2 Independence, political interference and corruption

Judges and other court personnel need to be able to make decisions free from interference from the state and the private sector. If they are motivated to ingratiate themselves with an authority with influence over their careers, or to top up their earnings with money from one of the parties to a case, the judicial process will have been corrupted. The independence of the judiciary is therefore crucial to its effectiveness. But independence is not enough. A fair judiciary must also be subject to mechanisms that hold it accountable to the people. The challenge is to design appropriate institutional structures and legal culture that uphold the independence, impartiality and integrity of the judiciary, while rendering it answerable for its decisions. Susan Rose-Ackerman explores how different judicial models grapple with this challenge and sketches out the typical vulnerabilities in civil and common law systems. Stefan Voigt shows that in designing institutional structures it is not sufficient to write judicial independence into statute books – judges and court staff need to be independent in practice. Roy Schotland considers the widespread US system of electing judges to office, and asks whether they are unduly influenced by the knowledge that a particular company or individual donated money to their campaigns. Tom Blass discusses President Putin's reform of the Russian court system and looks at the pressure to which judicial appointees are subjected, as well as the nature of corruption in Russia's judiciary. Gugulethu Moyo ends by describing executive assaults on the independence of the Zimbabwean judiciary, especially in regard to the country's controversial land reform programme.

Judicial independence and corruption

Susan Rose-Ackerman[1]

Law enforcement cannot be an effective anti-corruption tool unless the judiciary is independent both of the rest of the state and the private sector. In cross-country research, measures of judicial independence are related to other positive outcomes such as higher levels of growth, and of political and economic freedom.[2]

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2 Judicial independence is associated with higher political and economic freedom according to Rafael La Porta, Florencio Lopez-de-Silanes, Christian Pop-Eleches and Andrei Shleifer, 'Judicial Checks and Balances', *Journal of Political Economy* 112 (2) (2004). Their measure, however, is limited to the tenure of high court judges and the role of precedent.

Independence implies that judges' careers do not depend on pleasing those with political and economic power. Such separation of powers is necessary both to prevent politicians from interfering with judicial decision-making and to stop incumbent politicians from targeting their political opponents by using the power of civil and criminal courts as a way of sidelining potential challengers. The judiciary needs to be able to distinguish strong, legitimate cases from those that are weak or politically motivated. Otherwise, the public and users of the court system will lose confidence in the credibility and reliability of the court system to punish and pass judgement on crimes and civil disputes, and judicial sanctions will have little deterrent effect. Individuals may conclude that the likelihood of arrest and conviction is random or, even worse, tied to one's political predilections. In such cases, the legal process does not deter corruption and it may undermine the competitiveness of democratic politics.

Independence is necessary but not sufficient. An independent judiciary might itself be irresponsible or corrupt. If judges operate with inadequate outside checks, they may become slothful, arbitrary or venal. Thus, the state must insulate judicial institutions from improper influence at the same time as it maintains checks for competence and honesty. Judges must be impartial as well as independent. On the one hand, an independent judiciary can be a check both on the state and on irresponsible or fraudulent private actors – whether these are the close associates of political rulers or profit-seeking businesses acting outside the law. On the other hand, independent courts may themselves engage in active rent seeking.[3] States need to find a way to balance the goals of independence and competence. In practice, a number of solutions have been tried; none seems obviously superior, but this overview suggests some common themes and some promising avenues for the reform of malfunctioning judiciaries.

Independence is often opposed by political actors. Resistance may arise from a president or a legislature wishing to avoid checks on their power and from influential vested interests. Given such resistance, governments may limit the impact of the courts by keeping overall budgets low so that salaries and working conditions are poor. They may make judicial appointments on the basis of clientelist ties, not legal qualifications. Country reports in Part Two document political influence over the selection of judges in a number of Latin American countries and also the Czech Republic, Georgia, Pakistan, Russia, Sri Lanka and Turkey. In sub-Saharan Africa the problem is especially serious. However, some African nations have moved in the direction of judicial independence at the initiative of the judges themselves, who have negotiated with political leaders and appealed to public opinion.[4]

Those with political power sometimes support independence, however. A free-standing judiciary may act as a guarantor of special-interest deals enacted by past governments.[5] In addition,

3 On the positive side see La Porta et al. (2004), op. cit.; and F. Andrew Hanssen, 'Independent Courts and Administrative Agencies: An Empirical Analysis of the States', *Journal of Law, Economics and Organization* 16 (2) (2000).

4 Jennifer Widner, *Building the Rule of Law: Francis Nyalai and the Road to Judicial Independence in Africa* (New York: W.W. Norton, 2000).

5 William M. Landes and Richard A. Posner, 'The Independent Judiciary in an Interest-Group Perspective', *Journal of Law and Economics* 18 (3) (1975). Mark Ramseyer argues that the judiciary is less independent in single-party states than in competitive political systems. See Mark Ramseyer, 'The Puzzling (In)Dependence of the Courts: A Comparative Approach', *Journal of Legal Studies* 23 (1994).

a nation's leaders may want to reassure foreign investors by establishing courts that act independently of domestic power structures. Such courts, however, may create tensions especially in authoritarian governments. If they become too independent, they may threaten those in power. Egypt, for example, created a supreme constitutional court and an administrative court system in the 1970s. Their existence led to a showdown in 2005 as judges asserted an independent role in politically sensitive areas, such as election monitoring (see country report on Egypt, page 201). States with corrupt court systems and a desire for foreign investments often consider the creation of 'boutique' courts to satisfy that need but they may be difficult to insulate from a corrupt environment. Indonesia, for instance, created a commercial court under the guidance of the IMF that was intended to enable foreigners to avoid the corrupt regular court system. Unfortunately, it could not be insulated and its judges made rulings apparently from corrupt motives that favoured well-connected local debtors. A recent IMF report recognises the need for more widespread judicial reform and suggests that recent reforms may improve matters.[6]

Aspects of judicial independence

Judicial independence, championed by the UN and the International Commission of Jurists,[7] is associated with positive outcomes in scholarly work, but the term has no precise definition. At the level of institutional detail, the phrase does not translate into a particular set of recommendations. Furthermore, it is not enough to get the formal rules right; independence must also operate in practice (see Stefan Voigt's 'Economic growth, certainty in the law and judicial independence', page 24) and independent judges must carry out their duties responsibly. Of course, no set of institutional rules can overcome the handicap of a judiciary that has no personal integrity or respect for legal argument. Judges must operate with impartiality, integrity and propriety.[8] Nevertheless, one can isolate a number of issues that must be resolved in the process of creating a functioning judicial system. The focus here is on structural conditions that influence who is selected for the judiciary and constrain them once in office. They fall into two broad categories: some primarily promote independence; others seek to limit corruption inside the

6 Daniel S. Lev, 'Comments on the Judicial Reform Program in Indonesia', in *Current Developments in Monetary and Financial Law*, vol. 4 (Washington D.C.: IMF, 2005); and Ceda Ogada, 'Out-of-Court Corporate Debt Restructuring: The Jakarta Initiative Task Force', in the same volume. *Indonesia Selected Issues*, IMF country report no. 04/189 (July 2004) is at www.imf.org/external/pubs/ft/scr/2004/cr04189.pdf
The report points out that, although up to 70 per cent of commercial courts' decisions are based on sound legal reasoning, 30 per cent, including many controversial decisions, continue 'to tarnish the court's reputation'.

7 The International Commission of Jurists (www.icj.org) has a Center for the Independence of Judges and Lawyers and was instrumental in drafting the UN's Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in 1985. See 193.194.138.190/html/menu3/b/h_comp50.htm

8 These are the principles in the Bangalore International Principles of Judicial Conduct: see chapter 3, page 40. See also the American Bar Association's Model Code for Judicial Conduct (2004). Jessica Conser, 'Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Analysis', *North Carolina Journal of International Law and Commercial Regulation* 31: 255–332 (2005), discusses these codes along with the North Carolina Code of Judicial Conduct, which makes the courts completely independent of the other branches and subject to little regulation.

judiciary. Of course, these categories sometimes overlap, but it will aid the discussion to list them separately.

Conditions related to the independence of the judiciary from the rest of government

Judges:

- Qualifications and method of selection of individual judges, including the role of political bodies and judicial councils
- Judicial tenure and career path
- Determination of budget levels and allocations, including pay scales
- Impeachment criteria and criminal statutes governing corruption of the judiciary and their enforcement; existence of immunity for judges
- Level of protection from threats and intimidation.

Court organisation and staffing:

- Presence or absence of juries or lay judges
- Position of prosecutors in the structure of government
- Organisation of the judicial system – existence of a separate constitutional court, specialised courts and courts at several government levels.

Conditions primarily related to the control of corruption for a given level of political independence

Judges:

- Caseloads (overall and per judge) and associated delays
- Judges sit in panels or decide alone; composition of panels (i.e. all judges or also include lay assessors)
- Pay and working conditions, especially *vis à vis* private lawyers
- Conflict-of-interest and asset disclosure rules
- Rules on *ex parte* communication with judges in particular cases.

Court organisation and staffing:

- Case-management systems, including assignment of cases to judges
- Role of clerks and other court staff, and checks on their behaviour
- Openness of court proceedings to public and press
- Prevalence of written opinions and dissents.

Legal framework:

- Rules for getting into court, for joining similar cases, dealing with frivolous cases, etc.
- Rules of civil and criminal procedure

- Role of precedent, law codes, constitution, statutes and agency rules
- Rules for the payment of legal fees.

Legal profession:

- Respect for, and competence of, the legal profession
- The nature of legal education, and its relevance to modern legal disputes.

This is a long list, which admits of many variations. However, one can identify two stylised models that seek independence through different routes. The first isolates the institution from political influence through such devices as professional training, oversight and career path. The second achieves independence from the regime in power through political balance, and through publicity and public participation. In practice, these models are not mutually exclusive, but it will help focus our thinking to concentrate on the strengths and weaknesses of these alternatives. The former is a stylised model of the system in most of continental Europe, and the latter tracks important aspects of the judicial branch in the United States and the British Commonwealth. In application each includes some elements of the other, and the pressures for greater transparency and participation are felt worldwide. Nevertheless, analysis of these contrasting ideal types highlights the alternatives that reforming states face.

Some researchers characterise common law systems, such as those in the United States and the United Kingdom, as having more independent judiciaries than those in continental Europe and as being more investor-friendly.[9] Others argue that the civil law model produces more independent courts and is more appropriate for emerging legal systems.[10] The systems are indeed different, but one judicial system cannot be unambiguously characterised as better than the other. I describe a well-functioning version of each and then demonstrate how each can be vulnerable to corruption and capture.[11]

In the civil law model, the role of the court is to arrive at a judgement based on the body of law codes and statutes. Legal decisions themselves do not have formal value as precedent although they may, in fact, influence subsequent cases. Public written opinions state the legal result and, in the ordinary courts, do not include dissents. Judging is a professional apolitical task,[12] and judges are career civil servants who have passed a competitive exam soon after completing their legal training. Their first positions are at the lowest level of the judicial hierarchy, and they are

9 For example, La Porta et al. (2004), op. cit., find a statistical association between their measure of judicial independence and legal origin, but this, in part, reflects their restricted measure of independence. La Porta, Lopez-de-Silenes, Shleifer, and Vishney, 'Law and Finance', *Journal of Political Economy* 106 (6) (1998) find that common law systems protect investors the best, French-civil-law systems the worst, and German and Scandinavian systems in between. However, they do not develop measures of judical independence. Daniel Berkowitz, Katharina Pistor and Jean-François Richard, 'Economic Development, Legality, and the Transplant Effect', *European Economic Review* 47 (2003) show that, except for the French civil code, these results are not robust once one accounts for the means of transplantation.

10 Charles H. Koch Jr., 'The Advantage of the Civil Law Judicial Design as the Model for Emerging Legal Systems', *Indiana Journal of Global Legal Studies* 11(1) (2004).

11 The ideal types have been most clearly articulated by Mirjam Damaska in *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986).

12 In practice judges sometime leave their judicial posts to run for public office in Germany. Nevertheless, the norm is a career judiciary.

evaluated by those higher in the pecking order or by special judicial councils that determine promotions, disciplinary penalties and transfers.[13] Judges typically remain in the judiciary until retirement. Although the judiciary's budget must be approved by the legislature, it is prepared by the judicial branch with the legislature approving the total, but not determining how it will be spent.[14] However, the pay and benefits of judges are set by civil service rules. Specialised courts may exist in areas such as administrative law or taxation, but within a particular court, cases are assigned randomly to judges or panels of judges. Jury trials are uncommon; mixed panels consisting of judges and civilians are sometimes used, but the judges usually dominate. A judgeship is a full time, life-time position, a factor that limits problems with conflicts of interest, but formal rules also limit acceptance of outside remuneration. The number of judges and their staffs is large enough to assure reasonably prompt resolution of cases. This result is facilitated by fee-shifting rules that require the loser in a civil suit to pay the winner's legal fees, and by civil and criminal procedures that expedite court proceedings (for example, limited discovery, limited use of oral argument, no juries).[15]

If the country has a written constitution, the one exception to this pattern is the constitutional court. This is a free-standing court with a mandate to evaluate laws, rules and other government actions for conformity with the constitution. Because it is an integral part of the democratic political system, its members are usually chosen by the legislature from the pool of distinguished senior lawyers, judges and academics. The selection process assures partisan balance although the aim is to select justices with a strong commitment to the norms of the legal profession and the preservation of the constitutional order. Constitutional issues are referred to this court by other courts and, if requested, it can review newly passed laws for conformity with the constitution. In keeping with its more explicitly political role, constitutional courts in many countries permit dissents, which are a common occurrence in Germany and Argentina.[16]

In the common law model, courts build on precedent in their effort to interpret the law and apply it to new situations. Political/policy concerns are a straightforward part of courts' decisions. Thus, independence does not imply isolation from policy, although judges must use

13 Systems with judicial councils differ. Some simply confirm the role of senior judges; others, as in Italy, are a device for limiting the role of senior judges. John O. Haley, 'Judicial Reform: Conflicting Aims and Imperfect Models', *Washington University Global Studies Law Review* 5 (2006). In some countries they are a route for political influence; see TI reports on Georgia, Pakistan and Turkey and 'Corruption, accountability and the discipline of judges in Latin America' in chapter 3, page 44.

14 Most courts charge fees to litigants. When these constitute a large share of the courts' budget, the courts are independent of the rest of government but extremely vulnerable to corrupt inducements from litigants.

15 In addition to Damaska, *supra,* see Carlo Guarnieri, 'Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe', in José María Maravell and Adam Przeworski, eds., *Democracy and the Rule of Law* (Cambridge, UK: Cambridge University Press, 2003) pp. 223–41.

16 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000). See also Herman Schwartz, 'Eastern Europe's Constitutional Courts', *Journal of Democracy* 9 (4): 100–14 (1998), and Wojciech Sadurski, *Rights Before Courts; A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, the Netherlands: Springer, 2005). The special status of constitutional courts complicates efforts to measure judicial independence. Both La Porta et al. (2004), op. cit, and Feld and Voigt (2003), op. cit., use data on constitutional tribunals as a component of their measures of judicial independence – a potentially misleading measure.

legal arguments to justify their decisions. Trials are public, and judicial power is checked by lay juries who decide the facts in many criminal and civil cases. Civil and criminal procedures protect litigants' rights but lead to delays that create incentives not only for corruption but also for the litigants to settle before trial – through plea bargains in criminal cases and monetary settlements in civil cases.

The judicial selection process is intertwined with politics. Even if judges to higher courts are selected from those already serving on lower courts, those making the selection frequently have clear political allegiances, often serving in the cabinet of the sitting government, as in the United Kingdom (see the UK report on page 282 for description of recent changes). In the United States there are two variants. At the state and local level, many judges are elected in partisan contests to fixed terms and, even if initially appointed, may face recall elections (see the US case study in this chapter, page 26). At the federal level judges are nominated by the president and approved by a majority of the Senate. Once approved, they have life tenure and their salaries cannot be reduced. Thus, politics can influence who is nominated, but once confirmed, federal judges or justices are out of the control of the political bodies unless their behaviour is so egregious as to lead to impeachment and removal from office. Federal judges' lifetime appointments and their insulation from politics once on the bench are important factors to study to isolate their impact on judicial behaviour. Studies at the US state level show that elected judges, especially those chosen in competitive elections, tend to sentence convicted criminals to longer terms as the date of the election approaches.[17] This result suggests that judicial independence is harmed by the election of judges, especially if incumbents are subject to re-election.

In the United States and the United Kingdom judges are often chosen from lawyers with long careers in private practice. Hence, avoiding conflicts of interest between former legal practice interest and the current position as a judge is particularly important. US law has stringent requirements for disclosure of assets and restrictive limits on permitted activities while in office. The norms of the legal profession act as a check on the behaviour of judges, and the American Bar Association has an informal role in vetting nominees. In the United Kingdom, higher court judges are selected from among sitting judges, so financial conflicts of interest are less important at the time of promotion, but can still be a problem at the time of a judge's initial appointment. Furthermore, in both countries sitting judges seeking promotion have an incentive to please the government in power.

Corruption and self-dealing in civil and common law systems

Now consider how corruption and self-dealing can arise in these systems if they depart from their respective ideals.

17 The results are reported in Sanford C. Gordon and Gregory A. Huber, 'Accountability and Coercion: Is Justice Blind when It Runs for Office?', *American Journal of Political Science* 48 (2)(2004); and Sanford C. Gordon and Gregory A. Huber, 'The Effect of Electoral Competitiveness on Incumbent Behavior', draft NYU and Yale, 2006. Their studies use data from Pennsylvania and Kansas, respectively.

In states that follow the civil law model, serious problems arise if the supposedly apolitical, civil service nature of judicial selection and promotion is undermined by the use of political selection criteria. A patronage-based appointment process will be particularly harmful here because the checks that exist in most common law systems are largely absent.

Even if access to the judiciary is merit-based, corruption inside the judicial hierarchy can be particularly harmful. If top judges are corrupt or dependent on political leaders, they can use promotions and transfers of judges to discipline those unwilling to play the corruption game.[18] Lower-level judges might then collect bribes and pass on a share to those above. Top judges may also be able to manipulate the assignment of cases to those willing to rule in favour of powerful clients. The lack of dissents and the low level of lay participation will make corruption relatively easy to hide.

To the extent that trial procedures are under the control of judges rather than lawyers, this will give litigants incentives to corrupt lower-level trial judges who can manipulate procedures in their favour. However, the use of panels of judges and the presence of lay judges sitting with professionals help to limit corruption by increasing the chance that it will be uncovered. The use of lay judges, common in parts of Europe, is being tried in Indonesia, Japan and elsewhere as an option between a professional judiciary and jury system.[19]

If the judiciary suffers from a lack of resources and staff, this can produce delays that litigants may pay to avoid. In the extreme, judges and their staff can create delays in order to generate payoffs. An overly bureaucratised system can become dysfunctional with litigants finding it difficult to discover how the system operates and being tempted to use bribes to cut through the red tape.[20] Furthermore, where judges are career civil servants with salaries fixed by the state and little independent wealth, they may be vulnerable to financial inducements offered by wealthy litigants and their lawyers.[21]

The common law model presents a different set of corrupt incentives. The political nature of the appointment process may lead candidates to pay politicians for the privilege of being appointed, or they may be beholden to wealthy contributors if they must win contested elections. Even if appointed, judges may be biased toward the political party or coalition that appointed them. If judges are independently wealthy from a prior career as a private lawyer, they may be subject to conflicts of interest. These may surface, not as outright bribery, but as an incentive to favour litigants associated with organisations in which the judge has a financial interest. Dereliction of duty may arise in forms that do not fit conveniently under the legal definition of corruption, but that nevertheless distort the operation of the judicial system.

18 One reviewer noted that in interviews in some Latin American countries, judges said they would never be promoted because they lacked a 'political godfather'.

19 *The Economist* (UK), 4 March 2004.

20 See, for example, the description of the situation in an Albanian court and efforts of a USAID project to introduce reforms. One problem was the diffusion of responsibility for individual cases across several judges, each of which could blame the others in case of problems. See www.usaidalbania.org/(xtozlhzfgi0sef45xuyela45)/en/Story.aspx?id=39

21 Of course, this can also be a problem in common law systems for judges without accumulated assets.

Some corrupt incentives are common to both systems. First, if pay and working conditions are poor, judges and their staffs may be relatively easy to corrupt. Judges may be more vulnerable to these inducements in continental Europe-like systems where they have few accumulated assets. Poor working conditions may also translate into hassles and delays for litigants, providing incentives to pay as well as receive bribes.

Second, if important aspects of case management, such as the assignment of judges, trial dates and meetings with judges, are under the control of staff, this creates opportunities for payoffs. Bribes to staff can speed up (or slow down) cases, avoid random assignment of judges and otherwise smooth the path of a case. If having one's case accepted for resolution by the courts is a discretionary matter for the judiciary, corruption can help make the choice. In practice, however, it may be difficult to distinguish between the corruption of judges and that of court staff. Corrupt staff can give the appearance of a corrupt judge, or a corrupt judge can claim that the staff is at fault.

Third, the rules governing relations between judges, lawyers and litigants can ease or facilitate corruption. If a judge makes a practice of meeting with the lawyer for one side without the presence of the other, this can be an invitation to corruption. Fourth, if the caseload facing judges raises novel and complex issues not included in their legal training, there may be a temptation to use bribe payments to resolve them. The corrupt judge is then not violating an accepted legal interpretation because no such standard exists. Fifth, judges may be threatened and intimidated by wealthy defendants, particularly those associated with organised crime or those accused of 'grand' corruption at the top of government. Judges may be offered bribes with the implication that if the offer is refused, the judge and his or her family may suffer physical harm.

Sixth, corruption is facilitated by an opaque judicial system where both litigants and the public have trouble finding out what is going on. There are several aspects to transparency. One involves the courts' own efforts to publicise their operation and decision processes, and includes the requirement that judges disclose their assets and any conflicts of interest. As noted above, such disclosure is especially crucial when judges are appointed or elected in mid-career, rather than being part of a civil service system. The second concerns the ability of outsiders to find out what is happening. Here a free media with access to judicial proceedings and documents is key, along with an active civil society able to publicise lapses and work for reform.

Finally, the location of the prosecutors can influence the incidence of corruption in both types of legal systems. In the United States the prosecutor is within the executive branch. This means that certain types of corrupt activities may be overlooked if they are too closely associated with the regime in power. Similar problems may arise in Commonwealth systems if the judges are beholden to incumbent politicians. In civil law systems the prosecutor may be located inside the executive branch, as in France and Italy, in the judiciary, or in an independent agency more or less isolated from both courts and the regime in power, as in Brazil or Hungary (see 'Judicial corruption from the prosecutor's perspective' on page 79). Further analysis of the prosecutors is beyond the scope of this essay, but clearly the same tensions between independence and oversight exist for them as do for judges.

Conclusions

I have outlined two contrasting ways of organising the judiciary, each of which has its strengths and weaknesses. Corruption in the judiciary can occur even when the courts are independent of the rest of the state. In fact, their very independence may facilitate corruption because no one has the authority to oversee them. If the judiciary is to be an effective watchdog over the government, it must be both independent of the legislature and the executive, and of high integrity. It must not be subject to pressure from powerful politicians or others in the public and private sectors who benefit from a corrupt status quo. Thus a fundamental paradox exists. If courts are independent, judges may be biased toward those who make payoffs. If they are not independent, they may be biased in favour of politicians who have power over them. Both are troubling outcomes, and suggest that favourable institutional design is necessary, but not sufficient. Some of the inter-state variation in corruption depends upon the honesty and competence of sitting judges and their norms of behaviour. Nevertheless, emerging democracies also need to evaluate the contrasting models outlined above. Each model can function well under some circumstances. The task for reformers is to locate their system's particular vulnerabilities and to design a programme that deals with the multiple facets of independence in a way that limits corrupt incentives and provides prompt and impartial justice.

Economic growth, certainty in the law and judicial independence

Stefan Voigt[1]

Thriving market economies depend on strong states that secure private property rights and their voluntary transfer. Yet the strength of a state can be its greatest weakness: if it is strong enough to secure private property rights, it is also strong enough to attenuate them or to expropriate property from its citizens. A simple promise to honour private property rights in the future will not be credible: citizens know that after they have invested, the state may have an incentive to renege on its promises and attenuate the investor's property rights.

In such a setting judicial independence is important because it serves as a mechanism for the government to turn its 'simple promise' into a credible commitment. If the government reneges on its promise, the investor can take the case to court and, given the court is independent, the government would lose. An independent judiciary therefore has the potential to make all actors better off. If it increases the predictability of state action by making representatives of the state stick to their promises, the planning horizon of many actors is likely to increase. A longer planning horizon goes hand in hand with higher levels of investment in machinery and human capital. This empowers higher degrees of specialisation, which in turn lead to higher growth. Independent judiciaries, therefore, are conducive to high income levels and growth, and are similarly associated with higher tax receipts for the state.

It would seem rational that politicians should strive to introduce judicial independence as a founding condition of prosperity. However, promising an independent judiciary is not sufficient to induce additional investment: so long as investors are not convinced that a judiciary will truly be impartial, they will not change their investment behaviour. It therefore makes sense to distinguish between

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two types of judicial independence: *de jure* and *de facto*. Whereas *de jure* judicial independence can be derived from the letter of the law, *de facto* judicial independence lies in the independence actually enjoyed by judges, which can be measured by their effective term lengths, the degree to which their judgements have an impact on government behaviour, and so on.

The study (details at the end of this report) analyses whether judicial independence is associated with economic growth by introducing two indicators:

- A *de jure* indicator focusing on the legal foundations of judicial independence (taking into account variables such as the method of nominating or appointing highest judges, their term lengths, their possibility of reappointment, etc.)
- A *de facto* indicator focusing on countries' actual experiences (taking into account variables such as the effective average term length of judges, the number of times judges have been removed from office, and the real income of judges).

If we were to compare the ranking of countries according to the *de jure* and the *de facto* indices, a notable divergence can be observed: not a single country in the top 10 of the *de jure* judicial independence index is in the top 10 of the *de facto* judicial independence index.[2]

For a sample of 66 countries an econometric model was estimated according to which real GDP growth per capita from 1980 to 1998 was explained by judicial independence (using the two indicators detailed above) and standard controls. It is found that while *de jure* judicial independence does not have any impact on economic growth, *de facto* judicial independence positively influences GDP growth. Not only is this positive influence on GDP growth statistically significant, it is also *economically* significant. Further analysis found that a switch from a totally dependent to a totally independent judiciary would, other things being equal, lead to an increase in GDP growth rates of 1.5 to 2.1 percentage points. This amounts to a large increase in economic growth; real per capita GDP in a country with such an extreme constitutional transformation would double in 33–47 years.

This distinction between *de jure* and *de facto* judicial independence indicates that it is not sufficient to enshrine judicial independence in legal documents. It is also necessary to shape judicial independence through additional informal procedures that may be accompanied and enforced by informal social sanctions. Analysis of the data indicates that issues such as the average term of judges, deviations from the term lengths expected based on legal documents, effective removals of judges before the end of their terms, as well as secure incomes for judges, are more important for economic growth than *de jure* judicial independence. Only the constitutional specification of court procedures as one aspect of *de jure* judicial independence proves to be significant and positive. The impact of *de facto* judicial independence on economic growth is robust to outliers, to the inclusion of several additional economic, legal and political control variables and the construction of the index. It can therefore be concluded that judicial independence, especially *de facto* judicial independence, does matter for economic growth.

For the full study see Lars Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators', European Journal of Political Economy, 19 (3) (2003). See also Lars Feld and Stefan Voigt, 'Making Judges Independent – Some Proposals Regarding the Judiciary', in R. Congleton, ed., Democratic Constitutional Design and Public Policy: Analysis and Evidence (Cambridge: MIT Press, 2006).

2 The top 10 in the *de jure* judicial independence index are Colombia (most independent), Philippines, Brazil, Georgia, Slovenia, Singapore, Russia, Botswana, Ecuador and Greece. The top 10 in the *de facto* judicial independence are Armenia, Kuwait, Switzerland, Turkey, Costa Rica, Austria, Japan, South Africa, Taiwan and Israel.

Judicial elections in the United States: is corruption an issue?

Roy A. Schotland[1]

> There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.[2]

However campaign funds are raised, do they amount to corruption? Campaign contributions, unless severely abused, need not constitute corruption, but can create the appearance of a conflict of interest unless appropriate controls are applied.[3]As an official, a judge is obligated to decide impartially, and every judge and the public have an interest in that obligation being carried out. At the same time, once the public chooses to have judges face election, the judges and the public have an interest in incumbents and other candidates being able to conduct appropriate campaigns. A conflict of interest is abused – and transformed into true corruption – when the judge puts personal interest ahead of his or her obligation to the public. In the campaign contribution setting, abuse would occur if the judge's performance on the bench were affected by contributions received, or hoped for. The challenge is, then, to satisfy the interest in appropriate campaigns while at the same time minimising the risk of abuse.

US federal courts get much more attention than state courts, but in terms of caseload, the latter handle almost 20 times as many cases. There are 867 federal judges (Article III, life-tenured), compared to 10,886 state appellate and general-jurisdiction trial judges. The states have a striking variety of methods for selecting judges: in 11 states, all judges are appointed, but most other states

1 Roy Schotland, Georgetown University Law Center and National Center for State Courts, Washington, D.C., United States.

2 *Stretton v. Disciplinary Board,* 944 F. 2d 137, 145 (1991) (upholding a limit that barred judicial candidates from personally soliciting campaign funds and required that soliciting be done by their campaign committees).

3 As the exemplary California Supreme Court Justice Otto Kaus said, not about campaign contributions but about the dilemma of deciding controversial cases while facing a retention election: 'You cannot forget the fact that you have a crocodile in your bathtub. You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well.' See Roy A. Schotland, 'The Crocodile in the Bathtub', *California Courts Review* (fall 2005). On the line between campaign contributions and bribes, see Hon. John T. Noonan, *Bribes* (Berkeley: University of California Press, 1984).

Sadly but inevitably, a handful of US judges have been caught accepting bribes. The most significant was the Second Circuit's Senior Judge Martin Manton, a leading candidate for appointment to the Supreme Court in the late 1930s until it came out that he had sold his vote in several cases. Prosecuted by Thomas E. Dewey (later twice the Republican candidate for president), Manton was convicted and jailed. Subsequently all decisions in which he had participated were reviewed by the Second Circuit. In 1991, a federal district judge in Mississippi was convicted of taking bribes, impeached by the House of Representatives and convicted by the Senate. Of course there have been other corrupt judges, almost always involving amazingly small sums. See *U.S. v. Sutherland*, 656 F. 2d 1181 (5th Cir. 1981) and *U.S. v. Shenberg*, 89 F. 3d 1461 (11th Cir. 1996).

have different methods for different courts or different jurisdictions: in 19, some or all judges are appointed but then face 'retention' elections in which voters decide whether the judge continues on the bench or leaves; in 19 (some of the 'retention' states, plus some others), some or all judges face contestable non-partisan elections, and in 16 (again some overlap with the ones already noted), they face partisan elections. In all, 60 per cent of appellate judges and 80 per cent of trial judges at state level face contested elections and only 11 per cent face no elections. Especially in contested elections, but sometimes in retention elections, judges raise campaign funds.

Judicial elections began in 1789 in Georgia, and Mississippi adopted them for all state judges in 1832. Between 1846 and 1860, 21 states had constitutional conventions, with all but Massachusetts and New Hampshire choosing elections. The choice of elections was not (as myth holds) 'an unthinking "emotional response" rooted in . . . Jacksonian democracy'.[4] On the contrary, the history of constitutional conventions shows that the move to elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary 'free from the corrosive effects of politics and able to restrain legislative power'.[5]

Moderate reformers built consensus among delegates by adopting constitutional devices designed to limit the potentially disruptive consequences of popular election. Provisions rendering judges ineligible to run for other offices while serving on the bench were intended to prevent the political use of judicial office to win other offices. And they gave judges terms longer than any other elective officials, and later adopted non-partisan or retention elections to restrict the 'impact of party and majority rule'.[6]

How is this system performing today? Consider recent problems in two states. In Illinois, campaign contributions to candidates – judicial or otherwise – are not limited as to amounts or sources, though there are disclosure requirements. Illinois elects its high court justices in partisan contests by geographic district. In a 2004 contest to fill an open seat in the southern third of the state, the two candidates raised (in almost equal amounts) a total of US $9.4 million, making this the second most expensive judicial campaign ever.[7] At the time, a class action by State Farm Insurance policyholders against the insurer's standard treatment of an important aspect of auto-accident claims was pending in the Illinois Supreme Court. Plaintiffs had won more than US $1 billion and then prevailed at the intermediate appellate court. Other insurers faced similar litigation and the case was an issue in the election campaign.

The election winner, Judge Lloyd Karmeier, had raised US $4.8 million, including direct contributions of US $350,000 from State Farm employees and lawyers; in addition, a group funded by persons connected with State Farm had raised US $1.2 million, all but US $500 of which it

4 K. L. Hall, 'The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary 1846–1860', *44 Historian 337* (1983). By 1860, 21 of the 30 states elected judges.

5 Ibid.

6 Ibid.

7 The most expensive was in 1986 when California's Chief Justice Rose Bird and two of her colleagues were denied retention after a campaign that cost US $15.9 million, almost entirely from small, grassroots contributions. Note, however, that the Illinois campaign was in a district with a population of 1.3 million.

contributed to Karmeier. Others affiliated with State Farm, or directly interested in the outcome of the case, contributed substantial additional sums. The contributions to Karmeier's opponent's campaign, albeit from different sources, showed a similar pattern. After Karmeier was elected, the *St. Louis Post-Dispatch*, which had previously endorsed him, editorialised: 'Big business won a nice return on a US $4.3 million investment in Tuesday's election. It now has a friendly Justice . . . And anyone who believes in even-handed justice should be appalled at the spectacle.'[8]

When Karmeier did not withdraw from the pending State Farm case, plaintiffs filed a motion for his withdrawal. State Farm opposed, arguing that the facts shown did not require recusal. The full court denied the motion on the ground that it was up to Karmeier, who then declined to withdraw. In August 2005, with Karmeier participating, that court unanimously (one justice not participating for unrelated reasons) reversed US $600 million in punitive damages, and by a majority of 4–2 – with Karmeier in the majority – also reversed the award of a further US $457 million. The US Supreme Court denied the plaintiffs' petition for review of Karmeier's participation.[9]

Are the Illinois events an example of corruption? Or an example, however troubling, of what happens when campaign contributions are not limited by law?

Problems remain acute even where contributions are limited. Consider a tort suit against Conrail that reached the Ohio Supreme Court in 1999. The plaintiff's daughter had been killed by a train after she drove onto a grade crossing despite closed gates and flashing lights. The jury awarded punitive damages of US $25 million, reduced by the trial judge to US $15 million. Both sides appealed to the Ohio Supreme Court. The plaintiff was represented by Murray & Murray, a firm that included nine members of the Murray family. Before the Ohio high court agreed to hear the appeal on 18 February 1998, campaign contributions were made to two associate justices by that firm, the nine Murrays in the firm and seven Murray spouses. The contributions were made on 9 February to one justice and from 19–21 January to the other. All were within Ohio's US $5,000 limit on individual contributions and totalled US $25,000 to each justice, both of whom were up for re-election in November 1998. According to their post-election campaign finance reports, these contributions turned out to be 4.4 per cent of one justice's total and 4.7 per cent of the other's. For each justice, the contributions were among their largest. Both justices participated in the oral argument in November 1998, a month before their campaign finance reports were filed; in January 1999, Conrail filed a motion seeking the recusal of each justice. In October 1999, without the court or either justice addressing that motion, the court decided in favour of the plaintiffs. Conrail made these facts the basis for seeking review in the US Supreme Court, but the review was denied.[10]

The law can do better. Since 1995, Texas' Judicial Campaign Fairness Act has included a US $30,000 aggregate limit on how much any single law firm (i.e. the firm, partners, employees, etc.) can contribute to a judicial candidate. This figure, six times the state's US $5,000 cap

8 *St. Louis Post-Dispatch* (US), 5 November 2004.
9 *Avery v. State Farm Mutual Auto Ins. Co.,* 835 N.E. 2d 801 (Ill. 2005), 126 S. Ct. 1470 (2006).
10 *Consol. Rail Corp. v. Wightman,* 715 N.E. 2d 546 (Ohio 1999), cert. denied, 529 US 1012 (2000).

on any individual's contribution, was deemed a fair balance between, on the one hand, the large firms whose contributions may easily go above US $30,000 and, on the other hand, the small firms, particularly plaintiffs' firms, which have far fewer potential donors. In fact, while large firms often do produce large aggregate contributions, in many states we find that plaintiffs' firms, however small the number of partners, make contributions of more than US $200,000. Many observers of campaign finance express particular concern about fund-raising from single or concentrated sources. That is, many believe that contributions from many sources, whatever the total amount raised, are less problematic.[11]

Put these contributions in context. The peak year for judicial campaign spending was 2000 when candidates raised US $50.5 million,[12] a 61 per cent rise over the previous peak (1998) and nearly double the average-per-seat sums for 1990–99. In addition, non-candidates (mostly groups on the defence and plaintiff sides of tort battles) spent an estimated US $17.5 million; prior spending by such groups had probably never topped US $1 million. In 2002, candidates raised US $30.5 million and non-candidates spent US $2.3 million on television advertising alone. In 2004, candidates raised US $46.8 million and non-candidates spent US $12 million on television spots.

Whether this amounts to corruption or not, it unquestionably jeopardises confidence in the courts. A 2004 poll showed over 70 per cent of Americans believe that judicial campaign contributions have some influence on judges' decisions; among African-Americans, 51 per cent believe that contributions carry a 'great deal' of influence. The results of a 2001 poll were similar and, after the Karmeier election, an Illinois poll in 2005 showed that over 87 per cent of voters believed that contributions influence decisions to some degree at least; only 52 per cent think that judges are 'fair and impartial'.[13]

What is to be done? One step seems unarguable: all states should have realistically comprehensive limits on campaign contributions in judicial elections.[14] So far, no state requires disclosure of even *indirect* contributions (e.g. contributions to '527s' and similar organisations that are allowed to raise money for political activities including voter mobilisation efforts and issue advocacy and may not be required to disclose); without that, evasion of contribution

11 Contrary to widespread belief, lawyers are a relatively minor source of judicial campaigns' contributions. They accounted for 22 per cent of contributions in 2000, 37 per cent in 2002 and 22 per cent in 2004, or 26 per cent on average. Data sent to author by National Institute on Money in State Politics. See www.followthemoney.org/ As the 1998 ABA Task Force stressed: 'Often attorneys account for large proportions, often even over 75 per cent . . . but it is also true that often attorneys' contributions total only a minor fraction.' American Bar Association, 'Report and Recommendations of the Task Force on Lawyers' Political Contributions' (1998).

12 For ease of comparison, all the figures are in 2004 dollars. The original sums raised by candidates were US $46.1 million in 2000 and US $29 million in 2002.

13 For 2004, see Justice at Stake Campaign, March 2004, faircourts.org/files/ZogbyPollFactSheet.pdf; for 2001, see Greenberg Quilan Rosner Research & American Viewpoint, Justice At Stake Frequency Questionnaire 8 (2001) at www.gorr.com/articles/1617; on Illinois, see Center for State Policy and Leadership at the University of Illinois at Springfield, 'Illinois Statewide Survey on Judicial Selection Issues' 23 (winter 2004) at www.ilcampaign.org/issues/judicial/judicial_poll/index.asp.

14 The ABA Model Code of Judicial Conduct was amended in 1999 to provide that if counsel or a party in a pending case makes a contribution exceeding applicable limits in a pending case, the judge must withdraw. Canon 3 (E) (1) (e).

limits – and of potential recusal – is easy. For example, Ohio limits direct contributions but in 2000, companies with major stakes in Ohio high court decisions, including Wal-Mart, DaimlerChrysler, Home Depot and the American Council of Life Insurers, contributed at least US $1 million each to the Chamber of Commerce for its TV ads in three Ohio Supreme Court campaigns.[15] That they did so was only reported a year later in a front-page story, and full disclosure was not required until after several years of litigation.

What of public funding? Although 25 states provide public funding (that is, grants from government to candidates who qualify, as in the US presidential primary and general elections) for some elective offices, only two states have it for judicial campaigns: Wisconsin for high court races since 1979, and North Carolina for appellate court races since 2004. Even if one assumes counter-factually that getting public funding adopted is feasible (Ohio's Justice Pfeiffer said that he would 'not necessarily oppose' public funding, but conceded: 'I'd be surprised if we can get much traction for that in Ohio. You could probably get more interest in the General Assembly for legislation to keep cats on a leash'),[16] public funding faces two severe hurdles. First, the Wisconsin programme was effective in its early years, but funds have steadily shrunk so that in the last competitive election in 1999, where candidates spent US $1,325,000, the public funds available amounted to only US $27,005. North Carolina's new programme had substantial funds but already needs additional appropriations, and the campaign finance reform record generally shows that support does not stay strong.[17] Second, even if candidates accept little or nothing in private contributions, their supporters cannot be stopped, or limited, from taking the obvious route of spending large sums wholly independent of the candidate.

A key step, lengthening terms, is the top priority in Ohio where judicial elections have been among the nation's fiercest. Longer terms mean fewer elections, less need to campaign and raise funds, and of course less concern about decisions' vulnerability to distortion. Also, the length of terms certainly affects who wants to come on the bench and who will stay there. Clearly, more attention to the procedures and standards for recusal is also needed.

May non-legal steps help? 'Campaign conduct committees', sometimes appointed by a high court but usually unofficial, initiated by bar associations and composed of diverse, respected community representatives, have long been active in some jurisdictions, and are spreading. They focus on educating candidates about appropriate campaigning and also act, if necessary, to halt inappropriate campaigning. Clearly they can and should take steps to establish and encourage appropriately limited campaign fund-raising and spending. Other non-legal steps are among the most important of all, bringing benefits that go beyond the problems treated here. More education about what judges do, in schools but also by lawyers' and judges' outreach to the public, is particularly important.

15 *Wall Street Journal* (US), 11 September 2001.
16 *Central Ohio Source/Daily Reporter* (US), 24 July 2001.
17 See Michael J. Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (Albany: Rockefeller Institute Press, 1998).

Last, why not solve the problem by replacing elections with appointive systems? That was feasible in the mid-20th century, but has stalled for the past generation because voters (e.g. Ohio 1987, Florida 2000, South Dakota 2004) have overwhelmingly agreed with its opponents' war cry: 'Don't let them take away your vote'.[18] Appointive systems come with their own corruption-related problems; the judge might be picked to do the will of the appointer or might 'buy' his or her position by contributing to the state governor's or president's own election campaign.

If one views campaign contributions as corrupting, this scene is deeply disturbing. But if one views appropriately limited funding as necessary for democratic elections, then the above checks and balances need to be applied more widely.

Combating corruption and political influence in Russia's court system

Tom Blass[1]

Prior to the *perestroika* process, the judiciary was largely perceived as: 'Nothing more than a machine to process and express in legal form decisions which had been taken within the [Communist] Party.'[2] The independence of the judiciary was one aspect of the changes called for by Mikhail Gorbachev in his groundbreaking speech to the 27th Party Congress in 1986.

The reality – a supine, underpaid judiciary, ill-equipped to withstand corruptive practices and the influence of economic or political interests – has proven slow to change, despite a series of reforms by Boris Yeltsin and his successor, President Vladimir Putin.

A 1991 decree by the Supreme Soviet of the Russian Federation established the judiciary as a branch of government independent from the legislature and the state. The following year, a Law on the Status of Judges was introduced that granted judges life tenure after a three-year, probationary period; new powers to review decisions by prosecutors regarding pre-trial detention; and established the role of the judicial qualification collegia – self-governing bodies, composed by and responsible for the appointment and regulation of members of the judiciary. The Yeltsin regime transferred control over the financing of courts from the Ministry of Justice to a judicial department attached to the Supreme Court, further distancing the judiciary from the executive branch.[3]

18 See, e.g., G. Alan Tarr and Robert F. Williams, eds., *State Constitutions for the 21st Century, The Judicial Branch* (Albany: SUNY Press, 2006).

1 Tom Blass, freelance journalist and consultant with the Foreign Policy Centre, London, United Kingdom.

2 F. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (The Hague; Martinus Nijhoff, 1993).

3 International Bar Association, 'Striving for Judicial Independence: A Report into Proposed Changes to the Judiciary in Russia' (London: IBA, 2005). Available at www.ibanet.org/iba/article.cfm?article=51

After Putin was elected president in 2000, he made numerous assertions about the importance he attached to the judiciary. 'An independent and impartial court is the legal protectedness (sic) of citizens,' he said in 2001. 'It is a fundamental condition of the development of a sound, competitive economy. Finally, it is respect for the state itself, faith in the power of the law and in the power of justice.'[4]

President Putin's Programme for the Support of Courts 2002–06 was structured to increase funding for the court system as a whole, including judges' salaries. Top pay is now around US $1,100 per month for judges, although average judicial salaries are closer to US $300 per month.[5] More recent developments include a move toward publishing details of court judgements.

While elements of these reforms are positive, new threats to the independence of the judiciary have emerged, with the International Bar Association, the OECD, the International Commission of Jurists, and the US State Department all expressing concerns at practices they perceive as not conducive to the independence of the judiciary.

Judicial appointments

Not all judges welcomed Putin's attempts at reform. Among his initial targets were the qualification collegia, established in the early transition and responsible for appointing and dismissing judges. Originally these were constituted entirely by judges, but the 1996 Constitutional Law on the Judicial System was amended in 2001 so that one third of the membership would be constituted by legal scholars appointed by the federation council – which is appointed by the president. Under the Law on the Status on Judges 1992, judicial appointments were made by the president 'based on the conclusions of the collegia relative to the court in question'.[6] The same process applies to the appointment of court chairpersons, whose tasks include allocating cases and overseeing the running of courts. They wield substantial influence over the careers of their fellow judges.

In a 2005 report on proposed changes to the structure of the collegia, the International Bar Association (IBA) said it was 'particularly concerned by a number of cases of judicial dismissals where undue influence appears to have been wielded by Court chairpersons or other parties'. 'A system which could allow chairpersons to cow or eliminate independent-minded judges', it noted, 'is in practice the antithesis of recognised international standards for the judiciary'.

The IBA cited a number of instances in which it was alleged that undue influence had been brought to bear. In the case of Judge Alexander Melikov, dismissed by a qualification collegium in December 2004, it said it had studied the judge's allegation that his dismissal followed his refusal to follow the directive of the Moscow City Court chairperson 'to impose

4 Speech by President Vladimir Putin on 9 July 2001 at a meeting with the World Bank President James D. Wolfensohn and the participants of the Global Justice Conference, St Petersburg, 8–12 July 2001. Available at www.ln.mid.ru/bl.nsf/0/77628302b16249ee43256a86002b3d89?OpenDocument

5 IBA (2005), op. cit., and interviews with lawyers.

6 IBA (2005), op. cit.

stricter sentences and to refuse to release certain accused persons pending their trials'. The IBA said that it was 'impressed by his credibility' and was satisfied there was no legitimate ground for dismissal.

Another recent case further highlighted the role of chairpersons. Judge Olga Kudeshkina was dismissed from Moscow City Court in May 2003 for 'violating the rules of courtroom conduct and discrediting the judiciary' after she claimed to have been pressured by the public prosecutor and the chairperson of the court to decide in the prosecutor's favour in an Interior Ministry investigation.

In a widely publicised letter to President Putin in March 2005, Kudeshkina said the judicial system in Moscow was 'characterised by a gross violation of individual rights and freedoms, failure to comply with Russian legislation, as well as with the rules of international law' and that there is every reason to believe that the behaviour of the chairperson was possible because of patronage provided by certain officials in the Putin administration.[7]

Perceived extent of corruption

While it is difficult or impossible to quantify the validity of Kudeshkina's claims, her letter was in tune with the lack of public confidence in the judiciary. Research by the Russian think tank INDEM goes so far as to quantify the perceived average cost of obtaining justice in a Russian court. At 9,570 roubles (US $358), the figure is still less than the 2001 figure of 13,964 roubles.[8]

Another Russian survey found that over 70 per cent of respondents agreed that 'many people do not want to seek redress in the courts because the unofficial expenditures are too onerous', while 78.6 per cent agreed with the statement: 'Many people do not resort to the courts because they do not expect to find justice there.'[9] The same organisation estimated that some US $210 million worth of bribes is spent to obtain justice in law courts in a year, out of a total US $3.0 billion in bribe payments.[10]

Senior court officials also hint at corruption within the judiciary.[11] Veniamin Yakovlev, former chair of the Supreme *Arbitrazh* court, said that while mechanisms had been, and continue to be, put into place to root out corruption and the 'overwhelming majority' of judges conducted themselves lawfully, 'it would be wrong to maintain that the judiciary has been purged of all traces of bribery'. In an interview with *Izvestia*, Valery Zorkin, current chairman of the constitutional court, was more forthright when he said that 'bribe taking in the courts has become one of the biggest corruption markets in Russia'.[12]

7 See www.khodorkovskytrial.com/pdfs/Kudeshkina_3-17-2005.pdf
8 See www.indem.ru/en/publicat/2005diag_engV.htm
9 Cited in Mikhail Krasnov, 'Is the "Concept of Judicial Reform" Timely?' in *East European Constitutional Review* 94 (winter/spring 2002). See also www.indem.ru
10 See www.indem.ru
11 European Bank of Reconstruction and Development Law in Transition Report 2005, available at www.ebrd.com/country/sector/law/concess/assess/report.pdf
12 See www.ipsnews.net/interna.asp?idnews=26088

Anecdotal evidence (including from lawyers within Russia who would not wish to be named) suggests that the corruptibility of courts increases, moving down the judicial hierarchy[13] and further away from Moscow.

Legal scholar Ethan Burger points out that large financial stakes and asymmetry between the parties in a court proceeding increases the likelihood of corruption,[14] and that it is more likely to occur in trial courts than in the appeal courts since it is 'easier to bribe a single trial court judge than a panel of appellate judges or members of the Supreme *Arbitrazh* Court'. Due legal process is altered in one of two ways, according to Burger: a judge may decide a case on its merits, but ask for payment before making a judgement; or the judge may 'simply favour the highest bidder'.

Recommendations

The challenge now is for the Russian judiciary to build on the various reforms which have already taken place and to win the confidence of court users, regardless of the level of proceedings in which they become involved. But such a transformation will require more than structural or procedural reform.

Successive laws pertaining to the judiciary passed since the dawn of *glasnost* have reinforced or reiterated its independence. Despite some adjustment of their membership structure, the Judicial Qualification Collegia remain essentially self-governing. Salaries of judges and court officials, while low in comparison to those in Russia's private sector and the West, have been significantly raised in the past 15 years. Civil society groups in Russia and outside (including TI) have been vocal in calling for greater transparency and openness within the judicial system.

Russian courts already have what is required to be fair, open and transparent. These elements need to be encouraged and consolidated. What follows are six concrete recommendations that can assist in consolidating what is fair, open and transparent in the Russian court system:

- The government should resist any further dilution of the judicial composition of the Judicial Qualification Collegia.
- Judges' salaries should be regularly reviewed with a view to achieving near-parity with private sector salaries in order to reduce the incidence of bribe taking and to retain talent within the judiciary.
- The programme for publishing court decisions should be accelerated and expanded, with an emphasis on explaining the legal basis of judgements, the nature of disputes, the sums at stake and awards given.
- Local and national public awareness campaigns should be initiated to educate on the role of judges, the concept of judicial awareness and future expectations of the judiciary.
- The government should review existing penalties for corruption within the judiciary.
- Judges should be allocated cases on a randomised basis to minimise bias toward one party.

13 The *arbitrazh* court system is divided into courts of first instance, courts of appellate instance, federal *arbitrazh* circuit courts (cassation courts) and the Supreme *Arbitrazh* Court.

14 Ethan S. Burger, 'Corruption in the Russian *Arbitrazh* Courts: Will There Be Significant Progress in the Near Term?', *International Lawyer,* 38:1 (spring 2004).

Corrupt judges and land rights in Zimbabwe

Gugulethu Moyo[1]

The independence of Zimbabwe's judiciary has been the subject of many reports over the past five years and there is a general consensus that it is no longer independent and impartial.[2]

By the end of the 1990s, Zimbabwe's Supreme Court had established an international reputation as an independent court that vigorously upheld human rights, although its human rights jurisprudence was mainly focused on civil and political rights. The high court also previously played a positive role in upholding fundamental rights.

Beginning in 2000, the government began a purge that resulted in most independent judges being replaced by judges known to owe allegiance to the ruling party. This reconstituted judiciary has conspicuously failed to protect fundamental rights in the face of serious violation by legislative provisions and executive action. Corruption has also played a role in compromising judicial independence because the allocation of expropriated farms to several judges has made them more beholden to the executive. Most accounts of the trajectory of judicial independence in Zimbabwe inextricably link its decline to government policies adopted in 2000 aimed at accelerating the protracted land reform process.[3]

The need for more equitable land distribution has been one of Zimbabwe's most intractable problems. At the beginning of black majority rule in 1980 about 6,000 white commercial farmers controlled 40 per cent of the most fertile land while seven million blacks were crowded into largely dry 'communal areas'. In the first decade of majority rule the government was faced with legal constraints, entrenched in the constitution that required it to pay prompt and adequate compensation if it wanted to appropriate land and, if the original owner requested, to do so externally in foreign exchange. This prevented it from carrying out meaningful re-distribution. Even after these constitutional restraints were removed, however, the government failed to adopt policies that addressed the problem effectively or to cooperate with international offers to provide financial assistance to an orderly programme.

Towards the end of the 1990s, the economy was in decline and the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) party was in danger of losing support. A new party, the Movement for Democratic Change (MDC), had attracted a considerable following and posed a threat to the ruling party's hold on power. To counteract this, ZANU PF exploited the hunger for land felt by millions of black peasants to launch a populist, 'fast-track' land reform

1 Gugulethu Moyo, International Bar Association, London, United Kingdom.

2 See www.un.org/News/briefings/docs/2003/db021903.doc.htm. See also *Justice in Zimbabwe,* a report by the Legal Resources Foundation, Zimbabwe, September 2002, www.hrforumzim.com; and Karla Saller, *The Judicial Institution in Zimbabwe* (Cape Town: Siber Ink, 2004).

3 See Arnold Tsunga, 'The Legal Profession and the Judiciary as Human Rights Defenders in Zimbabwe: Separation or Consolidation of Powers on the Part of the State?', Zimbabwe Lawyers for Human Rights (unpublished, 2003); and *The Independent* (Zimbabwe), 7 April 2004.

programme. At the end of February 2000, ZANU PF militias, who identified themselves as veterans of Zimbabwe's liberation struggle, invaded and occupied white-owned farms.

There is a considerable body of evidence that indicates that the occupations were not spontaneous actions by land-hungry peasants, as claimed by the government,[4] but an orchestrated campaign by the ruling party, the security agencies and various government departments. The occupiers perpetrated widespread acts of violence against the commercial farmers and farm workers, who were seen as sympathetic to the MDC. Thousands of workers were driven off farms and left destitute. The occupiers used the farms as bases from which to hunt down and attack opposition supporters in rural areas. After white farmers were expelled, the government, which has been repeatedly criticised for corruption,[5] allocated the best land not to landless peasants, but to high-ranking party and government officials, with some acquiring several farms each.[6]

When the dispossessed farmers sought legal protection and the Supreme Court declared the farm invasions illegal, the executive portrayed the intervention as a racist attempt to protect the interests of the minority white farmers and mounted a vicious campaign against white judges. President Robert Mugabe and several ministers, prominent among them Justice Minister Patrick Chinamasa, took it in turns to condemn these judges as 'relics of the Rhodesian era', alleging they had obstructed implementation of the government's land reform programme. War veterans staged protests that culminated in the invasion of the main courtroom of the Supreme Court just as the court was due to sit. During this incident, the veterans shouted slogans such as 'kill the judges', and both Supreme Court and high court judges subsequently received death threats.[7] In early 2001 Chief Justice Roy Gubbay was forced to resign.[8] Heavy pressure was exerted on the other Supreme Court justices, two of whom also resigned. Relentless pressure against the remaining independent judges in the high court led first to the resignation in 2001 of the remaining white judges, followed later by a number of independent black judges, notably Justices Chatikobo, Chinhengo and Devittie. One high court judge, Judge Godfrey Chidyausiku, joined in the attacks, alleging that the chief justice and Supreme Court had pre-decided in their favour all the cases brought by commercial farmers.[9] This accusation was unfounded since the Supreme Court had decided against the commercial farmers in 1996.[10]

4 See 'Politically Motivated Violence in Zimbabwe 2000–2001: A Report on the Campaign of Political Repression Conducted by the Zimbabwean Government under the Guise of Carrying out Land Reform', Zimbabwe Human Rights NGO Forum, August 2001, www.hrforumzim.com

5 TI has consistently identified Zimbabwe as a country with high levels of corruption, ranking it 107 out of the 159 countries assessed in 2006. The governor of the Reserve Bank of Zimbabwe has said that endemic corruption was overtaking inflation as the country's number one enemy, which could further dampen prospects of economic recovery. See *News 24* (South Africa), 28 February 2006.

6 See 'Second Report of Parliament of Zimbabwe Portfolio Committee on Lands, Agriculture Water Development Rural Resources and Resettlement', December 2004, www.parlzim.gov.zw/Whats_new/Order_paper/december2004/20december2004.htm.

7 See *Justice in Zimbabwe* (2002), op. cit.

8 'Report Highlighting the Critical Situation Faced by Judges and Lawyers in Zimbabwe', International Bar Association, April 2001. Available at www.ibanet.org/humanrights/Zim.cfm.

9 *Justice in Zimbabwe* (2002), op. cit.

10 *Davies & Ors v Minister of Lands and Agriculture & Water Development* 1996 (1) ZLR 81 (S).

What led the government to declare war on the Supreme Court was a decision in 2000 that interdicted it from continuing with the acquisition and resettlement programme until a proper plan was in place and the rule of law had been restored on the farms. Two other black High Court judges had previously ruled that the land resettlement programme was being conducted in an illegal manner. In this earlier ruling, the government conceded the illegality of the farm invasions and consented to the order relating to them. In the 2000 ruling, despite adjudging the scheme unconstitutional, the Supreme Court gave the government considerable latitude to remedy the illegality by suspending the interdict for six months.[11] The Court said it fully accepted that a programme of land reform was essential for future peace and prosperity, but could not accept the unplanned, chaotic, politically biased and violent nature of the current policy.[12] Despite this conciliatory approach, the judgement incensed the government. It became determined to purge the bench and replace it with judges who would legitimise its land grab.

Soon after Gubbay was forced out, the government appointed Godfrey Chidyausiku as chief justice, passing over several other Supreme Court judges. Chidyausiku's suitability was publicly questioned.[13] When a fresh land case was brought before the Supreme Court in September 2001, the new chief justice dismissed an application by the Commercial Farmers Union (CFU) that he should recuse himself because of his close association with the ruling party and his previous statements endorsing the government's land policy. He and three newly appointed judges then determined that the government had fully complied with the Supreme Court order to put in place a lawful programme of land reform that was in conformity with the constitution.[14] This was despite detailed evidence from the CFU that the rule of law had not been restored and that farmers were still being prevented unlawfully from conducting their operations.

The only judge from the Gubbay-led bench on this case, Justice Ahmed Ebrahim, dissented, finding that the government had failed to produce a workable programme of land reform or to satisfy the Court that it had restored the rule of law in commercial farming areas.[15] The law that the government had passed was unconstitutional in that it deprived landowners of their rights or interests without compensation; allowed arbitrary entry into property and occupation; and denied landowners the protection of the law and the right to freedom of association. The judge expressed the opinion that the majority decision had been predicated not on issues of law, but issues of political expediency. The reconstituted Supreme Court has made several other questionable rulings upholding the legality of the land reform programme and the limits imposed on compensation for expropriated farms.[16]

Of the seven current justices in the Supreme Court, all but one were appointed in 2001, after the land acquisitions began. Reports have emerged that all the new appointees, including Chief Justice Chidyausiku, were allocated farms after the eviction of their former

11 *Commercial Farmers Union v Minister of Lands & Ors* 2000 (2) ZLR 469 (S).
12 Ibid.
13 *Financial Gazette* (Zimbabwe), 25 January 2001.
14 *Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers Union* 2001 (2) ZLR 457 (S)
15 Ibid.
16 See, for instance, *Quinnell v Minister of Lands and Rural Resettlement* S-47-2004.

owners.[17] There is no doubt that the possession of the farms, often violently taken from their owners, has seriously compromised the independence of judges, particularly in legal challenges to land requisition. Two judges, Benjamin Hlatshwayo and Tendai Chinembiri Bhunu, even invaded and took over commercial farms personally.[18] Reports of such cases have deepened the perception that judges have subordinated their obligations to justice to the desire to amass wealth. In 2006, Arnold Tsunga, executive director of the NGO Zimbabwe Lawyers for Human Rights, said: 'A number (of judicial officers) have accepted farms which are contested. These farms have not come as written perks (in their contracts of employment) but as discretionary perks by politicians. When judges and magistrates are given and accept discretion perks because of poverty, surely their personal independence is compromised as well.'[19]

According to several credible independent organisations, judges with the integrity to resist undue influence by the government and ZANU PF have been prevented from independently dispensing justice by intimidation and harassment.[20] Walter Chikwanha, the magistrate for Chipinge, was dragged from his courtroom in August 2002 by a group of veterans and assaulted after he dismissed an application by the state to remand five MDC officials in custody. The attack took place in full view of police who did not try to prevent it. Several court officials were also assaulted and one had to be hospitalised.[21] In December 2003, Judge President Michael Majuru of the administrative court resigned and fled the country after an altercation with Justice Minister Patrick Chinamasa over a controversial case involving a government agency and Associated Newspapers of Zimbabwe (ANZ), publishers of the *Daily News,* Zimbabwe's only independent newspaper. Majuru later claimed that Chinamasa offered him a farm as an inducement to rule in favour of the government.[22]

When dispossessed farmers continued to bring cases before the administrative court challenging technical aspects of the land acquisition programme, the government amended the constitution in 2005 making 'state land' all land acquired, or to be acquired for resettlement or whatever purpose, and barring any legal challenge to such acquisition, although legal challenges as to the amount of compensation payable for improvements are still allowed.

The failure of the courts to uphold the rule of law in land cases has created the impression that the security of property rights is no longer guaranteed, precipitating a general breakdown in the rule of law. Land grabs by government and party officials continue to occur with the new black occupiers of the first wave of possession now being forced off their property. Zimbabwe is said to have the fastest shrinking economy in the world and various economists

17 According to a list compiled by the Justice for Agriculture NGO, Chidyausiku was allocated a prime farm, Estes Park, in the rich Mazoe/Concession area. See www.zimbabwesituation.com/VIP_farm_allocations.pdf for further information. The list contains details of the new owners of more than 800 confiscated farms.

18 *Daily Telegraph* (UK), 17 June 2003.

19 Tsunga (2004), op. cit.

20 *The State of Justice in Zimbabwe,* report of the General Council of the Bar, December 2004. Available at www.barcouncil.co.uk

21 *Daily News* (Zimbabwe), 17 August 2002.

22 See www.zic.com.au/updates/2004/27july2004.htm

have attributed this primarily to the loss of property rights.[23] The government has tried to blame Zimbabwe's woes on the sanctions imposed by western states, although these are not economic but instead target government officials through travel restrictions and the freezing of their external accounts.

But it is not only in respect of land that courts have so conspicuously failed to uphold fundamental rights. Despite mounting criticism, the judiciary repeatedly demonstrates a tendency, especially in high-profile and electoral cases, to lend its process to the service of the state. In numerous cases challenging the constitutionality or legitimacy of measures that are palpably in violation of the law, the Supreme Court has departed from established legal principle in order to legitimate executive action. With few exceptions, judges are seen to have collaborated with a government that has violated many of the rights of its citizens, including freedom of expression, freedom of the press, freedom of assembly and the right to free and fair elections.[24]

23 Craig Richardson, *Property Rights, Land Reforms and the Architecture of Capitalism* (Washington D.C.: American Enterprise Institute, 2006); and *Zimbabwe Independent* (Zimbabwe) 5 August 2005.

24 For example in *Associated Newspapers of Zimbabwe Pvt Ltd v Minister of State in the President's Office and Ors* S-20-2003, the Supreme Court used the spurious 'dirty hands' doctrine to block a legitimate challenge by an independent newspaper to the legality of new legislation imposing undemocratic government controls over the operations of newspapers and journalists. This judgement directly led to the closure of the only independent daily newspaper in Zimbabwe. In *Tsvangirai v Registrar-General of Elections & Others* S-20-2002, Morgan Tsvangirai, the leader of the opposition, was standing in the presidential election against President Mugabe. Just prior to the election President Mugabe passed measures purporting to drastically alter the election laws and Tsvangirai sought to challenge the legality of these measures. The majority of the court ducked the issue by making a finding that Tsvangirai did not have any legal standing in the matter.