judges. In fact, some argue that this influence, given that it is relatively slight, serves a healthy function in a democracy. As Chief Justice William Rehnquist has said (1996: 16), because "[b]oth the president and the Senate have felt free to take into consideration the likely judicial philosophy of any nominee to the federal courts...there is indirect popular input into the selection of federal judges."[122] (The chief justice was contrasting this type of input with efforts to influence judges' decisions through threat of impeachment.)

No doubt some of the over 3,000 persons who have served as federal judges since 1789 have decided specific cases with an eye to pleasing the presidents who appointed them. However, references to this fact inevitably call forth a long list of examples of judges who confounded their

[121] For example, whether decisions—not only those disposing of non-jury cases, but also on motions for admission of evidence and various procedural rules—favored the defendant in criminal cases, the regulator in government economic regulation cases, and so forth. Overall, Democratic judges made "liberal" decisions 48 percent of the time, versus 39 percent of the time for Republican judges (Carp and Stidham 1998).

[122] This benign view of the influence of partisan affiliation on executive appointments may not necessarily hold in other countries.

appointers. President Theodore Roosevelt, for one, complained of Justice Oliver Wendell Holmes that "the nominal politics of the man has nothing to do with his actions on the bench....Holmes should have been an ideal man on the bench. As a matter of fact, he has been a bitter disappointment" (White 1993: 307). Presidents Richard Nixon and Clinton were no doubt disappointed that unanimous Supreme Courts, including their appointees, decided respectively that executive privilege did not protect the "Watergate tapes"(U.S. v. Nixon, 1974), and that presidents could be sued in civil court while in office (Clinton v. Jones, 1997).

A final claim that the federal appointive system may compromise independent decision-making of life-tenured federal judges involves, not loyalty to those who appointed them, but rather efforts to please those who could appoint them to a more prestigious court. In the 18th century, judicial promotions were very rare (Klerman, 1999: 456). By contrast, 36 percent of the 253 judges on the U.S. Courts of Appeals in 2000 first served as U.S. district judges[123] and seven of the nine current members of the Supreme Court in that year served previously on the U.S. Court of Appeals. Judges considered for appointment to a higher court are subject to the same selection and review process described above. It is plausible that the prospect of such appointment could lead some judges to decide cases to curry favor with those responsible for the appointments,[124] a tendency observed in two quantitative studies of district judges' decisions in cases challenging the constitutionality of the U.S. Sentencing Commission (Sisk, Heise, and Morris 1998: 1423-27, 1487-93). On the other hand, there are many more district judges than vacancies on the courts of appeals, and many more court of appeal judges than Supreme Court vacancies, leading one student of the subject to conclude that "the typical judge's chance of promotion is so low that it is unlikely that desire for promotion affects the decisions of more than a handful of judges" (Klerman 1999: 456).

Elections of judges. Over the 19th century, most states replaced gubernatorial appointment of state judges with either partisan or non-partisan elections. Twentieth century court reformers in turn sought to replace election systems with gubernatorial appointment from lists of nominees developed by commissions of judges, lawyers, and lay persons (labeled "merit selection systems"). Judges so selected stand for periodic "retention elections" in which the voters are asked, not to chose between two candidates, but simply to vote "yes" or "no" on whether to retain the judge in office. The result of these various efforts is a patchwork of selection systems among the states and even within the same states, as shown in Table 4 (drawn from Rottman (1995: Part II)). The table is an approximation, not a precise list.

Most U.S. judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns. Judicial elections present a complicated landscape, in part because of many variations in types of elections. A state supreme court justice who must mount a vigorous media campaign against a well-financed opponent is in a different

[123] As of July 1, 2000. Numbers include both active judges and those in "senior status," a form of semi-retirement. For active judges only, the figures are 52 and 158 (32 percent). The source of the data is the Federal Judicial Center's Federal Judicial History Office's database.

[124] One federal judge acknowledged to a public forum his view that younger district judges "aspire to the court of appeals, and they know their votes are being watched" as do court of appeals aspirants for the Supreme Court (American Judicature Society 1996: 81).

TABLE 4: Number of States with a Particular Judicial Selection Methods* in the 50 States, the District of Columbia, and Puerto Rico

	Supreme court	Trial court, gen. juris.	Trial court limited juris.***
Partisan election**	9	8	14
Partisan election, then retention election**	1	4	0
Non-partisan election**	13	17	12
Nomination by governor (without commission)	2	2	2
Nomination by governor from commission list, (usually with retention election)	15	10	3
Selection by the legislature	4	3	1
Selection by other judges (e.g., a higher court)	0	0	2
Other (typically variations of methods)	8	8	15

Data reflect the presence of more than one court in some categories in some states.

* Most states impose formal age and education qualifications on their judges (Rottman, 1995, tables 5 and 7).
** Judges in states that use election methods often gain office initially by gubernatorial appointment to a vacant judgeship. In some states, it is traditional for judges who are sympathetic to the governor and contemplating retirement at the end of their terms to retire early to allow the governor to appoint a replacement who will then have the advantages of incumbency in the next election.
*** In many states, there are two or three or more limited jurisdiction courts. Data here are for the most important of the courts.

position than a state trial judge facing a low visibility retention election.

The rhetoric about judicial elections is heated and not always informed by empirical evidence. What impact do elections have on judicial decision-making? There is no shortage of examples of judges who have been the object of campaigns to defeat their re-election or retention because of unpopular decisions. Three well-known cases involve the defeats of Chief Justice Rose Bird of California and Justice Penny White of Tennessee (both for decisions limiting death sentences), and Justice David Lanphier of Nebraska (for decisions involving laws limiting legislators' terms in office, citizen ballot initiatives, and the state's second degree murder statute) (American Judicature Society, 1999: 49-52). It is reasonable to assume that these and similar experiences[125] have made some other judges more cautious about making decisions that are legally meritorious but unpopular. There is also some more systematic evidence of the influence of elections on judicial behavior. Pinello, for example, found differences in decisional patterns on six supreme courts in the eastern United States based on whether the judges were elected or appointed. Judges who did not have to stand for re-election or reappointment, at least within a partisan tradition, were, for example, more likely to sustain criminal defendants' rights (Pinello, 1995: 130-131). Such findings suggest, but do not confirm, that elections inject non-legal factors into judicial decision-making. A study of the retention election systems in 10 states (Aspin and Hall 1994: 306) found that, although a majority of the 645 trial judges surveyed preferred retention elections to standard multi-candidate elections, they also believed that retention elections influence judicial behavior. The specific effects they reported varied considerably, but the largest single response, offered by a quarter of the respondents, was that

[125] Additional examples are available at <http://www.ajs.org/cji/fire.html>, the website of the American Judicature Society's Center for Judicial Independence.

retention elections made judges more sensitive to public opinion than they would otherwise be.

On the other hand, most retention elections are uncontested (Burbank, 1999: 332). Although Aspin and Hall found sensitivity to public opinion a prominent result of retention elections, very few judges in the 10 states they surveyed acknowledged that such elections affected specific decisions. (Of the 60 percent of respondents who reported any effect of elections on behavior, 5 percent said they sentenced more conservatively because of them (312-13)).

A related subject is judicial campaign financing. Can the public be confident that a judge is deciding cases independently when lawyers or the parties they represent provided funds to help the judge obtain or retain office? The extensive literature on this subject (Eisenstein 2000) does not establish links between judicial decisions and campaign contributions, but it does document the sometimes substantial sums contributed, especially to state supreme court candidates, and the sources of the contributions. In 1997, for example, four candidates for a single open seat on the Pennsylvania supreme court collected an average of $722,720 in campaign contributions (Eisenstein 2000: 13), primarily from lawyers. A study of Texas supreme court elections concluded that the amount of money received by candidates for the court is the best predictor of the victorious candidates (Cheek and Champagne 2000: 23). (Two public interest groups filed a lawsuit in federal district court in Texas in 2000, claiming that the state's judicial election system permits judges to accept contributions from litigants appearing before them, in violation of the constitutional right to a fair trial [*The Fort Worth Star-Telegram*, 4 April 2000)].[126]

Again, however, the picture is complex. Uncontested retention elections constitute a major proportion of judicial election activity. Aspin and Hall report that judges who experienced retention elections have self-financed, low-cost campaigns and only 18 of the 645 surveyed reported accepting outside funds (306). This proportion, however, would no doubt be higher for judges in traditional elections, facing opponents. In fact, an examination of partisan judicial elections in Illinois in the 1980s found that most of the judges who did not have opposition nevertheless received campaign funds in averages varying between $17,000 and $35,000 per election (Nicholson and Nicholson, 1994: 297).

Findings such as those summarized here suggest that judicial elections and their financing affect to some degree the appearance and reality of judicial independence. Although most judicial elections proceed without costly and controversial election campaigns, chief justices of 15 state supreme courts were sufficiently worried about the increase in the number of highly-contentious and high-cost judicial elections to call a "summit meeting" to try to do something about the trend. (National Center for State Courts, 2000). Furthermore, it is not clear how much popular accountability judicial elections provide. In an echo of the broader debate in the United States over electoral campaign financing, those who exercise their right to contribute to judicial campaigns come primarily from a narrow slice of the public: lawyers and law firms.

Judicial discipline and removal. Although the federal constitution provides federal judges tenure during "good behaviour," it also authorizes removal of life-tenured judges and other officials by impeachment (i.e., indictment) by the lower house of the legislature and trial in the upper house. Almost all state constitutions have similar provisions. The grounds for impeachment on the federal level are vague:

[126] According to a recent survey commissioned by the Texas Supreme Court, "83 percent of Texans believe that campaign contributions have a significant effect on judicial decisions" *The Houston Chronicle*, 9 April 2000

"treason, bribery, or other high crimes and misdemeanors" (Art. II, sec. 4). The failure of an 1804 effort to impeach a controversial Supreme Court justice for his judicial actions established for most observers that the federal impeachment provision is only to be used to punish judicial malfeasance (Rehnquist 1992: 114). Furthermore, impeachment and conviction are laborious and time-consuming. For both these reasons, in the history of the republic, the House of Representatives has impeached only 11 federal judges (the Senate convicted seven of them). Despite periodic calls for increased use of impeachment to remove judges who some perceive have exceeded their authority,[127] there does not appear to be any serious possibility on the horizon of making impeachment a form of discipline for judicial decisions.

On the state level, impeachment is similarly rarely used. There are, however, among the states additional means of removing judges from office, such as recall elections. Ten states and the U.S. Virgin Islands have recall provisions for state officials, including judges (The Book of States 2000–01: Table 5.23). Because impeachment is an inappropriate remedy for the vast majority of allegations of judicial transgressions, all states have established, within the judicial branch, commissions for judicial discipline and removal. In some states, these commissions only investigate and refer charges to other bodies; in other states they investigate and may take action. All state bodies include mixes of judges, lawyers, and laypersons.

In the federal system, regional councils of judges handle claims of judicial misconduct or disability. Anyone may present a complaint to the chief judge of one of the regional federal appellate courts alleging that a federal judge in that region "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or....is unable to discharge all the duties of the office by reason of mental or physical disability" [28 U.S.C. 372(c)(1)]. In 1999, about 800 complaints were filed, and almost all of them were dismissed, many because they were, contrary to the statute, "directly related to the merits of a decision or a procedural ruling."[128] Occasionally councils exercise their authority to discipline judges, as through private or public reprimand or the removal of cases, and the courts have generally upheld these efforts and the underlying statutory provisions against constitutional challenge (McBryde v. Review Committee, 1999). The situation is similar in the state courts, where judicial conduct commissions generally dismiss more than 90 percent of the complaints filed with them each year (AJS Judicial Conduct Reporter 1999: 1). Some judges have expressed concern that enabling other judges to determine whether a judge is, for example, derelict in carrying out the duties of the office or abusive to litigants has the potential to chill independent judicial decision-making (e.g., Battisti, 1975). A thorough review of a random sample of (non-dismissed) complaints that federal chief judges handled between 1980 and 1991, however, revealed no matter that the researchers viewed as interfering with or seriously threatening

[127] In 1997, for example, the House Judiciary Subcommittee on Courts and Intellectual Property held hearings on whether "judicial activism" is an impeachable offense, during which House Majority Whip Thomas Delay told the subcommittee that impeachment should not be used for "partisan purposes, but when judges exercise power not delegated to them by the constitution, I think impeachment is a proper tool" (U.S. House of Representatives 1997:16).

[128] Of the 826 complaints acted upon during the year ending September 30, 1999, chief judges dismissed 406 complaints, 300 of them because they were directly related to a decision or procedural ruling. Chief judges forwarded the other 420 complaints to councils of judges for review, which dismissed 416 of them. (Grounds for council dismissal not available.) (Source, Report of the Director of the Administrative Office, 1999: 80-81).

judicial independence (Barr and Willging 1993: 177-80).

Accountability through legislative oversight. As discussed earlier, U.S. judicial branches have primary responsibility for their own administration, but the legislature retains the authority to determine how much public funds to spend each year on the courts and to direct, within broad categories at least, how to spend it. Legislatures furthermore often have the constitutional authority to change court organization and jurisdiction. The legislature's power of the purse and, in the federal and some state systems, the authority to structure the courts creates a legislative oversight role that promotes a form of public accountability. For example, for the last four years, at congressional request, the federal judicial branch has submitted a report to Congress on *Optimal Utilization of Judicial Resources* (Administrative Office of the U.S. Courts 2000).

Accountability through statistical reporting. Reporting systems that provide descriptive statistics on judicial activity can also promote accountability. They can indicate, for example, how many cases were presented to the courts for decision and how many the courts disposed, and by what methods. These data can be compared to pre-established standards (e.g., not more than six months should elapse between filing of a major civil case and its disposition) or among courts. The federal judicial system has one of the world's most elaborate reporting systems (Administrative Office of the U.S. Courts), and many state court systems are also highly developed.

The object of most reporting systems is to describe case processing activity. They usually report activity in the aggregate (e.g., by an entire trial court) rather than by individual judge. The fact of reporting such data may exert some pressure on judges to change their behavior to conform to that of their peers. Some reporting requirements have behavioral change as a specific objective. For example, in 1990, Congress directed the Administrative Office of the U.S. Courts to disclose, semiannually, for each federal judge by name, the number of motions pending for six months, the number of non-jury trials with no decision for over six months, and the number of cases pending for over three years (along with the names of the cases involved) (28 U.S.C. §476). The object was to encourage judges to dispose of cases with sufficient promptness to avoid the embarrassment of a public report. The legislation, and similar state legislation, probably has that effect to some degree, although such requirements are amenable to manipulation. For example, some courts had adopted a practice of accepting notice from an attorney that she would file a motion but then giving the filing party 30 days to collect all papers, briefs, and other documents necessary for a "fully submitted" motion, even if some documents were not necessary for a decision on the merits. The courts then used the "fully submitted" date instead of the initial motion filing date as the start date for the six month pending period, thus creating an extra 30 days to decide the motion (The judicial conference disallowed this practice and has disallowed similar practices.)

5. Cultural Expectations

An important factor shapes judicial independence in the United States, in addition to or perhaps despite the many legal provisions summarized above. That factor is the cultural expectation that judges ought to behave independently. To be a judge in the United States is to decide cases according to the law and the facts despite the pressure of political sponsors and even popular opinion. "Judicial independence," said Supreme Court Justice Stephen Breyer (1998: 3), "is in part a state of mind, a matter of expectation, habit, and belief among not just judges, lawyers, and legislators,

but millions of people." This expectation is strongest with respect to direct intervention in cases. A 1996 survey revealed that 84 percent of U.S. citizens regard it as "not reasonable" for political actors to attempt to influence a judge's decision in a case (Lou Harris & Assoc., 1996). Certainly, the press stands ready to dig out and report such tampering. As one U.S. judge put it during a hemispheric judicial conference, the "media would have a field day" if it learned that a political party or government official had tried to influence a judge's decision behind the scenes (Torruella and Mihm, 1996: 975). Courts in the United States are not perceived as simply instruments of the state. Rather, courts are to be impartial, regardless of the parties and the issues, and must enforce the rights of individuals against the government, even when it may be unpopular to do so.

While most people think individual interventions to influence judicial decisions are improper, there is probably less popular support for judges' deciding cases contrary to widely held public preferences. As noted, voters have removed from office some state judges who have done so, and a federal judge was recently subjected to demands that he be impeached in retaliation for his controversial decision in a drug case. Despite such examples, the U.S. public has regularly shown a high level of tolerance for independent decision-making. Recurring calls for term limits for federal judges have never gotten very far, and for the last several decades states have been incrementally changing their judicial selection systems away from partisan elections and toward nominating commissions and retention elections.

To the degree people have attitudes toward the courts, public trust in the judiciary is generally high. According to a Gallup poll conducted at the end of 1998, Americans express more confidence in the judicial branch (78 percent giving it a high rating) than the executive and legislative branches of government (The Gallup Organization, January 8, 1999). Maintaining that confidence, furthermore, presents a challenge for those who select judges at every level. This challenge involves ensuring that the bench is not only competent and honest but also that it reflects the demographic make up of the society it serves. These efforts are important not so that loyalty to demographic interests replaces independent decision-making. They are important rather so that all members of society will have confidence that the judicial decisions affecting them were made by a judiciary accountable to and representative of the diverse interests of society.

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IV. MAJOR THEMES

A. Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals

by Linn Hammergren

1. Introduction

For decades, increased independence has been perceived as central to strengthening judicial performance. More recently, it has been joined by another element, the demand for greater judicial accountability, with some critics arguing that absent this second factor, the drive for independence may go too far, producing a variety of new problems. This comes as a nasty surprise for some judiciaries. Finally having escaped from the control of executives, legislatures, political parties, and nongovernmental elites, they now find themselves subject to demands for new kinds of responsiveness. What precisely this implies is not always clear, but the development is often seen by judges as threatening their recent gains.

The case studies included in this manual offer various examples of the origins of these new demands—concerns, especially in parts of Europe, about the political identification and activities of their judges;[129] complaints about the unprecedented ability of the Italian magistrates to shape their own institutions and to determine which crimes and criminals will be investigated; discussions, largely in the developed world, but increasing in the developing regions, about the role of courts in invalidating new laws and policies; criticisms of the judiciary's isolation from social realities. They also suggest (see article on the United States) that accountability is not entirely novel: the adoption of judicial elections in the United States in the 19th century arose in part out of a concern that judges, who clearly sprung from elite backgrounds, were too likely to represent their class interests, even in the absence of more direct pressures to do so.

At present, ideas about the specific problems accountability is intended to address, the form it should take, and to whom it is directed are far less developed than the notions about independence. This arguably increases their sensitivity to the contextual setting making likely a still greater variation in national responses. As with independence, there is a tendency to assume agreement on the meaning of the term so that it is rarely explicitly defined. As discussed below, accountability should not be understood as the diametric opposite of independence; the interaction of the two concepts is more complex. However, a worldwide tendency to augment judicial independence has raised new issues and in turn generated an interest in accountability as a means of addressing them. Current discussions tend to stress one or more of the following themes:

- A concern that the judiciary as a corporate body may have excessive control over its own composition, creating a self-perpetuating and self-protecting caste
- A concern that the removal of traditional external controls may allow the judiciary an unparalleled and possibly abusive freedom in managing its own resources.
- A concern that judges' ability to interpret laws as they apply them may give them excessive power in reshaping the legal framework according to values and views shared neither by the public nor by the other branches of government
- A concern that institutional mechanisms for defining standards for, controlling

[129] Interestingly, the background articles suggested greater social acceptance of judges' political activism in Europe and in Africa than in Latin America.

and correcting judicial behavior are inadequate

Where these problems have emerged, they might be remedied by again restricting institutional independence and partially re-imposing more traditional controls, if in improved forms. Accountability represents a different type of solution—a demand that a more or less independent body explains and justifys its actions, preferably in terms of widely accepted and pre-established rules or criteria. Presumably, a failure or unwillingness to do so will trigger some response—although, as elaborated below, the form this should take for the judiciary is not entirely clear. The potential reaction lends weight to accountability. The overriding logic behind its introduction is that organizations which have to recount and explain their actions will be less likely to err in the first place.

Because accountability is a relative newcomer to discussions of improving judicial performance, it is also relatively underdeveloped even in the otherwise most mature court systems. This raises the possibility that it should be addressed only after other issues are resolved. However, latecomers to judicial reform, like latecomers in other areas, may not have the luxury of sequencing their problems. If accountability is already a concern, then it will have to be attended along with the more conventional elements of normal institutional development. Because this simultaneous treatment may lead to some confusion of the various means and ends, it is worth examining more closely the linkages between these and other related goals.

2. *Relationship of Independence and Accountability*

In discussions of these concepts, two questions frequently emerge: whether the two elements are inevitably in conflict, or whether they are really not coterminous. The questions, which seem to go in opposite directions, arise from a common tendency to define independence and accountability in terms of relations among branches of government. Indeed if the judiciary is to be both independent of and accountable to the executive and legislature, then there is a certain circularity of argument. However, whereas independence is properly conceived as relating primarily to judicial-governmental relations (and secondarily to judicial relations with other powerful elites), judicial accountability is better understood as referring, as it does in the case of the rest of government, to institutional accounting to political and civil society. Thus, whereas other branches of government are critical in enforcing judicial accountability (requiring that reports be delivered) and in imposing sanctions when the response is unacceptable (as in requests to impeach a judge, redefine the limits of legal powers, invalidate the use of budgetary funds), the underlying question is the extent to which the judiciary answers to and thus serves society as a whole.

Accountability can also be distinguished from independence by the timing of the relationship. Independence focuses on prior control of judicial actions—the extent to which external forces shape decisions which are the judiciary's to make. Accountability is ex-post control, and refers to the requirement that the judiciary relate and explain both its administrative and functional operations and outputs. Obviously, the knowledge that one will have to justify ones actions may indeed exercise an influence on their content. That influence will be conditioned by the criteria used to evaluate the actions treated, making it extremely important that an agreement be reached before the fact as to the relevant standards and that there be a continuing discussion as to their adequacy. Accountability sets theoretical limits to judicial discretion, but these limits are by no means arbitrary. Whereas insufficient independence may pull the judiciary away from acting in accord with the law, accountability requires that it justify its actions

in terms of legal compliance. Whatever dynamic tension may arise between these two elements, accountability in some sense also strengthens independence. The need to account for its actions may reduce the judiciary's vulnerability to external pressures, since in most cases, the explanation that "the president made me do it" will not be an acceptable justification.

Although accountability and independence may be directed at the same kinds of judicial actions, the law-relatedness of accountability means that its focus is less on decisional outputs (the crux of independence) than on compliance with procedures. This applies to administrative and operational actions as well as purely jurisdictional ones and to the full array of the latter, not just the decision or two that attract particular attention. Many things a judiciary will be asked to account for are hardly what matters to those attempting to erode its independence—compliance with regularized appointments, contracting norms, and remuneration of administrative staff, where judges derive their income, and how they use public resources. These same details may, however, conflict with the judiciary's own notion of what being independent means. It is perhaps to judges, most of all, that independence and accountability appear to be in conflict. It is not only judges who feel this way; virtually every professional group which is asked to account for its actions is likely to raise similar objections.

Accountability is commonly seen as a means of combating judicial corruption, but here again the relationship is more complex. Were corruption the only concern, certainly the British judiciary, widely acknowledged to be among the world's most honest, would not be facing the current demand for more publicly transparent operations.[130] Thus, accountability aims at controlling a wider variety of performance problems—the broader issue of whether the judiciary's actions correspond to societal norms, some of them set forth in law and others of a less formal nature. It also is not, in and of itself, an adequate remedy for corruption.[131] Where corruption is the problem, three dimensions of change must be addressed: accountability plus independence plus simple organizational strengthening.[132] A judiciary which accounts for its actions may still not be able to control the behavior of its members (and thus need more organizational strengthening). It, or its members, may still be vulnerable to external pressures, if, for example, appointments, tenure, and salaries are insufficiently protected.

3. *The Demand for Greater Accountability*

The demand for greater judicial independence has a longer history than that of accountability. Independence is seen as necessary because of the notion that an effective, legitimate judiciary must be free of outside pressures on its internal operations. The complaint that independence

[130] The fairly informal and highly nontransparent means by which the bench has been selected in Great Britain is now a focus of considerable complaints. While the system has guaranteed high standards of performance, this apparently is no longer all that matters to the broader public. See Malleson for a discussion of the arguments and a speculative treatment of the origins of this change.

[131] One evident source of confusion is the use of the term "transparency" as a polite way of referring to issues related to corruption. Transparency is a major part of accountability, but like the latter, is only one element in combating corruption.

[132] This may be what Konner means by functional autonomy—in any event for a judiciary to perform well, it evidently needs the ability to control its own internal operations, as well as to protect them from outside influence. Accountability adds the ability to perform to societal expectations and not just to its own standards.

may lead to its own abuses is of more recent vintage, as is the argument that the judiciary like other branches of government should be subject to a responsibility for its actions. Five factors feed into this development:

- The explosion of the myth that the judiciary's role can be limited to the neutral application of the law and the recognition, even in systems where this is theoretically not supposed to happen, that the judiciary has an important place in deciding what the law is and how and where it will be applied
- The expanding importance of ordinary judicial decisions and of their impact on the lives of citizens. Even, or perhaps especially, in an era of reduced governmental intervention, increases in the type and number of social conflicts and the reliance on law to resolve them give the judiciary greater power.
- The emergence of constitutional democracies with their reliance on courts to control the actions of other branches of government and to decide conflicts among them or between them and citizens
- Changes in public attitudes toward authority—the judiciary may be the last to feel this, but in democratized societies, publics expect their officials to explain their actions, no longer taking them on faith. Arbitrary decisions whether by executive, legislature, or courts are no longer accepted.
- The growth of judiciaries themselves, so that informal systems of internal control and decision-making no longer guarantee predictable and standardized outcomes

In short, the emphasis on accountability is a consequence of the new weight accorded to the judiciary in an era where the rule of law, rather than arbitrary government intervention, is the means for maintaining social control and where that control is itself threatened by new forms and new dimensions of societal conflict. The extent of the demand may also be conditioned by the cultural context. Cultures which still privilege traditional authority may be less inclined to demand transparency from their judges. In the civil law tradition, the persistent belief that judges only apply the law may also diminish the demand. Here limits on judicial discretion may be sought through more law rather than through controlling judicial compliance with what already exists. Overall, the faith in the ability to limit problematic behavior by further restricting the legal areas of discretion appears misplaced.[133] However, in some contexts it may be the culturally preferred approach and for that reason, work to everyone's satisfaction.[134]

4. Four Elements for Accountability

The usual recommendations for increasing accountability are in general not much different for the judiciary than they are for any other public sector entity. Roughly speaking they also correspond to the four concerns raised above and result in the following types of mechanisms:

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[133] This argument directly contradicts Klitgaard's formula (Corruption equals monopoly plus discretion minus transparency). However, that formula appears more appropriate for a Weberian command bureaucracy, not the "results-oriented" organizations (and judiciaries) now being sought.

[134] Konner's discussion of Germany is suggestive in this regard. His depiction indicates a combined effect of a trust in authority and a faith in legal compliance and a consequently lesser cynicism, as compared to the rest of Europe or the United States, about judges' potential abuses.

- Transparent systems for selection of judges—publicized criteria and discussion of their application
- Transparency of internal operations and their subjugation to pre-established rules; budgets, use of resources, salaries, assets declarations, standards of behavior and evaluation should be formally set and available for public review.
- Transparency of judicial decisions—public records of proceedings and publication of sentences
- Functioning systems for registering complaints on institutional operations or behavior of individual members

All of these mechanisms are also vital to broader reform objectives and have been discussed in this light in other sections of this manual. The following discussion attempts, not always successfully, to address only the aspects most directly related to accountability.

As regards selection systems, these have received most attention, although usually out of a concern for their impact on independence. In many countries, this has given the judiciary itself more say in how its members are chosen. An alternative arrangement leaves selection or pre-selection[135] with some kind of external commission or council, the members of which are often either judges, or representatives of the broader legal community. While there has been an accompanying trend to stress "merit" appointments, the new demand is for the entire mechanism to be more transparent and open, if not to actual participation of the wider public, then at least to their scrutiny. As with other professions, the dilemma is where to place the balance between the presumably greater ability of professionals to evaluate their own members and the danger that only guild interests (whether limited to judges or the legal community) will be served. Few reformers have gone so far as to recommend popular elections, which raise their own problems of accountability and independence. More usual suggestions include the publication both of criteria and the rankings of candidates, the inclusion of public observations in the evaluations themselves, or an opportunity for public discussion of the results. The suggested improvements respond to two concerns: the closed nature of many selection systems (and thus the tendency for subjective criteria to enter, possibly to the detriment of individual independence) and the likelihood that exclusively professional control will not recognize the legitimate interests of external clients and users.

Increased independence has in many cases given the judiciary control over resources which once were managed by other entities (e.g., a ministry of justice). It also unfortunately has augmented the opportunity for wasteful or simply abusive practices. Even judges who exercise the utmost care in conducting their professional duties may, out of inexperience, ignorance, or occasionally, malice, handle financial and administrative matters in a far more cavalier fashion. Here, and with issues like reporting sources of income, guarding against inappropriate contacts with parties to legal disputes, or using court vehicles and other property, judges sometimes feel that their institutional independence precludes external oversight. Many judiciaries maintain, but do not release statistics on workflow or other performance measures, again citing the need to protect their independence. In many countries, there is still an on-going debate as to whether judges or the judiciary as a whole should be

[135] Even in countries (e.g., the United States) where selection is by political appointment or elections, there is an increasing tendency toward an informal vetting system managed by a council or committee charged with ensuring quality.

subject to the same standards of accountability for these administrative and operational details as is the rest of the public sector. Ultimately, the specific outcome will vary from country to country, but in general there is a tendency to unify the standards. Where those applied to the courts are less stringent or left for the courts to decide, this has generally not helped the judicial image or improved public faith in the quality of judicial performance as a whole.

In the area of judicial decisions, the conflict between independence and accountability enters more delicate terrain. It is one thing to tell the judges they will have to account for the use of their budget, be subject to normal auditing procedures, and even publish workflow statistics. It is another to require that they explain their judgments in any but the traditional manner. That tradition itself is subject to considerable variation. It often requires that judges prepared written explanations of how they reached a decision. However, that explanation may not be publicly available, and the decision itself may be released only to the parties. In some cases, resources constraints may pose real problems, but in many others, it is a simple preference for avoiding public scrutiny and criticism. Judiciaries which have adopted more openness can undergo some uncomfortable moments, but there are a variety of positive trade-offs. Courts have found this is a way of combating corruption, improving quality, and increasing public understanding.[136] In theory, at least, is should also discourage unnecessary recourse to judicial services—because parties will have a better idea of what the outcomes are likely to be. The point, it should be stressed, is not to make individual judges subject to some sort of special public accounting for each decision, but rather the simple requirement that their judgments be known as part of the normal course of events. And this, surprisingly perhaps, is not something that every court system automatically requires.

Even in the best of circumstances, there will always be judges who break the rules and parties who believe, rightly or wrongly that their judge did so. If not the judge, then some members of the administrative staff may also be suspected of misbehavior. Like any profession, the judiciary has preferred to deal with such problems in private and occasionally, not to recognize them at all. Increasingly, however, the public is demanding not only that problems be recognized and dealt with, but also that this be done in a transparent fashion. There are important differences among national systems, and also between their judiciaries and publics, as to the standards of acceptable behavior, the sanctions to be imposed, and the manner, and by whom, they will be applied. Increasingly, the traditional reliance on the judicial hierarchy itself to handle these matters has been seen as insufficient—diminishing the independence of individual judges, and possibly encouraging the formation of internal networks of influence[137] and occasionally, corruption. This had led to other suggested innovations—for example judicial ombudsmen or inspection offices which operate outside the judicial hierarchy and occasionally outside the judiciary. Transferring these responsibilities to judicial councils has been another tack taken, although often facing the same complaints about hierarchical pressures

[136] In Argentina for example, the federal civil courts have begun to publish sentences as a way of standardizing awards for damages. This is intended to encourage out-of-court settlement (and thus decrease congestion) and to provide a disincentive for bribery (because both the parties and the judge know that unusual results will be noticed).

[137] This in particular has been the complaint of the French association of judges, not because of corruption but because of the perceived need to please ones superiors and shape decisions as well as other behavior to their taste.

(sometimes because the council in the end relies on the normal hierarchy to handle the situation of lower level judges and employees). The question of handling complaints and discipline is a particularly delicate one, not the least because it is an obvious means of putting pressure on judges whose decisions run counter to the preferences of their colleagues or their clients. However, aside from the impact of changing attitudes about acceptable behavior and professional self-policing, a more transparent process may also offer greater protection to the individual judge who otherwise is at the mercy of the institutional consensus.

5. Some Related Mechanisms and Concerns

As one of the last public sectors to face the issue of accountability, the judiciary poses its own special problems, many of them intimately related to the importance placed on respecting its independence. This affects both what the judiciary can legitimately be required to submit for review and the kinds of actions that should follow. It also, as discussed below, is complicated by the judiciary's inherent ability to define the rules and thus to invalidate efforts to subject it to any kind of oversight.

a. When accountability fails or is unsatisfactory

The concept of accountability focuses on a required explanation for past actions. While this alone should influence judicial behavior, there is still the question of what happens if that explanation is not forthcoming or is found lacking. Where legal norms are actually breached (e.g., misuse of financial resources, a judge's violation of substantive or procedural law) this will provide grounds for legal actions against the responsible party. In other instances, the reaction may be less immediate and direct. It is likely to take the form of efforts to modify the legal bases of the judiciary's operations or composition, or more punitive actions, for example, reductions in resource allocations and in more extreme cases, irregular purges of the bench. As the background articles suggest, the standards against which judicial performance (and accountability) will be measured are a product of broader social values and thus will change along with the surrounding cultural setting.[138] Here judicial accountability, like that of any other public institution, is part of an on-going dialogue between the organization and the society it serves. Where that dialogue demonstrates fundamental disagreements, then it will give rise to efforts to renegotiate the relationship. The demand for accountability itself is part of that shift, as are modifications in the details of what the accounting will include.

b. Institutional and individual accountability

Judicial accountability is in many senses like that required of any public organization, but the accompanying notion of judicial independence complicates the matter. This is especially true because of its application to individual judges as well as the institution as a whole. Unlike employees in the rest of the public sector, individual judges are expected to make their decisions qua judges independently of their organizational superiors. Presumably, they also owe some individual accountability, although most of that will be channeled to and through the larger institution. Because accountability to the institution may be a means of corporate interference with individual independence, it is

[138] Change is not always in the direction of greater stringency. One move in the opposite direction in Latin America regards "prevaricato," a judge's misapplication of the law. In several countries, this was formerly a criminal offense even when done unintentionally. Recent changes make it hinge on malicious intent.

necessary that it be as rule-determined as that of the institution to its public. This is one of the reasons for attempting to separate the process of intra-institutional accountability from the ordinary judicial hierarchy—to avoid confusions occasioned by the immediate superior's role in reviewing (in the appeals process) judicial decisions with that of other activities. Nonetheless, there is considerable room for disagreement as regards the areas where individual judges should act with complete independence and where they are subject to administrative or other kinds of legal oversight. One matter arising in the Latin American region, for example, is that of the time limits for handling cases. Whereas many judges regard this as part of their functional independence, many judiciaries (and publics) view this as subject to ordinary disciplinary standards—a judge is independent as regards the content of his or her decision, but not as regards excessive delays in taking it.

c. Judicial responsibility

The civil and common law traditions have faced this question differently, with the former more willing to hold individual judges responsible for damages they may inflict in their judicial functions. Judges enjoy much greater immunity for their official actions under common law systems; activities which are subject to criminal or civil claims in civil law countries may invite no legal recourse in the common law tradition.[139] As regards responsibility for professional or private misbehavior, both systems usually allow judges immunity which must be waived before legal action can be taken. As this decision usually lies with the judiciary itself, it raises its own issues of accountability and increasing complaints that the judiciary has either been too protective of its members (and thus reluctant to waive immunity) or has used the process to punish those who don't fit the institutional culture.

Neither legal tradition has paid much attention to accountability and thus responsibility for other kinds of official, but nonjudicial actions—misuse of budgetary resources, hiring and supervision of administrative staff, or management of court resources. To some extent, in both systems, there has been a lag between treatment of such issues for the judiciary and for other parts of the public sector. As standards have been tightened for other public actors (who once might have used official cars for their private errands, but now do so at the risk of seriously negative consequences), judges have resisted, but with less than complete success, the tendency to subject them to the same rules. The issue is complicated by the fact that it is often up to the judges themselves to decide how and to whom the laws will be applied. And, while it is hard to say how misuse of public property or mistreatment of staff can be vital to judicial independence, judiciaries have not always seen fit to subject themselves to the new standards. It is true that such accusations may be made, falsely or accurately, to apply pressures to judges of too independent a stripe and thus that more than corporate self-interest is at stake. However, the solution would appear to lie in a more careful review of the charges made, and possibly in serious sanctions for frivolous or false accusations, rather than preserving judicial immunity for actions which would not be acceptable from other public actors.

d. Public service orientation

At least one element in the demand for accountability is the tendency to see judicial performance as a public service. For many judiciaries this is a new concept and one which

[139] This difference may make codes of ethics partially redundant in civil law countries, where some of the items often included in such documents are already treated ("typified") in the ordinary civil or criminal codes or in the judiciary's organic law.

they continue to resist. On the one hand, public service is more often associated with the executive and judges may see their function in another light. On the other, to the extent they do provide a public service, then they are more legitimately accountable to the same standards as other public servants. In truth, the judiciary is probably best described as simultaneously providing a public service and acting as a political or public power, and this dual status may in fact condition the accountability it offers. The duality does not eliminate the need for accountability on either side, but it may require two forms and standards, one for the public service element and one for the political aspect of the judicial role. Of course, as it is often one individual who performs both roles, there is an inevitable dilemma of how to separate the two forms of responsibility and accountability.

e. The bar and the bench

There is another delicate tension here, in that the two halves of the legal/judicial equation are also traditionally the best sources of checks on each other. Both the bench and the bar of course should exercise control over the actions of their own members. Nonetheless, it is well recognized that effective professional self policing, here as with other disciplines, may be diminished out of corporate self interest. The same threat is posed vis-à-vis each other (as the self interest of the broader legal community) but the greater dilemma is how to prevent one of the two professions from gaining too much power over the other. Here the advantage undoubtedly lies with the bar because of its access to more resources, political ties, and less formal organization. Still, while there are far more examples of an elite private bar controlling the judiciary or at least instigating its misbehavior, judges, individually and collectively, are not without their own means of shaping lawyers' actions. Maximizing the potential for cross-control and eliminating any existing imbalance of power obviously require political decisions that transcend any agreement of the two groups. If judges are to have effective defenses against an abusive bar, or the latter is to operate free of threats of judicial "terrorism," then other elements of political and civil society will have to support the enactment, effective implication, and external monitoring of new legal rules.

6. In Conclusion

The judiciary is one of the last major professional groups to face the demands for accountability arising with the spread of more democratic political and social cultures. While the shift is not universal, it clearly is linked to the prior advancement of greater judicial independence. Despite the impressions of some judges, the two developments are not contradictory; at least in the current environment, more independence seems to require more accountability, and accountability in some instances can be seen as enhancing independence. There are nonetheless enormous differences among and within national systems as to the extent of the demand, and the form, and the content of the mechanisms promoted. As regards the less juridical aspects of judicial performance, there is a marked tendency to push judges and judiciaries towards the same forms and standards of accountability as affect other public officials. The most difficult aspects of the new trends undoubtedly involve those areas most central to the judicial role (how decisions are reached, courtroom performance, and even workload standards) and those where "normal" accountability can be used to apply pressure on individual judges.

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B. The Role of Court Administration in Strengthening Judicial Independence and Impartiality

by William Davis[140]

1. Introduction

This paper describes the relationship among strong judicial leadership, sound court management and administration, and judicial independence and impartiality. Improving court management and administration can strengthen judicial independence and impartiality because a judicial system that renders justice in a timely, efficient and effective manner builds public confidence and respect for the rule of law. As noted by Alexander Hamilton in the Federalist Papers, the ordinary administration of justice contributes more to the public's appreciation of its government than any other activity. Increased public confidence in turn can lead to broad support for greater autonomy and resources for the judiciary, including from the political branches of government.

Donors can and should play a crucial role in this process by helping to (a) establish a governance structure for the judiciary that supports independence and impartiality; (b) develop the judicial leadership necessary to exercise such independence effectively; (c) build the judiciary's capacity both to govern itself and carry out its judicial functions well; and (d) support the establishment of specific structures of court administration that facilitate impartial decision-making, primarily by increasing the transparency of the court's operations. Each of these concepts is discussed below.

[140] DPK Consulting was founded in 1993 as a California professional partnership to assist governmental institutions at the state, federal and international levels to be more effective. DPK Consulting and its two principals, William E. Davis and Robert W. Page Jr., have focused on working with institutions, which are planning for and implementing major change.

2. Establishing a Governance Framework that Strengthens Independence

An important step in fostering the independence of the judicial branch is the establishment of a comprehensive governance structure--anchored in constitutional and legislative provisions—that clearly delineates the functions and responsibilities of the judicial branch, notably, the resolution of cases. There are two major approaches to achieving the judiciary's institutional independence from the executive and legislative branches:

- A fully independent judicial system as a separate branch of government which (a) governs itself and (b) controls its own budget
- Judicial system with independence in judicial decision-making but administrative and budgetary dependence on an executive department, generally the ministry of justice or its equivalent

However, a framework that grants the judiciary no administrative or policy-making authority will do very little to promote independence and impartiality. Even in European countries in which judicial administration is assumed by the executive branch, usually the ministry of justice, the trend is toward increasing the authority of the judiciary to administer its own activities. The trend is fueled in large part by growing demand for improvements in the operation of the justice systems.

Both Spain and Italy created judicial councils in the 1980s to assume from the justice ministries the management functions of the judicial system. A number of countries in Latin America followed suit. The French judges association recently adopted resolutions supporting the complete separation of judicial functions from the executive. Only a few European countries,

including Germany, the Netherlands, and Belgium, have not shown interest in departing from the traditional model.

Judicial leaders in several ommonwealth countries, most notably Britain and Canada, increasingly are asserting that administrative, policy and budgetary functions should belong to the judiciary rather than the executive. In other countries such as Pakistan, legal reforms to consolidate the governance function in the Supreme Judicial Council are emerging.

In most Latin American countries, administrative oversight has been transferred to either judicial councils or supreme courts. The Costa Rican Supreme Court created a council as a subordinate administrative entity to make decisions regarding the operation of the justice system so as to free itself from the demands of these matters. Similarly, in Chile and Uruguay, the Supreme Court created a committee of its members to perform the management and administrative functions.

Responsibility for management of the judiciary in the United States developed along a similar path, with the Department of Justice originally responsible for the administration of federal courts. The U.S. Constitution does not directly address responsibility for the management of the judiciary. In the 1930s, Congress transferred the management and administrative functions from the Department of Justice to the federal judiciary.

Many underestimate the need to recognize the professional risks taken by those individuals who support reforms. When there is an effort to alter the structural landscape, it will affect the entire political spectrum. Those persons who venture out to take leadership and advocate reform frequently find themselves confronting many different points of opposition from within the legal system, as well as from the outside. Donors need to be mindful of the potential costs to these individuals. For instance, Guatemalan judges who were seen as proponents of reform under the direction of a reform-minded Supreme Court were given less desirable assignments when new Supreme Court judges took office.

3. Support of Stewardship within the Judiciary

In order that a judiciary can gain and maintain independence and public support, it must demonstrate strong internal leadership. The process of transferring administrative and policy functions to the judiciary takes time and requires internal capacity and willingness to assume new roles and responsibilities. Donors can assist in this process, when there is both political will within the government and genuine interest among the judicial leadership, by helping the judiciary to (a) build leadership and managerial capacity within its ranks, (b) design appropriate administrative and managerial structures, and (c) advocate for increased funding For transparent processes that enhance the public's understanding and appreciation for the judiciary and the rule of law.

In the United States, the courts have gained more and more independence not only through organizational changes but also because judicial leaders have developed creative ways to address problems facing the judicial system, including delay, access to justice and prejudice within the court system. The willingness and ability on the part of the judicial leadership to exercise stewardship in these areas has created a correspondingly increased willingness within the executive and legislative branches to commit funding and transfer responsibilities with minimal oversight. As the managerial capacity of the judicial branch has increased, its members have increasingly become the initiators of reform programs.

In Latin America, several attempts to promote judicial administration have been frustrated due

in part to a lack of continuity of judicial leadership In Argentina, Colombia, and Venezuela, judicial councils established during the past decade quickly developed their own large bureaucracies (over 1,000 employees in the case of Venezuela) that did not improve the operation of the system. These experiences suggest that the mere creation of a policymaking and administrative structure within the judiciary will not always translate into an effective, independent system. The problematic reforms transferred authority and responsibility without a corresponding effort to develop the skills and leadership necessary to manage the systems.

For example, the Costa Rican Supreme Court has consistently exercised sound leadership, and, as a consequence, is one of the most respected courts in Latin America. The court has active committees that constantly evaluate the operation of different aspects of the system, including criminal procedures, organization of trial courts, and educational needs of the judges and staff. The court takes responsibility for the functioning of the system and initiates reforms. It has built public confidence in the judicial system through these initiatives. In fact, opinion polls show that it is the most respected public institution in the country.

The supreme courts of El Salvador and Honduras have also exercised leadership. The Honduran Supreme Court was instrumental in the formation of an inter-institutional committee to establish a plan for the transition to the new criminal procedures code. The assumption of responsibility to implement new reforms has lead to the increased administrative independence of the courts in Honduras.

4. Building Management Skills within the Judiciary

As with leadership, the judiciary must demonstrate an internal capacity to maintain independence. When the judiciary fails to address problems in the performance of the judicial system or is ineffective in its efforts to do so, the other branches are more likely to exert control over the judiciary. Control by other branches of government is problematic in many countries

In contrast, when a judiciary has the internal capacity to operate effectively, less control from other branches of government is needed and a management approach can be achieved. Activities to promote capacity building within the judiciary need to focus not only on management techniques, but also on such elements as ethical and moral leadership requirements of judicial leadership. The highly successful training seminars developed for state chief justices in the United States have adequately demonstrated the effectiveness of this approach. The chief administrative officer participates in these seminars in order to build a more cohesive approach to governance.

The range of potential programs in this area are broad, including

- Management of the budgeting process
- Management of relationships with the legislative and executive branches
- Organization and delivery of services to the trial courts and court management assistance programs to support improvements in the operation of the trial courts
- Building administrative systems
- Development of statistical systems to measure the performance of the judicial system
- Development of policy-making processes that rely on participation by all levels of the legal system

- Development of managerial training programs for those persons assuming positions in the governance structure
- Supervision of the bar association
- Public outreach to educate the public about the legal system
- Strategic planning for the future

Other areas of additional assistance include promulgation of rules of practice and procedure for civil, criminal, juvenile, family, probate, and estates cases; management of the appropriated resources; education and training of judicial officers as well as court employees; and the administration of programs that assist the judicial function, such as probation, pre-trial release and alternative dispute resolution.

a. Management of the budgeting process

The process for presenting the budget does not usually allow for the opportunity or necessity of addressing shortcomings in the system. The failure of the judiciary to present its financial needs in a professional and comprehensive manner weakens its ability to acquire necessary resources for development and growth and its credibility as an independent sector. It is clearly the responsibility of the judiciary to take the initiative on these matters.

The development of effective budgetary processes should include all levels of the courts. Lower courts should regard the budgeting process as a vehicle for identifying and justifying their needs to higher courts and to other branches of government. Training programs in budgeting as a part of the planning process for the system can assist in the development of integrated approaches.

A systematic approach to the development of a budget will better reflect the needs of the entire system. This process requires the courts to document their needs and identify priorities for funding. Competition with other governmental entities for scarce funds is acute. Success is more likely if needs are well documented, all levels of the court system participate actively in identifying needs, and a strategic approach is developed to defend those needs to the other branches of government.

A more challenging issue is the matter of decentralizing management responsibility for appropriated funds. In order to undertake decentralization, the management and administrative processes for delegating funds from the national to the local level must exist and work properly.

Donor assistance in this area can take the form of training of staff and judges in budgeting and planning. Projects that emphasize planning for improvements in the system should complement the strengthening of budgetary procedures. Other branches should also be involved in this process, since the judiciary will need to work closely with them in gaining approval for the budget.

b. Relations with the executive and legislative branches

An independent judiciary must have a systematic approach to working with other branches of government. This requires the development of formal and informal channels to communicate needs, concerns, plans, and activities. In the more sophisticated and developed systems in the United States, there are offices staffed with professionals who review pending legislation to determine impact on the judiciary and make recommendations to the legislative bodies on how to modify such legislation. They maintain regular contact with executive agencies that provide services or have relationships with the judicial system. When justice policy issues arise that cross institutional boundaries, these offices represent the judiciary

in policy discussions. The institutional capacity to engage these questions supports the role of an independent judiciary in the eyes of the public and the rest of the government.

The judiciary has on occasion taken the lead to create a forum for discussing matters of mutual interest among the three branches of government. For instance, Chief Justice Burger of the U.S. Supreme Court initiated an annual retreat for the chairs of the judiciary and appropriations committees of Congress to discuss issues facing the federal judiciary.

5. *Designing Appropriate Administrative and Managerial Structures*

The effective functioning of the courts requires an effective system of records, case flow and financial management, and some degree of centralization of functions within each court. These improvements enhance transparency and standardization, and thereby reduce opportunities for corruption, mishandling of records, and arbitrariness.

a. Records management

The maintenance of records is fundamental to the administration of justice. The court system must keep records in a highly reliable and predictable fashion. Efforts to build an effective records-management system contribute to the basic building-blocks for the judicial system. The management of records requires a comprehensive design of receipt procedures, storage and disposal procedures, and use of forms. Administrative integrity of the records system enables litigants and the public to rely on the system; transparency of the legal process is thus achieved.

The appearance of the court facility and the records that are being maintained are essential elements in building an independent and transparent system. In many countries access to case files is restricted to the parties and their lawyers. The integrity of the case files is of paramount importance. The entire history and record of evidence is included within the case file. Security concerns have led to the "sewing" of the case file in order to protect against fraudulent removal of original documents. The development of secured filing systems that protect against fraud is highly recommended. The degree to which automated procedures can be used to complement these systems should also be investigated. The design of trial and appellate court reform projects must necessarily include this dimension of court management.

b. Case flow management

Research in the United States, Australia, the United Kingdom, and Singapore has shown that courts must develop efficient procedures to manage the litigation process effectively. This concept implies that the judge is an active participant in the management of case flow. However, in many developing legal systems, especially those that are code-based, judges have traditionally allowed lawyers to establish the pace of litigation events. Often, delay benefits one party over the other, so acquiescing to delay constitutes a *de facto* abdication of judicial impartiality and responsibility. In practical terms, one of the most important ways for a judge to assert independence from the litigants is to be the de facto manager of the court docket, namely by setting a schedule for the various filings, hearings and other necessary events, and authorizing delays only when good cause is shown.

In order for judges to assume this role, programs must be developed to cultivate a sense of responsibility for the time it takes to process cases. Efforts to acquire this level of control are often met with stiff opposition from litigating attorneys and frequently from some judges. The design of programs to address the pace of

litigation is often most effective when done in cooperation with the legal professionals who use the system including viable independent Bar Associations if they exist. For instance, USAID supported such a program in El Salvador. First, the court staff counted every pending case, developed a list by age of the case, and recorded any recent case movement. If no activity were detected, the Court advised the parties that the case would be placed on inactive status until there was some case activity. If the parties wanted to keep the case in active status they had to indicate their intent to the court. Once the first step in the process of gaining control over the inventory of cases is complete, the court can organize its calendar around those active cases requiring judicial intervention.

Similar approaches were followed in several pilot courts in Ecuador, Lima, Peru and the Dominican Republic, resulting in significant reduction in the time cases were pending.

An effective addition to this basic concept of case management is the development of multi-track, case-processing systems that prioritize cases. The multi-track system recognizes that different cases require different treatment and different levels of intervention. This approach, which began in the United States, has expanded to other jurisdictions, among them Singapore, the U.K., and Australia. The procedures require a high level of technical assistance, and are best developed in pilot courts. Once a record of success is achieved, the courts can also use the results to justify increases in funding. Multi-track case processing has been a part of reform efforts in the federal and state courts of the United States for the past twenty-five years.

These data must be organized into useful measures to gauge the performance of the trial court. One such formula contains the following four key elements, in order of relative importance:

- Time to disposition
- Clearance ratio (ratio of dispositions to filings)
- Back-log avoidance (percentage of cases not yet older than the established time limit)
- Trial certainty (the frequency with which cases scheduled for trial are actually heard when scheduled)

Donors can also help institutionalize essential elements in the case-flow management process, including

- Uniformity in the numbering of cases
- Standardization of forms to facilitate case processing
- Processes to distribute documents to interested parties in the litigation processes
- Comprehensive design of receipt procedures
- Design of storage, retrieval, and disposal procedures
- Increasing the use of automation to improve control over the volume of cases

Of course, the mere process of case flow management, by itself, does not correct the problems; it is only the beginning of the process of questioning the movement of a case. The training of professionals to work closely with the judges in management of the trial courts will contribute to building a solid foundation for improvement in the operation of the judicial system.

c. Financial management

In many judicial systems, the courts are charged with the responsibility of managing the fines, fees, and client funds that are deposited for litigation, and making necessary purchases. These activities are areas ripe for corruption and require care to ensure proper handling of funds. The development of comprehensive accounting procedures, followed by adequate internal auditing processes, helps to establish a firm administrative foundation. A program that created a professional audit team in Honduras has had some success in addressing these kinds of problems in the trial courts

d. Organization of trial courts

The strengthening of the trial courts, contributes to the independence of the judicial system. While, the trial court is where most people form their first impression of the judicial system,the organizational structures for the trial courts in many countries have not changed in fundamental ways since they were created.

In Latin America, the trial court organizational model has not changed substantially for several hundred years. In the most common model, each judge has his or her own staff, functions are decentralized, and little effort is made to take advantage of standardization, economies of scale, or common services.

New models, that promote transparency and accountability, are being developed in a number of countries, including the United States. These models generally use centralized administrative structures, including a professional administrator who coordinates the provision of needed support to the judicial function. The model requires development of the administrative and professional capacity of staff to coordinate and manage the court.

Programs to improve judicial systems must focus on their most valuable resource, the judge's time. Frequently, judges do not have backgrounds in the administrative aspects of case-flow management, and the time they invest in handling administrative matters is time lost to handling their judicial responsibilities. Judges are often overloaded with administrative tasks, which results in inefficiency and public perception of judicial incompetence. In countries as diverse as Argentina, Costa Rica, and Pakistan, the evaluation of allocation of judicial time has disclosed that it is common for each judge to dedicate as much as 50 percent of their time to administrative matters.

In the United States, Chief Justice Warren Burger began in the early 1970s to call for the creation of professional manager positions within the courts. The result of his leadership was the creation of state court administrators, trial court administrators, and circuit executives. These new positions aided the systematization of procedures, automation and workload indicators, as well as greater transparency in administration and improvement in public perception and involvement.

Recognition of the complexity of court organization at both the appellate and trial levels has given rise to the development of managerial positions to aid the courts in the execution of their duties and responsibilities. These positions have come to be seen as necessary complements to the adjudicative functions. A professional manager is dedicated full-time to implementing the policies and procedures of the court, responding to the public, developing budgets, managing the records and purchases, organizing and maximizing the space, and managing the application of technology.

6. Adequate Funding for the Judiciary

In many countries, the executive and legislative branches have not demonstrated an interest in cultivating a strong and independent judicial system. Some of the clearest evidence of this

lack of interest is the long history of poor financial support for the judicial system.

Some countries have recently pushed for modifications to the constitution to obtain a fixed percentage of the appropriated funds. Costa Rica, El Salvador, and Honduras have modified their constitutions in order to secure fixed rates of funding annually. In Costa Rica, the judicial branch receives 6 percent of the funds available for appropriation, although, this percentage also includes the costs of the judicial police and the prosecution, leaving the judiciary with approximately 2.5 percent of the totals funds for judicial operations. The new base of funding available to the judicial system of El Salvador has enabled the Supreme Court to undertake numerous initiatives to improve the operation of the system. This transformation occurred after the Court initiated a campaign to gain greater say over the management of the funds destined for the judicial system. Formulaic approaches can be useful in the short run to address severe financial problems. However, they can become burdensome as costs continue to climb and erode the percentages and they may create funding issues for other components of the judicial system. In the case of Costa Rica, police costs are increasing much faster than judicial costs, thus putting pressure on the judiciary's budget. Another interesting example is provided by the courts in the Basque region of Spain, which once had control over their own funding. However, due to the absence of professional management, the authority to manage funds was transferred back to the executive branch. The judiciary still resents this result.

Other countries continue the traditional approach of requiring the judiciary to justify its needs to the legislative and executive branches in order to secure its funding. The process of giving the legislature and/or the executive branch free reign to set the judiciary's budget has generally not led to improvement in the levels of funding for the judiciary. The traditional process can be effective in motivating the judiciary to improve its own processes and its ability to explain the needs of the system to a wider audience. The legislatively guaranteed percentage, in contrast, does not require the same rigor or discipline. Further, once the defined percentage is reached it can become more difficult to raise the level of funding, as in the case of Costa Rica.

Experience has shown that the effort to build the capacity of the judiciary to develop and implement thorough budgeting procedures, coupled with the addition and/or training of skilled personnel to manage the process, can produce improved allocation of funds for the judiciary.

7. Conclusion

How the judicial branch governs and administers itself correlates to its independence. The legal framework shapes expectations and delineates specific roles and responsibilities, while setting forth the principles that permit an independent system. Effective justice systems require sound operational practices and leadership.

C. Civil Society Contributions to Judicial Independence[141]

by Stephen Golub

> *Justice is too important a matter to be left to the judges, or even to the lawyers; the American people must think about, discuss, and contribute to the future planning of their courts.*—Chief Justice William Rehnquist, United States Supreme Court[142]

> Civil society and the media...are arguably the two most important factors in eliminating corruption in public institutions. Corruption is controlled only when citizens no longer tolerate it.—The World Bank[143]

1. Introduction

This article seeks to highlight civil society's recent and potential roles regarding these goals. It draws mainly on Asian experience for two reasons. First, addressing this half of the globe complements the geographic foci of the rest of the Guide. More importantly, direct assistance to judiciaries has played a less prominent role for USAID in Asia than in other regions, making civil society support's impact on judicial independence more salient. As this paper makes clear, that impact is largely indirect, occurring in the contexts of broader efforts to advance the rule of law or other development goals. Insights from civil society support nevertheless illuminate significant options for program officers working on judicial independence.

2. Why Emphasize Civil Society's Relevance to Judicial Independence?

Why should donors support nongovernmental activities concerning judiciaries? Chief Justice Rehnquist and the World Bank are quoted above because they are frequently perceived as not unfriendly to the status quo, yet emphasize progressive nongovernmental forces' roles in reform. USAID's own 1994 study, Blair and Hansen's *Weighing in on the Scales of Justice*, suggests that donor rule of law strategies take "an approach that leans heavily on the insights of political economy and emphasizes constituency and coalition building."[144] Civil society plays an important or even central role in the approach advocated in that study.

Civil society assistance to NGOs and media can contribute to judicial independence on a number of levels. In addition to the value highlighted by Blair and Hansen, these include helping to monitor judicial performance and expose corruption. More broadly, Harahan and Malik describe civil society's many contributions to the administration of justice.[145]

A unifying theme cuts across these and other reasons for civil society assistance: it builds counterweights to those forces that undermine judicial independence. It thus advances

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[141] This draft paper was prepared with support from USAID and the Individual Project Fellowship Program of the Open Society Institute. It also draws on consulting assignments the author has carried out for the Ford and Asia Foundations, the Asian Development Bank, USAID, and the International Human Rights Law Group.

[142] As quoted in Samuel F. Harahan and Waleed H. Malik, *Partnerships for Reform: Civil Society and the Administration of Justice* (Washington, D.C: World Bank, June 2000), p. 1.

[143] World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (Washington, D.C.: World Bank, September 1997), pp. 44-45. For the purposes of this paper, media is considered part of civil society.

[144] Blair and Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-supported Rule of Law Programs*, USAID Program and Operations Assessment Report No. 7 (Washington, DC: USAID, 1994), p. 51.

[145] Harahan and Malik, *op. cit.*

impartiality by exposing jurists to legitimate pressure, persuasion and perspectives. Such countervailing influences may be necessary in such countries as Egypt and the Philippines, where (in connection with the preparation of this guide) IFES commissioned papers assessing judicial independence.

The Egypt paper thus notes that judges there commonly display a weak work ethic; disregard for professional ethics; corrupt behavior; acceptance of court staff's corruption; and tolerance of "family guilds" that influence hiring, promotions, assignments, and other favors.[146] The Philippines paper similarly highlights the prevalence of personal influence, patronage, and corruption.[147]

That paper further emphasizes that "the sources of judicial interference...may not be openly opposing the reform measures (in fact, nobody in his right mind would dare oppose these measures). It is just that these measures will be disregarded or slowly be implemented, to the point that it becomes meaningless."[148] In deciding whether and how to work on judicial independence, a program officer accordingly should assess not just jurists' professed commitment to reform, but civil society elements' and other sources' assessments of the jurists, the judiciary, and the forces that influence them. These sources include law journals, other research, newspaper articles, attorneys, NGO leaders, academics, journalists, other donors, and, not least, ordinary citizens who have been to court.

There is not an automatic formula for converting this data into a programming decision. A negative consensus may indicate that other goals should be pursued. The program officer alternatively may decide to assist judicial independence, but to avoid putting all of her programming eggs in this particular basket. Civil society assistance suits this objective well: for example, in some societies she can seek to support judicial independence, access to justice, and law reform by supporting NGOs that bring important cases to court. These NGOs may have agendas that complement but do not match that of the program officer. They may focus on the status of women, environmental protection, human rights, and a host of other issues, but may advance judicial independence through the pressure and persuasion they bring to bear on judges through their litigation. And even if their impact on judicial independence falls short, support for them may nevertheless prove worthwhile if, for instance, women or the environment substantially benefit.

More broadly, given the array of vested interests and influences permeating many nations' judiciaries, civil society is vitally important in ways that reach beyond mere consultation. Even with the best intentions on the part of their leaders, judiciaries often cannot be wholly self-reforming bodies. Furthermore, where the program officer's assessment indicates that well-intentioned judicial leadership is lacking or weak, civil society may offer the only possible vehicle for reform.

3. Specific Experiences and Lessons

The following discussion provides selected examples of approaches that might be useful to program officers seeking to advance judicial independence. However, as already emphasized, many should not be understood purely in terms of that goal. Program officers aiming to advance judicial independence should see the advantages

[146] John Blackton, "Egypt Country Report" prepared for this judicial independence guide, 2000.

[147] Hector Soliman, "Philippines Country Report" prepared for this judicial independence guide, 2000.

[148] *Id.*, p.5.

of supporting civil society even if such support does not solely or mainly address judicial independence *per se*. There is much to be said for respecting the priorities of local partner organizations, particularly since they may be more in touch with societal needs than any donor can be. In addition, a given activity may advance more than one goal at a time. reality is not neatly divided along the lines of donor categories. Finally, supporting judicial independence in combination with other goals can mean that even if a program falls short in one respect, it may excel in another.

The discussion is organized largely along country lines because some of these approaches are rooted in circumstances of particular countries, and should be understood as such. The analysis provides some tentative guidance concerning where these activities might most appropriately be employed.

a. India: Employing training to influence judicial membership and perspectives

The Centre for Social Justice (CSJ), an Indian NGO operating throughout much of the state of Gujarat, has undertaken a unique effort regarding legal and judicial training. It does not specifically focus on judicial independence, but holds pertinent implications nonetheless.

This unique undertaking is the training of applicants for judicial appointments. In other words, the Center helps train applicants to take and pass the civil service examinations that fill the lower level positions in the state judiciary. It particularly assists women and *dalits* (the preferred term for the pejorative "untouchables") to gain these positions.

At first impression, this may seem to be the opposite of judicial independence: an NGO helping to shape the judiciary by helping to influence who becomes part of it. The question is whether this is undue influence. The answer lies in the overall context of the country's bench and bar. They are justifiably known for "social action litigation" cases, akin to U.S. public interest litigation, that expand and vindicate the rights of the disadvantaged. At the local level, these institutions tend to be plagued by self-dealing at the expense of clients, actions that may account much more than conventional explanations for the country's epic court delay.[149]

CSJ at first intended to draw on young local lawyers to provide counseling, representation, training and other legal services. It soon learned, however, that the lawyers' own knowledge of the law was appallingly low. This is substantially a function of the very poor quality of much Indian legal education. In response to this reality, CSJ drew on the better, more senior attorneys it knew to provide training to its eventual staff lawyers.

Training of lawyers led to training of judges, as CSJ increasingly saw that the composition of the judiciary reflected the relative lack of access that the disadvantaged have to membership in it. As a matter of equity and diversity, the Center began offering training to female and *dalit* lawyers to increase their ranks among Gujarat jurists. This helped them to pass the appropriate civil service tests.

How does this relate to judicial independence? To the extent that undue influence on the Indian judiciary includes gender and caste biases, expanding the diversity of women and *dalits* expands the number of judges relatively free of those biases. It also may alter the perspective of fellow jurists who now must view members of

[149] See Robert S. Moog, *Whose Interests Are Supreme: Organizational Politics in the Civil Courts of India*, Association for Asian Studies Monograph and Occasional Paper Series, Number 54 (Ann Arbor, Michigan: Association for Asian Studies, 1997).

these disadvantaged groups as colleagues. Furthermore, as the Egypt country report points out, "Studies in other countries have suggested that women judges are less subject to corruption than male judges."[150]

The program officer who sees judicial membership as an obstacle to independence might consider supporting CSJ-style training in those countries where the composition of the judiciary is determined by examination. The programming implications of this experience are broader, however. It also may be possible to assist nongovernmental efforts to propose or vet potential judicial nominees, so as to ensure a greater degree of competence, probity, and diversity in a judiciary. It should not be assumed that these training and vetting activities are the province of a bar association, which may be subject to the same undue influence as a judiciary. Human rights-oriented and development-oriented NGO alternatives also should be considered.

Another innovative CSJ effort is the training of young lawyers it subsequently employs, through which CSJ advances access to justice. A zealous, competent advocate for the disadvantaged also represents a potential counterweight to the corruption, favoritism and biases that characterize some judges. The very fact that the poor are able to secure counsel, and that the counsel is competent and has a financial interest in justice rather than delay, puts at least a minimal check on business as usual in the courts.

Program officers accordingly should consider such NGO training appropriate where legal education is inadequate. They further should explore access to justice as a judicial independence strategy. It does not simply ensure that the poor have representation; it also is inherently geared toward providing representation that weighs against not just the other side in a legal dispute, but against the undue influence that the other side can bring to bear.

b. Cambodia: Starting from scratch to institutionalize access to justice

The political settlement that brought massive increases of foreign aid to Cambodia in the 1990s included substantial efforts to improve the country's legal system and human rights situation. The International Human Rights Law Group (IHRLG) carried out two civil society projects toward those ends. Given the havoc wrought on the country and its population by two decades of war, Khmer Rouge atrocities, international isolation and economic devastation, the IHRLG and other Western organizations understandably took far greater initiative than is necessary in many other societies.

By most accounts, the IHRLG's most successful effort was the Human Rights Task Force, an initiative that worked with Cambodian NGOs to increase their capacities to monitor, document and seek to improve the human rights situation. Such an effort was necessary for a host of reasons. While human rights communities began to emerge in other nations during the 1970s and 1980s, Cambodia suffered through war, Khmer Rouge rule that wiped out most of the educated elements in the population, Vietnamese invasion and occupation, and international isolation. The upshot was that the task force was working with local NGOs whose personnel were either very poorly educated or who had lived in refugee camps or the west throughout the 1980s, and who generally lacked human rights advocacy experience.

While the current Cambodian government's record regarding human rights has featured

[150] Blackton, *op. cit.*, p.4.

murder of political opponents, participation in and toleration of violent land-grabbing, and a host of other abuses, most observers nevertheless consider the Cambodian NGOs' efforts to some extent successful. They act as a minor check on those practices, win occasional significant victories (e.g., publicizing the dumping of imported toxic materials) and provide information that the international community has employed to restrain the government from even more egregious conduct. A noteworthy element in the IHRLG's successful capacity-building was that it brought in experienced Filipino human rights advocates, rather than westerners, to provide the bulk of the training and advising for the Cambodians. As different as Philippine and Khmer cultures are, the Filipinos still were much closer to the Cambodians in terms of orientation, having previously experienced their country's Marcos dictatorship in the 1970s and first half of the 1980s.

Though the task force did not mainly focus on the judiciary, its experience offers potential implications for judicial independence programming. In countries where the government is hostile to human rights, supporting NGO human rights activism can affect the overall climate by creating external and internal pressure that can contribute to greater leeway for the judiciary.

Another IHRLG project established a very basic legal aid program, the first in Cambodia. Given that the country only had a handful of lawyers as of the early 1990s, the program utilized non-lawyers whom its western staff trained to provide legal representation to criminal defendants. Prior to the program's founding, the prevalent practice of the police and courts was to incarcerate such defendants indefinitely without trial, until and unless their families could provide bribes to buy their freedom. The IHRLG's initiative was a crucial first step toward remedying this situation. For the first time, some defendants were charged, tried and acquitted within legally mandated periods (though the degree to which bribery by their families diminished cannot be ascertained). And though judges remain subject to heavy financial and political influence on their conduct, the presence of defense counsel seems to constitute a countervailing and monitoring force, rendering at least some judicial decisions more impartial. To a lesser extent than before this initiative, today not all accused are held indefinitely, not all necessarily depend on bribes for release from jail, and not all trials result in convictions.

The Law Group's efforts to assist the courts directly through an extensive mentoring program proved far less successful than their civil society projects, in large part owing to the pervasive corruption and political control that plagued the courts as well as other institutions of government. The country's judges, who had minimal training (most were former teachers, poorly educated even for that function), were unable to free themselves from the deeply embedded societal norms of corruption and adherence to party control, a complacency reinforced by a history that proved that bucking authority could be fatal. The Law Group's hard work with the judges had little if any lasting impact because, whether due to choice or pressure, they were unable to make much use of the Law Group personnel's advice or support. More broadly, there were and are substantial questions about whether a better judiciary accords with the priorities of a government that is permeated by corruption and sustained by repression, and that pours 40 percent of its budget into the armed forces[151] when external and internal military threats are minimal.

The programming implications of this experience are at least three-fold. First, in those

[151] *The Economist*, October 7, 2000, at 107.

countries where legal aid is rudimentary or nonexistent, it may be necessary to launch or support such efforts in order to build countervailing forces against undue influence on the judiciary. Second, it may be essential to bring in foreign expertise to train the staffs of the new legal aid NGOs and oversee their work—though drawing on regional rather than Western expertise can be more appropriate and cost-effective. Third, and more broadly, the Cambodia experience indicates legal aid can be supported to good effect, even where the government is not supportive of it.

c. *Philippines: Diverse goals and unintended impact*

The experiences of Philippine journalistic, legal services, court monitoring and survey research efforts in the 1990s illuminate a number of respects in which civil society initiatives relate to judicial independence.

The most dramatic impact of the four initiatives has flowed from the Philippine Center for Investigative Journalism (PCIJ), an NGO founded in the late 1980s. Judicial ethics and corruption came to be one of several leading arenas of PCIJ work. Its most noteworthy article was a piece that revealed unethical behavior on the part of a Supreme Court justice, prompting his resignation the next day. Some in the legal profession feel that the most important impact of the piece might have been to limit the influence of a top Marcos crony, with whom the justice reportedly had ties, on court decisions.

The center has prepared a number of other stories on unethical and corrupt judicial conduct. These have included articles on the questionable positions and actions of relatives of a former chief justice and an interview in which an anonymous judge explains the mechanics of colleagues' corrupt conduct. The pieces arguably have contributed to increased public perception of serious problems in the courts, and perhaps even to current efforts to address at least some of those problems.

This experience certainly does not translate into programming that targets specific individuals or institutions. Doing so would be highly inappropriate and controversial. Rather, program officers might explore whether top journalists want to launch NGOs or programs conducting investigative reporting and, if so, whether to focus support on the rule of law, more generally on democracy and governance issues, or most broadly on whichever topics the journalists deem most appropriate. That last option is the one under which PCIJ has received most of its donor support, including that which led to its judicial articles. Of course, in those countries where investigative journalism centers already exist, program officers could look into more targeted grants concerning, say, the rule of law, but should not suggest specific articles. The credibility of such centers hinges on their setting their own investigative agendas.

Philippine civil society also interacts with the legal system through the operations of alternative law groups (ALGs), legal service NGOs that work to further development by partnering with disadvantaged populations in ways ranging from community organizing to policy advocacy. In their direct judicial work and in helping partners participate in judicial processes, these NGOs create countervailing forces that further impartiality. And over the past few years, certain ALGs have become increasingly engaged in discussions regarding judicial reform. The main thrust of ALG work and accomplishments lies in other spheres, however: notably and successfully influencing scores of environmental, agrarian, urban housing, fisheries, local government and gender-oriented laws and regulations, and working with communities and paralegals to help get these legal reforms implemented.

The programmatic point here is that donors can contribute to judicial independence even while

supporting work concerning other aspects of the rule of law or even other, non-legal fields. For example, ALGs that focus on the environment or women's rights might well be funded under the rubric of access to justice, natural resources or gender programs. Even though they see their work in those terms, it has implications for judicial independence. Program officers concerned about this goal, but also wanting to advance other development objectives, should be aware of the overlap.

Related ramifications for judicial independence can be derived from the experience of apartheid-era South African NGOs that operated within the confines of that nation's repressive structures to persuade appellate courts to more forcefully assert their independence. The resulting decisions (against laws and regulations that, *inter alia*, limited non-whites' rights to live or travel where they pleased) helped undermine apartheid's legal apparatus. Clearly, not all judiciaries respond to the kinds of sophisticated jurisprudential arguments put forth by such NGOs as that country's Legal Resources Centre. Nevertheless, where there is the potential for such arguments to bear fruit, program officers should see public interest litigation as a vehicle for expanding judicial independence.

A third civil society initiative pertaining to the Philippine judiciary was a "court watch" program. Started in 1991 by the Makati Business Club and other organizations, it involved observation of court activities by law students and other outsiders, so as to discourage improper procedures and detect them when they did occur. Eventually dropped due to objections from judges and other parties, the idea nevertheless holds the potential to advance independence where judicial leadership supports it. Where such support is forthcoming, then, program officers should consider it as part of a mix of judicial independence activities. Where the support is lacking, it can indicate to program officers that sincere top-level support for other judicial independence initiatives is missing.

The fourth initiative has been survey research carried out through a good part of the 1990s.[152] Geared toward assessing and publicizing public, judicial and attorney attitudes toward the justice system, it arguably has played a role in raising awareness of low levels of confidence in the judiciary's integrity and operations.

The Philippine experience indicates that program officers concerned with galvanizing outside support and/or pressure for judicial independence have a variety of civil society options in hand. Under many circumstances, it would be preferable to use them in tandem: to combine access to justice, investigative journalism, court observation, and survey research. This blend can be used in combination with direct work with judiciaries, but also should be seen as standing alone where public awareness and elite commitment to reform are lacking. It conceivably can help stimulate that awareness and commitment.

d. Bangladesh: Working with and around the courts

Two interrelated instances of civil society efforts that advanced judicial independence have transpired in Bangladesh at the appellate and jurisprudential levels. A 1992 conference organized by Ain O Salish Kendra and the Madaripur Legal Aid Association, two legal services NGOs, was attended by lawyers and senior jurists from across South Asia. It highlighted progressive rulings by India's Supreme Court. As a follow-up, over the next few years a third NGO, the Bangladesh Environmental Lawyers Association (BELA), invited high level Bangladeshi jurists to the

[152] See, e.g., Mahar Mangahas et al. *Monitoring the State of the Judiciary and the Legal Profession*, a report by Social Weather Stations in cooperation with the Cordillera Studies Center, University of the Philippines, Baguio (Manila: Social Weather Stations, October 1996).

events it organized, often as resource persons. It made itself and its perspective familiar to the jurists in the process, undercutting a judicial perception of NGOs as alien organizations dwelling outside the legal mainstream. This is turn aimed to contribute to BELA's arguments being heard on their merits in bringing cases before the courts.

This combination of activities may well have contributed to a landmark High Court ruling on the NGO's standing to bring suit. More specifically, in 1996 the Court ruled in favor of BELA's argument that people displaced by a government flood control program were entitled to proper resettlement and compensation.

Other countries display similar examples of NGO-judiciary interaction in ways that echo the aforementioned experience of India's Centre for Social Justice. South Africa's Centre for Applied Legal Studies launched a series of "justice and society" conferences in the 1980s, bringing together largely conservative jurists with progressive lawyers for the first time outside the confrontational setting of the courtroom, and arguably contributing to a subsequent softening of perspectives and decisions by the former. In Pakistan, the NGOs Rozan and the AGHS Legal Aid Cell have trained and advised police and other justice sector officials. The Women's Legal Bureau in the Philippines and the Legal Assistance Centre in Namibia have been respectively involved in preparing curricula for judges and manuals for magistrates in their countries. In Mongolia, the National Center Against Violence has trained police, judges and prosecutors regarding violence against women.

These activities can help establish the legitimacy of these NGOs before judges. They also provide the jurists with perspectives they might not receive if government officials or law professors undertook this work, perspectives rooted in the NGOs' grassroots experience of how the law does and does not operate in reality.

To the extent that any of these NGO activities exerted influence on the jurists involved, was it undue influence? In a narrow sense, no, since they were not discussing matters before the courts. But the answer also is "no" in a broader sense, in that what these NGOs are doing merely puts them on the same plane occupied as a matter of course by senior litigators and other influential persons who have personal and professional ties to jurists in many countries. It simply levels the judicial playing field a bit.

Program officers seeking to promote this NGO-judiciary interaction should do so in a manner that does not necessarily start with proposing such partnerships. Rather, by first establishing personal and professional relationships with the parties potentially involved, they place themselves in a better position to be honest brokers who facilitate the cooperation. The relationships should not be initiated simply for these narrow purposes, of course. They more generally are valuable in understanding whether and how the rule of law operates in a given society, and in coming to appreciate these organizations' perspectives. The challenge, of course, is to forge ties that facilitate such understanding, but not to become co-opted in the process.

Bangladesh is noteworthy for our purposes for at least two other reasons. First, it represents the only effort that the author knows of in Asia in which a bar association, the Bangladesh Bar Council, has been involved with an effective national legal aid program. How does this relate to judicial independence? As with other countries, this access to justice effort constitutes a form of monitoring and a counterweight to improper influences that undermine judicial impartiality. By engaging the Bar Council in a legal aid effort, it draws that association into an activity that is implicitly oriented toward judicial independence.

A further, more distinctive feature of this effort is that the NGO established to undertake it, the Bangladesh Legal Aid and Services Trust (BLAST), is affiliated with the Bar Council but enjoys considerable autonomy from it. This should not be seen, then, as a Bar Council program, though it was established under the initiative of the leadership of that organization. The distinction is important, because it suggests a model for potential efforts elsewhere: operate more as an independent legal services NGO than as a branch of a bar association.

The broad implications for program officers are that they can help build judicial independence by facilitating both formal and informal contact between jurists and civil society elements. The program officers can suggest partnerships and specific activities, but this will not always be necessary. Under many circumstances, once relationships are established they may lead to cooperation and/or proposals that will advance independence in ways that donors cannot design or predict.

4. Broader Options and Perspectives

a. Threshold considerations

- What is often implicit should be made explicit: the key step in deciding whether to launch a judicial independence initiative or any rule-of-law program is not a needs assessment. Though that is a necessary part of the process, in and of itself such an assessment will always reveal needs to be addressed regarding the judiciary, other state institutions, or probably any issue the program officer selects. Rather, a decision on where to focus resources should filter through an interest/incentive assessment and an opportunity assessment.

- The interest/incentive assessment takes account of the individual and institutional interests that favor, oppose and have mixed agendas regarding, for example, judicial reform. The program officer asks diverse questions as a part of this process. How deeply rooted are these in the history, culture, politics and economics of the country? What has been my or any other development agency's experience to date pursuing programs with these individuals and institutions, and what does that say about the interests at play? What incentives exist to retain or reform conduct that needs to change? Are judicial and other governmental leaders' commitments to reform sufficient to overcome opposition?

- The opportunity assessment filters this identification of needs through an analysis of interests and incentives, to determine where the best opportunities for impact lie. It takes account of where genuine pro-reform dedication lies. It also attaches weight to ideas, strategies, activities and potential projects that spring from the intellectual soil of the host country. Finally, this assessment takes account of opportunity costs: what alternatively might be accomplished over the coming decade if different priorities for funding are pursued?

b. Engaging with civil society on judicial independence

- Most broadly and importantly, a program officer must be open to the possibility that civil society organizations' contributions to judicial independence will come as

ancillary products of their work. The experience across the globe is that NGOs' operate most effectively when donors give them the flexibility to set their own agendas. None of the law-oriented NGO impact described in this paper flowed from pre-planned donor or grantee intention to affect judicial independence. It instead arose from the funding agencies having confidence in the judgment of their grantee partners, and structuring support flexibly enough to allow the NGOs to decide on their own actions and priorities. In all cases, then, the impact included but was not limited to judicial independence. It undercuts grantee effectiveness to confine them to a narrow range of activities, leaving them unable to respond to emerging opportunities and challenges. Institutional support that enables NGOs to set their own agendas often is preferable.

- The substantive preference for institutional support can provide a degree of political insulation for a funding agency concerned about burning programmatic bridges to state organs if it funds NGOs or media efforts that criticize the state toward the end of bolstering judicial independence. It in fact can be preferable to legitimately explain that institutional support lets the grantee set its agenda. This is in contrast to grants that narrowly specify potentially controversial tasks.
- Civil society support should not be seen only as an alternative to funding state institutions. This chapter has identified a number of instances in which NGOs undertook training and cooperation with judiciaries, police and other justice sector agencies. Such interaction can yield multiple, cost-effective benefits.

D. The Context for Judicial Independence Programs: Improving Diagnostics, Developing Enabling Environments, and Building Economic Constituencies

by Erik Jensen[153]

1. Introduction

Organization of paper. This paper, which could be subtitled, "diagnosing the legal system in order to understand the challenges to and target interventions for judicial independence and judicial reform," is divided into four sections.

The first section sets out empirical and process-oriented methods by which to ascertain priorities in judicial reform program development. In light of the poor data available to target reform measures and generate constituencies, this section asks three questions:

1.1 What does the judiciary do and why? Targeted and effective judicial independence and reform programming requires vastly improved empirical baseline data.

1.2 How much funding is enough? Budgetary allocations are of direct relevance to judicial independence programs, with respect to both adequate resources for the judiciary as well as proper allocation of resources within the judiciary.

1.3 How much participation is enough? Credible participatory processes to build constituencies for reform are as important as any reform measure. While all pay lip-service to the hackneyed mantra of participation, few genuinely value its centrality in setting priorities and building constituencies. Cynicism is rather thick on this turf because participation has been used as a device to ratify preconceived agendas, rather than to seek input in good faith and then act on it.

The second section suggests that a pre-cursor to effective judicial reform programming is the development an enabling environment in which judicial reform programs may take root. Such an enabling environment requires improved information density about what the judiciary does, who constitutes the judiciary, the quality of its decisions, and the effect of its decisions on the economy and on human rights. Informed by reliable data, reform measures can more effectively target systemic improvements.

The third section briefly addresses special issues related to building economic constituencies for reforms, such as judicial independence and improved administrative governance. Attention to often overlooked economic constituencies may yield results in catalyzing and sustaining judicial reform programs.

The fourth section is a postscript that briefly outlines three distinct approaches to judicial reform programming. It urges a broader, interdisciplinary approach to judicial programs.

Tools to make strategic choices. Sir Isaiah Berlin once observed, "We are doomed to choose and every choice may entail and irreparable loss."[154] USAID officers need to make strategic choices about the placement of human and financial

[153] The author would like to thank The Asia Foundation's senior management for actively encouraging critical thinking and field applications that test ideas about moving judicial reform forward. The author would also like to thank Tom Heller and the Rule of Law project at Stanford Law School for creating opportunities to explore and empirically test key under-examined issues in judicial reform.

[154] Isaiah Berlin, *The Crooked Timber of Humanity, Chapters in the History of Ideas* (Knopf: 1991).

resources. It is hoped that this paper will be of assistance in carrying out that core function.

2. *Improve Empirical Data and Process Methodology*

Historically legal and judicial reform programs have suffered from an extraordinarily weak empirical basis for pursuing articulated policy prescriptions.[155] Some might read this section and allege that all of the recommendations support research and process, rather than action or "results." The proposed research can and should be directly linked to a program of action. Past challenges have highlighted the importance of reliable data to target efforts, decrease waste, and improve program impact. And, over the last decade methodology has been developed and tested to obtain such data. To illustrate, donor agencies would not embark on a contraception program without first ascertaining contraceptive prevalency rates in project areas. Similarly, strategic research to develop necessary baseline information should be incorporated into judicial reform programs.

This section answers three questions related to judicial reform programs, including the independence of the judiciary: What does the judiciary do and why? How much funding to the judiciary is enough? And, how much participation in judicial reform processes is enough?

a. *What does the judiciary do and why, and how is the judiciary perceived?*

Even in countries where projects in legal and judicial reform have enjoyed relatively robust implementation, international experience has demonstrated that generally projects have not produced the promised system outputs, outcomes and broader impacts. This has led to efforts over the last two years to re-examine the relationship between project design and goals pursued. Efforts are now underway to investigate an area where we lack an understanding of the evolution of effective legal institutions: disaggregation of supply, demand and treatment of cases by the courts. This analysis, which may include issues related to judicial independence, seeks to answer such questions as: What do the courts actually do? And, why do the courts do what they do? Public perceptions of what courts actually do directly relate to their legitimacy. Past judicial reform programs, informed and designed almost exclusively by the internal legal culture,[156] have

[155] Historically, four of the reasons for empirical problems are the following: Some of the weak empirical basis is attributable to challenges and inherent problems in the sector. Cross country comparisons can be difficult. And relative success in conflict resolution is not always easy to measure. Relatively scarce human resources in the field is another factor. While some leading law schools offer strong interdisciplinary options, most are very weak. And most schools with strong interdisciplinary studies completely neglect institutional analysis of legal systems. This is changing, but building up such expertise will take time. A third factor is that most lawyers have poor skills in empirical research. For example, in recent years lead articles on law and development published in leading law reviews have relied extensively on odd newspaper clippings. A fourth and related factor contributing to the limited human resource base in the area is the reluctance of the legal fraternity to collaborate with social scientists. The insights of lawyers and judges are important, but this group has overly dominated most diagnostic legal systems research to date. The majority of literature in the legal and judicial reform field is narrow and densely technocratic. Reform efforts are limited by the capacity of internal legal cultures to reform themselves. The staffing of the design phase of judicial reform projects highlights and perpetuates this limitation. Teams of consultants on legal and judicial reform project design tend to be exclusively composed of lawyers and judges. The exclusion of institutional economists, political scientists, sociologist, and other social scientists contributes to shortcomings in project design. This practice, however, is slowly changing.

[156] "Internal legal culture" refers to lawyers and judges both international and domestic. Often consulting teams are composed exclusively of lawyers and judges. And those who are consulted about the reform agenda are also lawyers and judges.

failed to incorporate the needs and experiences of ordinary citizens (consumers of judicial services) in resolving disputes. To achieve independence *in fact* courts need to develop their legitimacy in order to build a power base of support.

Disaggregating supply and demand. Attempts to disaggregate supply and demand within the judiciary can yield important insights, providing the tools to target interventions and structure incentives to improve performance. Poor diagnosis of problems in judicial performance increases the likelihood of project failure. For example, despite extensive reports analyzing judicial performance and recommending reforms in Indonesia, there is little empirical information about the actual business of the courts. Yet good targeting requires, among other things: a sharp analysis of use patterns at various levels of the judiciary, especially the lower courts; a qualitative assessment of the motivations of litigants and non-litigants for accessing or not accessing the courts;[157] and a baseline for understanding specific problems in the treatment of certain types of cases. A series of questions arises, including the following:

1. What types of cases are being filed in the courts?
2. Who is filing them *and why* (individuals and organizations)?
3. Who is defending them (individuals and organizations)?
4. What is the length of time certain types of cases will take to reach disposition?
5. Which case-types are most likely to go to trial?
6. When trials are held, how long do they take?
7. What is the motion practice and other demands on judicial time associated with certain types of cases?
8. How often are continuances granted and how many appearances are made in certain types of cases?
9. What types of cases would benefit from alternative dispute resolution programs?
10. Is there evidence that more potential litigants would access the courts or other dispute resolution fora if the courts or such alternative fora performed more effectively?

While the literature usually refers to "overstressed court systems."[158] one should be skeptical of this generalized claim. Hard empirical data may show overstress in certain parts of the system, and woeful underutilization in other parts of the system. The empirical work suggested here can lead to a better understanding of incentive structures within the judiciary and relative workloads within the system. For example, if the case backlog is sufficiently large, judges may be able to avoid accountability for failing to decide difficult cases in a timely fashion. This was a finding that emerged from research undertaken by The Asia Foundation under an Asian Development Bank funded diagnostic of legal and judicial reform in Pakistan, completed in 1999. Nationwide case-

[157] A qualitative assessment is supported by interviews with litigants and would-be-litigants. Quantitative data collected on the treatment of cases can also support inferences about motivation.

[158] As just one example, *see* Mark K. Dietrich, *Legal and Judicial Reform in Central Europe and the Former Soviet Union: Voices from Five Countries* (World Bank: 2000) at p. 6.

level research revealed that judges systematically avoided difficult cases (such as certain property and commercial disputes) because judicial performance criteria actually operated to provide perverse incentives for judges to handle simple cases and avoid difficult ones. Judicial performance is ascertained by achieving a minimum number of "units" per month. Each type of case is worth a set number of units, based on the difficulty of the subject matter and the estimated time it should take to dispose of such a case. Since there was a substantial case backlog in certain parts of the country, judges could choose to avoid deciding difficult cases in favor of multiple easy matters, which generally are of least consequence to the economy and society at large. The study revealed over-worked parts of the system as well. This is but one of many examples of the value of this research in revealing what the system does and how it is manipulated. Among other things, this research is also useful in ascertaining the number of frivolous or illegitimate cases in the system, the number of cases where public goods are at issue, and the level and nature of government involvement in litigation. Such information is essential to designing effective judicial reform programming.

Perceptions of what the court does: public opinion polling. Measuring and analyzing demand for an independent judiciary is an important area of inquiry. Building such demand focuses on the relationship between the internal institutional environment of the judiciary and public demand for reform among constituencies that may mobilize to channel that demand (e.g., economic actors, human rights activists, and citizens regarding issues faced in their daily lives). Public opinion polling can be a useful tool to ascertain and analyze demand, though US-based examples of such surveys are of minimal utility in framing opinion questionnaires in countries where citizens are far less familiar with the business of the courts. A public opinion survey on dispute resolution in Indonesia designed by The Asia Foundation, funded by USAID and currently being carried out in collaboration with AC Nielsen is a more relevant example for the developing country context. The survey will yield insights as to the types of disputes citizens encounter, where citizens resolve their disputes, which issues generate the greatest demand for reform, and where constituencies can be strengthened and mobilized.[159]

b. How much funding is enough?

"Finally," the reader may be thinking, "we are getting down to one of the traditional, technical issues related to independence of the judiciary." At the outset, before getting into the inconclusive analysis of funding options that follows, it is important to highlight the value of good budgetary analysis regarding resource allocation to the judiciary *vis-à-vis* other branches of government (and the military), as well as resource allocation within the judiciary. Donor expenditures on such analysis is money well spent. This is an area in which collaboration between the economic growth and democracy and governance sections of USAID may be fruitful. Usually, the economic growth field officers will be able to identify and access local public finance experts to undertake the analysis, and may also contribute to the development of a framework for the research, data analysis, and evaluation. Budgets should be analyzed not just at the national level, but also at the subnational level (provinces, states, and localities if they contribute to the judicial budget). A detailed explanation of the process that the judiciary undertakes to prepare and present its budget should be included in this analysis, which may be likely to reveal a lack of

[159] Results of this survey should be available toward the end of the year from The Asia Foundation.

capacity within judiciaries to prepare and present professional budgets.

Among other international instruments, the UN Basic Principles on the Independence of the Judiciary calls for governments to "provide adequate resources" to judiciaries to enable them to perform their functions. Let us leave aside the following larger question: in terribly impoverished nations, where should funding for the judiciary rank among a host of competing international obligations that have funding implications? So, how much funding is "adequate?" One may counter with the question: is the current level of funding clearly not enough? In the Philippines, slightly over 1 percent of the budget goes to the judiciary; in Pakistan .2 percent of the national budge and .8 percent of the provincial budget go to the judiciary. Not surprisingly, the courts in both countries think that their budgetary allocation is inadequate. In light of the scarcity of resources and competing financial demands facing most developing country governments, a two-phased strategy is recommended for judiciaries that would like to build a case for increased funding.

Phase one: develop transparent systems of resource allocation within the judiciary. In order to justify increased resource allocation, a case must be developed that (1) what the judiciary does is useful, and (2) it could provide more useful service with more funding. The earlier discussion of research on what the judiciary does and why is directly relevant to building the first part of this case. The second part of the case—that the judiciary could do more useful work with more funding—will be impossible to present credibly if the judiciary itself does a poor job of internal resource allocation. Note that the level of fiscal autonomy that judiciaries enjoy varies widely across countries. For example, some judicial budgets are micro-managed by ministries of justice;[160] others receive more or less a block allocation from the legislature at the national and subnational levels to manage within a bottom line. Where judicial budgets are micro-managed by bureaucracies, there is an inherent structural problem that needs to be addressed.[161] The comments below relate to those settings where the judiciary has some discretion in allocating its resources.

Poor internal resource allocation within judiciaries should be a matter of acute concern to DG officers.[162] One only needs to visit the relatively palatial Supreme Court and High Court facilities in many developing countries to understand the extent to which lower courts are firmly positioned at the end of the food chain for budget allocations within the judiciary. Increasingly in recent years, as resources have shrunk in relative terms, the superior courts have tended to deny desperately needed resources to the lower courts. As mentioned above, physical facilities are vastly different between the superior courts and the lower courts. Salaries and benefits differ enormously as well. It is not unusual to find that superior court judges receive eight to eighteen times the salary and benefits of lower court judges. Superior court

[160] This is apparently the case, for example, in Slovakia. For an excellent discussion of this model, as well as recommendations to create special budget chapters for supreme courts as well as regional courts, see the Slovakia case study. See also an excellent discussion of this model in the Ukraine case study. Recall that the U.S. Department of Justice managed the federal court budget until 1939.

[161] The country papers for this exercise present interesting, if familiar, analysis of budget allocation problems including the perennial problem of reliance on Ministries of Justice for budget allocations.

[162] While disproportionate attention has been paid to the constitutional role of courts, far too little attention has been paid to the role of the courts in a deliberative democracy: a citizens' view of the courts. One of the effects of this theoretical disequilibrium is that lower courts have been given far less attention by donors.

judges frequently fail to appreciate the demoralizing effect of such glaring differentials. Gross resource mismanagement within the judiciary undermines the credibility of the case for increased budgetary commitments to the judicial sector.[163] The endless anecdotes to the effect that subordinate court judges do not have enough paper and paperclips draw sympathy. But, if the paper and paperclips have been denied because superior judiciaries have allocated those resources to their own creature comforts, the sympathetic stories ring hallow. Recently, in one country, funds earmarked in the judicial budget to build a subordinate court in an area where a tent was being used as a courthouse were re-appropriated by the appellate court to cover appellate judges' highly discretionary expenses. Encouraging judiciaries to exercise transparency and responsibility in their budget allocations is an important first step in building the case for "adequate" levels of funding.

Phase two: examine alternative methods of funding the judiciary to assure that it is "adequate" and secure. This section briefly discusses five options for generating funds for the judiciary: fixed percentage of the budget, filing fees, interest on court deposits, statutory award of court costs, and the proceeds of penalties and fines.

Constitutional security: fixed percentage of the budget. Assuming that the judiciary makes progress on phase one—that is, it builds its capacity to prepare and present budgets and establishes its credibility in prudent resource allocation—this subsection considers constitutional and fixed budget approaches; the next section considers self-generated funds. The dominant strategy is to advocate mechanisms that provide more secure funding to the judiciary at the national and subnational levels.[164] The likelihood of success is limited, however, particularly in perpetually poor countries. Even if such a country constitutionally guarantees adequate funding or adopts a "fixed percentage of the budget" set-aside for the judiciary, experience has demonstrated that these budgetary commitments are ignored or manipulated in various ways. Still, the introduction of such a benchmark can be useful in policy dialogues about budgets, even if it is not ultimately adopted.

Most of the experience with a fixed percentage of the budget model has been in Latin America, for example: Costa Rica, El Salvador, Guatemala, Dominica, Honduras, and Venezuela (more recently). This model was discontinued in Bolivia in 1995. There are various positive features of this model: the set percentage formula tries to protect the judicial budget from political intervention; it has an educational value in suggesting what "adequate support" for the judiciary is; and—even with manipulation and fluctuations in national budgets[165]—it provides a level of predictability in funding. Fixed percentages range from one percent to four percent of the budget.[166]

[163] In many countries, the depth and extent of despair, corruption and, perverse incentives within the subordinate judiciary is barely fathomable. Court staffs are alienated and demoralized. Channels of dialogue with the superior judiciary often are poor. And the depreciation of currencies and inflation deepen the sense of insecurity.

[164] Of course, empirical challenges can be significant in cross comparisons of budget allocations where the functions of bureaucracies and judiciaries are not uniform. Yet, detailed, hard-nosed budgetary analysis is an invaluable tool, like the empirical research suggested in the previous section. The corollary of the question: "What does the system do?" is "How much does it cost?"

[165] Note that in federal systems, the resources for much of the judiciary are likely to come from the subnational level. So national percentage of the budget models may be rather insignificant compared to the resources at the subnational level. And constitutional problems in dictating subnational budgetary commitments may be significant.

[166] Costa Rica actually has a six percent set-aside, but that consists of three percent for the judiciary and three percent for the ancillary institutions such as the judicial police, prosecutors, and public defenders.

Funds generated by the judiciary. At the outset, it is useful to recall that earlier in the United States, the majority of trial courts were insufficiently funded through state and local government. In light of significant popular resistance to raising direct taxes to support the judiciary, user fees became an attractive alternative.

Realizing the difficulties in advancing the case for a budgetary set-aside or meaningful constitutional guarantees of adequate funding, a number of alternative techniques, some of which are a good deal better than others, may provide viable alternatives. The following are four examples of such mechanisms listed in descending order of desirability: (1) raise the filing fee; (2) allow earnings on court deposits to accrue to the judiciary; (3) provide by statute that the award of court costs goes to a judicial budget; and (4) allow penalties and fines assessed by the judiciary to go to the judicial budget. Of course, Option 4 presents the clearest possible conflict of interest and likelihood that the judiciary's impartiality may be compromised, but it is not without precedent. For example, Section 14 of the India Securities Exchange Board Act of 1992 permits a quasi-judicial body to generate funds for its own use from the fines and penalties it imposes on consumers of its services. The funding mechanism itself may not raise strong objections. But the suggestion that the proceeds (or a portion of it) go to a separate judicial fund, outside the immediate control of ministries of justice and finance, will meet resistance.

Salaries. Before closing, two cautionary notes related to judicial salaries should be considered. First, substantially raising judicial salaries should not be encouraged without simultaneously developing and implementing well-conceived and well-understood judicial performance standards. There is no empirical evidence demonstrating that judicial performance is improved simply by raising salaries.[167] Some of the country papers suggested that salaries were not even considered as a meaningful factor in the judicial compensation package. In these cases, it is plausible that judicial positions are sold or distributed as patronage and used to seek rents. In such environments, it is almost certain that increased salaries will have no positive effect on reducing the predatory behavior of such judges. Second, comparisons of judicial salaries with those in the civil service can become problematic. In some countries, judges are not paid as much as their counterparts in the civil service who have equivalent qualifications and experience. In other countries, the problem is the opposite: judge's salaries are tied to civil service grades; therefore, movement on improving their salaries is encumbered by the even more burdensome and difficult issue of civil service reform.

c. *How much participation is enough?*

The critical importance of building credible participatory processes has frequently been stressed by judicial reform experts. Experiences in many developing countries have demonstrated that "how" to reform is as important as "what" to reform. While it is beyond the scope of this paper to address this subject in detail, its importance cannot be overstated. Despite the "got-religion" lip service paid to stakeholder consultations and the considerable expectations that such consultations raise, the fact remains that, in practice, these consultations have tended to be poorly conducted.[168]

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[167] See, e.g., Vinod Tomas, et al, "Chapter 6: Governance and Anti-Corruption", in *The Quality of Growth* (World Bank & Oxford U. Press: Aug. 2000), at www.worldbank.org/html/extpb/qualitygrowth.htm.

[168] For a more extensive analysis of this issue, *see generally*, Erik Jensen, "Meaningful Participation or Deliberative Deception: Realities and Dilemmas in Legitimating Legal And Judicial Reform Projects Through Consultative Processes," Paper Presented at World Bank's Lawyers' Forum (Washington, D.C.: November 4, 1999).

Difficulties faced by previous legal and judicial reform programs may be attributed, in part, to lack of adequate levels of participation and stakeholder ownership. Credible, meaningful participatory processes surrounding judicial reform are challenging and time-consuming to design and implement. In assessing the prospect of participation, the question arises as to whether elements of the legal system, and the judiciary in particular, can bend to criticism and take value from the consultative processes at all. Judicial independence is a time-honored characteristic of the institution, though in practice "independence" is frequently confused with judicial "isolation." The legal institutional culture is hierarchical both vis-à-vis the public and within itself. The last section of the paper deals with building economic constituencies. But lessons could also be learned about the need to build constituencies for judicial independence and reform among citizen groups through programs adapted from such path-breaking work as that of the state courts in California to strengthen citizen-judiciary relations.[169]

[169] The California Judicial Council Task Force on Court Community Outreach was set up in 1997 to explore ways by which the courts could "improve services to the users of the justice system" and reclaim their respected historical role as being "relevant to the lives of the citizens they serve." The operational vision of the task force was twofold: (1) that courts should be open avenues of communication with the public through which the courts truly "listen" to the concerns and problems of members of the community; and (2) that courts should actively engage in public education about the role and operations of the courts. *See generally Report of the Special Task Force on Court Community Outreach* (1999); Veronica S. MacBeth, *Symposium: Judicial Outreach Initiatives*, 62 *Alb. L. Rev.* 1379 (1999). Among other things, the report addressed the question: "[h]ow can judges most effectively balance [their] community responsibilities within the appropriate limitations?"

3. *Make Transparency and Information Density a Top Priority in Order to Create an Enabling Environment for Judicial Reform and Independence*

Without governance related reforms to create an enabling environment for public institutions, isolated legal and judicial reform efforts are likely to fail. Experience has demonstrated that committed leadership is necessary, but alone insufficient to deliver substantial outcomes. Internal enforcement mechanisms and incentive structures must be developed to ensure cooperation among competing agencies and institutions. Without adequate incentives, civil servants and judges are unlikely to make sustained day-to-day progress. At the same time, reforms will only take hold through public access to credible information and constituencies demanding accountability and supporting reforms. This section briefly addresses the importance of transparency or information density to an enabling environment in which reform can take place; the last section addresses the potential for mobilizing economic actors as a constituency to demand accountability and reform.

Sequencing judicial independence and reform projects is not a tidy exercise. Yet, of all the so-called integral elements of judicial independence and accountability, improving information density about individual and collective legal rights and the institutional performance of the judiciary is perhaps the most essential contributor to an enabling environment in which reform can take place. It is the first step.

Institutional accountability is a critical component of legal reform. Institutions, however, do not reform themselves. Without wide public access to information, accountability will not take root and

constituencies cannot properly arm themselves to demand reform. Creating an enabling environment for reform through a set of activities designed to improve information density about laws, legal and administrative institutions, and avenues of citizen redress is a sound investment. Strategies should include creative use of law reform, the media, and new technologies to promote public access to information on the judiciary and related institutions. More specific examples include: publication of research (recommended above) on judicial performance, budgets, public opinion; publication of decisions (preferably through posting on the internet); publication of an annual "State of the Judiciary" report; publication of the work of the Ombudsman's Office—or equivalent administrative dispute fora—and passage and enforcement of a Freedom of Information Act.[170]

4. Build Constituencies for Reform, Especially Among Economic Actors

The three most obvious potential constituencies for judicial independence and reform, that may also have some level of capacity for collective organization, are human rights groups (and students), organized labor and organized business. While human rights groups (Indonesia) or labor groups (Yugoslavia and Poland) may catalyze a reform movement, sustaining reform efforts often requires economic actors who share a portion of the reform agenda (that is, they may share some broader public interest goals in addition to their more narrow industry-level objectives) and have a capacity to organize.

"On again, off-again" connection between law (the role of the judiciary, judicial independence) and economic activity. Until our empirical understanding of the connections between law and economic activity becomes much deeper, Rick Messick's use of Albert Hirschman's observation of the "on-again, off-again" connection between law (the judiciary and judicial independence being part of it) and economy is probably the best interim characterization of the connection.[171]

a. Do economic actors really care about judicial independence?

The short answer to this question is that economic actors are not natural constituencies for judicial independence *per se*, or even necessarily for judicial reform more broadly. The connection between economic actors and judicial reform is related to the larger question of the extent to which legal systems factor in to risk analysis in developing countries. Since 1992, China has been the largest recipient of foreign direct investment. In 1997, before the East Asian Economic Crisis, Indonesia was ranked fourth among countries receiving direct

[170] The Asia Foundation's approach to law reform recognizes that freedom of and access to information are arguably the most important elements in creating an enabling environment in which public institutions will become more responsive to citizens' needs. It is impossible to hold public institutions, particularly the judiciary, fully accountable in an environment of information asymmetry. Access to information empowers individuals by raising citizens' expectations as to what they may expect in their interface with authority. Lists of things can and should be done to strengthen judicial independence and accountability; this is the most fundamental first step, however.

[171] Richard Messick, "Judicial Reform and Economic Development: A Survey of the Issues," *The World Bank Research Observer*, vol. 14, no. 1 (1999).

foreign investment.[172] The Indonesia data indicate an incredibly high proportion of large investors. Given the extraordinarily weak rule of law in Indonesia then and now, this suggests that large investors looked to the predictability of what Mancur Olson might have called "stationary bandits" outside, but also within, the legal system. Their extractive price is predictable, and therefore more desirable, than "roving bandits."[173] Micro-indicative research conducted in business communities in Asia[174] suggests that the generalized "investor confidence" rationale for judicial sector support is inflated. Of much greater significance to both domestic and foreign investors is the overall political stability of the environment. To the extent that the judiciary may contribute to that stability, its performance is salient to investor confidence. Apart from generalized stability, at least three levels of economic activity and the courts' potential contribution to investor confidence come to mind. First, in some economic matters, the judiciary may impede certain lines of business from developing. This is often the case with respect to administrative regulation and administrative courts as they interact with small and medium sized business. Second, in other types of businesses a dysfunctional judiciary may encourage monopolistic behavior (entry is difficult) by those who can manage risk from within. In a third set of economic cases, whether a judiciary functions poorly may be perfectly irrelevant—where transaction costs are low and business risk is managed through vastly improved information networks.[175]

b. Could economic actors be convinced that they should care about judicial independence?

SMEs as a constituency for reform. The short answer to this question is "perhaps," especially with small and medium sized enterprises. The potential benefits to SMEs may be indirect, but they are not necessarily remote. The central challenge is to develop causal connections between support for judicial review of administrative cases and the potential of such review to enhance the predictive level of doing business and reduce over-regulation and rent-seeking by the bureaucracy.[176] In this way, the judiciary could help business, and, by doing so, strengthen a potentially important constituency in support of its own reform agenda, which may well include judicial independence. Program development should try to ascertain the causal linkages between the courts and SME operations. For example, can courts, through their ultimate enforcement capacity, improve administrative governance in the shadow of the

[172] *Global Development Finance*, World Bank Debtor Reporting System (World Bank: 1998), *quoted in* Theodore Moran, *FDI and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Institute for International Economics: 1998). It is well beyond the scope of this paper to discuss the effect of the East Asian Economic Crisis on investment in Indonesia and the effect of China's forthcoming implementation of the WTO. It is interesting to note that very large investors dominated FDI in Indonesia in 1997, while SME investment in China was the controlling block, even after discounting the substantial amount of "round-tripping" of capital by indigenous investors.

[173] Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (Basic Books: 2000). And, even where the judiciary or specific judges are relatively uncorrupt, experience comports with that suggested in several papers for this project: that is, that many courts are behind the curve in understanding the economic consequences of their decisions.

[174] For example, Amanda Perry's work in Sri Lanka. [Jensen-Perry email exchange: June 23, 2000.]

[175] Many other issues, such as what businesses need to do to attract large-scale capital, are beyond the scope of this paper.

[176] The SMEs' interests are in stabilizing the policy/legal framework for SMEs and regularizing judicial review of administrative action. See, e.g., Dietrich *supra* at p. 18 interviewing Romanian small- and medium-sized entrepreneurs.

law? Focus groups and polling among SMEs, where they are organized, is a useful activity to ascertain their interest and potential to organize, at least in part, around broader issues in the public interest, such as independence of the judiciary.

The Asia Foundation, with USAID funding, will be exploring the constituency potential of Indonesia's SMEs in a legal and judicial reform project that is just about to get underway. Indonesia's 6-7 million small and medium enterprises (SMEs) (35 million if one includes micro-enterprises) may provide a powerful, largely untapped constituency for legal reform. Through The Asia Foundation's SME policy reform programs in Indonesia,[177] 14 regional groupings of SME owners, called *forum dearah* or Fordas (Regional Fora for SMEs), have been established. The 14 Fordas include over 1,000 small and medium enterprises. SMEs are well aware that a stable and consistent legal environment is conducive to private sector development and are supportive of reform initiatives to increase legal certainty and stability. Mobilizing SMEs through the Forda network to voice their concerns could strengthen the reform movement enormously and will represent the first effort to explicitly engage the huge and potentially powerful SME sector in legal and political reform in Indonesia. This project is not specifically focused on judicial independence, but the same principles of constituency building apply.

Many of the issues, which concern the public interest reform movement generally, such as corruption; crime and lawlessness; lack of accountability; burdensome and complex bureaucracy and uncertain land titling, have had particular negative impacts on SMEs. Arbitrary government and rent seeking behavior among administrative officials has taken a heavy toll on business development. Complicated licensing and registration requirements involving various administrative departments have created extensive opportunities for rent seeking among those responsible for issuing business permits. Lack of information regarding the sequencing of multiple permits further contributes to delay and cost, as bureaucrats utilize inconsistent, inflexible procedures to extract bribes. Due to economies of scale, the unit cost of generic bribes hits SMEs harder than larger enterprises. Onerous licensing procedures can constitute a substantial portion of SME's start-up costs. As such, SMEs may constitute a highly supportive constituency for administrative transparency. Another advantage of focusing on local SMEs is that it deflects the argument that economic reform is all for foreign investors and, therefore, should be blocked. Given the current political environment in much of Asia, and in Indonesia in particular, focusing on local constituencies is more likely to be sustainable and effective. Again, in this area it is important to integrate the efforts of DG officers and EG (economic growth) officers in exploring these programmatic opportunities.

5. *Postscript: Three Distinct Approaches to Judicial Reform Programming*

In considering the issues discussed above, the DG officer should be aware of what seems to me are three distinct approaches to setting governance program priorities generally, and judicial reform priorities more specifically. These approaches I have characterized roughly as "structural," "doctrinal," and "functional-political economy." As noted in the description of each approach below, these three have their rough equivalents in the evolution of social science and legal thought.

[177] These are the Private Enterprise Policy Reform Program (PEPR) and its sister project the Policy Reform for Increased SME Growth Program (PRISM) which began in 1999, both funded by USAID's Office of Economic Growth.

Structural. Much of the literature on judicial independence lists constituent elements of such a state of institutional being. This literature is not very helpful in assessing how independent a judiciary is or, much more importantly, whether any given judiciary is a legitimate arbiter of public-private and private-private conflict. It is easy to get tied up in definitions in judicial independence discourse: independent, impartial, autonomous....[178] Even assuming that attaining these attributes is desirable, an assumption that some question, a methodology that effectively measures these attributes is yet to be developed. Indeed, at different historical junctures, judiciaries from Chile to Iran to Indonesia have been viewed as relatively to very independent, and simultaneously as illegitimate. The structural approach is tied to the public administration model of institutional development of the 1960s and 1970s.

Doctrinal. Another strand of literature on judicial independence is highly doctrinal. This is unsurprising given that lawyers and judges, whose education is based on doctrine, have dominated the analysis of legal systems. For decades, the idea that an independent judiciary is vital to restraining other state actors has been at the heart of doctrine-for-export in efforts to transplant legal systems. The doctrinal model is closely aligned with the Formalist School of legal thought of the 19th century and the first half of the 20th century. (Yet it is surprising how resilient this school has remained through many unfortunate legal reform projects in developing countries.)

Functional-Political Economy. Some of the most innovative field work since the mid 1980s has focused on the political economy of judicial reform and the relationship of the judiciary to economy and society, to culture and history. Political economy programming has several core elements that are germane to judicial independence programming. First, it employs a functional approach which focuses on where conflicts are resolved and why.[179] The judiciary is part of the focus, but not exclusively so. This functional approach relies on social science research to derive empirical evidence on the role (and perceptions of the role) of the judiciary as well as other dispute resolution fora, linking those roles to resource allocations. Examples of this research include examination of case records to understand client motivations, the quality of judicial reasoning, clearance rates, and execution of judgment; litigant and would-be-litigant interviews and surveys; analysis of budgets both across branches of government and within the judiciary; and opinion polling of various constituencies. Second, political economy programming is concerned with building credible processes and developing an enabling environment in which sustainable judicial reform programs may develop. One area of concern here is: what can the judiciary do to improve its legitimacy and strengthen its accountability *vis-à-vis* citizens, business groups, labor and human rights groups. Third, and related to the previous two, political economy programming examines incentives and

[178] For an interesting discussion of independence, *see* John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," 72 *So. Cal. L. Rev* 353 (1999): [A] person or an institution [is] ... dependent" if she, he or it "is unable to do its job without relying on some other institution or group." He then points out the numerous institutions through budgets, procedural rules and the like which can infringe on independence according to this broader definition.

[179] Especially in countries where the capacity of legal institutions is weak, performance substandards and implementation of laws relatively poor, the structural approach will suggest what the problems might be if the institutions worked and the laws were implemented, rather than what the problems actually are given the poor state of such legal systems. But in settings where institutions and the rule of law are weak, the analysis and reform prescriptions should be driven by the functional nature of what the legal institutions actually do in implementing the law and enforcing judgments.

performance. This approach relates to judicial independence, but it does not presume that judicial independence, or even judicial reform, will be the most important programmatic objective within any given governance program that aims to achieve larger goals of equitable growth, stability and democracy.

The functional or political economy approach, a non-doctrinal hybrid, is still evolving. It draws from the Realist School of the 1940s onward, the Critical Legal Studies Movement of the 1970s, the law and society movement, the law and economics movement, new institutional economics; and let us not forget Machiavelli, Weber, Durkheim, and Marx. Today, most importantly, practicing this approach requires careful listening to and intense interaction with thoughtful and diverse Asians, Latinos, Arabs, Africans, Eastern Europeans, and Russians. As obvious as this last point is, one would hope that it would be practiced more vigorously in the future.

APPENDIX A: Judicial Independence Standards and Principles

A number of international and regional human rights instruments mandate "an independent, impartial and competent judiciary." Various guidelines have been set forth internationally in documents drafted by experts, such as the UN Basic Principles on the Independence of the Judiciary. While these documents are not binding on member states, they evidence high-level support for the principle of judicial independence.[1]

The following are many of the documents and guidelines, governmental and non-governmental, that promote the principle of judicial independence in every region of the world.

I. International Conventions

Universal Declaration of Human Rights
Universal Declaration of Human Rights, Article 10, 12/10/1948, United Nations, G.A. res. 217A(III)

International Covenant on Civil and Political Rights
International Covenant on Civil and Political Rights, Article 14(1), 12/16/1966, United Nations, GA resolution 2200A(XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976

II. International Guidelines and Principles

Amnesty International Fair Trials Manual (1999)[2]
First published December 1998, AI Index: POL 30/02/98

Lawyers Committee for Human Rights Fair Trial Guide (2000)[3]
What is a Fair Trial? A Basic Guide to Legal Standards and Practice, Lawyers Committee for Human Rights, March 2000

UN Basic Principles on the Independence of the Judiciary (1985)
Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 (1985)

Procedures for the Effective Implementation of the UN Basic Principles on the Independence of the Judiciary (1989)
Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, Committee on Crime Prevention and Control, 10th Session, Vienna, Austria, 1988, ECOSOC resolution 1989/60, 05/24/1989

Basic Principles on the Role of Lawyers (1990)
Basic Principles on the Role of Lawyers, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

Guidelines on the Role of Prosecutors (1990)
Guidelines on the Role of Prosecutors, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

Draft Body of Principles on the Right to a Fair Trial and a Remedy (1994)
Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II, in "The Administration of Justice and the Human Rights of Detainees. The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening", Final Report, Commission of Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.a/Sub.2/1994/24, June 1994

Universal Charter of the Judge
Universal Charter of the Judge, General Council of the International Association of Judges, Tapei, Taiwan, 11/17/1999

III. UN Special Rapporteur on the Independence of the Judges and Lawyers

The U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities appointed a special rapporteur on the independence of judges and lawyers in 1994.[4] His mandate includes investigatory, advisory, legislative, and promotional activities pertaining to issues of judicial independence.

IV. Regional Conventions

Africa

African Charter on Human and People's Rights
African Charter on Human and People's Rights, 06/27/1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986

Americas

American Declaration of the Rights and Duties of Man
American Declaration of the Rights and Duties of Man, 1948, OAS res. XXX, Ninth International Conference of American States, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)

American Convention on Human Rights
American Convention on Human Rights, 11/22/1969, OAS Treaty Series No.36, 1144 U.N.T.S. 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), entered into force on July 18, 1978

Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms
European Convention for the Protection of Human Rights and Fundamental Freedoms, 11/04/1950, Council of Europe, European Treaty Series no. 5

V. Regional Guidelines and Principles

Asia and the Pacific

Statement of Principles of the Independence of the Judiciary *"Tokyo Principles"*
Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 07/17-18-1982, Tokyo, Japan, LAWASIA Human Rights Standing Committee

Revised Statement of Principles of the Independence of the Judiciary
Revised Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 09/13-15/1993, Colombo, Sri Lanka, 5th Conference of the Chief Justices of Asia and the Pacific

Statement of Principles of the Independence of the Judiciary *"Beijing Statement"*
Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 08/19/1995, Beijing, China, 6th Conference of the Chief Justices of Asia and the Pacific

Commonwealth (the United Kingdom and the former British colonies)
Latimer House Guidelines for the Commonwealth
Latimer House Guidelines for the Commonwealth, Joint Colloquium on "Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model", Latimer House, United Kingdom, June 15th-19th, 1998

Europe
Judges' Charter in Europe
Judges' Charter in Europe, 03/20/1993, European Association of Judges

Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges
Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 10/13/1993, 518th Meeting of the Ministers' Deputies, Council of Europe

European Charter on the Status of Judges
European Charter on the Status of Judges, 07/08-10/1998, Council of Europe, Strasbourg, France

Middle East
Recommendations of the First Arab Conference on Justice *"Beirut Declaration"*
Recommendations of the First Arab Conference on Justice, "Beirut Declaration", 06/14-16/1999, Conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century", Beirut, Lebanon

Latin America
Caracas Declaration
Caracas Declaration, 03/04-06/1998, Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Caracas, Venezuela

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[1] Additionally, there is some case law available. The UN Human Rights Committee, the Inter-American Human Rights Commission and Court, the European Human Rights Court and the African Human Rights Commission have had to interpret, respectively, article 14(1) of the International Covenant on Civil and Political Rights, articles 8(1) and 27(2) of the American Convention on Human Rights, article 6(1) of the European Convention on Human Rights and articles 7(1) and 26 of the African Charter of Human Rights.

[2] http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm

[3] http://www.ichr.org/pubs/fairtrial.htm

[4] The current special rapporteur is Mr. Dato' Param Cumaraswany.

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Basic Principles on the Independence of the Judiciary
Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, 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, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

The Universal Charter of the Judge

Preamble
Judges from around the world have worked on the drafting of this Charter. The present Charter is the result of their work and has been approved by the member associations of the International Association of Judges as general minimal norms.

Member associations have been invited to register their reservations on the text in Annex A.

Article 1: Independence
Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.

Article 2: Status
Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

Article 3: Submission to the law
In the performance of the judicial duties the judge is subject only to the law and must consider only the law.

Article 4: Personal autonomy
No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.

Article 5: Impartiality and restraint
In the performance of the judicial duties the judge must be impartial and must so be seen.

The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

Article 6: Efficiency
The judge must diligently and efficiently perform his or her duties without any undue delays.

Article 7: Outside activity
The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge.

The judge must not be subject to outside appointments without his or her consent.

Article 8: Security of office
A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

Any change to the judicial obligatory retirement age must not have retroactive effect.

Article 9: Appointment
The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

Article 10: Civil and penal responsibility
Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

Article 11: Administration and disciplinary action
The administration of the judiciary and disciplinary action towards judges must be organized in such a way, that it does not compromise the judges genuine independence, and that attention is only paid to considerations both objective and relevant.

Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation.

Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

Article 12: Associations
The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

Article 13: Remuneration and retirement
The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges work and must not be reduced during his or her judicial service.

The judge has a right to retirement with an annuity or pension in accordance with his or her professional category.

After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

Article 14: Support
The other powers of the State must provide the judiciary with the means necessary to equip itself properly to perform its function. The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to this matter.

Article 15: Public prosecution
In countries where members of the public prosecution are judges, the above principles apply mutatis mutandis to these judges.

(The text of the charter has been unanimously approved by the Central Council of the International Association of Judges on November 17, 1999)

APPENDIX B: Web Resources

I. Governmental Organizations

United Nations
http://un.org/
Official web-site locator for the UN system of organizations http://www.unsystem.org
http://www.un.org/rights/dpi1837e.htm United Nations background note, Independence of the Judiciary: A Human Rights Priority
http://www.undp.org/ UN Development Program
http://www.unhchr.ch/hchr_un.htm UN High Commissioner for Human Rights
http://www.unhchr.ch/hchr_un.htm UN Basic Principles on the Independence of the Judiciary
http://www.unhchr.ch/html/menu2/7/b/mijl.htm UN Special Rapporteur on the Independence of Judges and Lawyers

Asian Human Rights Commission
http://www.ahrchk.net/
http://www.ahrchk.net//solidarity/199704/v74_20.htm *Independence of the Judiciary in a Democracy*, Justice P. N. Bhagwati

Council of Europe
http://www.coe.int/
http://cm.coe.int/ta/rec/1994/94r12.htm Recommendation on the Independence, Efficiency and Role of Judges (Committee of Ministers)
http://www.echr.coe.int/ European Court of Human Rights

European Union
http://www.europa.eu.int/
http://www.eumap.org/ EU Accession Monitoring Program – *Monitoring the EU Accession Process: Judicial Independence*, Open Society Institute/EU Accession Monitoring Program

Organization of African Unity
http://www.oau-oua.org/

Organization of American States
http://www.oas.org/
http://www.cidh.oas.org/defaultE.htm Inter-American Commission of Human Rights
http://www.corteidh.or.cr/ Inter-American Court of Human Rights

USAID
http://www.usaid.gov/

II. Nongovernmental Organizations

Amnesty International
http://www.amnesty.org/
http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm *Amnesty International Fair Trials Manual*. AI Index: POL 30/02/98, December 1998

Human Rights Watch
http://www.hrw.org/

International Bar Association
http://www.ibanet.org/
http://www.ibanet.org/humri/index.asp Human Rights Institute

International Center for Criminal Law Reform and Criminal Justice Policy
http://www.icclr.law.ubc.ca/
http://www.icclr.law.ubc.ca/html/publications.htm#HumanRights Publications include *The Rule of Law and the Independence of the Judiciary* and *An Independent Judiciary: the Core of the Rule of Law*

International Commission of Jurists (Center for the Independence of Judges and Lawyers)
http://www.icj.org/

International Federation for Human Rights
http://www.fidh.org/

International Helsinki Federation for Human Rights
http://www.ihf-hr.org/

International Law Institute
http://www.ili.org/
http://www.ili.org/Publist.html Publications of the International Law Institute

International Association of Women Judges
http://www.iawj-iwjf.org/

Lawyers Committee for Human Rights
http://www.lchr.org/
http://www.lchr.org/pubs/fairtrial.htm *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*
http://www.lchr.org/feature/judicialreform/feature.htm Multilateral Development Banks and Judicial Reform (Latin America)

III. International Financial Institutions and Multilateral Development Banks

World Bank
http://www.worldbank.org/
http://www.worldbank.org/publicsector/legal Resources on legal institutions and international legal/judicial reform.
http://www1.worldbank.org/publicsector/legal/judicialindependence.htm Judicial Independence
http://www1.worldbank.org/publicsector/legal/protection.htm Human Rights Instruments and Judicial Reform
http://www1.worldbank.org/publicsector/legal/annotated.doc Annotated bibliography on Legal Institutions of the Market Economy
http://www1.worldbank.org/publicsector/legal/related.htm#World%20Bank Links to judicial reform related web-sites
http://www1.worldbank/publicsector/legal/premnotes.htm PREMnotes
http://www.worldbank.org/wbi/ World Bank Institute
Regional Development Banks

http://afdb.org/ African Development Bank Group
http://www.adb.org/ Asian Development Bank
http://www.coebank.org/ Council of Europe Development Bank
http://www.ebrd.com/ European Bank for Reconstruction and Development
http://www.eib.org/ European Investment Bank
http://www.iadb.org/ Inter-American Development Bank
http://www.iadb.org/idbamerica/archive/xjudicie.htm IDB special report on judicial independence
http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop_2.htm *Justice and Transparency from the Central American Prospective*, Dr. Jorge Eduardo Tenorio

IV. U.S. Resources

Asia Foundation
http://www.asiafoundation.com/

American Bar Association
http://www.abanet.org/
http://www.abanet.org/govaffairs/judiciary/report.html *An Independent Judiciary*, Report from the ABA Commission on Separation of Powers and Independence of the Judiciary
http://www.abanet.org/ceeli/ Central and Eastern European Law Initiative (CEELI)

Brennan Center for Justice
http://www.brennancenter.org/

Center for Judicial Independence
http://www.ajs.org/cji/index.html Promotion of judicial independence and public awareness

Other
http://www.iris.umd.edu/news/conferences/tinker/judreform.html papers on Judicial Reform

OTHER TECHNICAL PUBLICATIONS FROM THE OFFICE OF DEMOCRACY AND GOVERNANCE

PN-ACB-895
Alternative Dispute Resolution Practitioners Guide

PN-ACM-001
Case Tracking and Management Guide

PN-ACC-887
Civil-military Relations: USAID's Role

PN-ACH-305
Conducting a DG Assessment: A Framework for Strategy Development

PN-ACH-300
Decentralization and Democratic Local Governance Programming Handbook

PN-ACD-395
Democracy and Governance: A Conceptual Framework

PN-ACC-390
Handbook of Democracy and Governance Program Indicators

PN-ACE-070
A Handbook on Fighting Corruption

PN-ACF-631
Managing Assistance in Support of Political and Electoral Processes

PN-ACE-630
The Role of Media in Democracy: A Strategic Approach

PN-ACF-632
USAID Handbook on Legislative Strengthening

PN-ACE-500
USAID Political Party Development Assistance

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Judgments on removing basis

S.	Case	Brief facts
1.	***Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, (1969) 2 SCC 283** **5 Judges**	A Validation Act was passed because of the decision in *Patel Gordhandas Hargovindas* v. *Municipal Commissioner, Ahmedabad.* [(1964) 2 SCR 608] In that case the validity of the Rule 350-A framed by the Municipal Corporation under Section 73 was called in question, for rating open lands on the valuation based upon capital value. The word "rate" was given a specialised meaning and was held to mean a kind of impost on the annual letting value of property, if actually let out, and on a notional letting value if the property was not let out. The Legislature of Gujarat then passed the Validation Act seeking to validate the imposition of the tax as well as to avoid any future interpretation of the Act on the lines on which Rule 350-A was construed. The Validating Act was upheld as it was held to be within legislative competence.
2.	**Hari Singh v. Military Estate Officer, (1972) 2 SCC 239** 7 Judges	The Public Premises (Eviction of Unauthorised Occupants) Act, 1958 was struck down as unconstitutional by the High Court, on the basis that it gave the authorities two options for the procedure to be followed, without any guidance on which procedure was to be invoked in what case, for eviction of unauthorised occupants. While SLP was pending, a 1971 Validating Act providing for speedy procedure for eviction of persons in unauthorized occupation in public premises was passed, which vide Section 20 saved all actions taken under the 1958 Act and provided for a single summary procedure. The Court held that as the State legislature had legislative competence to pass an Act for eviction, and by validation the basis of the earlier judgment had been removed, the 1971 Act was a valid legislative exercise.
3.	***Misrilal Jain v. State of Orissa*, (1977) 3 SCC 212** 7 Judges	The Orissa Legislature enacted the Orissa Taxation (on Goods carried by Roads or Inland Waterways) Act, 7 of 1959, the constitutionality of which was challenged by the appellants on the ground that the Bill leading to the Act was moved without the previous sanction of the President of India, as required by the proviso to Article 304 of the Constitution. Thereafter, the Orissa Legislature obtained the previous sanction of the President to the moving of the Bill, passed the Orissa Taxation (on Goods carried by Roads or Inland Waterways) Act, 8 of 1968, imposing the same levy which it had unsuccessfully attempted to levy under the Act of 1959 and to validate under the Act of 1962.

		The 1962 Act was held to be valid.
4.	***I.T.C. Ltd. v. State of Karnataka*, 1985 Supp SCC 476** **3 Judges**	The Court was concerned with the constitutional validity of Section 65(1) of the Karnataka Agricultural Produce Marketing Regulation Act as substituted by the Amendment Act, 1980 which sought to validate the market fee levied on the "sellers of notified agricultural produce" under Section 65(1), for and during the period of its operation, prior to its being struck down by the Karnataka High Court. Prior to the amendment, the Act allowed market committees to levy and collect market fees from the buyers for maintenance of rural roads, which was held to not have sufficient quid pro quo required for a levy of fee to be valid. The Court upheld the levy contained in the amendment on the basis that by imposing a retrospective levy and by showing sufficient quid pro quo for the fee collected, and validating monies already collected, the legislature had acted within its competence and removed the basis of the earlier judgment.
5.	***Hindustan Gum and Chemicals Ltd. v. State of Haryana*, (1985) 4 SCC 124**	The Supreme Court had found the levy of octroi in the extended area of a municipality to be invalid, on the basis that the provisions of Section 5(4) of the Punjab Municipal Act, 1911 were inadequate in the absence of a reference to the notifications issued under the Act also in that sub-section. By the Amending Act the word 'notification' had been inserted in sub-section (4) of Section 5 of the Act with retrospective effect. Since the word 'notification' has now been inserted in Section 5(4) of the Act with retrospective effect, the basis on which the said decision was rendered has been removed because the deficiency in Section 5(4) noticed by this Court has been made good and the levy and collection of octroi have also been validated. The Amending Act satisfies the tests laid down by this Court in the decision in *Shri Prithvi Cotton Mills case*
6.	***Atlas Cycle Industries Ltd. v. State of Haryana*, 1993 Supp (2) SCC 278** ***5 Judges***	In 1942 a notification was issued under Section 62(10) of the Punjab Municipal Act (hereinafter called "the said Act") which stated that the Municipal Committee of Sonepat had imposed a tax called 'octroi' on the articles mentioned in the schedule to the notification when imported into the octroi limits of Sonepat municipality. In 1967, a notification was issued under Section 5(3) of the said Act by the Governor of Haryana. (This was because the State of Haryana had been created on November 1, 1966 by bifurcation of the State of Punjab.) The notification under Section 5(3) included within the municipal limits of Sonepat the area upon which the

		factories of both the petitioners stood. On and from August 18, 1967 octroi was levied upon materials imported by them into the municipal limits of Sonepat. The Supreme Court based its judgment (*Atlas Cycle Industries Ltd.* v. *State of Haryana* [(1971) 2 SCC 564] upon the provisions of Section 5(4) of the said Act, as it then read. Section 5(4), as it then read, spoke of rules, bye-laws, orders, directions and powers. It did not mention notifications. Therefore, the appeals were allowed and the Sonepat municipality was restrained from levying against and collecting from the petitioners any octroi in respect of raw materials, components and parts imported by them into their factories. **29.** On November 15, 1971 was passed the Punjab Municipal (Haryana Validation and Amendment) Act which amended Section 5(4) to include within it the word 'notification'. The amending Act was upheld.
7.	***D. Dasegowda v. State of Karnataka*, 1993 Supp (4) SCC 53** ***2 Judges***	**3.** The appellant who was working as Assistant Engineer in Public Works Department was transferred on deputation to Bangalore City Corporation under City Bangalore (Cadre and Recruitment) Regulation, 1971 which permitted 75% of vacancies in the cadre to be filled in by deputation from PWD. In 1977 Karnataka Municipal Corporation Rules were framed under which the appellant was absorbed as Assistant Executive Engineer in the Corporation. Validity of these Rules and absorption of the appellant was assailed in the High Court by way of a writ petition which was allowed. The Rules were struck down and the absorption of the appellant in the Corporation was set aside. In 1981 the Government issued an Ordinance removing the infirmity in the rules by providing that persons affected would be given reasonable opportinuty of hearing. It was replaced by the Karnataka Municipal Corporation Amendment Act, 1981 (Act 40 of 1981), which had a validating provision. The Court held that since the law had been amended and all actions taken including appointments and promotions were validated, it was a valid exercise.
8.	***Bhubaneshwar Singh v. Union of India*, (1994) 6 SCC 77** ***3 Judges***	A Validating Act was passed by Parliament, (in light of a judgment of the Supreme Court that directed that compensation for nationalisation of coal mines should include compensation for coal in stock), by which the lacuna or defect pointed out was removed by introduction of sub-section (2) in Section 10 of the Act with retrospective effect. Sub-section (2) of Section 10 as well as Section 19, both specified that the

		amount which is to be paid as compensation mentioned in the schedule shall be deemed to include and deemed always to have included, the amount required to be paid to such owner in respect of all coal in stock on the date immediately before the appointed day. The Court held that "It is well settled that Parliament and State Legislatures have plenary powers of legislation on the subjects within their field. They can legislate on the said subjects prospectively as well as retrospectively. If the intention of the legislature is clearly expressed that it purports to introduce the legislation or to amend an existing legislation retrospectively, then subject to the legislative competence and the exercise being not in violation of any of the provisions of the Constitution, such power cannot be questioned." Hence the Act was upheld.
9.	***Indian Aluminium Co. v. State of Kerala*, (1996) 7 SCC 637** **2 Judges**	**56.** From a resume of the above decisions the following principles would emerge: (1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them; (2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary; (3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law. (4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained; (5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made; (6) The court, therefore, needs to carefully scan the law to find out: (*a*) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (*b*) whether the

		legislature has competence to validate the law; (*c*) whether such validation is consistent with the rights guaranteed in Part III of the Constitution. (7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power. (8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof. (9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.
10.	***Bakhtawar Trust v. M.D. Narayan*, (2003) 5 SCC 298** ***2 Judges***	The validity of the Bangalore City Planning Area Zonal Regulations (Amendment and Validation) Act, 1996 was in question. The original Karnataka Town and Country Planning Act, 1961 provided maximum height of a new construction as 55 feet, whereas Rule 16 of Bye-law 38 framed by Bangalore Municipal Corporation provided maximum height of a new

		building as 80 feet. Pursuant to a direction of the SC requiring height to be limited, the Commissioner passed an order that three floors (the 6th, 7th and 8th floors) of the building constructed by the builders be demolished. In the meantime, the amending and validating Act was passed by the Karnataka Legislature, modifying the maximum height of the new building up to 165 feet and validating the new construction raised in violation of the outline development plant and the Zonal Regulations. A perusal of the aforesaid provisions shows that with effect from 1972 to 1984 under the Zonal Regulations the maximum height permissible for any new building was up to 55 ft. However, Rule 16 of Bye-law 38 provided height of the erection or re-erection of any new building up to 80 ft. It is also not disputed that the said Zonal Regulations ceased to have effect after the comprehensive development plan came into force in the year 1985 and after passing of the impugned Act, the height of the new building could be raised to above 50 metres i.e. 165 ft. The Court held that as the very premise of the earlier judgment had been uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded, the validating Act was valid.
1 1.	***State Bank's Staff Union (Madras Circle) v. Union of India*, (2005) 7 SCC 584**	The State Bank of India Act, 1955 and the State Bank of India (Subsidiary Banks) Act, 1959 etc. were amended whereby customary bonus was not payable by State Bank of India (in short "the Bank") after the Banking Laws (Amendment) Act, 1983 (Central Act 64 of 1984) was enacted. The appellant has questioned the constitutional validity of the said amendment before the Madras High Court by filing a writ petition which was dismissed. The appellant's primary stand before the High Court was that the Amendment Act was unconstitutional as it merely intended to nullify a judicial decision which Parliament had no competence to do. Other contentions were to the effect that an award passed under the Industrial Disputes Act, 1947 (in short "the Industrial Act") is entitled to greater recognition as in the case of conflict between the provisions of general law i.e. the State Bank Act and the Industrial Act, the latter Act must prevail. The Court held: **"26.** Curative statutes are by their very nature intended to operate upon and affect past transactions. Curative and validating statutes operate on conditions already existing and are therefore wholly retrospective and can have no prospective operation.

		28. There is no quarrel and in fact in our opinion rightly that the legislature cannot by a mere declaration, without anything more, directly overrule, reverse or override a judicial decision. However, it may, at any time in exercise of the plenary powers conferred on it by the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or neutralising effect the condition on which such decision is based. (See *I.N. Saksena* v. *State of M.P.* [(1976) 4 SCC 750) **34.** As noted above, the impugned Act did not merely declare the Tribunal's award inoperative. There is nothing to show that Parliament intended to exercise appellate powers over the Tribunal or the High Court by enacting the amending Act. The said Act in clear and unambiguous terms prohibits the grant of bonus to the employees of public sector banks, except in accordance with the Bonus Act, and also limits such payment only to those eligible under the Act." Hence valid.
1 2.	*Cheviti Yenkanna Yadav v. State of Telangana*, (2017) 1 SCC 283	The State of Telangana was carved out of the erstwhile State of Andhra Pradesh and the Statehood came into effect from the said date by virtue of the Andhra Pradesh Reorganisation Act, 2014 (Act 6 of 2014). After formation of the new State the Governor of Telangana promulgated Ordinance No. 1 of 2014 to amend the Andhra Pradesh (Agricultural Produce and Livestock) Markets (Amendment) Act, 2015 and by virtue of the said Ordinance Section 5 of the Act underwent two major changes. The total number of members in the Market Committee was reduced from 18 to 14 and the term of the Market Committee was reduced from 3 to 2 years. It was also provided in the Ordinance that notwithstanding anything contained in the principal Act, the existing members shall cease to hold office and the Government would be competent to appoint person or persons, to exercise the powers and perform the functions of the Market Committee. The Ordinance was challenged before the High Court. The High Court came to hold that the removal of all of the petitioners vide Clause 3 by way of legislative action was discriminatory as future appointees in the office of the members, Vice-Chairmen and Chairmen were liable to be removed or denuded of their power under the existing provisions as provided under Sections 5, 6, 6-A and 6-B of the said Act whereas the writ petitioners were sought to be removed prematurely taking away the procedural safeguard established by law. The legislature after the decision of the High Court amended the provision. By such amendment, it has removed the

		distinction between the existing members and the members who are to come in future. The validating Act was held to be valid.