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THE JUDICIARY AND GOVERNANCE IN 16 DEVELOPING COUNTRIES

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Abstract

Individuals and groups inevitably at times get into conflict and societies require institutions that can resolve disputes. As part of a project to undertake comprehensive governance assessments, we focus here on the nature of the rules (formal and informal) that affect the judicial arena. The legal culture of a society is important for how people perceive not only the judiciary but also the political system at large. The way judicial institutions operate also has an impact on a country's economic and development performance.

This paper presents the findings for the judiciary arena in 16 developing countries. We find that the judicial arena is problematic in virtually all countries included in our survey. Access to justice remains low. Administration of justice is not only slow, but there is often widespread corruption and a lack of accountability. People lack trust in the court system. The problems are particularly pronounced in former communist countries, including China, because of both the pace and extent of economic and political reform. Laws are often outdated and create problems for the transformation of these regimes.

This raises questions about how the international donor community should support the judicial arena. A key finding is that many of these problems are more political than technical in nature. Our survey highlights the extent of political interference, that connections matter and money buys justice. Another key point is that issues of justice have an intrinsic value to people. Thus, it is not enough to look at the legal system merely in instrumental terms, e.g. how it contributes to socio-economic development, but that finding fair ways of administering justice is also an end in itself. A third point is that there is virtue in flexibility and sensitivity to context. Improvement in governance practices is possible not only with the help of a liberal paradigm but also through reforming existing institutions. Informal institutions sometimes are more suitable than formal ones.

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Introduction

Assessing Governance

UN Secretary-General Kofi Annan has stated that ‘good governance is perhaps the single most important factor in eradicating poverty and promoting development.’² If governance matters, so does the need for more reliable and valid data on key governance processes. Many analysts believe, however, that current indicators provide inadequate measures of key governance processes. Based on the perceptions of experts within each country, governance assessments were undertaken in 16 developing and transitional societies, representing 51 per cent of the world’s population. The aim of the World Governance Survey (WGS) was to generate new, systematic data on governance processes.

To facilitate cohesive data collection and analysis, the governance realm was disaggregated into six arenas:

- (i) Civil Society, or the way citizens become aware of and raise political issues;
- (ii) Political Society, or the way societal interests are aggregated in politics;
- (iii) Executive, or the rules for stewardship of the system as a whole;
- (iv) Bureaucracy, or the rules guiding how policies are implemented;
- (v) Economic Society, or how state-market relations are structured; and,
- (vi) Judiciary, or the rules for how disputes are settled.

The project identified 30 indicators based on widely held ‘principles’ of good governance – participation, fairness, decency, accountability, transparency and efficiency – with five indicators in each arena.

In each country, a national coordinator selected a small panel of experts – c35-40 well-informed-persons (WIPs) to complete the assessment. The panel included, amongst others, government officials, parliamentarians, entrepreneurs, researchers, NGO

² Kofi Annan, *Partnerships for Global Community: Annual Report on the Work of the Organisation* (UN, 1998).

representatives, lawyers and civil servants. Respondents were asked to rank each answer on a scale from 1 to 5; the higher the score, the better. In addition, respondents were invited to provide qualitative comments. The total governance scores have a very robust correlation (0.77) with the country scores in Kaufmann et al.'s aggregate governance indicators, indicating the validity of the results.³ Previous discussion papers looked at the issues of *Governance and Development*⁴ and *Assessing Governance: Methodological Challenges*⁵ as well as presenting the findings for each of the other governance arenas. This paper focuses on the judiciary.

The Judicial Arena

The judicial arena is an integral part of a political process approach to governance, but it is also somewhat different from the others we have analyzed and discussed. Its *raison d'être* is derived from the social or political dynamics in the other arenas. As individuals live their lives, they inevitably at times get into conflict with others. Some conflicts may be of a purely private or civil nature, e.g. a dispute over inheritance rights. Others may be public, i.e. stemming from a person's interaction with government agencies. Many of the latter involve not just a single person but also a group or an organization. Each society, therefore, whether developing or developed, requires institutions and structures that can resolve disputes between contending parties. We are interested here in the extent to which the rules constituting the judicial arena are viewed by the WIPs as effective in administering justice.

Administration of justice may take different forms. In a historical perspective, it is clear that resolving conflicts in pre-modern societies typically lay with the sovereign – a king or a chief. In such places, many of the functions that we consider separate today – legislation, implementation, and adjudication – were controlled by this sovereign authority. As societies became more complex and spanned over larger territories, the need for differentiation and decentralization of this authority increased. Thus, while

³ Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, 'Governance Matters II: Updated Indicators for 2000/01', *World Bank Policy Research Working Paper No. 2772*, 2002.

⁴ Goran Hyden and Julius Court, 2002, *Governance and Development, World Governance Survey Discussion Paper 1*, Tokyo: UNU.

⁵ Julius Court, Goran Hyden and Kenneth Mease, 2002, *Assessing Governance: Methodological Challenges, World Governance Survey Discussion Paper 2*, Tokyo: UNU.

each society had an authority dispensing justice in one form or another, the evolution of a legal system with special courts is a product of growing social differentiation and expansion of economic and political scale⁶. Part of the inspiration for this development can be found in the religious sphere, part of it in the changes that took place in the secular realm. Few have paid more attention to this process than Max Weber. He examined it with a view to differentiating between the pre-modern and modern systems of law, the latter being largely a product of the emergence of a capitalist economic system. Weber, however, was also sensitive to the tensions that arose in the Western legal tradition as a result of its dual religious and secular origin. Thus, he argued that law was based on either substantive or formal rationality. The latter signifies the formulation and application of abstract rules by a process of logical generalization and interpretation. Its emphasis is on collecting and rationalizing by logical means all the legally valid rules and forming them into an internally consistent set of legal propositions. As capitalism expanded across wider reaches of the world, this type of reasoning became necessary to sustain that economic system. Substantive rationality, on the other hand, accords prominence not to logical consistency but to ethical considerations, utility, and expediency. It reflects the belief that all human beings act with certain values in mind, whether or not they are utilitarian, and regardless of their origin.⁷

This brief excursion into the history of the Western legal tradition is made with the view to making a few important observations on the issues analyzed in this paper. The first is that the legal tradition of the West is not uniform, but has given rise to a variety of legal systems, one being the difference between civil and common law. The second is that rules for administering justice were originally part of an oral tradition. The extent to which they were formalized and when this happened, vary from one society to another. For example, in the West, the formalization of a legal system and the creation of professional courts began in earnest in the 11th and 12th century⁸. As this transition

⁶ The earliest Anglo-Saxon legal compilation was the Laws of Ethelbert, ruler of Kent, who had married a Christian, and had himself been converted to Christianity by one the Pope's own emissaries, Augustine. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge MA: Harvard University Press 1983, p. 54.

⁷ For more detail, see Max Rheinstein (ed.), *Max Weber on Law in Economy and Society*. Cambridge MA: Harvard University Press 1966.

⁸ Berman, *op.cit.*, p. 54 ff.

continued, old rules were recast in a new combination. Nature became property; economic relations became contract; and, conscience became will and intent. The third point is that as the West extended its influence around the world during the era of imperialism in the 19th and 20th centuries, its agents encountered the persistence of old rules. A major issue, therefore, was what to do with them: eliminating them because they were seen as archaic or barbaric? leaving them alone, but imposing a Western system of laws on top of them? The legacy left behind in most developing countries today is mixed. There are both ‘modern’ and ‘customary’ courts, both formal and informal bodies dealing with the dispensation of justice. The fourth point is that regardless of the differences, the role of law, as Fuller⁹ stresses, is subjecting human conduct to the governance of rules. The emphasis, however, is not only on the rules themselves, but also on the ways in which these rules are applied in society. For this reason, the judicial arena, from a governance perspective, is important not just as adjudicating but also as socializing and enforcing rules. The legal culture that develops in society as a result of how arbitration in a broader sense is carried out is important for how people perceive not only the judiciary but also the political system at large. Moreover, the way judicial institutions operate, may also have an impact on a country’s economic and development performance.

This paper will first examine some of the major issues in the field of law and justice before proceeding to analyze the findings of the WGS. We begin by presenting the aggregate findings and then discuss what is interesting about each individual indicator. The final section deals with the implications for research and practice.

Governance Issues in the Judicial Arena

This section will focus on two sets of issues that have been dominant in the literature that deals with governance of the judicial arena. The first relates to the role that law plays in development. The second concerns whose rules and which ones matter. We shall discuss each in turn.

⁹ Lon. L. Fuller, *The Morality of Law*, 2nd edition. New Haven CT: Yale University Press 1964, p 106.

Law and Development

Although transplantation of law, as suggested above, has been a permanent feature of world history,¹⁰ the idea that rule of law is important for a country's development became a particular concern in the 1960s when development was perceived largely as a matter of imitating the success of Western societies. Driven by the intellectual energy of US-based scholars like James C.N. Paul, Clarence Diaz, and Robert Seidman, reshaping the legal education syllabus and the role of lawyers in society became a priority of this effort. Achieving a transformation of the legal systems in newly independent and other developing countries, however, proved more elusive than its protagonists had expected. Within a matter of ten years this approach had lost its appeal. Two other members of this "Law and Development" group – David Trubek and Marc Galanter – have subsequently admitted that the demise of their effort was very much due to the misguided notion that the American model, which they called liberal legalism, could be exported to and take root in developing countries.¹¹

The notion that rule of law matters disappeared in the next two decades when development was seen much more in political economy terms, first as redistribution of resources to the poor, and later as providing incentives for greater participation in the market. This does not mean that issues of justice disappeared. Police acted brutally and were more often associated with corruption than with protection. Access to justice was difficult; delivery of judicial services weak. Evidence was mounting that lawlessness and weak legal institutions were having a negative impact on economic and social progress.

It was not until the 1990s, however, with the renewed emphasis on democracy and good governance that issues related to the role of law in development were revived. As Thomas Carothers has noted "one cannot get through a foreign policy debate these days without someone proposing the rule of law as the solution to the world's troubles".¹² The two concepts of governance and rule of law are clearly interrelated: without a fair

¹⁰ See: Julio Faundez, (ed.), *Good Government and the Rule of Law*, London: Macmillan Press 1997, p. 1

¹¹ David M. Trubek and Marc Galanter, "Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States", *Wisconsin Law Review* (1974), p1062

¹² Thomas Carothers, "The Rule of Law Revival" in *Foreign Affairs*, Vol. 77, No. 2 (1998), pp 95.

and effective judiciary based on the rule of law one can hardly imagine good governance.

The literature that has developed in recent years as a result of the renewed interest in law and development has given rise to two different approaches. One argues that the judicial arena is an integral part of development; that development is defined by the presence of rule of law. Another argues that the judicial arena contributes to development; it affects economic performance and people's welfare. We differentiate between the two by labeling the first the *constitutive*, and the second the *instrumentalist* approach.

The works of John Rawls and Amartya Sen are particularly relevant for highlighting the constitutive approach. Rawls' discussion of the rule of law forms part of his overall view of "justice as fairness".¹³ Radin, for instance, interprets "Rawls as making the stronger claim that the rule of law is *required* for liberty".¹⁴ In a somewhat similar vein, Sen argues that, "legal reform advances freedom – a crucial and constitutive quality of comprehensive development. Legal reform is thus important on its own."¹⁵

Development depends on people being able to enjoy basic legal rights. A recent study of the poor conducted under the auspices of the World Bank confirms that these people view issues of safety, security, and access to justice as high priority.¹⁶

The instrumentalist approach focuses on the question whether and how legal institutions affect development performance. Economic theory suggests that the judiciary might affect economic outcomes. Long time ago, Adam Smith argued that "a tolerable administration of justice", along with peace and low taxes, was all that was necessary to "carry a state to the highest degree of opulence."¹⁷ Ever since, however, scholars have argued about the ways in which administration of justice may make a difference to

¹³ J. Rawls, *A Theory of Justice*. Cambridge MA.: Harvard University Press, 1972, p. 235

¹⁴ Margaret Janet Radin, "Reconsidering the Rule of Law", in *Boston Law Review*, Vol. 69, No. 4, July 1989, p. 787.

¹⁵ Amartya Sen, "What is the role of legal and judicial reform in the development process?" World Bank Legal Conference, Washington DC, June 5, 2000, p11

¹⁶ D. Narayan, R. Patel, K. Schafft, A. Rademacher, and S. Koch-Schulte. *Voices of the Poor: Can Anyone Hear Us?* Washington D.C.: The World Bank 2000.

¹⁷ Quoted in R. Messick, "Judicial Reform and Economic Development: A Survey of the Issues", *The World Bank Research Observer*, vol. 14, no. 1 (February 1999), pp. 117-36.

development. What is more important: upholding property rights, enforcing contracts between economic actors, checking abuses of government power, or ensuring the rule of law? The 2002 World Development Report (WDR) brings much of the recent evidence together and concludes that income and the rule of law – encompassing the collective importance of property rights, respect for legal institution, and the judiciary – are highly correlated.¹⁸ The same report also shows that the absence of formal contract enforcement mechanisms has limited the growth of firms and the development of financial institutions, citing research, which shows a direct relation between independent courts and the expansion of trade.¹⁹ Another study finds a strong correlation between the legal protections to creditors and investment.²⁰ These studies notwithstanding, the direction of causality remains uncertain. Furthermore, other studies indicate that widespread legal reform is not necessary to attract foreign investment and that legal reforms are inherently slow.²¹ Thus, while the evidence points to the positive impact of solid legal frameworks on economic performance, the evidence is not yet sufficient to draw definite conclusions.

Even if legal reform may not influence foreign investment, it may make a difference to the welfare of ordinary citizens. For instance, work in Asia indicates that legal empowerment can improve the circumstances of the poor – and that a vibrant civil society, and laws that protect it, are important for legal empowerment strategies.²² Anderson suggests that the ways that the poor may be adversely affected by the performance of the justice system, include:

- The failure of the justice system to protect people from “theft, violence and official abuse”;

¹⁸ World Bank, *World Development Report 2002: Building Institutions for Markets*, Washington DC; The World Bank.

¹⁹ Arne Bigsten et al., “Contract facilities and dispute resolution”, *The Journal of Development Studies*, vol 36, no 4 (2000), pp. 1-37.

²⁰ Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny "Legal Determinants of External Finance" *Journal of Finance*, vol 52, no 3 (1997), pp. 1131-1150.

²¹ Hewko, J., 2002, Foreign Direct Investment: Does the Rule of Law Matter, Rule of Law Series Working Paper, Carnegie Endowment for International Peace.

²² Stephen Golub and Kim McQuay, “Legal Empowerment: Advancing Good Governance and Poverty Reduction”, in *Law and Policy Reform at the Asian Development Bank*. Manila: Asian Development Bank 2001.

- The failure of the justice system to “enforce legitimate entitlements and legal rights (e.g. to wages or inheritance)”;
- “The prevalence of police extortion, unjust imprisonment and courtroom bribery”;
- Lawlessness forcing poor households to use “scarce disposable income for self-protection (e.g. bribes and weapons)” in order to protect themselves.²³

These overviews of recent research are helpful, but they leave us with the conclusion that empirical research on the impact of the judiciary on human development remains thin and more work is required.

Whose Rules and Which Matter?

Legal systems are embedded in culture and customs. Finding the common denominators of a universal legal regime is very difficult, although ever since the adoption of the Universal Declaration of Human Rights in 1948 this has been the ambition of the international community. To start with, they have had to cope with the differences inherent in the four predominant contemporary legal systems of the world: (1) common law, (2) civil law, (3) socialist law, and (4) religious law. The former is found in Anglo-Saxon countries, and those that were colonized by Britain. It emphasizes the rights of the individual vis-à-vis the state, checks and balances between various branches of government, and the courts’ use of precedents and individual cases in their adjudication. Its strength lies in flexibility to adjust to changing social, economic, and political circumstances. Civil law is most closely associated with France and francophone countries, although it is present also elsewhere on the European continent. It was introduced as *Code Napoleon*. While it does pay attention to how individual rights can be protected from state interference, its basic premise is that the government executive and the legislature exist in order to regulate individual behavior. In this system, the individual is not autonomous but seen as wedded to the state through a series of obligations. Adjudication in courts is based on a rational interpretation of the law. Legislation is more important than precedent in settling disputes. Socialist law is a category in decline since the demise of the Soviet Union. To the extent that it still exists

²³ Michael Anderson, “Getting Rights Right”, id21 Insights #43. Falmer, Sussex: Institute of Development Studies, September 2002.

in countries like China, Cuba, North Korea, and Vietnam, it is characterized by its ideological foundation and the absence of concrete power-sharing mechanisms. Even more than in the civil law countries, rights of the state take precedence over those of the individual. In fact, individual rights are subordinated to the ideological goal of the state. Religious law, finally, resembles socialist law in that both are based on ideological beliefs. The development of law is not a prerogative of elected legislators but constrained by texts of a religious nature.

Most legal systems in practice, especially in developing countries, however, are mixed. For instance, in many African countries, the legal system is a mixture of common or civil law traditions together with a varying range of customary law. In countries with Islamic law, there is often an influence also from other sources, be they Western or customary. In former Communist countries, elements of socialist law may contend with new influences from civil or common law traditions, as the case is in Central and Eastern Europe.

So does it make any difference to development what kind of legal system a society has? Norgaard and Hilmer Pedersen have examined this question. Their conclusions are first that countries with common or civil law are more democratic than others, and second, that pure legal systems – common, civil, or religious – perform best in terms of economic development. Countries with “mixed” legal systems perform as much as twice as poorly in terms of GDP per capita than those with “pure” systems.²⁴

So, are there common denominators for judging what constitutes universally applicable principles and rules for the judicial arena? We believe that there is a growing consensus around at least a reasonable set. For instance, drawing together findings of studies devoted to the rule of law, Lawrence Solum²⁵ has identified seven requirements that need to be present before one can talk of ‘good’ governance:

²⁴ Ole Norgaard and Karin Hilmer Pedersen, “Development, law, and democracy: Exploring a new relationship”, in G. Hyden and O. Elgstrom (eds.), *Development and Democracy: What Have We Learnt and How?* London: Routledge 2002, pp 87-105.

²⁵ Lawrence Solum, “Equity and the Rule of Law”, in Ian Shapiro (ed.) *The Rule of Law*, New York University Press, 1994, pp 120-48.

- Arbitrary decisions by government officials must not serve as the basis for legal verdicts;
- Government officials must not perceive themselves as being above the law;
- The law must be known to the public through clear methods of promulgation;
- Legal rules must be stated in general terms and not aimed at particular individuals or groups;
- Similar cases must be treated in an equivalent manner;
- Procedures for determining must be fair and orderly; and
- Actions required and forbidden by the Rule of Law must be easy for citizens to identify.

Other scholars like Moore²⁶ and Carothers²⁷ come to similar conclusions in trying to identify what constitutes key values associated with the rule of law. Based on their argumentation, we feel confident, therefore, that our choice of the five indicators for this arena reflects some form of consensus. The ones we have included here are:

1. Access to justice. Equal protection under the law is a human right that is universally acknowledged, as Article 7 of the Universal Declaration of Human Rights (UDHR) shows. In practice, however, access to justice varies. The extent to which rules of the judicial arena address this issue is an important governance concern.
2. Due Process. Procedural fairness is another principle that is acknowledged in the UDHR, more specifically in Articles 9 and 11. This principle applies not only to what happens in the courtroom but also all other aspects associated with a legal case, including, for example, the way evidence is collected. The more transparent the rules are and the more systematically they are adhered to, the greater the likelihood that the legal system is being viewed as authoritative and respected.
3. Autonomy. Judges need a definite measure of autonomy in order to be able to carry out their job. The discretion that follows with this autonomy, however,

²⁶ Michael S. Moore, "A natural law theory of interpretation" *Southern California Law Review* 58 (1985): 277-398 at 313-18

²⁷Carothers, *ibid*, p164

could willfully or not be misused. For this reason, there must be mechanisms in place for holding also judicial officials accountable. Appeal, judicial review, and special inquiries are examples of how legal service accountability can be exercised. The importance of these mechanisms has been acknowledged in a recent World Bank report, which argued that greater accountability of judges to the users of the judicial system has been more important in increasing its efficiency than the simple increase in financial and human resources.²⁸ Finally, media, NGOs and parliamentary committees are examples of mechanisms that fall outside the judiciary, but which can have an impact on the actions of judicial officers.

4. Incorporation of international human rights norms. An interesting development in the past few decades has been the emergence of an international jurisprudence, which draws its inspiration from the human rights conventions that have been signed, and often ratified, by national governments. Because the principles articulated in this international jurisprudence tend to be more daring than those included in national legal systems, they pose a challenge for the development of universal norms. Although every country in the world has ratified at least one of six principal human rights treaties, and over half the countries of the world have ratified all six treaties – up from just 10 per cent just a decade ago – there is a significant lag when it comes to translating these principles into practice at national level.
5. Non-judicial mechanisms for settling disputes. Because so many legal systems are mixed, it is no surprise that many mechanisms for settling disputes are informal. In many rural areas of the world, community representatives may administer justice. For instance, one study notes that between eighty and ninety percent of all local disputes in southwestern Nigeria are taken to traditional rulers.²⁹ These informal instances are often preferred because access is easier and costs lower. They do also have their downsides, e.g. a tendency to discriminate against women and the absence of mechanisms for appeal. Nonetheless, because of their prevalence in developing countries, in particular, they do form an integral part of governing the judicial arena.

²⁸ World Bank, “WDR 2002”, *op.cit.*, pp 118-19.

²⁹ Michael Anderson, 2002, *op cit.*

The Judicial Arena: The Aggregate WGS Picture

These five indicators capture dimensions of dispute resolution that are vital in any society. They specifically relate to some of the key principles of governance that we identified above. Access to justice refers to fairness; due process to transparency; judicial autonomy to accountability; international human rights to decency, and, non-formal mechanisms to the efficiency of the system. By disaggregating the judicial arena in this way, we hope to identify what are some of the most important and contested issues in each of the countries in our survey. First, however, we discuss the aggregate scores for each country for the judicial dimension and the changes over time.

Differences among Countries

Our findings confirm that the judicial arena is problematic in most countries. The average score for this arena is generally quite low and there are only a few countries that score anywhere near their average scores for other arenas. By looking at the individual country scores for 2000 in Table 1, we intend to provide a better sense of what is at stake in this arena across countries. We begin with a few comments about those that scored highest.

Table 1. Aggregate judiciary scores by country, 2000.

Country	Access to justice	Due process	Judicial autonomy	International legal norms	Non-judicial processes	Average
High scoring countries						
Chile	2.67	3.00	3.03	3.70	2.67	3.01
India	2.86	3.31	2.92	3.47	3.00	3.11
Jordan	3.78	3.53	3.15	3.48	3.33	3.45
Mongolia	2.28	2.54	2.49	3.46	2.49	2.65
Tanzania	2.73	3.12	2.88	3.09	2.85	2.93
Thailand	3.37	3.46	3.51	3.52	3.01	3.38
Medium scoring countries						
Argentina	2.43	2.16	2.21	3.80	2.91	2.70
Bulgaria	2.44	2.34	2.27	3.54	2.15	2.55
China	2.58	2.30	2.48	2.67	2.94	2.59
Indonesia	2.43	2.11	2.00	3.26	2.97	2.55
Peru	1.92	1.78	2.05	3.68	2.68	2.42
Low scoring countries						
Kyrgyzstan	2.21	2.08	2.09	2.71	2.72	2.36
Pakistan	1.82	2.15	2.03	2.36	2.42	2.16
Philippines	1.97	2.63	2.46	2.94	2.97	2.59
Russia	1.79	2.13	2.03	2.89	2.71	2.31
Togo	2.19	2.17	2.12	3.04	2.75	2.45
Average	2.47	2.55	2.48	3.23	2.79	2.70

Somewhat surprising, Jordan and Thailand emerge as the top scorers in this arena. Respondents in these two countries give a higher rating than, for instance, their Indian counterparts or those in Latin American countries which all have been exposed to the Western tradition of rule of law for a longer period of time. Jordan and Thailand are both reform-minded monarchies. They are not known for their separation of power, but they have long-standing institutions that have stood the test of political turmoil stemming from domestic or international challenges. The judiciary is no exception. For

instance, in Jordan respondents were of the view that the judiciary is relatively independent and does protect human rights. Furthermore at the time of our survey, a Royal Commission was looking into how the judicial system may be reformed and improved. Respondents mentioned the need to upgrade judges and improve their conditions as a special challenge that the Commission has been ready to address. The two cases discussed here raise an interesting governance issue which is whether countries should keep reforming existing institutions on the assumption that they can enhance regime legitimacy or they need to introduce new institutions, which is often the call by the international community when it comes to conceiving of what a transition to democracy entails.

Chile's relatively low score may at a first glance look like a surprise too. The score is attributed to the many inefficiencies of a judicial system. Their main complaint about the present system was that the administration of justice tends to be slow and expensive – and influenced by the government in office. In this regard, our findings reflect those of other surveys, which suggest that while other institutions have contributed to democratization in the country, the judiciary is still lagging behind. The ratings and comments we received indicate that the legacy from the Pinochet period was still present in the judicial arena. It has taken time for citizens to respect the judiciary after the dictatorship. In recent times, however, there have been significant improvements, with the re-opening of cases and changes in the judicial doctrine to deal with human rights violation. A good number of the WIPs, therefore, expressed their belief that recently launched reforms will have a positive impact on the judiciary in Chile.

Tanzania is relatively typical of what is happening in many countries since they embarked upon political reform. The commitment to reform in government circles is often wavering and lack of financial resources often places a real limit on what government can accomplish. Thus, while the government has signed most human rights related conventions and human rights have been included in the constitution, the implementation has been slow. Respondents indicate that financial constraints are one of the main issues hampering equality. Similarly, corruption in the judiciary is seen to inhibit implementation of justice, although the recent arrest of some magistrates on charges of corruption indicates that there is some progress in dealing with that problem.

Respondents also point out that the low capacity of courts to clear cases – there are too many ‘undecided cases’ – is another real problem. Tanzanians often face the situation that justice delayed is justice denied. This is the case especially if you are unable to bribe the court officials to take up your case quickly. While generally critical in their comments on our questions, Tanzanian WIPs also had a few positive things to say about the changes going on in this arena. They highlighted the importance of traditional and community institutions. They are seen as capable of offering a fair resolution to conflicts, especially in the rural areas. They also mentioned the ongoing judicial reform program as well as the existence of a number of non-judicial institutions, such as the Media Council of Tanzania, the Tanzania Business Council and several other tribunals, playing an important role in mediating between key actors in society.

Chinese respondents were quite open in their comments on the judicial arena in their country. Although China’s score is only a little worse than the average for this arena, respondents highlight a range of challenges facing the judicial system in China. The first concerns the lack of independence of judicial institutions and the importance of the Party in guiding judicial procedures. As one respondent put it: ‘The ruling Party and its organizations enjoy the biggest power in Chinese political life.’ Respondents noted that the ability of the judicial system to resolve conflicts remain limited as long as there is no significant change in the political system. A second but related problem is that the Party organization at all different levels is often above the law. The judiciary in China will never be fair as long as these officials are allowed to ignore the law of the land. A third issue relates to serious judicial corruption in China, with WIPs highlighting the need for greater supervision. Again, it was noted that this was particularly prevalent at the local level. The fourth issue that our Chinese respondents commented upon concerns the importance of having the right connections. People can get away with crimes because they know some one in a powerful position. There is no such thing, comments suggested, as people being equal before the law.

Scores for the judicial arena in Argentina were relatively high in comparison to other arenas as well as in an international comparison. The overall picture, however, is rather mixed. There are some positive things going on, but there are also some serious shortcomings. On the positive side, respondents made it clear that the rules affecting the

business sector were both clearer and more efficient than those shaping the government sector. In other words, the judicial arena dealt with complaints by the private sector more effectively than they did with complaints involving government institutions. Because of the frustrations many people have encountered in dealing with the courts, respondents suggested that non-judicial mechanisms for resolving conflicts have gained in popularity because they are cheaper and easier to access. Two more specific criticisms were reiterated by more than one of our respondents. The first is that access to justice depends on finance – ‘access is inversely proportional to the amount of money citizens have.’ The second criticism was the lack of internal accountability in the judicial system. Courts enjoy a definite measure of autonomy, but there are no institutional mechanisms in the system for holding the judges accountable. External monitoring by the media through investigative journalism has emerged as the most effective check on what is going on in the judicial arena.

Although the Philippines is in the low-scoring group overall, the judicial arena was rated surprisingly well by respondents. They noted that judicial reform programs were in place and that these efforts were progressing despite the adverse wider governance context of the Estrada administration at the time. Because of the credibility of the Chief Justice, the Supreme Court enjoyed an especially high level of legitimacy. This appreciation was tempered by the perception that at lower levels in the judicial system, things were not so good. Ordinary citizens had little trust in the first-level courts. Like in so many of the other survey countries, the issue of unequal access was raised, as was the absence of accountability. Because of these problems, alternative dispute resolution (ADR) mechanisms were seen as useful. For example, respondents pointed to tribal mediation processes and *barangay* (village) mediation systems as working because of the ineffectiveness of mainstream judicial procedures and highlighted the increasing role of NGOs in conflict resolution in recent years.

Pakistanis rated their judicial arena quite low. In fact, Pakistan was the lowest scoring country in this arena. The judicial system has serious structural problems. Respondents insisted that the judiciary is ‘corrupt to the core’ and, therefore, ‘there is no such things as justice’ in Pakistan. In addition to corruption, respondents identified the cost of going to court and the time involved as key issues reducing access to justice. Particularly

women suffered due to their social and financial situation. Although accountability mechanisms exist on paper (such as appeal, judicial review, etc.) they are ineffective. The only ‘silver lining’ in the judicial arena in Pakistan, respondents suggested, was that much conflict resolution takes place through informal systems (village elders or *jirga* processes through feudal lords). These informal processes have grown in importance because of the failure of the formal mechanisms. One WIP estimated that 50% of conflict resolution in villages is done by local elders. While ADR mechanisms are seen by some as fairer than formal systems, it varies considerably. Others point out that they totally exclude women and marginalized groups and serve in some cases to perpetuate human right abuses like honor killings.

Table 2. Mean scores on judiciary indicators by groups of countries.

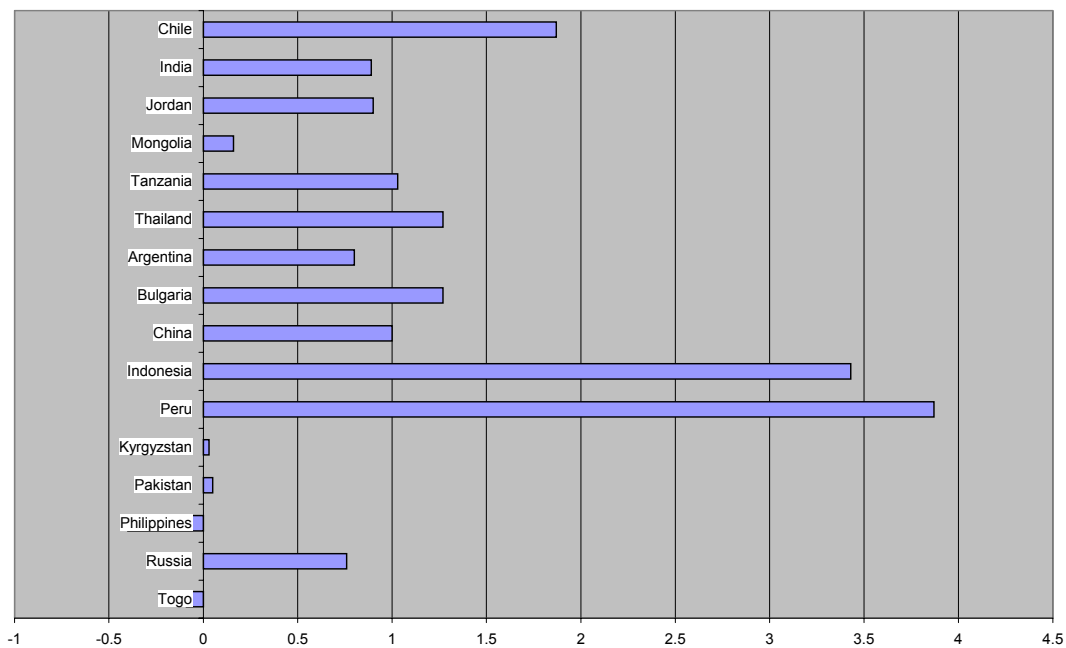
Category of countries	Mean score 2000
High-scoring	3.09
Medium-scoring	2.56
Low-scoring	2.37

Before we conclude this discussion, we like to highlight the differences in average score by category of countries. The high-scoring group does considerably better although its average compared to that of other arenas is on the low side. The difference between the other two categories is less marked, indicating that the medium group is scoring considerably lower in this arena than in the others.

Changes over Time

The changes over time for each country in the judicial arena are summarized in Figure 2. The most striking thing is that virtually all countries in our survey improved their ratings. Those that did not – the Philippines and Togo – only worsened marginally. The improvement was particularly noticeable in Indonesia and Peru, but considerable also in Bulgaria, Chile and Thailand.

Figure 2. Changes in Aggregate Judiciary Scores from 1996 to 2000



The massive improvements in Peru and Indonesia are largely a reflection of the euphoria that people felt when the corrupt regimes of presidents Fujimori and Estrada were coming to an end. In Peru, the coordinator noted that a particularly important factor influencing public opinion was the release of videos made by Vladimiro Montesinos, the presidential intelligence adviser, which exposed the corrupt nature of the judicial system during Fujimori's time. Although the situation has improved in Peru in every one of the governance arenas, our respondents indicated that dealing with the weaknesses of the judicial arena was the highest priority. The WIPs in Indonesia were of the opinion that things had definitely changed to the better after the fall of Suharto, but there was still a lingering suspicion that reform was going to prove difficult, especially with regard to such basic principles as access to justice, transparency and accountability.

While the improvements in most other countries are less marked and almost expected, as in the cases of Argentina and Chile, the changes in Thailand are especially interesting. They have taken place since the country went through a constitutional reform that included not only a more distinct separation of power between the various

branches of government, but also a greater emphasis on human rights. Thus, for instance, the powers of the monarch to resolve disputes were reduced while at the same time a variety of human rights were enacted. Although the implementation of these 1997 constitutional and legal reforms was still at an incipient point when we conducted our survey, the majority of our respondents indicated the situation was improving. Special mention was made of the appointment of outside persons to review the judiciary and the ensuing improvements they noted in accountability and transparency.

Analysis of Individual Indicators

As we have indicated above, the five indicators for this arena refer to a range of issues that are important in developing countries, as they deal with their state of governance. By looking more specifically at each one of them, we gain an even better understanding of what is at stake in this arena. In addition to commenting to the particular ratings, we will also include qualitative comments provided by our WIPs.

Access to justice

This indicator has one of the lowest overall ratings in the whole survey, not just the judicial arena. Four countries – Peru, Pakistan, Philippines and Russia – are given ratings below the two-point level. Only Thailand and Jordan scored above the three-point level. There are several reasons for the low scoring on access to justice across the sample. Judging from the comments we received, some are purely geographical, others administrative. For instance, the capacity to administer justice efficiently is not there in every country, as suggested by respondents in Argentina, Chile, the Philippines and Tanzania. Delay, therefore, is quite common and, as suggested above, tantamount to denial of justice. The most common reasons, however, go beyond geography and lack of capacity. Four such reasons are worth highlighting here.

The most common is that “money buys justice”. In one country after another, respondents noted that the rich have easier access to legal recourse and can affect the outcome of trials. In practice, many citizens are denied their rights because they do not

have enough money. One Indian respondent summed it up: ‘People can hardly afford the legal expenses, delays make justice almost unavailable and legal aid to poor is a farce in reality.’ A second reason is political connections and patronage. This issue was highlighted, for example, in Bulgaria and China, but it was articulated also in Mongolia, where patronage is seen to reduce an honest and fair resolution of disputes. In Kyrgyzstan one expert went as far as saying that connections determine everything! A third reason in some countries is direct political interference. Political leaders want to avoid embarrassment and thus attempt to affect the outcome by threat or intimidation of judges. This seems to be particularly common in countries with an autocratic legacy. In our sample, this was mentioned in China, but also was highlighted in Bulgaria, Russia and Togo. A fourth reason is the relative ignorance among the public of both the law and opportunities that exist for redressing injustices. This is not surprising in many countries where poverty is widespread and illiteracy extensive, yet it is clear from our survey that it is quite common everywhere.

The case of India provides a fascinating example of both the opportunities and constraints that exist in popular access to justice. While the higher courts are often progressive in their judgments and the highest court in the land has initiated the use of public interest litigation, i.e. the court itself taking the initiative to redress an injustice, the lower echelons of the system are far less progressive, often inefficient and also corrupt. The addition of *Lok Adalats* (People’s Courts) and various informal conflict resolution mechanisms has provided outlets for some people, but even so, the situation in India is far from satisfactory from the point of view of popular access to justice.

Due process

The most important thing to say about this indicator is that transparency and predictability of the legal system in most countries are quite low. Laws on paper are different from law as practiced. Neither laws nor legal procedures are adequately understood. This issue seems especially pronounced in countries where the transformation of the legal system has been both rapid and far-reaching. We can provide some helpful illustration from different countries.

It is no coincidence that Mongolia, one of the top scorers in our sample, comes out quite low on this indicator. Mongolia, which scores badly, despite being in top group is certainly a case of incomplete legal transition. The procedural rules are outdated and even though they were being revised at the time of our survey, judges are left with wide discretionary influence on both how justice is administered and the outcome of specific cases. It is little wonder that due process is widely seen as the weakest element of the governance realm in that country.

In Russia, the laws that are necessary for the market economy to function, are just taking shape. Our respondents make the point that judges often relapse to the laws of the old bureaucratic system. The response in Bulgaria is quite similar with frequent references to the relative ‘clumsiness’ of the new legal system. Too many changes in the laws and procedures too often is also quoted as a problem in Indonesia, although the legal reforms there have not been as extensive as in the former communist countries. Much of the dissatisfaction there is also related to the ease with which judges can be corrupted and totally ignore due process. This is referred to as *mafia peradilan* (court mafia) in Indonesia.

The complaints about the lack of due process also extend to law enforcement. For instance, as one respondent in Pakistan put it: ‘evidence is doctored, there is no scientific procedure for recording evidence, and witness protection is not guaranteed.’ The ineffectiveness of the police, often exacerbated by corruption, leave citizens without a sense of security. Although this complaint is specific to the judicial arena, its ramifications are often wider. As suggested in Working Paper Six, it tends to backfire on the perceived ability of the executive to guarantee the security of citizens.

Autonomy

The relative autonomy of the judicial arena in relation to other arenas is important if it is going to play its role in society. The discretion that follows from this autonomy, however, must be tempered by mechanisms for ensuring accountability, the latter being a key principle of good governance. Such mechanisms tend to be weak, if not absent, in the countries included in this survey.

This time, only three countries – Chile, Jordan and Thailand – are rated above the three-point level. Thailand is the only country where respondents strongly express the view that accountability mechanisms are in place and work. They point to the clear separation between the executive and the judicial branches of government today. In their view, the courts operate free from political interference or corruption. They also make reference to the existence in the Thai constitution of provisions for public organizations to carry out inspections of the judiciary, although many admitted that accountability processes in practice are still slow.

The lack of public scrutiny and the implications for accountability was a common theme also in other countries, such as China and Russia, where there is little scope for public scrutiny. ‘Accountability of judges to the public is insignificant’ was a frequent comment by our Russian respondents. In China, one WIP noted: ‘it is almost a commonly accepted that <without money, don’t go to the court>’. In other countries, such as India and Tanzania, public scrutiny may exist in theory, but does not have an impact on the accountability of judicial officers.

While there is much criticism of the way judges use their discretion, there is also some praise. Individual judges can serve as role models and make a difference by reversing lower court decisions. This was highlighted especially in the Philippines, where the Chief Justice at the time of our survey was seen as a man of substantial credibility. Many respondents admitted that their inclination to give a relatively high score on this indicator was related to his particular role in the administration of justice.

Corruption was cited again as a serious problem undermining the autonomy of the judiciary. A respondent from Kyrgyzstan captured the feeling of many of his fellow-countrymen when he said that, ‘the problem is that authorities do not want courts to really be independent.’ A similar view was expressed in Togo: ‘There is no real independence of the judicial system because of corrupt magistrates and frequent political pressure.’

Although the Ombudsman institution deals primarily with administrative law cases, wherever such an institution has been introduced, it faces the same accusation of being inefficient and corrupt. It is clear that the problem of accountability affects not only the executive and legislative branches of government, but also the judicial branch.

International legal norms

The incorporation of international legal norms, especially in the field of human rights, has become an important matter in recent years. With the development of an international jurisprudence in this field, there has been a growing effort to spread these norms to national jurisdictions. A variety of inter-governmental organizations and international NGOs have spearheaded this activity. The International Human Rights Conference in Vienna in 1993 is one prominent example of this effort.

We were interested to probe the extent to which legal norms from the outside have been seriously considered by governments and members of the legal profession. We asked respondents more specifically to comment on the extent to which norms from various international conventions have been adopted.³⁰

Two points are of special interest in discussing this indicator. The first is the lack of commitment by governments to international treaties. In virtually all countries, our respondents took a critical, if not cynical, position on this issue. One of our Indian WIPs noted that the Government of his country is quick to sign conventions, but slow in ratifying them, and even slower in implementing them. A similar comment was made by one of the Argentine respondents. Such references were also included in comments made by respondents in China, Indonesia, Kyrgyzstan, Peru and Togo.

The second point concerns the role of the international community in spreading these legal norms. Our respondents made it clear that they were aware that Western

³⁰ Our question did not make a distinction between signing and ratifying an international treaty, even less the extent to which legal norms taken from international treaties had been implemented. We recognize, therefore, that 'adoption' left our respondents a little confused as to what the question implied. Several respondents, however, made an effort to clarify their rating by commenting on the fact that their government had often signed a treaty but done little to live up to its aspirations.

governments and international NGOs exercise pressure on the government of their own countries to sign and ratify human rights agreement. Some approve of this; others see it as a form of neo-colonialism. There seems to be a relatively broad agreement, however, that foreign governments and NGOs have little, if any, impact on what happens in their respective countries. Proliferation of international legal norms, therefore, is not likely to take place very rapidly. It is a process that will take its time, if the comments we received are anything to go by.

Non-judicial processes

Not all conflicts are resolved by formal judicial institutions. We include in this arena, therefore, also those non-judicial institutions or processes that do participate in the administration of justice. Somewhat to our surprise, respondents indicated that these institutions and processes are quite important in their countries. It is no surprise, therefore, that the ratings on this indicator were generally quite high. Non-judicial or non-formal mechanisms are typically found at the local level and usually involve civil rather than criminal cases. Examples of such institutions are, for instance, courts of elders in Kyrgyzstan, tribal mediation processes in the Philippines and Tanzania, traditional chiefs in Togo, and religious groups in Thailand. In other countries, reference was made to the existence of village mediation systems. We were also informed that NGOs were sometimes performing the role of resolving local conflicts. Thus, there are quite a variety of institutions and processes in place. It may be important to point out that such institutions have developed also in former communist countries.

These non-formal institutions are often preferred because they are less costly and the local parties to the conflict are familiar with the procedures. Another reason that was mentioned is the corrupt nature of the judicial system. People avoid the formal courts because they don't trust them. It is clear, however, from comments we received in both China and Russia that non-formal mechanisms are not always a blessing. They tend to be biased against women and there is also room for both corruption and violence also in these institutions. For instance, 'honor' killings of women were mentioned as problematic in both Jordan and Pakistan.

Non-formal mechanisms seem to exist because they fill a void that is not covered by formal courts. There is no evidence that they are in decline. In fact, in India, the country coordinator notes that these institutions are not only necessary, but also promoted by organizations working with rural and urban poor. Any effort at assessing the state of governance in a country, therefore, has good reason to include non-formal mechanisms for resolving conflict.

Implications for Research and Practice

Before discussing the implications for research and practice, we like to highlight three main points that come out of the discussion in this paper. The first is that the judicial arena is problematic in virtually all countries included in our survey. Access to justice remains low and interest in improving national legal systems by incorporating norms from outside is similarly faint. The second point is that the reasons for the weakness of the judicial system are worrisome. Administration of justice is not only slow, but often also corrupt. People lack trust in the court system.

The third point is that the problems may be particularly pronounced in former communist countries, including China, because of both the pace and extent of economic and political reform. Laws are often outdated and create problems for the transformation of these regimes.

Implications for Research

The first point that we like to make here is that while including the judicial arena at par with other arenas in approaching governance, it is evident that there is still a need for more and better data on what is happening. This applies not only to non-formal institutions and processes, but also to the performance of formal courts and other institutions operating in this arena. Compared to data availability in other arenas, the situation in the judicial arena is still problematic.

The second point is that issues of justice are important to people. Much of what is going on in the judicial arena has an intrinsic value to people. Thus, it is not enough to look at

the legal system merely in instrumental terms, e.g. how it contributes to socio-economic development. Our survey has made it clear that a fair way of administering justice is not just a means but also an end in itself.

The third point is that we still know very little about how different legal systems work. Although many of the problems that the WGS has identified seem to cut across different systems, there may be reason to follow up the work of Norgaard and Hilmer Pedersen³¹ on how particular legal systems relate to democracy and development. Does the legacy of a civil or common law system make a difference? Do ‘mixed’ systems, as the two authors suggest, pose more problems than those that are pure? Our survey suggests that further research on this kind of issues would be important and potentially rewarding.

The fourth point concerns the relationship of the judicial arena to other governance arenas. Our survey shows that the executive branch is often interfering in the affairs of the judiciary. Especially intriguing in our findings is also the relationship to civil society and the prevalence of non-formal, often community-based, institutions that play an important role in resolving conflicts at the local level. This is generally a complementary function, although it may also be conflictual, since local justice administration by non-formal institutions is not always sufficient or satisfactory.

Implications for Practice

The main finding is that in our governance perspective the judicial arena is important but the way it functions is not very satisfactory. While some of these problems may be possible to address through capacity building, it is clear that they are more political than technical in nature. Our survey points to the many cases of political interference, the lack of accountability and widespread corruption. Respondents have repeatedly drawn attention to the fact that that connections matter and money buys justice.

We do not suggest that the international donor community should stop funding work in the judicial arena, but we do agree with Carothers that aid to this arena has not been very effective to date. As he writes, “after more than ten years and hundreds of millions

³¹ Norgaard and Hilmer Pedersen, *op.cit.*

of dollars in aid, many judicial systems in Latin America still function poorly... Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction.”³² Our survey suggests that the challenge is that judicial reform takes longer time than donors typically allow for their project support. A revision of the time horizon for support of such reform may be the first step to take.

The second point is that the judicial arena is important not just for commercial and financial development, although these concerns tend to be of highest priority, especially in international finance institutions. While it may be a necessary concern, it is definitely not sufficient for improving governance in this and other arenas. What is going on in other arenas has an impact on the quality of the judicial arena. Commercial and financial reform objectives, therefore, cannot be treated in isolation of their political context.

The third point is that there is virtue in flexibility and sensitivity to context.

Improvement in governance practices is possible not only with the help of a liberal paradigm but also with reforms of existing institutions. We also found that informal institutions sometimes are more suitable than formal ones. As Frank Upham³³ has noted, putting all the eggs in the formal basket is often misguided, yet it is the preferred practice in the World Bank and many other donor agencies. The point is that there is no single formula for a fair administration of justice.

³² Carothers, 1998, *op cit*, p. 104.

³³ The arguments which follow are based on Upham’s presentation at a round table organized by the Carnegie Endowment for International Peace.