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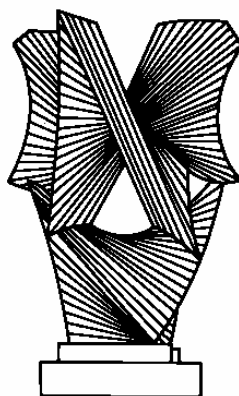
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## The Judiciary and Economic Development

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## THE JUDICIARY AND ECONOMIC DEVELOPMENT

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No degree of substantive law improvement—even world “best practice” substantive law—will bring the Rule of Law to a country without effective enforcement.<sup>1</sup> A sound judiciary is key to enforcement. No doubt some technical laws can be enforced by administrative means, but a Rule of Law, in the primary economic sense of protecting property and enforcing contracts, requires a judiciary to resolve disputes between private parties. And protection against the state itself is made easier where the judiciary can resolve a controversy raised by a private party against the state based on constitutional provisions or parliamentary legislation. One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the Rule of Law and more broadly in economic development.

A number of studies show some of the positive benefits of strong effective judiciaries. The degree of judicial independence is correlated with economic growth.<sup>2</sup> Better performing courts have been shown to lead to more developed credit markets. A stronger judiciary is associated with more rapid growth of small firms as well as with larger firms in the economy.<sup>3</sup> Economic studies show that within individual countries the relative competence of provincial and state courts affects comparative economic competitiveness:

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<sup>1</sup> Indeed, some evidence exists that “good” law can be “bad” when it is not enforced. Bhattacharya and Daouk (2004) find that the cost of equity actually rises when a country introduces an insider trading law, but does not enforce it. See also Beny (2005).

<sup>2</sup> Feld and Voight (2004).

<sup>3</sup> Islam (2003, p. 7–8).

Studies from Argentina and Brazil show that firms doing business in provinces with better-performing courts enjoy greater access to credit. New work in Mexico shows that larger, more efficient firms are found in states with better court systems. Better courts reduce the risks firms face, and so increase the firms' willingness to invest more.<sup>4</sup>

Surveys illustrate some of the deleterious effects of weak judiciaries on economic expansion:

Firms in Brazil, Peru, and the Philippines report that they would be willing to increase investment if they had more confidence in their nation's courts. Firms in Albania, Bulgaria, Croatia, Ecuador, Moldova, Peru, Poland, Romania, Russia, Slovakia, Ukraine, and Vietnam say they would be reluctant to switch suppliers, even if offered a lower price, for fear they could not turn to the courts to enforce the agreement.<sup>5</sup>

Still other country surveys of firms show the impact of lack of confidence in courts on extending trade credit and in the willingness to do business with anyone other than those they know well.<sup>6</sup>

An ineffective judiciary may have extraordinary and far-reaching effects on a country. Brazil provides an example.<sup>7</sup> A critique in the *Financial Times* under the telling headline "Brazil's judicial nightmare brings gridlock for growth" relates one unusual aspect of such effects:

The vast majority of claims stuck in the judicial system are against the public sector. Their total value is unknown, but [a public prosecutor] reckons the government's 'judicial liability' is roughly equal to Brazil's public debt.... [The prosecutor states that] if the delays in the judiciary were removed, all levels of government (federal, state and municipal) would go bankrupt the next day.<sup>8</sup>

In other words, Brazil's public debt is understated by 50 percent. But from an economic development perspective, the worst aspect is perhaps that the Brazilian private sector has

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<sup>4</sup> World Bank (2004, p. 86).

<sup>5</sup> World Bank (2004, p. 86).

<sup>6</sup> World Bank (2004, p. 86).

<sup>7</sup> In 1997 Brazil had a backlog of 6 million cases (with each judge having a backlog of 700 cases) according to one estimate and a backlog of 50 million cases according to another estimate. Dakolias (1999, p. 110 and n. 88).

<sup>8</sup> Wheatley (2005).

enormous assets (equal to the value of the claims it is unable to vindicate through the court system) on which it is not able to earn interest currently or otherwise benefit.

The *Financial Times* critique also laid out the perverse incentives produced by the poorly functioning Brazilian judiciary:

Brazil's dysfunctional judiciary ... is increasingly seen as an obstacle to national development. It is a system that allows debtors of all kinds to abscond at will, knowing that none but the most determined of creditors will pursue them through the courts. It forces banks to lend at astronomical rates of interest because they cannot foreclose on debts. More worryingly, it means that vital infrastructure projects are stalled because investors cannot be sure the judiciary will uphold their rights.<sup>9</sup>

Even where the judiciary is competent and independent, national legal culture may place limits on substantive law improvement taking the form of transplantation of substantive law from other legal cultures. Kanda and Milhaupt give the example of the inclusion in the Japanese Commercial Code in 1950 of the "duty of loyalty," taken directly from U.S. law and generally considered today to be a key judicial tool in the United States for assuring good corporate governance: "For almost forty years after it was transplanted, the duty of loyalty was never separately applied by the Japanese courts, and played little role in Japanese corporate law and governance."<sup>10</sup>

Where the legal institutions such as the judiciary are not effective, an improvement in substantive law may make very little difference. Studying the transition countries of Eastern Europe and the former Soviet Union, Pistor, Raiser, and Gelfer came to the conclusion that despite the great improvement of corporate and bankruptcy law in those countries during the period from 1992 to 1998, improvement in financial markets occurred only to the extent that legal institutions became more effective. Explicitly considering changes in the substantive corporate and bankruptcy law as measured by the legal indicators used in the LLSV Law and Finance study, they found that progress in

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<sup>9</sup> Wheatley (2005).

<sup>10</sup> Kanda and Milhaupt (2003, p. 888). See further discussion in Kenneth W. Dam, "Equity Markets, the Corporation and Economic Development" (February 2006). U Chicago Law & Economics, Olin Working Paper No. 280 Available at SSRN: <http://ssrn.com/abstract=885196>.

such financial measures as market capitalization and private sector credit could be attributed primarily to improvement in the effectiveness of legal institutions:

Our regression analysis shows that legal effectiveness has overall much higher explanatory power for the level of equity and credit market development than the quality of law on the books.... [G]ood laws cannot substitute for weak institutions.<sup>11</sup>

Though their study was based on surveys, which are inherently subjective, and though the surveys did not target judiciaries but rather more general measures of legal effectiveness, the study nevertheless is powerful evidence that relatively too much emphasis has been placed, especially in the financial sector, on improvement in the details of substantive law compared to the effectiveness of legal institutions, including judicial effectiveness.

#### An Effective Judiciary: The Question of “Formalism”

Every lawyer in a developed country can point to numerous shortcomings in his own country. Yet judiciaries in developing countries frequently fall far short of developed country standards. In recent years efforts have been made to develop cross-country measures of judicial effectiveness. By all odds, the most ambitious effort was a study, prepared for the World Development Report of 2002,<sup>12</sup> measuring how effectively judicial systems dealt with the simple cases that fill courtrooms around the world.

For this purpose four economists, including three of the Law and Finance authors, working with the World Bank, organized a large scale but relatively simple and straightforward study of the procedures used in 109 countries to resolve two hypothetical disputes in which the merits of the cases in favor of the plaintiff were overwhelming, but the defendant chose not to settle.<sup>13</sup> The two cases were designed to be simple “run-of-the-mill” cases—in short, typical of the cases facing every country’s judicial system. The first was an action to evict a residential tenant for nonpayment of rent, the second an action to collect on an unpaid check. Lex Mundi, an international association of law

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<sup>11</sup> Pistor et al. (2000, p. 356). The LLSV reference is to La Porta, Lopez-de-Silanes, Shleifer and Vishny (1998).

<sup>12</sup> World Bank (2001).

<sup>13</sup> Djankov et al. (2003).

firms, worked out the exact factual specifications of the disputes to facilitate cross-country comparison. This association also developed a questionnaire designed to produce, with respect to each of the 109 countries, data concerning each of a number of subject matter areas (“variables” in the language of economists). The most significant variables were whether the proceedings: (1) involved professionals versus laymen; (2) were written or oral; (3) involved legal justification being set forth in the complaint and the court’s judgment; (4) were legally constrained with regard to the use of evidence; and (5) were subject to review by superior courts, especially during the pendency of the case in the court of first instance. Particularly significant were estimates for each country of the duration of the legal proceedings as well as an assessment of the incentives of the parties that bore on speed and efficiency.

One upshot of the economists’ analysis was the construction of a “formalism” index based on the foregoing five variables plus two others. Formalism is not a concept in the average lawyer’s vocabulary since each lawyer tends to take his own national legal system as given. In fact, the word “formalism” is perhaps not as useful for legal purposes as “procedural complexity.”<sup>14</sup> “Formalism” is a concept invented by the four economists to measure what they consider differences among countries bearing on judicial efficiency. Their view was essentially that the two Lex Mundi hypothetical cases were the simple kinds of disputes that in some societies could be resolved by a neighbor of the two parties without any formalities whatever.

Against that standard of highly efficient resolution (though atypical because dependent on the cooperation and good faith of both parties), the authors implicitly judged national legal systems from the following a priori criteria: (1) limited jurisdiction (special purpose) courts are better than general purpose courts; (2) nonprofessional judges are better than professional judges; (3) the less the need for professional legal representation the better; (4) the greater the use of oral evidence and arguments (which they christened collectively as “orality”), as opposed to written presentations and argument, the better; (5) the less the need for “legal justification” for the complaint and the court’s judgment the better; (6) the more informal the rules of evidence the better; (7) the fewer the requirements for conciliation and for notice the better; (8) the less the control of the proceedings by an appellate or superior court the better; and (9) the fewer the procedural stages the better.

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<sup>14</sup> Islam (2003).

The authors did not assert that absence of formalism was better for complex cases, but rather they judged that formalism was not efficient for the two cases in the Lex Mundi study (which are however illustrative of the kinds of cases that are most numerous in many court systems).<sup>15</sup>

No doubt many lawyers will be shocked by these implicit judgments. The reason is that many procedural rules the four economists disliked are implicitly or explicitly based on a set of criteria designed to produce an accurate and just result. Rules of procedure and of evidence are designed to reduce “errors” in the judging of the facts and to assure that the facts are judged by the right substantive law standards. (This, of course, requires more rules where a lay jury is involved than where a judge tries the case, and so lawyers in the United States—which is one of the few countries, perhaps the only remaining country, where a jury trial in non-criminal cases is still common—are especially sensitive to miscarriages of justice arising from too informal a set of procedures.) So, too, review by superior courts is designed to reduce legal errors and thereby further the objective of justice by treating similarly situated parties in a like manner.

Nevertheless, even lawyers who value formalities for accuracy and justice reasons understand that for routine cases or for cases with very little at stake, a legal system cannot provide a readily available forum for the population at large if the formalism useful in complex cases is not attenuated. The traffic court and the small claims court are common examples where nearly all lawyers understand that there is a trade-off between accuracy and efficiency. Or to put the point differently, such disputes are sufficiently minor that the prompt settlement of the dispute one way or the other is arguably the most important value.

One other legal reservation about the published analysis of the Lex Mundi study is that the mode of inquiry, and especially the focus of the analysts on formalism, tends to bias the results against some of the basic assumptions of a civil law system, especially as known in continental Europe and in many developing countries. Except for rules

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<sup>15</sup> Davis (2004, p. 159) has argued that the two simple cases used to construct the formalism index and to measure efficiency do not provide an overall measure of the enforceability of contracts: “For example, in many jurisdictions residential tenants are granted significant levels of protection from eviction for ideological reasons that have no application in cases involving commercial contracts.”



constraining the use of certain kinds of evidence (which one finds in common law systems when there is a jury), the rules that the economists disliked tend to be more frequent in civil law systems, especially the use of written evidence and argument and the existence of “stages” of the proceeding. Indeed, the authors include as variables rules that exist only in one or two common law countries but in the majority of civil law countries.<sup>16</sup> The reasons for adoption of these rules in civil law countries normally have to do with the relatively greater role for the judge as opposed to counsel for the parties in a civil law system.

At a high level of generality, it can be said that civil law systems are based on the notion that a judge, normally a professional career judge, will run the proceedings and will know when oral evidence from a party or witness is useful; otherwise, documentary evidence and written submissions by the parties will suffice. And at the same high level of generality, it can be said that common law judges assume that the parties in non-criminal cases will more or less run the proceedings, coming to the judge only to resolve disagreements and for interim rulings and, finally, assuming that the parties have not worked out a settlement, for trial. Because of these differences, many civil law countries do not even have a trial in the sense of an oral proceeding involving presentation of evidence conducted on consecutive days—sometimes called a “concentrated hearing”—because the judge will call for oral testimony when needed.<sup>17</sup>

The International Encyclopedia of Comparative Law sums up these differences and the consequences as follows:

In civil law ... nations the ratio of judges to attorneys tends to be greater than in common law countries. Civilian judges are more actively involved in both civil and criminal proceedings with the goal of reaching the correct result than common law judges with their more privatized judicial procedure that delegates most evidence gathering to the parties' attorneys....<sup>18</sup>

The role of judging in civil law nations involves much more responsibility for gathering evidence and moving the process forward.... Civil law judges also take on more of the effort of analyzing law ... while common law judges rely on the attorneys to brief them on the legal issues.<sup>19</sup>

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<sup>16</sup> These variables include “legal representation mandatory,” “oral interrogation only judge,” and “mandatory prequalification of questions.”

<sup>17</sup> See Langbein (1985, p. 830–832).

<sup>18</sup> Clark (2002, p. 3-137).

<sup>19</sup> Clark (2002, p. 3-146).

The Encyclopedia author points out the obvious consequences for the ratio of judges to lawyers: “In Germany ... 13 percent of the total number of lawyers are judges, while the percentage in the United States is three percent.”<sup>20</sup> This higher ratio of judges reflects not so much a preference for large government (as some critics of civil law systems would have it), but rather a belief that litigation should not be a contest of legal gladiators and that justice requires judges to take responsibility for managing litigation. Given especially their preference for “orality,” it is not surprising that the economists analyzing the Lex Mundi study found that French law countries rank higher on the formalism index than common law countries.<sup>21</sup> In short, formalism is just another word to describe the procedures and requirements that are found most often in a civil law system. Whether formalism, as defined in the economists’ analysis of the Lex Mundi results, has implications for the rate of economic growth in the developing world is quite a different matter that remains to be analyzed.

High income countries have less formalism than either African or Latin American countries.<sup>22</sup> If, as suggested above, greater formalism may be associated with greater accuracy (fewer errors of fact and law) and greater justice, higher income countries, having more wealth, could be expected to “consume” more formalism. But the opposite is the case. Even within legal families, wealthier common law countries have lower formalism scores than poorer common law countries, and a similar relationship holds for civil law countries.

Still, there is little to suggest that formalism is systematically related to the relative development of a country. Once one looks within regions, there appears to be no relationship whatever within some regions: Wealthier Latin American countries have formalism levels similar to poorer Latin American countries. The same is true in Africa. Yet despite similar levels of formalism (actually slightly higher levels of formalism), the wealthier countries in these regions have much shorter average duration times for both check collection and eviction.

Since it does not seem practicable to expect a civil law country to decide to

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<sup>20</sup> Clark (2002, p. 3-137).

<sup>21</sup> Djankov et al. (2003, p. 510).

<sup>22</sup> Djankov et al. (2003, p. 510). Moreover, Eastern European countries have significantly higher formalism levels than Western European countries.

change to a common law system (because to do so would require retraining of most lawyers and of all judges, as well as a cultural change in attitudes toward the nature of law and justice), the practical issue is what steps can be taken to deal with simple cases, such as the two cases examined in the Lex Mundi study. Among the options are small claims courts and alternative dispute resolution, such as mediation and arbitration; however, some countries have “various restrictions on alternative dispute resolution mechanisms [that] prevent firms from taking full advantage of them” and many more countries have not taken steps necessary to promote such mechanisms, such as by providing for enforcement of arbitration awards.<sup>23</sup> Another alternative more focused on business activity would be a specialized commercial court.<sup>24</sup>

### Judicial Efficiency

The main purpose for the World Bank sponsorship of the Lex Mundi background study in preparation for its annual World Development Report (as opposed to the published analysis) appears to have been to analyze judicial efficiency rather than “formalism” or the merits of the various legal origin systems. Although efficiency is only one aspect of the quality of a judiciary, it nonetheless is measurable, unlike some of the other essential qualities.<sup>25</sup> One important aspect of efficiency is time to disposition of a case. The study showed that even the simple cases studied can take a long time to resolve. The average duration for all countries in the eviction case was 254 days. For the check collection case the average was 234 days.

The variance in duration across countries was dramatic. On the high side of the average, Pakistan required 365 days in both cases, Nigeria 366 days in the eviction case, and Thailand 630 days in the eviction case.<sup>26</sup> Since these three countries’ systems are based on common law, it can be seen that delay is not a monopoly of civil law systems. In fact, once one turns to comparisons within regions, formalism does not seem to be related to efficiency, at least not in the way the Lex Mundi analysis suggests. For example, the Lex Mundi study included twenty-two Asian countries, of which half were common law countries and half were civil law countries. While it is true that common law countries had lower levels of formalism than civil law countries, civil law countries

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<sup>23</sup> World Bank (2004, p. 88).

<sup>24</sup> Islam (2003).

<sup>25</sup> Dakolias (1999, p. 92–95).

<sup>26</sup> Djankov et al. (2003, p. 494–500, Table V).

were more—not less—efficient: the average duration of the check collection case was 216 days in comparison to the common law average of 257.

Nor is it simply a question of the stage of economic development of the country (and hence, for example, the resources it can apply to the problem). Certain developed countries with common law systems manifested unusual delay—such as 421 days in Canada and 320 days in Australia in the check collection case (compared to 40 days in Swaziland and 60 days in Belize, also English origin countries).<sup>27</sup> These extreme results within the common law family suggest that much more is involved than just the common/civil law dichotomy. And that much more does not seem to be primarily “formalism,” since Canada and Australia—which experienced the high levels of delay just cited—had much lower than average formalism indices; indeed, Australia had one of the lowest formalism indices in the world.<sup>28</sup> Moreover, Swaziland, one of the fastest check collection countries of all, had a formalism index much above the common law average and higher than many civil law countries, including France itself.

In short, the high variance of outcomes within both legal families leads to the conclusion that while it is instructive to look at the regression results from the Lex Mundi studies, sound answers to the policy question of what a particular developing country can do to improve its judicial efficiency require looking at that country’s legal system as it exists today. And that is true whether the developing country has a common law or a civil law system.

Still another way of measuring efficiency, reported in the Lex Mundi study, is to use survey evidence to tap into subjective judgments of people with some reason to know about a particular country’s legal system. The Lex Mundi study, for example, measured “efficiency of a judicial system” of a country by utilizing an assessment of the “efficiency and integrity of the legal environment as it affects business, particularly foreign firms.” These ratings were provided by International Country Risk (“ICR”), an international risk assessment company, and were intended “to represent investors’ assessment of conditions in the country in question ....”<sup>29</sup> These perceptions of judicial effectiveness are necessarily based on subjective judgments, but they may be especially valuable where they represent attitudes of local residents in countries that are trying to

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<sup>27</sup> Djankov et al. (2003, p. 494–500, Table V).

<sup>28</sup> Djankov et al. (2003, p. 484, Table IIb).

<sup>29</sup> Djankov et al. (2001, Table 2).

build market economies and attract more of the population into the market sector. Economic development depends in the long run not just, for example, on attracting foreign direct investment but on attracting the creation of new local enterprises funded by local savings.

Several further kinds of evidence explain the differing assessments. One is that delays tend to be longer and backlogs greater in African and Latin American countries than in much of the rest of the world. Delays are one important reason for the finding, in a survey conducted in selected Latin American countries, that a “majority of court users are ‘not inclined’ to bring disputes to court because they perceive the system to be slow, uncertain, and costly, or of ‘poor quality.’”<sup>30</sup> Generalization across countries in this respect is, however, misleading. For example, one study of commercial cases found that the average such case takes almost eight years to verdict in Ecuador but less than a year in Colombia and Peru.<sup>31</sup>

Granted that this kind of assessment is subjective and is not intended to reflect directly the efficiency of various countries’ legal systems in dealing with small cases involving domestic parties, it nevertheless provides some insight into the relative ranking of legal systems, including judiciaries. Though English origin countries outscored French origin countries in the Lex Mundi study, the difference is partly based on the fact that Latin American and Eastern European countries have the highest duration levels and all of them with the exception of Belize have a civil law origin. Within regions, there appear to be substantial differences based on legal origin, but not necessarily in the direction the Lex Mundi analysis suggests. In Asia, as noted above, civil law countries have shorter durations than common law countries.

A significant difference in efficiency levels exists between developed and developing countries. A World Bank analysis of the data showed, for example, that “high income countries” scored much higher on efficiency than either African countries or Latin American countries.<sup>32</sup> And a study reaching a similar conclusion, based on an index of the “efficiency of the judicial system,” found a “mean score for the efficiency of the judicial system across developing countries is 6.26, compared with 9.14 in developed countries.”<sup>33</sup> Once again the studies point to the need for reform in developing countries

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<sup>30</sup> Buscaglia and Domingo (1997, p. 296).

<sup>31</sup> World Bank (2001, p. 120).

<sup>32</sup> Islam (2003, Figures 4 and 6).

<sup>33</sup> López-de-Silanes (2002, p. 5).

but do not help in determining what reforms will work best.

One of the common complaints by developing country judiciaries is lack of resources. More money and especially more judges would presumably, other things equal, lead to faster disposition of cases and perhaps more effective judiciaries. Although budgets are a big problem for developing country judiciaries and some have too few judges, it is reasonably clear that neither budgets nor numbers of judges are the heart of the problem. It is true that Ecuador and Peru have only one judge per 100,000 people, but Singapore has less than one judge per 100,000 people (compared to 27 per 100,000 in Germany and 10 per 100,000 in France).<sup>34</sup> Indeed, there is considerable evidence that, in general, the problem is not primarily one of resources. A review of studies in Latin America and the Caribbean showed “no correlation between the overall level of resources and the time to disposition of cases.”<sup>35</sup>

So too the size of budgets has to be measured against what the money is actually spent on. Buscaglia found that “approximately 70 percent of Argentine judges’ time is spent on non-adjudicative tasks.”<sup>36</sup> This finding suggests that the problems run more deeply, even insofar as pure efficiency is concerned. We do know that in many cases the judges themselves are opponents of reform measures, which suggests a lack of enthusiasm for actually implementing reforms undertaken.<sup>37</sup> However useful may be grants for computers and case management systems (typical subjects of foreign assistance) where a developing country judiciary is already characterized by independence, competence, and integrity, such grants do not attack the basic problems in some developing countries:

Funding traditional judiciary projects that provide training, hardware, organizational advice, convenes an international conference, and provides technical assistance for superficial issues such as caseload management within the existing structure, is likely to backfire by entrenching the existing misgoverned regime and vested interests (or related corrupt networks) in cases where judges are appointed on [a] basis removed from merit-based considerations and/or subject to economic capture.<sup>38</sup>

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<sup>34</sup> World Bank (2001, p. 120–121 and Table 6.1).

<sup>35</sup> Botero et al. (2003, p. 63).

<sup>36</sup> Buscaglia and Domingo (1997, p. 297).

<sup>37</sup> Santiso (2003, p. 117, 122) and Srinivasan (2004, p. 95–96).

<sup>38</sup> Kaufmann (2003, p. 25).

In any event, according to a World Bank study “no correlation between the overall level of resources and times to disposition” was found in a study of data from the United States, Latin America and the Caribbean.<sup>39</sup>

Another possible explanation lies not in the size of judicial budgets but in their composition: What is the money actually spent on? Equally important, what resources go into the legal system beyond judicial budgets? Judiciaries are made up of more than judges and their clerks. Practicing lawyers are also important. According to an Asian Development Bank study, Cambodia, a country of 11 million inhabitants, had only 249 registered members of the bar, of whom only 197 were practicing lawyers.<sup>40</sup> A legal system includes not just lawyers and litigants, but also the government (especially a ministry of justice) and external groups such as bar associations and journalists covering court proceedings.<sup>41</sup> Bar associations and journalists are important if for no other reason than that in civil law countries being a judge is a career profession where reputations are likely to count as the judge seeks higher income and more attractive locations through promotion. Hence, it would take a thoroughgoing systems approach involving not just judges but the entire environment in which they operate to be sure of the sources of inefficiency and the level of judicial performance.

In some, but by no means all, developing countries, a symptom of dysfunctionality of a judiciary lies in the size of the backlog of cases. Backlogs are of course related to times to disposition and other measures of delays, but backlogs are important in themselves because they lead to a lack of public confidence in a country’s judiciary and to a hesitancy to rely on the judiciary in business planning.

Backlogs sometimes result from certain kinds of short-sighted judicial reform. In Brazil, for example, the new constitution of 1988 so expanded the range of constitutional rights, including new social and economic guarantees, and the kinds of plaintiffs entitled to bring constitutional actions, that backlogs multiplied many times over.<sup>42</sup> Moreover, the Brazilian constitution has 250 articles, 83 transitory provisions, 14 unnumbered articles, and 37 amendments, with many “specific rules normally found only in codes or regulations.”<sup>43</sup> But the Brazilian case illustrates the more general problem that increasing

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<sup>39</sup> World Bank (2001, p. 128).

<sup>40</sup> Asian Development Bank (2003, p. 49).

<sup>41</sup> Islam (2003, p. 21).

<sup>42</sup> Prillaman (2000, p. 82–97).

<sup>43</sup> Rosenn (2000, p. 291–292).

access to the courts (or reducing the cost of access)—which is badly needed in many developing countries—can be expected to lead to heavier workloads. The Brazilian case also points to the need to establish procedures and rules that channel court use to cases where courts can actually make a contribution; much of the Brazilian constitutional litigation appears to have been politically or interest group motivated.<sup>44</sup> As Prillaman observes, the 1998 Constitution was “so prescriptive and detailed that it constitutionalized a staggering range of minor issues and flooded the courts—even the Supreme Court—with the most trivial cases.”<sup>45</sup> A decade after its adoption, opinion in Brazil was “unanimous” that “unfettered access for everyone had produced, not surprisingly, access for no one.”<sup>46</sup>

### Court Decisions As Law

The Brazil case does show one important disadvantage of civil law systems, at least as applied in some developing countries. One of the reasons for the proliferation of constitutional litigation is the notion in many civil law countries that judicial decisions are not a source of law, in contrast to the heavy reliance of common law countries on judicial precedent. Rosenn comments on the consequences for Brazil: “Since Brazil has only a minimal system of binding legal precedent, the courts decide the same constitutional issues many times over.”<sup>47</sup> Aside from the waste of resources, the Brazilian approach “leads to conflicting interpretations of constitutional provisions,”<sup>48</sup> leading to further litigation. Indeed, the dire consequences of courts not using precedent carries over to lower courts and leads in Brazil to a “conviction that every case must be tried on its individual merits,” thereby causing multiyear delays even where the outcome should be clear in advance.<sup>49</sup>

The misleading consequences of taking the French legal system at face value, at least on the issue of precedent, is shown by this Brazilian experience.<sup>50</sup> Not all civil law countries ignore precedent (or “jurisprudence,” as prior court decisions are called in many civil law countries). Certainly French courts do not do so, as is ably shown in an extraordinary empirical research article demonstrating in great detail how French courts

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<sup>44</sup> Rosenn (2000, p. 317).

<sup>45</sup> Prillaman (2000, p. 8).

<sup>46</sup> Prillaman (2000, p. 6).

<sup>47</sup> Rosenn (2000, p. 291).

<sup>48</sup> Rosenn (2000, p. 291).

<sup>49</sup> Wheatley (2005).

<sup>50</sup> Merryman (1996).



deal with precedent. In this article Lasser establishes that two key French judicial officials, the advocate general and the reporting judge, “pay extremely close attention to past judicial decisions.... A complete *conclusions* or *rapport* always cites and analyzes relevant case law.”<sup>51</sup> This fact is disguised by the form of French judicial decisions, which by tradition are very brief and do not cite case law. These decisions are written in a single run-on sentence, usually with a cascade of “whereas” clauses, that lead powerfully and ineluctably to an inescapable conclusion, like a mighty and irrefutable syllogism machine. This impression is belied, however, by the French reporting judges’ practice of preparing for the consideration of their colleagues at least one alternative draft opinion, often coming to a diametrically opposite conclusion.<sup>52</sup>

The Brazil case further illustrates the disadvantage of abstract judicial review. The U.S. requirement that parties raising a constitutional issue must show that it affects them in a direct and legally cognizable way, plus the ability of the U.S. Supreme Court to limit its intake of questions to important issues, has meant that it has been able to limit its actual substantive decisions to well under 200 cases per year,<sup>53</sup> thereby assuring focus and reasoned opinions. The Brazilian Supreme Court, in contrast, was dealing with more than 100,000 cases a year.<sup>54</sup> One has to wonder about the quality of the work product and about the impact on the economy of increasing backlogs and thereby to further attenuation of access to justice. But in late 2004 Brazilian legislation was passed permitting the Brazilian Supreme Court to set binding precedent for lower courts (but presumably not for itself); this and associated measures would cut the flow of cases by only half, leaving a still unwieldy caseload.<sup>55</sup>

### Structural Issues

When one turns from efficiency in simple cases to the broader problem of major cases where the government or specific government officials have an interest, broader structural issues are raised. One set of structural issues has to do with issues of “judicial review.” The two principal kinds of judicial review issues that are treated differently arise, first, when legislation is challenged for unconstitutionality and, second, when an

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<sup>51</sup> Lasser (1994–1995, p. 1376). See also Lasser (2004).

<sup>52</sup> Lasser (1994–1995, p. 1373) and Dawson (1968, p. 410–411).

<sup>53</sup> In its 2003 Term the U.S. Supreme Court disposed of 7781 cases but this number included refusals to grant review, and only 80 cases were disposed of with full opinions. See Harvard Law Review (2004, p. 504 (Table II) and p. 507–509 (Table III)).

<sup>54</sup> Colitt (2004).

<sup>55</sup> Ibid.; Not-so-swift Justice: How to Reform Brazil’s Justice System, The Economist, May 25, 2004.

administrative act (that is, a decision or regulation issued by a government official or regulatory body) is challenged as being contrary to the constitution or a controlling statute.

Not surprisingly, when dealing with judicial review, the question is not whether the abstract power of judicial review exists but rather whether, assuming the availability on the books of such a power, it can be effectively exercised. The answer turns on the independence of the judiciary, including the stature and competence of judges to deal impartially with such high stakes and fundamental litigation. Let us therefore first deal with the question of independence.

### Structural Independence

It is useful, in dealing with the independence of the judiciary, to distinguish structural independence from behavioral independence. The former term, as used here, refers to the way in which government is constitutionally structured: does that structure lend itself to independence? The latter is more far-reaching. Are individual judges independent—that is, not just dispassionate and free from bias, but willing to take difficult positions, to resist corruption, and to make truly independent decisions?

In analyzing the structural independence of the judiciary, it is important to dig more deeply into the principle of the separation of powers. While many countries believe that the structure of their government is based on that principle, the content of the principle differs across countries to the point that one can say that two fully incompatible versions of that principle exist in the world. One should distinguish the French revolution concept (bearing in mind that post-World War II developments in France have transformed the French concept in part) from the U.S. concept.

The spirit and the outcome of the French Revolution was to make sure that the people should reign (not the King nor the aristocracy), and therefore the Assembly, the legislature, was to be sovereign because it would speak for the people. To achieve that goal, the pre-revolutionary French *Parlements*—which were more judicial than parliamentary, at the national and at regional levels—were disbanded because they were viewed as bulwarks of the aristocratic establishment and as having strayed from adjudication into law-making.<sup>56</sup> The Assembly would be the sole voice, and to that end

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<sup>56</sup> Dawson (1968, p. 369–371).

the French Revolution outcome assured that courts were given a very minor role of merely interpreting in a narrow, almost mechanical way the meaning of legislation passed by the Assembly.

Under such a structure there not only was no judicial review, but the judiciary was not able to act as an independent voice. The separation of powers meant that the power to legislate was in the Assembly, full stop.

In the American sense of the separation of powers (often referred to as a system of “checks and balances”), the U.S. Constitution established three independent bodies, the Article I Congress, the Article II Presidency, and the Article III Judiciary. It is true that the Article III judges were to apply the law, but where the law was a statute contrary to the Constitution the courts were to apply the higher law—the Constitution—and not the statute passed by the Congress. So decided the Supreme Court in the pathbreaking case of *Marbury v. Madison*.<sup>57</sup> Although there were minor precedents of statutes being disregarded or narrowly construed because they were contrary to the common law, this was the first example of judicial review on constitutional grounds in the world.

Although the *Marbury* case was an American judicial decision, it was widely admired and had great consequences for the rest of the world. The U.S. Constitution—in the sense of a founding document to be enforced by the judiciary—was widely followed in nineteenth century Latin America. A 1974 study found that by that time only one of the twenty Latin American republics had not adopted judicial review.<sup>58</sup> In the twentieth century judicial review spread to Europe. After World War II it arrived even in France with the creation in 1958 of a Constitutional Council.

Judicial review was not, however, adopted in Britain. Not only had the British never agreed upon a written constitution in the sense of a single written document,<sup>59</sup> but to the extent that it can be said that the United Kingdom has a constitution, it is to be found in a wide variety of sources, some written and some to be found in past customs and events.<sup>60</sup> Thus, although the British constitution “is based upon a system of tacit understandings, ... the understandings are not always understood.”<sup>61</sup> In short, no agreement exists as to the content of the British constitution. Indeed, “every author is free

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<sup>57</sup> 5 U.S. 137 (1803).

<sup>58</sup> Rosenn (1974, p. 785).

<sup>59</sup> Carroll (2003, p. 15–18).

<sup>60</sup> For illustrations, see Bradley and Ewing (2003).

<sup>61</sup> Finer et al. (1995, p. 100), quoting Sidney Low. 1904. *The Governance of England*. p. 12.

to make a personal selection and to affirm that this is the one, even the only one, that embraces all the most important rules and excludes all the unimportant ones—though nobody has ever been so foolish as to assert this.”<sup>62</sup>

The British constitution, if we accept the position not at all obvious to a foreigner that Britain has a constitution, is quite a different creature from the American constitution. Indeed, it is much closer in concept to the French revolutionary outcome because the British Parliament, just like the French Assembly of the time, is sovereign. Under longstanding English doctrine, “Parliament has the right to make or unmake any law whatever,” and “No person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>63</sup> As Blackstone summarized the matter over two centuries ago, the competence of Parliament is unlimited in law:

The power and jurisdiction of parliament ... is so transcendent and absolute, that it cannot be confined, either for causes or persons, with any bounds.... It can change and create afresh even the constitution of the kingdom and of parliaments themselves.... It can, in short do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.<sup>64</sup>

Unlike written constitutions that have formal requirements (such as special voting provisions or referenda) for their own amendment, constitutional law can therefore be changed from one day to the next by the British Parliament in the same way that it enacts statutes.<sup>65</sup>

It has to be said that, with the success of the Glorious Revolution, including the statutes that were adopted by Parliament,<sup>66</sup> the need for a written British constitution was not apparent. After all, most of the world’s constitutions were originally adopted after a major discontinuity in sovereignty or power. Such a discontinuity was the case in the United States, but also in the newly independent countries, notably in Latin America in the nineteenth century and in Africa in the twentieth century, as well as the countries that sought to transition from Communism in the late twentieth century.

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<sup>62</sup> *Finer et al.* (1995, p. 41).

<sup>63</sup> *Wade* (1961, p. xxxiv–xxxv).

<sup>64</sup> *Sir William Blackstone. Commentaries on the Laws of England. Vol. 1, Book 1, Chapter 2. Sec. III.*

<sup>65</sup> *Finer et al.* (1995, p. 43).

<sup>66</sup> See discussion in *Kenneth W. Dam, "Institutions, History, and Economic Development"* (January 2006). U Chicago Law & Economics, Olin Working Paper No. 271. Available at SSRN: <http://ssrn.com/abstract=875026>.

Today judicial review of legislation on constitutionality grounds has become common. As noted above, even France introduced judicial review in 1958 in the form of a Constitutional Council.<sup>67</sup> But that Council is a very different animal from the U.S. Supreme Court. It can only pass on the constitutionality of a legislative measure before it is finally enacted and then only at the request of designated public officials.<sup>68</sup> Orderly as this may appear, it does little to protect the citizen who may find years later that he is aggrieved, indeed aggrieved by an “unconstitutional” application of a legislative measure that on its face appears fully constitutional.

Even though the French Constitutional Council cannot be seen as a fully independent and purely judicial body,<sup>69</sup> the role of the Council has been greatly expanded as a result of constitutional changes expanding the class of those who can commence a case coupled with an increasing number of rulings finding unconstitutionality.<sup>70</sup> Still, the limitation on its role to passing on the constitutionality of legislation only before final enactment, limitations on who may bring a case, and the composition of the Council itself all make clear that the French separation of power principle, even today, is sharply different from the American separation of powers principle.

Another major difference between the French and American systems of judicial review lies in the fact that the French Constitutional Council is the only tribunal that can set aside legislation on constitutional grounds. It is thus an example of judicial review by a specialized court. In the United States, in contrast, any court can set aside a decision on constitutional grounds. Even a state court can exercise judicial review when either a federal or state statute essential to its decision is attacked on constitutional grounds. France is thus an example of “concentrated” judicial review, while the United States is at the other pole of “diffuse” review.

Most European countries concentrate judicial review in a single high-level court, which deals only with constitutional complaints. Some of these cases originate in this single “constitutional court,” but many of the cases come to it on reference from some other court where the constitutional issue arises out of nonconstitutional litigation. The result in Europe is that the constitutional issue is often presented as an abstract issue of

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<sup>67</sup> For a general discussion on the Constitutional Council, see Brown and Bell (1998, p. 14–24).

<sup>68</sup> Bell (1992, p. 32).

<sup>69</sup> For a general discussion of factors leading to the political character of the Constitutional Council, see Bell (1992, 32–37, 229–234).

<sup>70</sup> Morton (1988, p. 89–92).

law, divorced from the facts of any concrete dispute. Even if the case is referred to it, the constitutional court would not normally express an opinion on the nonconstitutional issues, which would remain within the jurisdiction of the court making the reference. This kind of procedure is therefore sometimes called “abstract” judicial review.

Such decisions thus reflect an analysis of basic constitutional principles without much consideration in most cases of the impact of the decision on particular persons or particular factual situations.<sup>71</sup> The decision thus normally binds the entire citizenry as well as the government, sustaining the constitutionality of the challenged statutory provision or rendering it entirely inoperative. The French pre-enactment review thus carries this pattern to an extreme of abstract constitutional decisionmaking because there has been no experience at all with the application of the still unenacted statute.

In the U.S. system where the constitutional issue can be decided by any court, even a state court under U.S. federalism, the constitutional issue is usually presented in the context of a concrete set of facts. This is what is meant by the doctrine that a dispute must present a “case or controversy” to be “justiciable” (that is, for the court to be able to assert jurisdiction of the dispute), however important the constitutional issue may be in the abstract. The result is that the court deciding the case often has the opportunity to see how the challenged statute actually operates. In fact, as a general principle, no U. S. litigant can raise the question of constitutionality of a statute unless directly affected or in imminent danger of being directly affected. As a result U.S. courts often face the issue whether the statute is unconstitutional on its face or only unconstitutional as applied to the situation of the particular litigant. But the larger point is that although many lawyers and judges consider judicial review an inherently political act, the decentralized system tends to present the issue in terms of a concrete dispute and hence as more judicial in character.<sup>72</sup> That all cases presenting constitutional issues, whether commenced in federal or state court, can be reviewed by the U.S. Supreme Court assures that fragmentation of constitutional legal principles under U.S. diffuse review does not occur.<sup>73</sup>

On the other hand, diffuse judicial review raises a host of special technical problems. If one lower court decides differently from another, which can easily happen, there has to be some way of resolving the differences, which in the U.S. system is a prime function of the U.S. Supreme Court. Perhaps the reason that European countries

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<sup>71</sup> Favoreu (1990, p. 41).

<sup>72</sup> See Fallon et al. (2003, p. 55–267).

<sup>73</sup> Fallon et al. (2003, p. 1552–1620).

prefer a centralized system is that, unlike the United States, they have many specialized courts such as, in Germany, high level review courts (in effect, supreme courts) for civil, tax, labor, and social matters, as well as for administrative law matters.<sup>74</sup> If tax courts consider only tax cases, then one can understand why one might be concerned with allowing such a court to decide constitutional issues that affect a wide variety of litigants and subject matters.

### Behavioral Independence

Independence of the judiciary does not depend solely on the structure of government and the judiciary's formal role within it. It also depends on the judges themselves. That is why analysts speak of behavioral independence. The importance of behavioral independence can be illustrated by reflecting on the constitutional arrangements of the United States and Britain. Although one could easily conclude that the structural arrangements in Britain makes judicial independence unlikely, the fact is that the British judiciary, particularly at the highest level, is known for its independence.

Some economic literature speaks of *de facto* independence in contrast to *de jure* independence.<sup>75</sup> While this is a valid distinction and has advantages for empirical work, the term behavioral independence has advantages for policymaking and public understanding because it recognizes that some—though not all—characteristics that determine how judges act cannot be traced to legal or formal safeguards, but reflect the education, values and prestige of the judicial profession in a particular country. Therefore, the distinction used here is between structural factors of a constitutional nature (such as the separation of powers) and nonconstitutional factors, some of which are based on law, that encourage judges to act independently.

Part of behavioral independence resides in the judge as a person: Is a judge able to be dispassionate, free from bias, able to resist political pressures and the temptations of corruption, and so forth? In most societies those are not just questions of upbringing and

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<sup>74</sup> Schröder (2002, p. 129– 132).

<sup>75</sup> Stephenson (2003); Feld and Voigt (2004); Ramseyer (1994). One insight of the empirical literature is that courts are likely to be more independent where there is a functioning democracy with rival parties alternating in office because politicians in power will be aware that another party may soon be in office. This is an important insight, but does not afford much useful policy guidance to any particular developing country.

morality. The answer also depends on the judges' economic security, place in the society, education, and career experience.<sup>76</sup>

That the British judiciary has not traditionally been structurally independent is shown by the intermingling of judicial, legislative, and executive functions at the highest level.<sup>77</sup> Until legislation was passed in 2005, the so-called Law Lords, who formed the highest appellate level in the British judiciary, also sat in the House of Lords, one of the two houses of Parliament. More dramatic was the position of the Lord Chancellor, who was not only a Law Lord, but also the head of a large government department, and thus part of the government of the day, playing a role involving judicial appointments. The Lord Chancellor was not just a member of the House of Lords, but presided over the Law Lords and was entitled to chair the House of Lords.<sup>78</sup> The separation of powers objection to this intermingling of roles was not solely conceptual, as shown by the fact that the conduct of the Lord Chancellor was not always free from controversy.<sup>79</sup>

Legislation enacted in March 2005 adopted the thrust of the British government's proposals designed to eliminate the intermingling, though the legislation was highly controversial in the House of Lords, in some measure over partially symbolic issues. The Law Lords will be transferred to a newly created Supreme Court<sup>80</sup> (due to take place in 2008). The Lord Chancellor's role with respect to judicial selection will be in part transferred to an independent judicial appointments commission. The commission will recommend and the Lord Chancellor (in his role as the cabinet officer—the "Secretary of State"—of the Department of Constitutional Affairs) will appoint.<sup>81</sup> The Lord Chancellor will no longer be a judge. The Chief Justice of England and Wales will become head of the judiciary. Thus, the judiciary will acquire some measure of formal independence of the government and the legislature.<sup>82</sup> It is important to note that in place of the former

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<sup>76</sup> See Sajó (2004).

<sup>77</sup> This intermingling is a result of the constitutional settlement of 1689 described in Kenneth W. Dam, "Institutions, History, and Economic Development" (January 2006). U Chicago Law & Economics, Olin Working Paper No. 271. Available at SSRN: <http://ssrn.com/abstract=875026>.

<sup>78</sup> Carroll (2003, p. 36) and Bradley and Ewing (2003, p. 388–391).

<sup>79</sup> Bradley and Ewing (2003, p. 388–391) and Oliver (2003, p. 337).

<sup>80</sup> Constitutional Reform Act 2005, chapter 4, p. 12.

<sup>81</sup> Constitutional Reform Act 2005, chapter 4, p. 29. The report by the Commission will state who has been selected and then the Lord Chancellor can accept, reject or require the selection committee to reconsider the selection, p. 33. Until the 2005 change, the Lord Chancellor simply appointed.

<sup>82</sup> As a further step toward separation of powers, no member of the Judicial Committee of the Privy Council will be a cabinet minister. On the constitutional changes, see Trials and Tribulations. The



Lord Chancellor with both judicial and non-judicial roles, there will henceforth be two offices occupied by the same person, the office of the Lord Chancellor (responsible for the management of the courts) and the office of the Secretary of State (responsible for election law, legal aid, human rights, data protection, freedom of information, and regulation of the legal profession.) Further, the Lord Chancellor will continue to be a member of the House of Lords.<sup>83</sup>

Although the independence of British judges was based for so long on behavioral rather than structural considerations, without in practice any notable compromise of the Rule of Law, it nonetheless does not follow that a developing country can afford to neglect structural independence. Behavioral independence, like the other elements of the Rule of Law, was acquired after a long struggle in which many English judges were willing to stand up to the English sovereign at great personal risk during the Tudor and Stuart periods, even before the Act of Settlement of 1701 gave life judges tenure on good behavior.<sup>84</sup> Today a developing country, especially where political parties do not regularly alternate in power, would be well advised to adopt procedures and practices, such as life tenure, that encourage judges to be independent.

It is generally thought that lifetime tenure is desirable for judges because it gives them economic security and frees them from undesirable pressures, whether from government, politicians or private parties. Alexander Hamilton, a U.S. “founding father,” can be said to have fathered this concept in the United States, arguing that “nothing can contribute so much to ... firmness and independence as permanency in office.”<sup>85</sup> Hamilton buttressed the argument for permanency by arguing for a constitutional prohibition of reduction of judicial salaries because, “a power over a man’s subsistence amounts to a power over his will.”<sup>86</sup>

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Economist (U.S. Edition, March 26, 2005); The Constitutional Reform Bill—the Office of Lord Chancellor, House of Commons Library Research Paper 05/05 (Jan. 12, 2005) Available at <http://www.parliament.uk/commons/lib/research/rp2005/rp05-005.pdf>. See Wikipedia entries on Lord Chancellor and on Constitutional Reform Act 2005.

<sup>83</sup> That a single person can be a member of both the executive and legislative branches is of course normal in a parliamentary system.

<sup>84</sup> Klerman and Mahoney (2005, p. 3).

<sup>85</sup> Federalist Papers No. 78. This was just one of the arguments adduced by Hamilton in support of lifetime tenure on good behavior, including that the “experience of Great Britain affords an illustrious comment on the excellence of the institution.”

<sup>86</sup> Federalist Papers No. 79.

Experience has demonstrated that an independent judiciary rests on a permanent corps of judges who can be removed only for cause. Latin American offers examples of the practice, and the effects, of making judges easily removable by the executive. A World Bank report makes the following observations about Peru:

The tenure of judges matters.... Peru is frequently rated as the country with the least judicial independence. Former President Fujimori kept more than half of judges on temporary appointments from 1992 to 2000.<sup>87</sup>

Perhaps the most dramatic evidence of the effects of denying judges lifetime tenure is found in the experience of Argentina. The tenure of Argentine Supreme Court justices is one of the shortest in the world.<sup>88</sup> One reason is that those justices have become identified with the party, indeed the President, in power. It started in the 1930s with conservative judges siding with electoral fraud by conservative parties, with the result that public opinion thereafter favored their ouster. When Peron came to power in the 1940s, he arranged for the impeachment of Supreme Court justices from the earlier period. Later Presidents followed suit. By 1994 the Argentine Supreme Court had been completely replaced six times since 1946.<sup>89</sup> And Peronist President Menem in the 1990s expanding the Court from five to nine justices, so that he could “pack” the court with a majority.<sup>90</sup> And so it continued, with a new Peronist party President Kirchner in the first decade of the twenty-first century forcing out Menem-era justices, so that he could gain public support while having his own court.<sup>91</sup> According to a research paper by Alston and Gallo, this populist pattern of attacking the Supreme Court and bringing about a situation where new Presidents have their own court is a major cause of the continued decline of Argentina from one of the wealthiest ten countries in the world to one of the poorest.<sup>92</sup>

The executive’s ability to remove judges has been common in Latin America. Furnish asserts that “by Mexican tradition sitting presidents have dismissed sitting judges whenever it suits their purpose to do so.”<sup>93</sup> Wiarda and Kline have explained the consequences:

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<sup>87</sup> World Bank (2001, p. 130).

<sup>88</sup> Spiller and Tommasi (2003, p. 298).

<sup>89</sup> Dakolias (1995, 173, n. 18).

<sup>90</sup> Miller (2000, p. 373).

<sup>91</sup> See Valente (2003).

<sup>92</sup> Alston and Gallo (2005).

<sup>93</sup> Furnish (2000, p. 239).

The court system has not historically been a separate and coequal branch, nor was it intended or generally expected to be. Many Latin American supreme courts would declare a law unconstitutional or defy a determined executive only at the risk of embarrassment and danger to themselves, something the courts have assiduously avoided.<sup>94</sup>

The place in society that a judge enjoys, and feels he has, depends very much on the quality of judges and how the public views them. The practice in the United States and Great Britain of appointing lawyers after they have completed several decades in private practice or in distinguished government service tends to assure judicial independence on this score, at least so long as judges are picked on merit rather than on political criteria, which appears to be the case in Great Britain and has normally been the case in the United States at the federal level. However, the election of judges in U. S. states probably threatens to compromise the independence of some of them. The practice in a few countries of attracting the very best law graduates to a judicial career can also produce an independence of mind and spirit in judges.

Still, although recruitment of judges after law graduation followed by a lifetime judicial career may turn out to be positive for judicial independence, that statement has to be qualified for some judicial tasks and in some countries. With regard to judicial tasks, Mauro Capelletti, an Italian comparative law scholar, has argued that, even in Europe, career judges are not suited to deal with judicial review of the constitutionality of statutes:

The bulk of Europe's judiciary seems psychologically incapable of the value-oriented, quasi-political functions involved in judicial review. It should be borne in mind that continental judges usually are 'career judges,' who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical rather than policy-oriented application of statutes. The exercise of judicial review, however, is rather different from the usual judicial function of applying the law. Modern constitutions do not limit themselves to a fixed definition of what the law is, but contain broad programs for future action. Therefore the task of fulfilling the constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes.<sup>95</sup>

The prestige of a judiciary as an institution can play a role in its independence.

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<sup>94</sup> Wiarda and Kline (2000, p. 64).

<sup>95</sup> Cappelletti (1971, p. 62–63).

Questions of prestige, competence, and independence are, of course, interrelated. A judiciary without independence is likely to lack prestige in the legal profession, and law graduates may in turn avoid a career in a judiciary lacking independence. To take an example of how lack of independence degrades both prestige and competence, consider Ukraine: “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.’”<sup>96</sup>

As the Ukraine example shows, low judicial salaries in some countries lead to less qualified judges. An analysis of the Mexican judiciary reached a similar conclusion:

Low judicial salaries ... left the best-trained and most capable young law graduates inclined to pursue careers in private practice. Consequently, lawyers with uncompetitive institutional pedigrees, undistinguished records of professional experience, and/or modest socio-economic backgrounds tended to pursue careers on the bench. This observation is corroborated, in part, by the findings of 1985 and 1993 judicial surveys that an average of 93.15% of Mexico’s federal judges and magistrates graduated from what are generally considered to be inferior quality law programs.<sup>97</sup>

Compensation is a difficult issue in many developing countries where pay for civil servants is often derisively low, often on the assumption that bribes will supplement salaries. Yet quite aside from the corruption issue, compensation levels cannot be ignored if competence is sought. President Lee Kwan Yew of Singapore rather indelicately summed up the point: “You pay peanuts, you get monkeys.”<sup>98</sup>

Much depends, however, on how junior judges are trained, managed and promoted. If promotion is handled by a government agency—the ministry of justice— independence may be compromised. To the extent these functions are in the hands of senior judges, the results will depend on the leadership of the existing judiciary. One outcome may be judges who are reluctant to stand up to the government. Younger Japanese judges who too aggressively challenge accepted ideas are likely to find themselves promoted by the judicial secretariat to “a small branch office or a back-

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<sup>96</sup> Rekosh (2002, p. 59).

<sup>97</sup> Kossick (2004, p. 742).

<sup>98</sup> Asian Development Bank (2003, p. 19).

mountain family court,”<sup>99</sup> meaning that they can expect to spend their career in a backwater without hope of achieving eminent positions in major metropolitan centers. This is an example of how culture—legal culture—can explain how law functions in a society and therefore how it influences economic development. In short, the danger of a career judiciary is that it can produce a bureaucracy that is risk-averse, promotion-minded, and far from manifesting behavioral independence.

Even a non-career judiciary can act like a bureaucracy. This statement holds true for the judiciary in the United States, as conceded by one of the best known federal judges below the Supreme Court level in the course of arguing that good judging is more important than substantive law, at least in business litigation:

[T]he United States relies more on courts and less on law. Good thing, too! For judges are just bureaucrats with general portfolios.... [Judges] can enforce contracts. For then the investors and managers themselves lay down the rules. Judges serve as neutral umpires, enforcing the contracts without regard to who gains and loses in a particular case. The contents of the contracts, however, come from competition in financial markets, rather than from law.<sup>100</sup>

To determine whether a judiciary in a particular country is truly independent is often difficult. Even formal structural independence and uncorrupt judges with adequate legal education, tenure and compensation do not assure independence where powerful governmental or political interests are at stake. The Asian Development Bank, which has made illuminating efforts to assess judicial independence and to promote it, has issued thoughtful assessments of member government judiciaries that throw light on how difficult achievement of true judicial independence can be in a developing country.<sup>101</sup>

### Administrative Review

Many countries, indeed the majority of civil law countries, have a separate system for review of administrative decisions—that is, decisions by a government official or a governmental agency. The efficacy of that form of review is directly relevant to the Rule of Law because it provides a principal means of limiting the powers of government to

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<sup>99</sup> Ramseyer and Rosenbluth (1993, p. 156).

<sup>100</sup> Easterbrook (1997, p. 28). Judge Easterbrook used the word “law” in this context to refer to statutes. On the bureaucratic role of the judge, see Bell (1987).

<sup>101</sup> See Asian Development Bank (2004).

what the legislature provides. Moreover, in the contemporary world, the share of GDP accounted for by state-owned enterprises is quite large with as much as 30 to 50 percent of the labor force in Latin America in the state sector,<sup>102</sup> at least prior to privatization efforts in some countries in the 1990s. The huge size of the public sector thus makes the review of the action of the state administration of great importance. If in earlier centuries the threat to the Rule of Law came from a predatory ruler, the contemporary threat is more from a large state administration, seeking to control the economy or at least to protect state-owned industries. The review of the bureaucracy's acts is therefore at least as important as judicial review of the constitutionality of legislation.

A separate court for reviewing administrative acts of government is not unusual. Many civil law countries, such as Germany,<sup>103</sup> have a separate hierarchy of such courts (on top of tribunals within individual administrative agencies). Even the United States has a special court of appeals, the Federal Circuit, which reviews the acts of certain administrative agencies. But in both the United States and Germany, these special courts are clearly within the judiciary with judges of the same kind that one finds in courts dealing with disputes between private parties. This tradition of the regular judiciary reviewing administrative acts contrasts sharply with another tradition of tribunals located outside the judiciary. The leading example of the latter is the French Conseil d'État (Council of State).

The Conseil d'État is not a court as such. In fact, it was established in Napoleonic times to protect the administration from the courts. It is an administrative body that advises other bodies in the French administration and the government itself. But the Conseil has within it a section that is a tribunal deciding cases, called the Section du Contentieux (hereafter the "Tribunal").<sup>104</sup> The Tribunal acts as a "court of last resort in public, administrative law."<sup>105</sup> The members of this Tribunal are chosen from among the members of the Conseil, and in many instances individual members serve simultaneously in the Tribunal and in a purely administrative section of the Conseil, as the following anecdote from a visitor to the secretive Conseil suggests: "Indeed the author did observe

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<sup>102</sup> Wiarda and Kline (2000, p. 67–68).

<sup>103</sup> See discussion the German court system, *supra*.

<sup>104</sup> There is also a structure of French administrative courts that is not part of the Conseil d'État but for which the Tribunal acts as the point of ultimate review. See generally Brown and Bell (1998).

one conseiller come down in the lift from a judicial hearing to attend part of a meeting of an administrative section and then go back in the lift to return to judicial business.”<sup>106</sup>

The result appears to be mutual respect and support not just within the Conseil but also between the members of the state bureaucracy and the members of the Conseil, including the Tribunal:

The members of the Conseil are viewed as being themselves part of the administration, with the corresponding attitudes and mentality. They may have been civil servants, or trained as administrators, for example at one of the famous *grandes écoles* specifically established for education of future leaders of the public administration, such as the *École Nationale d'Administration*. Moreover, the *conseillers d'État* are sometimes made available, on a kind of loan, to one of the ministries, to do temporary jobs requiring experienced trouble-shooters.... There is, therefore, a kind of fellow-feeling between the members of the Conseil d'État and the representatives of the administration; their idiosyncracies are not dissimilar. The government bureaucracy knows that the members of the Conseil d'État have acquired a wisdom in matters of administration which can only be beneficial for the management of the public service. As a result, there is mutual confidence. That circumstance may have facilitated the pragmatic way in which the Conseil d'État has always dealt with the problems caused by the discretionary powers of the administration.<sup>107</sup>

Martin Shapiro characterizes the attitudes and values of members of the Conseil as fundamentally different from that of judges:

Thus the council is not a court staffed by judges but an extremely elite segment of the high civil service designated to supervise the legal behavior of the rest of the civil service.... The Conseil d'État and most of the administrative courts of Europe consists of one set of elite administrators watching the rest of the administration. The principal result will be a tighter, more efficient, more disciplined, and more unified civil service and bureaucratic administration. While the form and often the substance are protection of individual legal rights against the state, the ultimate purpose is the improvement and autonomy of the administrative machinery of the state.<sup>108</sup>

The question for developing countries is not therefore whether the Tribunal

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<sup>105</sup> Lasser (2004, p. 272).

<sup>106</sup> Bell (2001, p. 158).

<sup>107</sup> Koopmans (2003, p. 137).

<sup>108</sup> Shapiro (1981, p. 153–154).

within the Conseil d'État is independent and a bulwark against abuse by the state. The Conseil is now two centuries old and has proved its integrity and value.<sup>109</sup> Indeed, the Conseil has begun to exercise a form of constitutional judicial review to determine whether executive action is consonant with the constitution.<sup>110</sup>

The question is rather, in the spirit of Merryman's question about the "French Deviation," whether a system of separate administrative review that is not anchored in the judiciary will work when it is adopted by a developing country without the experience and traditions of the French Conseil.<sup>111</sup> Alexander Hamilton argued for formal independence, now enshrined in Article III of the U.S. Constitution, as well as independence in fact through guaranteed judicial tenure, because the judiciary is in "continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches."<sup>112</sup> Where administrative courts that are not regarded as part of the judiciary do not have an established "track record" giving them prestige and a sense of independence, it is difficult to conceive of them being able to uphold the Rule of Law in the face of a determined Head of State and a powerful state administration of the kind found in some developing countries.<sup>113</sup>

Even more problematic, however, is the position of developing countries that do not permit independent review, even by administrative courts, of administrative acts because of the enormous growth of the state apparatus in most countries in the last half century, which in turn has greatly expanded the ambit of governmental impact on the private economy. In the case of Thailand, for example, no administrative courts existed until 2001. Until then, "Thai citizens had almost no recourse to challenge actions of public authorities—even if they were patently illegal or corrupt."<sup>114</sup>

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<sup>109</sup> Brown and Bell (1998, p. 62–63).

<sup>110</sup> Cappelletti (1989, p. 154–155).

<sup>111</sup> Merryman (1966).

<sup>112</sup> Federalist Papers No. 78.

<sup>113</sup> The same question was raised by Dicey about France in the nineteenth century, saying that "it is difficult, further, for an Englishman to believe that, at any rate where politics are concerned, the administrative courts can from their very nature give that amount of protection to individual freedom which is secured to every English citizen." See quotation and discussion of the ensuing controversy in Brown and Bell (1998, p. 4–5). But that was then, and now is more than a century later in France.



## Legal Origins and Independence of the Judiciary

The Legal Origin authors' principal investigation of the judiciary as an institution is an article entitled "Judicial Checks and Balances."<sup>115</sup> The article concludes that judicial independence is particularly important in securing "economic freedom."

The title "Judicial Checks and Balances" leads off what purports to be an analysis of the distinction between French-style "separation of powers," which is concerned with preventing the judiciary from interfering with the sovereignty of the legislature, and U.S.-style "checks and balances," which is concerned with allowing each of the three branches—executive, legislative and judicial—to check and balance the other two branches. Against that contextual background they find that common law systems do better than civil law systems in protecting "economic freedom" (though they find no significant difference in protecting "political freedom"). The authors proceed with their conventional analysis based on private law origins, despite the fact that Britain does not allow the judiciary to check and balance the legislature, which, as seen above, is in Britain considered sovereign, just as was traditionally the case in France. The Legal Origin authors do so also despite the fact that many civil law systems, including much of the rest of Europe and many in Latin America, do indeed allow the judiciary to check and balance the legislature through judicial review.

Also awkward for the Legal Origins hypothesis is that the authors find that the difference between common and civil law systems becomes statistically insignificant for some measures of economic freedom when they include "judicial independence" in their regressions.<sup>116</sup> (In their analysis judicial independence is an index combining tenure of judges in regular and in administrative courts and whether judges consider themselves bound by prior decisions.) The authors' explanation for their statistical result and for their conclusion is that judicial independence is the means that explains why common law countries outperform civil law countries.

The Legal Origin authors fail to note that the separation of powers and judicial

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<sup>114</sup> World Bank. Draft Report, World Development Report 2006: Equity and Development. Box 7.4.

<sup>115</sup> La Porta et al. (2004). Note that the authorship in the two articles is slightly different, with Pop-Eleches being a co-author in lieu of Vishny, who participated in the original Law and Finance research. La Porta et al. (1998). For a different but related economic study, see Feld and Voigt (2004).

<sup>116</sup> LaPorta et al (2004, p. 459, 461, Table 7).

independence are public law phenomena, not private law phenomena where legal origin may be a more viable concept. As we have seen, separation of powers and judicial independence are two different concepts, and they are implemented quite differently in various common law countries, especially as between the United States and the United Kingdom. A well-known scholar with a civil law background, after carefully comparing parliamentary government where it makes sense to speak of the parliament as sovereign and an American-style separation of powers where it makes no sense to so speak, perceptively observed:

It is quite possible ... that the classification of legal systems into ‘common law’ and ‘civil law’ families facilitates comparative research in the area of private law.... For the study of public law, however, the idea of legal families does not work.<sup>117</sup>

A further reason for doubting the relevance of the Legal Origins approach to public law is that, certainly in France, public law—at least where the work of administrative departments and agencies is concerned—is almost entirely judge made. A guide to French law written for English language lawyers puts the point directly: “In a loose sense, one might say that French public law looks something like a common-law system in which the basic principles are the work of the courts.”<sup>118</sup>

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<sup>117</sup> Koopmans (2003, p. 40).

<sup>118</sup> Rudden (1991, p. 9). See also Brown and Bell (1998, p. 290, 293–295).

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