JUDICIAL REFORM: CONFLICTING AIMS AND IMPERFECT MODELS

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INTRODUCTION

Efforts to reform judicial systems around the world have continued with unabated vigor for at least four decades. In the United States and in Europe such efforts produced an array of reforms commencing in the 1960s and lasting at least through the 1970s. Beginning with California in 1960, for example, by 1979 every U.S. state but one had created one or more judicial commissions to set standards and deal with complaints of misconduct against individual state judges.[1] Although the United States Congress eschewed the state approach of establishing commissions for such purpose, in 1980, the Judicial Conduct and Disability Act gave the chief judge for each circuit responsibility for disciplinary oversight of all federal judges within the circuit in conjunction with a special committee comprising of the chief judge and an equal number of circuit and district judges.[2]

By the end of the 1980s the attention of the judicial reform movement had shifted to Latin America, and subsequently, after the collapse of the Soviet Union to Eastern Europe, then to Central, South and Southeast Asia, and most recently to the Middle East.[3] Two factors contributed to this change of focus. The first was acute concern over the need to prevent future failures of judicial independence under repressive authoritarian regimes,[4] particularly any repetition of the experiences of Argentina and

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1. Arkansas adopted its Judicial Discipline and Disability Commission by constitutional amendment in 1988. ARK. CONST. amend. 66, *available at* http://www.state.ar.us/jddc/pdf/amendment_66.pdf (last visited Oct. 10, 2005). For detailed information on state oversight commissions, see American Judicature Society, State Judicial Conduct Organizations webpage, *at* http://www.ajs.org/ethics/eth_conduct-orgs.asp (last visited Oct. 15, 2005).

2. 28 U.S.C. § 372(c) (2000). The Judicial Improvements Act of 2002 (28 U.S.C. §§ 351–364) replaced the 1980 Judicial Conduct and Disability Act but did not substantially alter the procedures for judicial oversight under the prior legislation. American Judicature Society, Federal Judicial Conduct webpage, *at* http://www.ajs.org/ethics/eth_fed-jud-conduct.asp (last visited Oct. 14, 2005).

3. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF., Mar./Apr. 1998, at 95.

4. *Id.* at 100–01.

Chile in the late 1970s and early 1980s.[5] A second catalyst was new interest in the effectiveness of judicial systems by political economists, especially those influenced by Douglass North and other "new institutionalist" economists.[6]

The result of this attention shift has been an explosion of development programs for judicial reform.[7] By the turn of the century, the United States Agency for International Development (USAID) alone had spent hundreds of millions of dollars on such efforts.[8] USAID's Office of Democracy and Governance, for example, currently allocates over 1.5 million dollars a year to its Rule of Law Program.[9] The European Union,[10] Canada,[11] the Nordic states,[12] and Japan[13] are especially active in developing and funding significant reform programs, particularly in their respective regions.[14] At the global and regional levels, the World Bank and the Inter-

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5. *See, e.g.*, Alejandro M. Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action Under a State of Siege*, 4 HUM. RTS. L.J. 311, 314–16 (1983); Margaret Popkin, *Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective*, *in* GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 112–216 (Nov. 2001), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf (last visited Oct. 14, 2005).

6. *See, e.g.*, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990); EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS (1997).

7. For a broad but brief overview of judicial reform and other "rule of law" efforts over the past two decades, see Carothers, *supra* note 3, at 95.

8. *Id.* at 103–04.

9. *See* USAID, BUREAU FOR DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE, OFFICE OF DEMOCRACY AND GOVERNANCE DATA SHEET 23, http://www.usaid.gov/policy/budget/cbj2004/cent_prog/dcha.pdf (last visited Oct. 10, 2005).

10. The European Initiative for Democracy and Human Rights, funded by the EU, spends around 100 million a year on efforts to strengthen the rule of law. EUROPEAN COMM'N, A WORLD PLAYER: THE EUROPEAN UNION'S EXTERNAL RELATIONS 9 (2004), *at* http://europa.eu.int/comm/publications/booklets/move/47/en.pdf (last visited Oct. 5, 2005).

11. Canadian development assistance policy also emphasizes rule of law initiatives. CANADIAN INT'L DEV. AGENCY, GOVERNMENT OF CANADA POLICY FOR CIDA ON HUMAN RIGHTS, DEMOCRATIZATION AND GOOD GOVERNANCE 5, http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/HRDG2/$file/HRDG-Policy-nophoto-e.pdf (last visited Feb. 6, 2006).

12. *See, e.g.*, SWEDISH INT'L DEV. COOPERATION AGENCY, DEPARTMENT FOR DEMOCRACY AND SOCIAL DEVELOPMENT, JUSTICE AND PEACE: SIDA'S PROGRAMME FOR PEACE, DEMOCRACY AND HUMAN RIGHTS (1997), http://www.sida.se/shared/jsp/download.jsp?f=Part+1+JusticePeace97.pdf&a=2085 (last visited Jan. 15, 2006).

13. For example, the Japanese Legal Assistance Project of the International Cooperation Department (ICD) of the Research and Training Institute of Japan's Ministry of Justice has provided much effort and resources to aiding development of basic laws in other Asian countries, including helping draft Cambodia's civil code. *See* TAKESHITA MORIO, SIGNIFICANCE OF PROVIDING SUPPORT FOR THE DRAFTING OF THE CODE OF CIVIL PROCEDURE OF THE KINGDOM OF CAMBODIA AND FUNDAMENTAL PRINCIPLES OF THE DRAFT CODE, http://www.moj.go.jp/ENGLISH/RATI/ICD/icd-09.pdf (last visited Oct. 5, 2005).

14. Carothers, *supra* note 3, at 103.

American Development Bank,[15] respectively, play leading roles as institutional sponsors of judicial reform efforts. Other notable well-funded efforts include projects by the Central European and Eurasian Law Initiative (CEELI) of the American Bar Association;[16] the Democracy and Rule of Law Project of the Carnegie Endowment for International Peace;[17] the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE);[18] and the Center for International Legal Cooperation (CILC), a Dutch non-profit organization.[19] The list goes on and on.

Assessment of the results of these myriad judicial reform efforts remains mixed. As illustrated by the views expressed by Judge Peter Messitte and Linn Hammergren in the preceding issue of the *Washington University Global Studies Law Review*,[20] a few observers see meaningful gains while others remain considerably more pessimistic.[21] My purpose in this Article is not to attempt to resolve such contrasting views or even to suggest how best to proceed in assessing judicial reforms overall or in particular regions or countries. Rather, my aim here is more modest. I wish simply to attempt to identify a few underlying problems that appear to inhibit effective reforms from achieving broadly shared goals. In so doing, I suggest a research agenda designed to develop feasible solutions. We need to analyze more thoroughly the institutional contexts and models from which reform efforts tend to draw. Such an exercise would enable us to identify and suggest the particular features of judicial systems that deserve renewed attention as appropriate for emulation. Both my data and my analysis grow out of a continuing study of judicial systems begun

15. *See* Inter-American Development Bank, Sustainable Development Department, Rule of Law, http://www.iadb.org/sds/scs/site_2776_e.htm (last visited Feb. 6, 2006).

16. *See* A.B.A., Center for Eastern European and Eurasion Law Initiative, http://www.abanet.org/ceeli/ (last visited Oct. 5, 2005).

17. *See* Carnegie Endowment for Int'l Peace, Democracy and Rule of Law, Homepage, http://www.carnegieendowment.org/programs/global/index.cfm?fa=proj&id=101 (last visited Oct. 5, 2005).

18. *See* Org. for Security and Cooperation in Eur., Office for Democratic Institutions and Human Rights webpage, http://www.osce.org/odihr/?page=overview (last visited Oct. 5, 2005).

19. *See* Ctr. for Int'l Legal Cooperation, General Information webpage, http://www.cilc.nl/geninfo.html (last visited Oct. 7, 2005).

20. *See, e.g.*, Judge Peter Messitte, *Expanding the Rule of Law: Judicial Reform in Central Europe & Latin America*, 4 WASH. U. GLOBAL STUD. L. REV. 617 (2005); Linn Hammergren, *Expanding the Rule of Law: Judicial Reform in Latin America*, 4 WASH. U. GLOBAL STUD. L. REV. 601 (2005).

21. *See, e.g.*, Hiram E. Chodosh, *Emergence from the Dilemmas of Justice Reform*, 38 TEX. INT'L L.J. 587 (2003); Bryant G. Garth, *Building Strong and Independent Judiciaries through the New Law Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002).

several years ago.[22] At this point, I should hasten to add, my conclusions remain tentative.

I. DATA AND CONTEXT: VITAL INDICATORS FOR JUDICIAL REFORM

Policy aims determine policy choices. Goals differ, however, for promoters of judicial reform. Different agencies have quite different aims. Thomas Carothers, co-director of the Carnegie Endowment for International Peace Democracy and Rule of Law Project, identifies four "clusters" of concern with respect to judicial reform programs in Latin America in particular. They include promotion of viable democratic institutions and processes, economic development, human rights and social justice, and effective international criminal law enforcement, particularly drug trafficking, money-laundering, and related transnational criminal activities.[23] A significant number of reform initiatives are thus part and parcel of progressive political and social concerns to enhance effective human rights protection and generally to promote social justice.[24] Others reflect a market-oriented, economic reform agenda, with emphasis on measures to foster predictable and stable enforcement of contract and property rights.[25] Another set combines elements of both with an emphasis on everyday citizen access to justice through a more efficient and effective judiciary.[26]

Values also matter. Nearly all U.S.–sponsored reform projects are couched rhetorically in terms of the "rule of law" as a means to foster democratic governance by establishing institutional constraints against

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22. The project began with a comparative law seminar on judicial organization and independence at the University of Washington School of Law in the spring of 2000.

23. Thomas Carothers, *Many Agendas of Rule of Law Reform in Latin America*, *in* RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 4, 6–12 (PILAR DOMINGO & RACHEL SIEDER EDS., 2001).

24. *See, e.g.*, Shannan C. Krasnokutski, *Human Rights in Transition: The Success and Failure of Polish and Russian Criminal Justice Reform*, 33 CASE W. RES. J. INT'L L. 13 (2001); César Landa, *The Scales of Justice in Peru: Judicial Reform and Fundamental Rights*, *in* UNIVERSITY OF LONDON INSTITUTE OF LATIN AMERICAN STUDIES, OCCASIONAL PAPERS # 24 (2001), http://www.sas.ac.uk/ilas/Landa.pdf (last visited Oct. 7, 2005); Popkin, *supra* note 5.

25. *See, e.g.*, Hugo Eyzaguirre, INTER AM. DEV. BANK, INSTITUTIONS AND ECONOMIC DEVELOPMENT: JUDICIAL REFORM IN LATIN AMERICA, http://www.iadb.org/sds/doc/sgc-Doc12-E.pdf (last visited Oct. 7, 2005); Gary Goodpaster, *Law Reform in Developing Countries*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 659 (2003); Richard Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715 (2004).

26. *See, e.g.*, MARIA DAKOLIAS, WORLD BANK, THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM (1996), http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1996/06/01/000009265_3961214163938/Rendered/PDF/multi_page.pdf (last visited Oct. 7, 2005).

arbitrary authoritarian executive rule. Yet, as specific reform measures are introduced, fundamental disagreements begin to surface. The differences in means and approach, and the attendant conflicts that emerge, reflect their proponents' perceptions of the threat of authoritarian rule by "right-wing" versus "left-wing" despots. Similarly, while judicial independence is a frequently stated goal, views necessarily differ with respect to the advisability of reforms intended to insulate individual judges from any external control or accountability. As expressed by Linn Hammergren, "an absolutely independent judiciary, which answers only to itself (no accountability) is as much a problem as one that is absolutely dependent."[27] Procedural reforms designed to promote efficiency, fairness, and accuracy also often reflect an ideological divide. Those who seek to prevent use of the criminal process by repressive "rightist" regimes and to ensure greater efficiency of, and more access to the civil process for the politically, economically, and socially disadvantaged will generally favor very different reform measures from those who seek more effective criminal law enforcement for transnational crimes or who emphasize greater protection of contract and property rights, with greater certainty and predictability in litigated outcomes.

Whatever the potential for disagreement over some reform goals and measures, three fundamental aims seem to have garnered broad consensus. Nearly all groups ostensibly support efforts to increase judicial competence, to reduce corruption, and to improve case management and judicial administration.[28] All of these goals relate to public trust in the courts and appear at first glance to be relatively free from the tensions of opposing ideological concerns. Structural reforms to increase judicial competence and to reduce political influence in the selection of judges are thus widely supported. Similarly, nearly all reform agencies at least pay lip service to efforts to reduce corruption and to improve judicial administration, especially caseload management.

Goals and values, however, do not determine the appropriateness of specific reforms. Data and context count as well. Reform programs

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27. LINN HAMMERGREN, FIFTEEN YEARS OF JUDICIAL REFORM IN LATIN AMERICA: WHERE WE ARE AND WHY WE HAVEN'T MADE MORE PROGRESS 19, *available at* http://www.pogar.org/publications/judiciary/linn2/latin.pdf (last visited Oct. 29, 2005) [hereinafter "HAMMERGREN, FIFTEEN YEARS"].

28. *See, e.g.*, Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691. Thome principally focuses on the programs initiated and supported by the World Bank. He notes the gradual re-definition of World Bank aims from a preoccupation with developmental concerns to a "more nuanced" approach linking development and human rights. *Id*. at 698.

inevitably are based on information and understandings about those judicial systems that do work and some underlying rationales for their success, yet determining actual causality is almost impossible. No one can be sure, for example, whether the introduction of some new mechanism for selecting or training judges, or for improved court administration, will have the desired outcome without reliable data on prior experiences with similar mechanisms in similar contexts. Yet, we lack the most relevant data on existing systems and the means for evaluating the likely effects of their emulation. Consequently, one problem with nearly all reform programs is that little effort is made to evaluate the full range of available models with any careful, comparative assessment of their effectiveness in particular institutional and cultural contexts.

Consider, for example, structural reforms to reduce political influence in the judicial appointment process. One much-touted reform in Latin America has been the introduction of special councils to select the nominees for judicial appointment to the executive.[29] The goal has been to make political considerations less significant in the appointment of judges under presidential systems based predominately on a U.S. model where presidents nominate all federal judges subject to confirmation by only the legislative branch. Those who have proposed the introduction of such "judicial councils" apparently paid scant attention to the context in which the model councils were created and have been used elsewhere.[30]

The French were the first to create a judicial council, the *Conseil superior de la magistrature*, for selection of judges and administration of the judiciary in the 1946 Constitution for the Fourth Republic.[31] Italy authorized a *Consiglio Superiuore della Magistratura* (CSM) in its 1948 Constitution,[32] although the Christian Democrats failed to implement these provisions until 1958 when previous election losses finally forced the government to concede pressures for greater political oversight and accountability in the administration of the judiciary.[33] An intended result

29. For a detailed examination and critical evaluation of the use of judicial councils in Latin America, see Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project Rule of Law Series Working Paper No. 28, June 2002), http://www.ceip.org/files/pdf/wp28.pdf (last visited Oct. 9, 2005) [hereinafter "Hammergren, *Judicial Reform*"].

30. *Id.* at 3.

31. *See* Jean Gicquel, *L'evolution du Conseil supérieur de la magistrature*, *in* THIERRY S. RENOUS, ED., LES CONSEILS SUPÉRIEURS DE LA MAGISTRATURE EN EUROPE 202.

32. *See* Carlo Guarnieri & Pedro C. Magahães, *Democratic Consolidation, Judicial Reform, and the Judicialization of Politics in Southern Europe*, (Instituto de Ciêcias Sociais de Universidade de Lisboa, Working Paper, Apr. 2001).

33. FREDERIC SPOTTS & THEODOR WEISER, ITALY: A DIFFICULT DEMOCRACY 151 (1986).

was to lessen the control of senior judges over the selection and promotion of younger judges. Ideological splits within the magistry and additional reforms in the 1960s further reduced the influence of conservative senior judges and reportedly lead to politicization of the judiciary and attendant corruption.[34]

The experience of Spain and Portugal differs as judicial councils were introduced and used effectively to buttress (conservative) judicial autonomy.[35] As Linn Hammergren has observed,[36] the Latin American experience with judicial councils reflects similar concerns but with more mixed results. There, judicial councils were introduced to reduce partisan political considerations in the selection of judges and judicial administration, but thus far do not appear to have been successful.

The quest for appropriate reforms should begin with a better sense of which are most apt to produce the desired effects.[37] For example, how are different ways of selecting and training judges more or less likely to improve competence on the bench? What institutional and cultural factors appear best to explain differences in the degree of judicial integrity—or incidences of corruption—across systems? And which court systems seem to be the best managed and why? In other words, what is needed at the outset of any reform effort is a basic inventory of the principal patterns of judicial organization, as well as a preliminary assessment of what works and why.

II. THE EFFECT OF POLITICAL AND JUDICIAL FACTORS ON JUDICIAL INTEGRITY

The inquiry might best begin with a look at what evidence we have of current systems that seem to be either particularly successful or mired in failure. To bridge the gap between conflicting goals, more attention needs to be paid to the inter-relationships among social trust, wealth distribution, and corruption. Judicial reform is only a small piece of the puzzle. Neither human rights nor developmental goals can be achieved without effectively

34. *Id.* at 158–61; Donatella Della Porta, *A Judges' Revolution? Political Corruption and the Judiciary in Italy*, 39 EUR. J. POL. RES. 4, 4–5 (2001). Della Porta notes that in the 1980s and 1990s the problems of political interference and judicial corruption began to recede as the judiciary became increasingly autonomous as an institution. *Id.*

35. Guarnieri & Magahães, *supra* note 32, at 27–29.

36. Hammergren, *Judicial Reform*, *supra* note 29, at 5, 18.

37. Of the few studies available, few even attempt such comparison. *See, e.g.*, Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences* (July 1999), *available at* http://www-hoover.stanford.edu/publications/epp/95/95b.html (last visited Oct. 7, 2005).

breaking and then reversing a spiral of social distrust, wealth inequality, and corruption.[38]

Transparency International's annual Corruption Perception Index (TI CPI)[39] provides a useful gauge of which counties seem to be the most successful in preventing official corruption. The most recent survey (2004) lists the following countries as the twenty-five least corrupt in order of rank: Finland, New Zealand, Denmark, Iceland, Singapore, Sweden, Switzerland, Norway, Australia, the Netherlands, United Kingdom, Canada, Austria, Luxembourg, Germany, Hong Kong, Belgium, Ireland, United States of America, Chile, Barbados, France, Spain, Japan, and Malta.[40] The index does not measure judicial corruption in particular, but does provide at least a rough estimate of predictable levels of official corruption generally.[41] Noteworthy is the apparent correspondence of high per capita income, literacy, wealth equality, and levels of trust with lack of corruption. To some this may suggest an intractable problem: Unless the social spirals of relative poverty, illiteracy, chronic inequalities in wealth, and, above all, social distrust can somehow be corrected, corruption and other dysfunctions in judicial and other public institutions are likely to persist.

As the recent study by Paul J. Zak and Stephen Knack entitled "Trust and Growth" demonstrates, significantly higher rates of economic growth prevail in environments where social trust is high, and low-trust societies reduce growth.[42] They conclude that very low-trust societies can be caught in a poverty trap.[43] Their findings are further buttressed by more specific

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38. *See, e.g.*, Luz Estrella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345 (2000) (one of the most telling critiques of judicial reform in Latin America by a former Colombian judge, which insists in locating reforms of the judiciary within a broader agenda of political, social, and economic reform).

39. TRANSPARENCY INTERNATIONAL, TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTION INDEX 2004, http://www.transparency.org/cpi/2004/dnld/media_pack_en.pdf (last visited Oct. 10, 2005) [hereinafter "TI CPI"].

40. *Id.*

41. As a measure of judicial corruption the TI CPI has to be used with extreme care. Japan, for example, ranks 24th in the TI CPI but has experienced not even a single incident of judicial corruption in a half century. *See* John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, *in* LAW IN JAPAN: AT THE TURNING POINT (D.F. Foote ed., forthcoming 2007) (manuscript on file with author).

42. Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 (470) ECON. J. 295, 296 (Apr. 2001). For a positive evaluation of the "robustness" of the Zak and Knack paper, see Sjoerd Beugelsdijk, Henri L.F. de Groot, & Anton B.T.M. van Schaik, *Trust and Economic Growth: A Robustness Analysis*, 56 OXFORD ECON. PAPERS 118–34 (2004).

43. Zak & Knack, *supra* note 42, at 296. The poverty trap is that if trust is too low in a society, people will be disinclined to save money, and savings overall will be insufficient to sustain positive economic output growth. *Id.*

data on judicial corruption. In a 1999 report, the Geneva-based Centre for the Independence of Judges and Lawyers identified "pervasive" corruption in thirty of forty-eight countries surveyed, nearly all developing or transitional states.[44]

Still, broad indices of wealth, equality and trust do not fully explain why Chile (TI CPI #20) appears to be so much more successful than Argentina (TI CPI #108) or Ghana (TI CPI #64) in comparison to Cote d'Ivoire (TI CPI #133) or even Barbados (TI CPI #21), Botswana (TI CPI #31), and Bahrain (TI CPI #34) as compared to the Dominican Republic (TI CPI #87), Malawi (TI CPI #90), and Saudi Arabia (TI CPI #71).

However reliable the TI CPI and other measures may or may not be with respect to official corruption in general, they are not necessarily accurate with respect to judicial corruption. Hence, such indices must be used with caution. The causes for judicial corruption appear to vary from state to state.[45] The Japanese experience illustrates differences within countries in the nature and locale of corruption. Corruption has long been endemic within the partisan (or perhaps more aptly, factionalized) political arena.[46] Yet public officials generally have a record of integrity as well as competence. With respect to the courts, no country in the world can fairly boast of a more honest or competent corps of judges, prosecutors, and staff. The only case in the past half century in which a judge was removed for improper conduct involving financial favors was that of a judge who had accepted the invitation to play golf at the expense of a lawyer who, a few weeks later, was appointed trustee in a bankruptcy action.[47] With this caveat, we can nevertheless reasonably assume some correspondence between the levels of perceived official corruption in general and within the judicial system in particular.

Differences in the incidence of corruption also surely depend on an identifiable set of specific factors. Few are likely to take issue with the assumption that corruption will be less prevalent among countries in which: (1) the norms of official and judicial integrity are well established and internalized by those involved; (2) deviations from these norms are

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44. Centre for the Independence of Judges and Lawyers, Ninth Annual Report on Attacks on Justice, *cited in* UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, GLOBAL PROGRAMME AGAINST CORRUPTION, STRENGTHENING JUDICIAL INTEGRITY AGAINST CORRUPTION, CICP-10, Mar. 2001, at 4.

45. UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, GLOBAL PROGRAMME AGAINST CORRUPTION, STRENGTHENING JUDICIAL INTEGRITY AGAINST CORRUPTION, CICP-10, Mar. 2001, at 6.

46. RICHARD H. MITCHELL, POLITICAL BRIBERY IN JAPAN xv–xvi (1996).

47. Haley, *supra* note 41, at text to n.23.

relatively easy to detect; and (3) potential offenders reasonably anticipate the prompt imposition of informal or formal sanctions. Thus to some extent, we may also reasonably assume that related institutional configurations—both judicial and political—play some contributive part.

On these assumptions we should then attempt to discern what, if any, basic differences exist in judicial organization, especially in the selection, training, and monitoring of judges, and how these patterns might arguably affect judicial integrity and competence. We particularly need to identify within different legal systems those features that reinforce the internalization of norms of integrity among judges and that facilitate both detection and prompt punishment of wrongdoing. The inquiry could well begin with a preliminary examination of the shared features of common law and civil law systems.

III. COMMON LAW SYSTEMS AND CIVIL LAW SYSTEMS

A. Common Law Systems

Common law jurisdictions share two basic features. Both of which relate directly to the integrity and competence of the judiciary in general. First, especially at the trial court level, judges are usually selected from a pool of practicing lawyers. Second, they generally serve in the court to which they were first appointed for the duration of their careers, with no expectation of moving to a higher court as a normal career progression.

Most common law jurisdictions follow the English pattern. Judges for courts at all levels generally will have spent a significant number of years in practice almost exclusively as barristers. The particulars of the selection process vary by country, but sitting judges and members of an elite legal bureaucracy usually make the actual (if not the formal) decisions regarding judicial appointments. Past patterns have resulted in judiciaries largely determined by judges who themselves were members of an elite pool of barristers (generally identified as Queen's Counsel) and whose integrity, general legal competence, partisan political neutrality, and individual autonomy as judges appear largely to be taken for granted.

Yet, common experience and the elite nature of the English-styled judiciary in turn strengthen the effectiveness of peer pressures (social disapproval) as a mechanism to control individual judicial behavior. In most common law systems judges enjoy high professional and social prestige. Each judge thus possesses a certain "social capital" that is endangered to some extent by misconduct by any of his/her peers. Consequently, judges can be expected to express strong disapproval, even

extreme censure, of any judge believed guilty of serious moral infraction. The principle of the autonomy of the individual judge, as well as generally accepted notions of judicial independence, allows significant room for maverick behavior. However, the informal constraints of the English system—particularly the potential for peer disapproval—limit deviation from accepted norms of behavior. The system thus presumptively produces fewer maverick judges.

The process for appointment of judges in England and Wales is undergoing a transformation. Recent legislation eliminated the office of the Lord Chancellor, which until now, made appointments with the advice of a Legal and Judicial Services Group.[48] Whether the new legislation will result in a significant shift in who influences the process is not yet clear.

The United States is the common law aberration. Although the United States shares the two fundamental features of all common law systems (the selection of judges by appointment or election) from a pool of experienced lawyers to a single court for the expected duration of a judicial career; and the necessity for significant qualifications. First, as judicial selection in the United States occurs either through the electoral process or by political appointment, political accountability is assured but partisan politics necessarily permeates the selection and above all retention processes. Non-partisan elections, politically-neutral commissions to make initial recommendations (such as the "Missouri Plan"), and other attempts to insulate potential candidates from blatantly-partisan political appointment merely mask political influence. By nearly all accounts they fail significantly to weaken partisan considerations.

Moreover, with the exception of federal judges and judges in Rhode Island, no judge in the United States enjoys lifetime tenure.[49] In two states (Massachusetts and New Hampshire) judges are subject to mandatory retirement at age seventy.[50] Judges in all other states and the District of Columbia have limited tenure and undergo some form of political scrutiny in order to remain in office beyond an initial term of years.[51] Some states provide for longer initial terms of office for appellate judges, especially at the highest level, than for courts of first instance, but, with the three

48. U.K. DEP'T FOR GOVERNMENTAL AFFAIRS, JUDICIAL APPOINTMENTS IN ENGLAND AND WALES: POLICIES AND PROCEDURES, *available at* http://www.dca.gov.uk/judicial/appointments/jappinfr.htm (last visited Oct. 14, 2005).

49. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 12 (Jan. 2004), http://www.ajs.org/js/JudicialSelectionCharts.pdf (last visited Oct. 14, 2005).

50. *Id.* at 10, 11.

51. *Id.*

aforementioned exceptions, no state judge or justice remains in office for more than fifteen years without being subject to either a retention vote (a partisan or nonpartisan election in which they may be opposed by a competing candidate for the office) or reappointment (by governor with confirmation of one or both houses of the legislature or by a judicial commission) or both.[52] The District of Columbia has the longest initial term of office (fifteen years)[53] followed by New York (fourteen years for justices of the highest court and first-instance judges but, oddly, not intermediate appellate judges, whose initial term is only five years).[54] California (Supreme Court justices and Courts of Appeal judges), Delaware, Virginia (Supreme Court justices), and West Virginia (Supreme Court justices) have initial twelve-year terms.[55] In twenty-three states the initial term of office is six years or less.[56] The terms vary from seven to ten years for all judges in seven states.[57]

On a more positive note, the United States also differs from its common law "cousins" in the variety of legal career experience judges bring to the bench at the time of their initial appointment. Over a third of all federal judges appointed between 1977 and 2002 had prior prosecutorial experience.[58] The percentage of those with prior judicial experience is even greater. Nearly half of all U.S. district court judges and two thirds of circuit court judges appointed between 1977 and 2002 had prior judicial experience.[59] Conversely, less than a third of federal judges appointed during the past three decades had no judicial or prosecutorial experience.[60] In effect, as some suggest,[61] at the federal level the United States is increasingly developing a career judiciary of sorts. Nevertheless, the pool of potential state and federal judges remains very large, limited in

52. *See generally id.*

53. *Id.* at 8.

54. *Id.* at 11.

55. *Id.* at 7, 8, 14.

56. *Id.* at 7–14 (Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Texas, Vermont, Washington, Wyoming).

57. *Id.* (Connecticut, Hawaii, Kentucky, Maine, New Jersey, North Carolina, Pennsylvania).

58. *See* Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 283, 304 tbl.2 (2003).

59. *Id.* at 304 tbl.2, 308 tbl.4.

60. *Id.*

61. As demonstrated by annual statistics published by the ABA on legal education and bar admissions, entry into an ABA accredited law school is the principal restriction on the number of lawyers who enter the profession each year. *See* A.B.A., Legal Education and Bar Admission Statistics webpage, http://www.abanet.org/legaled/statistics/le_bastats.html. Graduation from an ABA-accredited law school is today tantamount to admission to practice.

terms of number and competence only by access to legal education in the historically-unique system of post-undergraduate, professional schools.[62]

Thus, in contrast to the English (and other common law jurisdictions), the variations among judges in the United States in terms of integrity, competence, and political partisanship are expectedly much greater. The degree of variation among judges in turn reduces the influence of peer pressures and enables an even greater degree of individual judicial autonomy. In other words, one is apt to find more maverick judges—in terms of integrity, partisan political rulings, and basic incompetence—in the United States than in any other common law jurisdiction.

B. Civil Law Systems

In contrast to common law systems, in most continental European and other civil law systems (excluding Latin America and other hybrid systems) judges are members of an elite corps of civil servants in one or more specialized "judicial service" bureaucracies.[63] They are selected first through a highly selective system of secondary and post secondary education, and then through varied programs to provide advanced practical legal training through apprenticeship and examination programs (as in Belgium)[64] or specialized institutes and training programs specifically designed for judges (as in Spain),[65] judges and prosecutors (as in France)[66] or the legal profession in general (as in postwar Japan[67] and Korea).[68] Examinations for entry into separate training programs as well as the programs themselves help to ensure that the pool of potential judges is

62. Goldman, *supra* note 58, at 305.

63. The judicial corps are organized as separate bureaucracies for administrative courts, other specialized courts, and the regular courts with civil and criminal jurisdiction.

64. European Judicial Training Network, Belgium: The High Council of Justice webpage, http://www.ejtn.net/www/en/html/nodes_main/4_1949_208/5_1585_3.htm (last visited Oct. 15, 2005).

65. European Judicial Training Network, Spain: Escuela Judicial Consejo General del Poder Judicial, Centro de Estudios Jurídicos de la Administración de Justicia (CEJAJ) webpage, http://www.ejta.net/www/en/html/nodes_main/4_1949_208/5_1585_25.htm (last visited Oct. 14, 2005).

66. European Judicial Training Network, France: The French National School for the Judiciary webpage, http://www.ejta.net/www/en/html/nodes_main/4_1949_208/5_1585_9.htm (last visited Oct. 14, 2005); Daniel Ludat, *The French System of Recruitment and Training of magistrat Judicial Officers*, LEGAL CONNEXION, Dec. 15, 1994, http://www.legal-connexion.info/research/ENMIud.htm (last visited Oct. 14, 2005).

67. The Secretariat of the Judicial Reform Council, The Japanese Judicial System 4 (July 1999), *available at* http://www.kantei.go.jp/foreign/judiciary/0620system.html.

68. The Judicial Research Training Institute, Curriculum: Training of Prospective Judges Prosecutors and Lawyers, *available at* http://jrti.scourt.go.kr/english/curriculum_01.asp?flag=1 (last visited Oct. 14, 2005).

relatively small and competent. Unlike their counterparts in continental European legal systems, common law judges move from lower to higher courts in a career progression. Senior members of the specialized judicial corps or a broader cadre of elite legal bureaucrats determine a judge's career advancement. They typically fill staff positions under a judicial council or within a ministry of justice or other agency responsible for judicial administration.

The European patterns function generally to produce a relatively competent and honest judiciary. However, as career government officials, judges are not fully immune from any dysfunctions, and their effects, that may plague other civil bureaucracies. One would expect therefore that countries with significant levels of official corruption in general would also have significant levels of judicial corruption.

In this respect Japan is a variant. As noted, Japan is a low-corruption state, yet it has long suffered disturbingly high levels of political corruption at the national and local levels.[69] Nevertheless, no country in the world can claim a more honest and competent judiciary.[70] Nor does any country have a more selective system for initial appointment based on merit as measured by educational achievement.[71] The judiciary is small—less than 3000 judges in a country of nearly 130 million. Senior judges closely manage it—and the judiciary is closely monitored by both senior and peer judges throughout a judge's career.[72] Because most trials and all appeals involve three-judge panels, judges rarely adjudicate by themselves.[73] They are also transferred around the country on a periodic basis, spiraling through courts at all levels but into increasingly senior positions as their careers progress.[74] Promotion rests on continuous performance evaluations over time by senior judges.[75]

Few judicial systems thus satisfy as fully the various criteria for maintaining low levels of judicial corruption. Among the most advanced industrial states, Japan ranks between Denmark and Sweden in terms of equal distribution of wealth.[76] Within the judiciary the internalization of

69. MITCHELL, *supra* note 46, at xiv–xvii (1996).
70. The Secretariat of the Judicial Reform Council, *supra* note 67, at 1–2.
71. Haley, *supra* note 41, at 5.
72. *Id*. at 3, 6.
73. *Id*. at 3.
74. *Id*. at 6.
75. *Id*. at 5–7.
76. The Gini index is a measure of income inequality that determines the extent to which the distribution of income (or consumption) among individuals or household in a country deviates from a perfectly equal distribution. For Japan, the Gini Index is 24.90 (1993) as compared to Denmark at 24.70 (1997) and Sweden at 25 (1995). *See* United Nations Development Programme, Human

integrity as a overriding value and the means for detection of those who violate the norm are both very strong. Moreover, both formal and informal sanctions are readily available to punish any offender.

If Japan represents the best, the Latin American model represents the worst. The most developed and wealthiest Latin American states share certain basic problems with the least developed and poorest states. No single region on the globe suffers greater disparities of wealth. Ecuador ranks best in terms of the most equitable distribution of wealth with a Gini index of 43.70. All of the seventeen other Latin American republics—excluding Cuba and Belize—are among the forty countries with the greatest disparities of wealth based on the Gini index.[77]

The Argentine judiciary is exemplary as a judiciary in crisis despite over a decade of major reform efforts.[78] Fundamentally similar to other Latin American systems, Argentina combines the worst features of the American system with those of civil law systems. Judges at the national and in most provinces are appointed by the executive with consent of the upper house of the legislature with life tenure during good behavior. Since 1994, judicial appointments to all federal courts except the Supreme Court must be made from a list of three candidates selected by the newly established a Council of the Magistry (*Consejo de la magistrtura*).[79] At least two provinces—Buenos Aires and Cordoba—have also adopted a similar judicial council system. The appointments are not merely to courts at particular levels but to specialized chambers within the court at that level.

Development Indicators 2003 webpage, *available at* http://hdr.undp.org/statistics/data/indicators.cfm?x=5&4=2C$_2$=2 (last visited Oct. 14, 2005).

77. *Id.* Interestingly, the only East Asian state in this list is the Philippines, which shares institutional history with Latin America as first a Spanish colony subject to colonial Spanish American law and colonial rule (under Mexico) with subsequent American institutional and cultural influences as a U.S. colony thereafter.

78. Unless otherwise indicated the data and conclusions related to the Argentine judiciary are based on a series of interviews with lawyers, judges, as well as leading legislators, administrators and legal reform organizations that were conducted in Cordoba and Buenos Aires in August 2004 under the auspices of the Chase Educational Foundation. I am particularly indebted to Susan and Duncan Chase, Gonzalo Pereyra de Olazbal, and judges Jorge Alemany, and Guillermo Antelo. Among those interviewed were: Dr. Luis Enrique Pereira Duarte, President, Selection Commission and Judicial School, National Council of the Magistry (Presidente, Comisión Selección y Escuela Judicial, Consejo de la Magistratura Poder Judicial de la Nacion); Dr. Francisco M.D.J. Majen, Executive Secretary of the National Council of the Magistry (Secretario Letrado, Consejo de la Magistratura Poder Judicial de la Nacion); Mr. Héctor Chayer, General Director and Ms. Mariana Guisarri, Academic Coodinator of FORES (Foro de Estudios sobre la Administración de Justicia); and Alberto Gustavo Iannella (lawyer).

79. *See* CONST. ARG. arts. 99(4), 114 (amend. 1994).

Thus, Argentine judges share with their American counterparts an often partisan—especially Peronist—political past and a relatively extreme form of individual independence. However, like some other civil law systems, such as Italy, Spain, and France, oral trial proceedings are unusual. Judges rarely hear live witnesses or take testimony. Rather, decisions are usually based solely on documentary submissions. Acting alone without a jury, judges decide cases, determining the facts and the applicable legal rules often in chambers or even at home. They do not confer in any collegial fashion about cases, nor is there necessarily an adversarial hearing in the presence of attorneys from both sides. Because judges individually hire their own staff, no central court administration exists to ensure efficient overall management of cases.

Moreover, the pool of attorneys qualified for appointment is huge. The University of Buenos Aires alone has nearly 30,000 law students who satisfy the requirements to become an attorney upon graduation. Although the judicial council has instituted a selection system with an examination as one component, apparently only one province (Cordoba) has followed suit. And, it appears, the level of competence for qualification remains quite low. Apparently, a plurality of judges in Argentina begin their careers as law students in low level clerical positions—often unpaid—in the courts, moving into staff positions when they graduate and then acquiring sufficient knowledge of the system to enable them to do reasonably well on whatever examination or proficiency test required to fill vacancies at the lowest level. Later, as a first instance judge with some experience, these former clerks have an advantage for appointment to chambers of higher level courts. The effect is a career "bureaucratic" judiciary without the safeguards against political involvement and competence, or internal monitoring controls to prevent corruption.

CONCLUSION

Most legal systems around the globe share one of four basic configurations for judicial selection and organization. The most common is the continental European pattern of career judges. Within this group, Japan stands out as being, on the one hand, one of the most politically autonomous judicial bureaucracies, and on the other, one of the most closely self-monitored. The United Kingdom is the model for the second most common configuration, one followed in nearly all commonwealth nations. In the English system, judges are selected from a small pool of elite barristers. Traditionally, judges themselves have a significant voice in the selection process, although formally, judges are politically appointed.

The U.S. variation is the most political of all selection processes. As in other common law systems, however, once appointed, judges in the United States enjoy the broadest scope of individual autonomy. The prevailing pattern in Latin America combines features from both the United States and continental European systems, not necessarily with success. Measured by the available means to ensure both competence and integrity, no configuration surpasses the Japanese system. To the extent that the pool of potential judges is limited by educational requirements and merit-based examinations, arguably other continental European systems, such as Germany's, also fare well.[80] Systems that allow monitoring of the behavior of individual judges also have an advantage in preventing corruption. Most civil law systems, for example, routinely evaluate the conduct of judges for promotion and assignment. The resulting capacity for prompt punishment is again a civil law advantage. Not surprisingly, countries with the lowest levels of corruption tend to be well-established civil law systems. But all things are not equal.

As exemplified by Latin America, the continental European approach does not necessarily ensure competency. Systems that provide broad access to legal education and lack stringent merit-based examination systems have no means to generate competence. Nor, to the extent that individual judges are not monitored, are career judges necessarily less corruptible. As evidenced by England and Wales, a system in which judges enjoy elite status, resulting in "prestige capital," provides informal incentives for the internalization of norms and for peer pressures that may operate effectively in tandem to foster both competence and honesty.

Ultimately, we return to political values and context. Any attempt to reform judicial systems, either to limit access or monitor individual judges (or both), runs counter to deeply held values within common law systems, particularly the United States. American reforms are apt to reject reform proposals that limit political accountability. Such emphases, coupled with concern for a diverse judiciary that reflects the social and political composition of the community as a whole, make countervailing reforms difficult. As Linn Hammergren concludes with respect to legal reform in Latin America, judicial reform is political.[81] The paths ultimately followed will be those determined by political actors and their prevailing values. Which political actors and whose values remains in doubt.

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80. David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat,* 61 S. CAL. L. REV. 1795 (1988).

81. HAMMERGREN, FIFTEEN YEARS, *supra* note 27, at 12.