

An Independent Judicial System

The Court's authority – possessed of neither the purse nor the sword – ultimately rests on substantial public confidence in its moral sanctions.

Felix Frankfurter

An independent, impartial and informed Judiciary holds a central place in the realisation of just, honest, open and accountable government.¹ A Judiciary must be independent of the Executive if it is to perform its constitutional role of reviewing actions taken by the government and public officials to determine whether or not they comply with the standards laid down in the Constitution and with the laws enacted by the Legislature. In emerging democracies they have an additional task of guaranteeing that new laws passed by inexperienced Executive or legislative branches do not violate the constitution or other legal requirements.²

Independence protects the judicial institutions from the Executive and from the Legislature. As such, it lies at the very heart of the separation of powers. Other arms of governance are accountable to the people, but the Judiciary – and the Judiciary alone – is accountable to a higher value and to standards of judicial rectitude.

The concepts of independence and accountability of a Judiciary, within a democracy, actually reinforce each other. Judicial independence relates to the institution – independence is not designed to benefit an individual judge, or even the Judiciary as a body. It is designed to protect the people.

Judicial accountability is not exercised in a vacuum. Judges must operate within rules and in accordance with their oath of office which reigns them back from thinking that they can do anything they like. But, how can individual judges be held accountable without undermining the essential and central concept of judicial independence?

Individual judges are held accountable through the particular manner in which they exercise judicial power and the environment in which they operate.

- Judges sit in courts open to public³;
- They are subject to appeal;
- They are subject to judicial review;
- They are obliged by the law to give reasons for decisions and publish them;
- They are subject to law of bias and perceived bias;

¹ See official communiqué of the Commonwealth Law Ministers Meeting, Mauritius, 1993 (Commonwealth Secretariat, London). This chapter benefits from the writer's attendance at a closed meeting of senior judges from the common law tradition, held in Vienna in April 2000. The judges formed themselves into a judicial integrity "leadership" group and determined to develop coherent national judicial integrity strategies and to share information as these proceeded. The meeting was jointly organised by the United Nations Centre for International Crime Prevention and Transparency International.

² For a discussion of the role of the courts in Brazil, see *Brazil: Judicial Institutions at a Crossroads* by Luiz Guilherme Miglória, *Economic Reform Today*, No.4, 1993.

³ In extraordinary situations it has been found necessary to have a "faceless" judge, guarding the judge's identity to protect him or her from retaliation, e.g. by drug traffickers in Colombia.

⁴ Some of the criticism is ill-informed and often goes unanswered because judges traditionally do not get involved in public controversies: sometimes it is simply because the judges have failed to explain their reasons clearly enough.

- They are subject to questions in the Legislature;
- They are subject to media criticism⁴;
- They are subject to removal by the Legislature (or by a supreme judicial council)⁵; and
- They are accountable to their peers.

Until very recently it was near heresy to raise the question of the accountability of the Judiciary. At best, this was seen as implying that the practice of “judicial elections” was legitimate, whereas most of those in the common law tradition have a repugnance for the notion of judges running for public office and see this as conflicting with their duty to protect the weak and the marginalised. At worst, this was regarded as arguing for the Executive to be given a licence to intrude into the judicial arena in ways that could only be damaging.⁶

Judges accused of corruption

The Albanian Justice Ministry announced that the country's Supreme Justice Council has fired 70 judges for corruption and incompetence in the last three years. The latest dismissals were on 4 March, when three judges were sacked and stripped of their immunity for releasing a rapist without sentencing him...

*Radio Free Europe/Radio Liberty,
8 March 2000*

Now, however, the realisation is growing that accountability (but not accountability through the ballot box), far from eroding independence, actually strengthens it. The fact that individual judges can be held to account increases the integrity of the judicial process and helps to protect the judicial power from those who would encroach on it.

But even if the rules of judicial conduct are articulated and accepted, are they enforced? If not, there may be a perception that there is no risk if a judge deviates from them. But how, then, should they be enforced?

- One would not want to give more power to the Executive – whose decisions the courts review. Nor to the Legislature, as that would be to draw judges into the game of politics. Appointment by the elected representatives of the people can emphasise that senior judges are empowered with a mandate from the people and, in the event of a formal impeachment, are removable by them.
- Likewise there is a need to be cautious about individual judges being accountable to a Chief Justice – a judge in Hong Kong was once removed by a Chief Justice only to have his decision reversed by the Privy Council (Hong Kong's highest court) which pointed out that even a Chief Justice has to comply with the law.
- Peer pressure is important, but independence from colleagues in a collegiate court can also be very important. In an appellate court each judge has to be able to keep his or her mind truly independent of colleagues.
- Fair procedures and due process are needed for judges who are accused of impropriety.
- There is a need for some system for dividing serious misconduct (which may call for removal) from the minor matters (for example, lack of taste, a need for counselling, a lack of understanding and needing a quiet word rather than an open reprimand).

The vulnerabilities of the Judiciary

A primary indicator that corruption is spiralling out of control is a dysfunctional judicial system. Hence, the need for the Rule of Law is absolute. In many countries, surveys suggest that the public regard their judiciaries as hopelessly corrupt. In the Ukraine it is said that fully seventy percent of all court decisions remain unenforced.⁷

5 Removal from office relates to the concept of independence, as it touches on security of tenure.

6 For example, in Georgia (where unqualified judges were a problem), the lower court judges were all subjected to written examinations, and the more incompetent of them (about two thirds) were then removed. (Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, *Governance Matters: From Measurement to Action in Finance and Development*, June 2000, Vol. 37

No. 2.) While each example may have been effective in the short term, the degree of Executive interference was such that it must inevitably cast a long shadow over the emergence of a Judiciary who the public can view as being independent of the Executive, and thus capable of upholding the Rule of Law.

7 *Controlling Corruption: A Parliamentarian's Handbook* prepared by the Parliamentary Centre, Canada in conjunction with the EDI of the World Bank and CIDA, at p. 44.

Contributing to this parlous state of affairs are lawyers – who demand bribes for the judge, but may well keep them for themselves – and court clerks – who lose files and require money to find them or who withhold bail bonds until bribes have been paid. The Judiciary is therefore vulnerable because those around them are failing in their duties.

But there are, of course, ways in which an Executive will try to influence the Judiciary and these are many and varied. Some are subtle, such as awarding honours or ranking judges in the hierarchy at state occasions. Some may be impossible to guard against, while others are simply blatant – such as providing houses, cars, and privileges to the children of judges.

Perhaps the most blatant abuse by the Executive is the practice of appointing as many of its supporters or sympathisers as possible to the court. The appointment process is therefore a critical one, even though some governments have found that their own supporters develop a remarkable independence of mind once appointed to high office.

To combat this independence, the Executive can manipulate the assignment of cases, perhaps through a compliant Chief Justice, to determine which judge hears a case of importance to the government. It is therefore essential that the task of assigning cases be given not to government servants but to the judges themselves, and that the Chief Justice enjoy the full confidence of his or her peers.

When a particular judge falls from Executive favour, a variety of ploys may be used to try to bring the judge to heel. He or she may be posted to unattractive locations in distant parts of the country; benefits, such as cars and household staff, may be withdrawn; court facilities may be run down to demean the standing of the judges in the eyes of the public and to make their already arduous jobs even more difficult; or there may be a public campaign designed to undermine the public standing of the Judiciary. Such a campaign may be aimed at criticising certain judges or claiming that a mistake was made when they were selected for appointment. In such instances, judges are not in a position to fight back without hopelessly compromising themselves and their judicial office. To minimise the scope for this, responsibility for court administration matters, including budget and postings, should be in the hands of the judges themselves and not left to the government or civil servants.

When it comes to public attacks (and they take place in both well-established and newer democracies), judges must not be, nor consider themselves to be, above public criticism. They cannot claim, at one and the same time, to be guarantors of rights to freedom of speech and yet turn on their critics. Nor should they attempt to muzzle public debate about problems within the Judiciary itself, as has been the case in some countries when the issue of corruption in the judicial process has arisen.⁸

Venezuela's path to justice: Hundreds of judges ousted

CARACAS – The Judiciary is so notoriously corrupt in Venezuela that polls show a majority of citizens would prefer to scrap the court system and build a new one from scratch.

President Hugo Chavez, a fiery populist, has chosen a less drastic route – but one that is sending a dramatic message.

In a seven-month campaign to excise the “cancer of corruption” from the Judiciary, the Chavez government has suspended or fired 400 of the nation's 1,394 judges. Scores – and perhaps hundreds – more judges may yet get the axe. The judicial housecleaning has brought a positive response from the public, making it one of the most popular measures taken by Chavez, a former army coup leader who pledges a “peaceful revolution” for his oil-producing nation.

But experts say authorities still have a long way to go. While removing judges in large numbers, the government has not yet shown a willingness to entrust the judicial branch with enough money and autonomy to make it truly independent.

Even the respected veteran law professor helping to lead the purge of judges admits that his efforts may not ultimately pay off. “What we are doing can disappear like grains of sand falling through my hand,” said Rene Molina Galicia, the inspector general of tribunals.

Molina said Venezuela desperately needs to expand its number of courtrooms, offer equal access to justice for the poor, create an effective system of public defenders, double the pay of judges to about \$6,000 a month, and close fly-by-night law schools that have created a glut of lawyers.

A crisis of law and order is becoming ever more apparent. Angry citizens have taken to lynching alleged murderers, rapists and car thieves on nearly a weekly basis somewhere in the country. Police tally an average of 21 murders a day, comparable to casualties in a nation at war. A vehicle is stolen in Venezuela every 10 minutes. ...

The Venezuelan courts deteriorated rapidly with the transition from military dictatorship to democratic rule in the late 1950s....

Tim Johnson, Miami Herald, 1 May 2000

A Blot on Judicial Ethics

If there's one part of the federal government that ought to be insulated from lobbying, the Judiciary is it. Yet a distasteful system has developed in recent decades in which judges, supposedly to further their understanding of particular issues, attend posh, all-expenses-paid “seminars” at resorts that are sponsored by groups with strong—and generally strongly conservative—ideological leanings. The seminars combine a vacation atmosphere with one-sided presentations on environmental and other areas of law. A new report by an environmental group, the Community Rights Counsel, documents the surprising extent of this flourishing effort to wine, dine and indoc-trinate a too-willing Judiciary.

Washington Post, 28 July 2000

⁸ For example, in Bangladesh, after TI-Bangladesh had conducted a public survey in which the lower Judiciary emerged extremely poorly, the Magistrates called on the government to take action against the NGO. However, the country's President, himself a

former Chief Justice, entered the debate, stating that if only a part of the survey results reflected reality, the lower Judiciary had very serious problems to deal with.

In Israel, the Supreme Court President has gone so far as to issue a memorandum to judges stating that they may not individually file complaints against those who criticise them, but that these must go through his office so that he can act as a filter. Defenders of free speech, he said, have a responsibility to be consistent. "If we as a court say that criticism is good for a government, it is also good for us. We must be even more open to criticism than others."⁹

Much criticism can hurt, especially those judges who do their very best in difficult, and at times, hazardous situations. Criticism should be restrained, fair and temperate. In particular, politicians should avoid making statements on cases which are before the courts and should not take advantage of their immunity as legislators to attack individual judges or comment on their handling of individual cases.

"In spite of [an] array of punitive measures, corruption has not ceased to contribute many cases to Argentinean criminality... [but] the Judiciary, whose members are appointed by the Executive with the agreement of the Senate, a body in which the members of the President's party holds the majority, is permanently charged of inertia..."
Bernardo Beiderman, "Corruption: Preventive Action and Criminal Policy" in *Responding to Corruption*, ed. Paolo Bernasconi (International Society of Social Defence, La Città del Sole, Naples, 2000) pp. 248-249.

The government's Chief Law Officer should consider it his or her solemn duty to defend members of the Judiciary against intemperate and destructive criticism by fellow members or by the government. The head of the Judiciary also has an important role to play in speaking on behalf of all of the judges in those rare cases where a collective stand must be taken.¹⁰

At the lower level of the court structure, a variety of corrupt means may be used to pervert the justice system. These include influencing the investigation and the decision to prosecute before the case even reaches the court; inducing court officials to lose files, delaying cases or assigning them to corrupt junior judges; corrupting judges themselves (who are often badly paid or who may be susceptible to promises of likely promotion); and bribing opposing lawyers to act against the interests of their clients. A review of court record handling and the introduction of modern tracking methods can go a long way to eliminating much of the petty corruption which plagues the lower courts in many countries.¹¹

Clearly, these corrupt practices call for action on several fronts. Those responsible for the investigation and prosecution of cases must impose high standards on their subordinates; court officials should be accountable to the judges for their conduct and subject to sanction by the judges where, for example, files are lost; and, the Judiciary itself must insist on high ethical standards within its own ranks, with complaints being carefully dealt with and, where necessary, inspection teams visiting the lower courts to ensure that they are functioning properly.¹²

The law societies and bar associations must also be encouraged to take stern action against members who behave corruptly. The fact that a system may itself be corrupt does not mean that the lawyers themselves have to become part of such a system.

It is commonly considered unfair for lawyers to be disbarred for extensive periods for having, in effect, tried to practise law in a corrupt environment – one in which they were "obliged" to resort to petty corruption themselves to gain the services to which their client had a lawful right but was being illegally obstructed from obtaining. Most commonly this would be for pro-

9 Quoted in the Jerusalem Post, 10 December 1999. Since introducing the requirement, the Judge stated that he had not allowed any to proceed.
10 Statements of explanation by members of the Judiciary can themselves create further difficulties, as in the case in Israel where Justice Arbel was sued personally in a civil suit by a person named in it. Stated in Jerusalem Post, 10 December 1999.
11 Delay is a common indicator of levels of corruption. A popular

joke in Brazil tells of a woman who applied to the court for permission to have an abortion because she had been raped – by the time the application was granted her son was ten years old!
12 In very serious cases, the use of "integrity testing" may be unavoidable, even in the context of members of the Judiciary. It has been used in this way in areas of the United States and in India where there have been persistent and credible allegations of corruption made against individual judges.

cessing services.¹³ This approach needs to be re-examined in view of the damage such tolerance does to the legal system. Although it may, in some situations, be an unavoidable necessity for a client to pay a backhander to the gate-keeper, one questions whether the lawyer need ever professionally be in such a position.

A final point of vulnerability for the judge is after his or her retirement. Judicial pensions tend to be less than generous, and the practice in some countries of “rewarding” selected judges with diplomatic posts on their retiring from office, is clearly one which is open to abuse if not handled in a very transparent fashion.

Appointments to the Judiciary

The duty of a judge is to interpret the law and the fundamental principles and assumptions which underlie it. While a judge must be independent in this sense, he or she is not entitled to act in an arbitrary manner. The right to a fair trial before an impartial court is universally recognised as a fundamental human right.

Individuals selected for judicial office must have integrity, ability, and appropriate training and qualifications in the field of law. The selection process should not discriminate against a person on the grounds of race, ethnic origin, sex, religion, political or other opinion, national or social origin, property, birth or status. It is, however, not considered discriminatory to insist that a candidate for judicial office be a national of the country concerned.

The ways in which judges are appointed and subsequently promoted are crucial to their independence. They must not be seen as political appointees, but solely rather for their competence and political neutrality. The public must be confident that judges are chosen on merit and for their individual integrity and ability, and not for partisanship.

Different countries choose varying ways to appoint, re-appoint, or promote the Judiciary. The process can involve the Legislature, Executive, the Judiciary itself, and, in some countries, representatives of the practising legal profession or civil society. In the United States, some jurisdictions go so far as to elect their judges. Election of judges poses a special risk. While it has the attraction of being democratic, it may favour populism over professionalism. This risk can be reduced if the list of candidates is vetted for professionalism and non-partisanship. Still, the prospect of having judges campaign for re-election is particularly unattractive. An individual in court is entitled to a fair trial, and this is hardly assured if the judge has to court popular opinion through the way in which he or she conducts the hearing in order to win re-election.

There are also potential dangers in appointing the Judiciary exclusively by the Legislature, Executive or Judiciary itself. As a general rule, in countries where either of the first two bodies is the formal appointing mechanism, and there is general satisfaction with the calibre and independence of judges, appointments do, in fact, involve some degree of cooperation and consultation between the Judiciary and the authority actually making the appointment. However, if the public feels that the appointment process is still too “clubby,” or, too tainted by political considerations, then a non-legal establishment may need to be introduced. Although individuals from such an establishment may not have the professional assessment ability, they may be able to prevent the more overt types of abuse.

13 This would be corruption “ according-to-rule,” where a person is demanding a bribe in order to perform a duty which he or she is ordinarily required to do by law, as discussed in Chapter 1. It

is not to suggest that corruption by a lawyer to obtain benefits “against the rule” could ever be justified from a professional standpoint.

The promotion of judges should be based on objective factor – particularly ability, integrity and experience. Promotion should be openly seen as a reward for outstanding professional competence, and never as a kickback for dubious decisions favouring the Executive. The selection of judges for promotion should involve the judges themselves and any say that the Executive might have should be minimal. The prospect of promotion as a reward for “being kind” to the Executive ought never to be a realistic one.

Removal for cause

The removal of a judge is a serious matter. It cannot be permitted to occur simply at the whim of the government of the day, but rather it should be in accordance with clearly defined and appropriate procedures in which the remaining Judiciary plays a part. It is also essential that the courts have appropriate jurisdiction to hear cases involving allegations of official misconduct. If not, removal of a judge can undermine the concept of judicial independence. Yet, judges must always be accountable, otherwise the power vested in them will be liable to corrupt. A careful balance must be struck. Judges should be subject to removal only in exceptional circumstances, with the grounds for removal to be presented before a body of a judicial character. The involvement of the senior Judiciary itself in policing its own members in a public fashion is generally regarded as the best guarantee of independence.

It is axiomatic that a judge must enjoy personal immunity from civil damages claims for improper acts or omissions in the exercise of judicial functions. This is not to say that the aggrieved person should have no remedy; rather, the remedy is against the state, not the judge. Judges should be subject to removal or suspension only for reasons of incapacity, or behaviour which renders them unfit to discharge their duties.

It is customary to make a clear distinction between the arrangements for the lower courts where run-of-the-mill cases are heard, and the superior courts, where the judges are much fewer in number, have been more carefully selected and who discharge the most important of the judicial functions under the constitution. It is incumbent on the senior judges to use their independence to ensure that justice is done at lower levels in the hierarchy. Lower-court judges are customarily appointed in a much less formal fashion and are more easily removed for just cause. However, neither higher nor lower-court judges are “above the law”. There must be sanctions for those who may be tempted to abuse their positions or display gross professional incompetence.

Tenure of office and remuneration

As far as the senior judges are concerned, it is implicit in the concept of judicial independence¹⁴ that provision be made for adequate remuneration, and that a judge’s right to the remuneration not be altered to his or her disadvantage.¹⁵ If judges are not confident that their tenure of office, or their remuneration, is secure, clearly their independence is threatened.

The principle of the “permanency” of the Judiciary, with no removal from office other than for just cause and by due process, and their security of tenure at the age of retirement (as determined by written law), is an important safeguard of the Rule of Law. It is generally desirable that judges must retire when they reach the stipulated retiring age. This reduces the scope for

14 There have been a number of important international pronouncements on the independence of the Judiciary, several of which appear in the Best Practice Section.

15 In some countries faced with dire economic problems, judges

have accepted a reduction in salaries in line with those of all other public servants, but this has usually been done on the basis of the judges “requesting” similar treatment, rather than it being done to them unwillingly.

the Executive to prolong the tenure of hand-picked judges whom they find sympathetic while reducing the temptation, on the part of the judge, to court Executive, or other appointing authority, “approval” for re-appointment as the date of retirement nears.

Judicial administration

There is ample scope in most countries for corruption to flourish within the administration of the courts. Corruption ranges from the manipulation of files by court staff to the mismanagement of the assignment of cases.

As a result, there has been a tendency for countries to empower their Judiciary to manage the courts and an operational budget provided by the state. A political figure is formally responsible for the budget – to the Legislature which approved the funds. This approach was endorsed by the fifty independent countries of the Commonwealth in 1993, whose law ministers noted that to provide judiciaries with their own budgets “both bolstered the independence of the courts and placed the Judiciary in a position to maximise the efficiency with which the courts operate.”¹⁶

Codes of conduct

Given that – at least up to the point where impeachment by the Legislature comes into play – judicial independence is best served by individual accountability being handled by the judges themselves (with at most a minority of involvement of others), how can impartiality and integrity be maintained?

One option is to establish formal machinery. The other is for the senior Judiciary to accept the task for itself. The most potent tool would seem to be an appropriate code of conduct. This should be developed by the judges themselves, and provide both for its enforcement and for advice to be given to individual judges when they are in doubt as to whether a particular provision in the code applies to a particular situation. Codes of conduct have been used to reverse such unacceptable practices as when the sons and daughters of judges appear before their parents as lawyers to argue cases. While in a country where there is considerable trust in the Judiciary, such an appearance might not cause any concern, in a country where there is widespread suspicion that there is corruption in the Judiciary, such a practice takes on an altogether different appearance.

The determined approach in Karnataka

The approach to promoting judicial integrity in the Indian State of Karnataka with a population of 30 million, is two-fold. From the date of a judge’s appointment (on merit) he or she attends training in ethics, management, transparency, and public expectations.

The new judge declares his or her assets and liabilities (including loans) before taking up the appointment and repeats the declarations every year thereafter. Declarations of assets are made

Indonesia acts to clean up its courts

In a move to restore confidence and address allegations of corruption, Indonesia’s Attorney-General announced that his office would appoint non-career judges next week to help clear the backlog of commercial and civil cases now awaiting trial.

Bank restructuring has been hampered by the verdicts of commercial courts – which have either ruled inconsistently or been seen as favouring insolvent companies.

In a controversial case last week, the Jakarta commercial court ruled that the Indonesian Bank Restructuring Agency (Ibra), which seized Bank Bali last July, did not have legal right of control. One anti-corruption campaigner, lawyer Teten Masduki, estimated that only a small number of the 51 Supreme Court judges are clean. Hence the debate over where the commercial and Supreme courts will obtain their new judges.

Under the plan for ad-hoc judges, the government will look to industry experts or academics – untainted by association with the previous government – to serve on the bench. IMF Indonesia representative John Dodsworth has blamed corruption within the legal system for Ibra’s inability to seize assets of insolvent companies.

To overcome the shortage of clean and skilled judges, a presidential adviser suggested that Indonesia import Dutch judges to hear commercial cases.

But Mr Marzuki yesterday said this was legally impossible as under the law, only Indonesian nationals could preside over its courts.

The Strait Times, South East Asia News, 6 April 2000

Friends, relatives of the judges...

“Our society is such that a judge functions in an environment where everyone is known to another, and a criminal suspect soon discovers a cousin, an in-law or the friend of a friend of a forgotten aunt of the judge...”¹⁷

President N. Soglo of Benin, opening address to the Corruption, Democracy and Human Rights in West Africa Seminar, Africa Leadership Forum and Transparency International, Cotonou, Benin, September, 1994.

¹⁶ See Commonwealth Law Ministers Meeting Communiqué, Mauritius, 15-19 November 1993 (available from Commonwealth Secretariat, Marlborough House, London SW1, United Kingdom). Experience in Latin America has been very negative.

¹⁷ The judicial code of conduct in India prohibits judges from presiding over cases in which their relations are appearing as lawyers. The practice had given rise to a series of scandals in the past, particularly in Bombay.

to the High Court Registrar, who maintains computerised files. The disclosures includes family members (wife, son, daughter, and parents if still alive). The Vigilance Commission (the government's anti-corruption commission) inspects the returns and makes discreet inquiries about the declarations. Members of the public have access to the declarations. The whole procedure is governed not by an act of the Legislature but by the High Court Rules, i.e. made by the judges themselves.

The question of improving conditions of service receives constant attention, and there is a "self improvement scheme" whereby judges at regular intervals attend meetings to interact with each other and to prepare research papers on topics of interest.

Formal machinery for the disciplining of judges...

The Commission on Judicial Conduct in the State of New York, USA, comprises 11 members – including four judges, one lawyer who is not a judge, and four lay people from backgrounds other than the judiciary. The Chief Judge appoints three members; the Governor appoints four; and the Legislature the remainder, but with the majority and minority leaders of the Senate and the assembly appointing one member each. Commissioners have staggered terms. Since its creation in 1974, over 110 judges have been removed from office, over 400 publicly disciplined, over 700 have been confidentially cautioned, and 200 judges and justices have resigned before an investigation has been completed.

The establishment of the Commission is provided for in the State's constitution.

A report of the Ad Hoc Committee on Judicial Conduct, Record of the Association of the Bar of the City of New York, Sept/Oct. 1999, Vol.54 No.5 at p. 601.

At the same time there are checks on the system itself. Cases are allocated to judges on a random basis, and as late in the day as is practicable. When complaints are received, these are checked where they relate to continuing patterns of behaviour, and a registrar has even disguised himself in order to go to a public registry to check on how members of the public were being treated by his own staff – and disciplinary action resulted. As a consequence, reforms have been introduced which streamline the availability of information about cases and files, thus bypassing the lawyers and the court officials who previously had been insisting on payment before they would tell a person the stage his or her case had reached or when it was to be heard in court.

The disposal of old cases was continuously monitored to ensure that the numbers were declining, with incentives being provided for the judges who were making significant progress in clearing backlogs.

Some indicators for assessing the Judiciary

- Do judges have the jurisdiction to review the lawfulness of government decisions? If so, are these powers used? Are decisions respected and complied with by the government? Is there a perception that the Executive gets special treatment, be it hostile or preferential?
- Have the judges adequate access to legal developments in comparable legal systems elsewhere?
- Are members of the legal profession making sufficient use of the courts to protect their clients and to promote just and honest government under the law? If not, is access to the courts as simple as it can be? Are the legal requirements unnecessarily complicated?
- Are appointments to the senior Judiciary made independently of the other arms of government? Are they seen as being influenced by political considerations?
- Are judges free to enter judgments against the government without risking retaliation, such as the loss of their posts, the loss of cars and benefits, transfers to obscure and unattractive parts of the country?
- Are cases brought on for trial without unreasonable delay? If not, are these delays increasing or decreasing? Are judgments given reasonably quickly after court hearings? Are there delays in implementing/executing orders of the court, e.g. issue of summons, service, grant of bail, listing for hearing? Are there delays in delivering judgments?
- Are court filing systems reliable?
- Are the public able to complain effectively about judicial misconduct (other than appeal through the formal court system)?

Other actors in the judicial system

The Judiciary does not stand alone in its need for independence – the independence which enables it to guarantee the Rule of Law. This may be sufficient in the field of administrative and civil law, but in the criminal field there are other actors on which the Judiciary must rely. If investigators and prosecutors are not independent, but are under political control, the criminal process will almost certainly be unable to cope with major corruption cases where these affect the interests of the ruling party. Reform of these situations is far from easy.

For example, an effort to overhaul France's ancient judicial system, mired in corruption and influence-peddling, recently ran aground. Accused, guilty and innocent alike, can spend long years in jail awaiting trial, with ruinous effects on their families and their lives. The prosecution of a case can be speeded up, slowed or abandoned on the whim of the Minister of Justice, and headline-seeking investigators like to leak confidential details of their inquiries to a media which feels no restraint in naming those being investigated.

Despite opinion polls that said that the great majority of the electorate supported proposed changes, plans by President Chirac to drag the system into an era of independence miscarried. The political consensus in support of the changes (necessary for them to become law) collapsed after the Opposition claimed that amendments they had demanded were being ignored. Deputies worried that too much power was being placed in the hands of judges without sufficient counter-balancing “controls” (in other words, that they were being rendered independent). They were, in effect, frightened of not being able to themselves control the judges.

What was planned was to end the system of appointing prosecutors by the government, but rather to have them appointed by the Higher Council of the Magistrate – a body which would also be reformed to ensure that a majority of seats were held not by the Judiciary but by outsiders. The Ministry of Justice would be stripped of the right to give “instructions” about individual cases to prosecutors – a tradition that has been at the heart of a string of failures to prosecute politicians caught in sleaze scandals. The presumption of innocence would also be strengthened, including a right of immediate access to a lawyer. Magistrates would be rotated to prevent their accumulating excessive clout and a special commission would be established to investigate complaints.¹⁸

The Chief Law Officer

In the common law system of a number of countries, the Attorney-General is not only a member of the Executive but is also the Chief Law Officer of the state. As the latter, the Attorney-General acts as the “guardian of the public interest”¹⁹ and has extensive powers and discretions with respect to the initiation, prosecution and discontinuance of criminal proceedings. The Attorney-General also has primary responsibility to provide legal advice in matters of public administration and government. The proper performance of these functions is dependent upon impartiality and freedom from party political influences, which can be threatened if the Attorney-General is subject to Cabinet control and the Legislature is effectively dominated by the Executive.

The role of the Attorney-General in upholding the Rule of Law was considered by the fifty

18 “Politics puts paid to law reforms”, NZ Herald, 24 January 2000.
“Chirac faces defeat on justice reform”, Financial Times, 20 January 2000.

19 The authoritative text on the role of the Attorney-General in the fifty Commonwealth countries is Law Officers of the Crown

by John L. Edwards, (Sweet & Maxwell, London, 1964). For a recent review of the position, see the Report on Review of Independence of the Attorney-General by the Electoral and Administrative Review Commission, Queensland (July 1993; Brisbane, Qld., Australia; ISBN 0 7242 5666 0).

independent countries of the Commonwealth when their Law Ministers met in Mauritius in 1993. Their meeting concluded that the function of the Attorney-General is pivotal in terms of providing advice to government as to the laws governing it; ensuring to the full extent of his or her authority that government takes place within a framework of law; ensuring that government and official agencies adhere to international human rights standards; and scrutinising new or proposed legislation. In supporting the role of the Attorney General or Chief Law Officer, the participants also called for the provision of training and other schemes which would ensure that all public officials had a lively awareness of their own responsibilities in ensuring that the rights of citizens were respected. Most importantly, this included members of the police.

Some indicators for assessing the Chief Law Officer

- Is the Attorney-General's role as guardian of the public interest understood by the government, the office-holder and the public?
- Do the Attorney-General's colleagues in government understand the issue of the office's independence and the vital distinction between the public interest as opposed to political party interest?
- Has the Attorney-General the power to override a decision of the Director of Public Prosecutions? If so, is the Attorney-General required to report the circumstances of the case to the Legislature?²⁰
- Is there a legislative statement of the powers, functions and responsibilities of the Attorney-General? If not, is it needed or desirable?²¹
- Where an application by a member of the public to bring court proceedings is of a type which requires the consent of the Attorney-General, is there any formal way in which the Attorney-General must account for refusal to grant consent?²²

Public prosecutors

The Rule of Law requires that prosecutions on behalf of the state be conducted fairly and reasonably. The commencement of – or refusal to commence – prosecution proceedings ought not to be motivated by improper, and particularly political, considerations, but by the public interest and the need for justice. Unquestionably, one of the most difficult areas of the law is the discretion to prosecute. This issue lies at the very foundation of a system of justice. Clearly, considerations such as possible political advantage or disadvantage, or the race, origin or religion of the suspected person are wholly irrelevant. However, other significant areas which may affect the decision-making process can only be resolved through the exercise of independent judgment. To exercise decision-making fairly and transparently, a public prosecutor should not be subject to direction from any political party or interest group. The office of the public prosecutor can be equated with that of high judicial office; as such, accountability can be brought to bear through provisions which require removal for cause.

Clear guidelines, available to both the legal profession and the wider public, should govern what infringements of the law ought to be taken into account in deciding to prosecute and what should be excluded.

20 Such a procedure is provided for in the draft bill which appears in the Best Practice compilation in the Internet version of this Source Book.

21 Ibid.
22 Ibid.

Independent prosecutors

On some occasions, public confidence in the fairness and openness of systems of accountability will depend solely on the trust they have in the individuals charged with investigating particularly controversial issues. Moreover, if these issues actually touch on the inner workings of government, or even on the judicial or investigative process itself, those ordinarily charged with the duty of investigation may find themselves in a situation in which they cannot perform their tasks with the trust and support of the public. Such situations can be dealt with by establishing commissions of inquiry.

However, where criminal conduct is suspected, a commission of inquiry can be hamstrung if it is to perform its function while protecting the basic constitutional right of the suspect to a fair trial. The “special prosecutor” – a public office which has been used in the United States with some success (e.g., in exposing the Watergate scandal) – is a possible alternative to a commission of inquiry.

Some legal systems make provision for an independent prosecutor in addition to, and independent of, the public prosecutor. This approach has been found to have merit where allegations and investigations of corruption are made which touch upon the higher echelons of government. In such circumstances, the public may distrust the ability of the administrative machinery of government to investigate itself.

The existence of legislation empowering the appointments of independent prosecutors can be a useful addition to a country’s armoury of investigative and prosecutorial weapons. As such, a growing number of countries are showing interest in this model.²³ However, it must be noted that it is generally too late to wait for events to arise which might warrant the appointment of such a prosecutor. A hurried appointment may result in less than adequate legislation governing the powers of the independent prosecutor. This, in turn, can increase political suspicion that the office’s constitution may be less than what is really needed for a professional and independent discharge of duties. If such an office is needed, it should be established in an atmosphere which is not charged by scandal. The lessons of the actions (and expense) of the public prosecutors appointed during the Clinton presidency in the USA also need to be taken to heart.

Some indicators for assessing prosecutors

- Is the public at large generally convinced that decisions on whether or not to investigate and to prosecute are taken fairly, reasonably, and without being influenced by political considerations or connections?
- Is the office-holder responsible for these decisions operating under published guidelines. If not, would confidence in the office be increased by these being developed and published?
- If guidelines already exist, are they accessible to the public? If not, what are the reasons for the lack of disclosure?

23 It has been provided for in Nigeria’s new anti-corruption legislation (enacted this year and designed to render the highest elected officials subject to investigation despite their immunity from suit) with the simple requirement that other agencies of government cooperate with the prosecutor. There is no formal

guarantee of the investigator being provided with the budget he or she thinks necessary for the task. The provisions thereby avoid the situation which has arisen in the United States, whilst of course meaning that an investigation can still be hampered by its being under-resourced.

