

JUDICIAL INDEPENDENCE AND RULE OF LAW: ANTIDOTES TO DESPOTISM

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The global tide of “populism,” or “tribalism,” is well known but not as yet completely understood. The best explanations seem to involve self-contradictory attitudes on the part of voters in nominal democracies – a widespread and often justifiable distrust of government yields a longing for a strongman to take charge, which then yields the most untrustworthy of governments, whether mere autocracy or “kleptocracy.”¹

The instability and drift toward despotism in the world is dangerous from many points of view. The counter to it would be robust and healthy social communities founded on law. A government with a sense of fairness and justice is the most effective deterrent to civil unrest – and in turn the key to fair governance is the Rule of Law, highlighted by transparency and accountability. The third step in this progression is that the Rule of Law depends heavily on an independent judiciary.

Many laborers in the field of governance emphasize that a key ingredient of the Rule of Law is Judicial Independence. The judiciary is an integral part of any stable government. In the stable democracies, judiciaries may go through slight alterations of either form or substance but those do not affect the basic relationship of judicial to political branches. To the contrary, countries that change the entire form of government often create threats to the very concept of judicial independence.

Transitions from one form of government to another may occur in several ways:

- internal transitions such as were the apparent objectives of Turkey and Nigeria in recent years
- “peaceful” revolutions such as we thought had been experienced in a few places during the Arab Spring of 2012
- somewhat more heated transitions such as those of the Warsaw Pact countries at the end of the Soviet era
- disruption in existing regimes such as Romania, Hungary, and Poland
- violent internal confrontations such as the civil wars of the former Yugoslavia and Rwanda
- invasion and occupation such as the “regime change” approach of the U.S. in Afghanistan and Iraq

Each of these methods presents a unique set of problems for the judiciary. No justice system can operate effectively in the midst of chaos but chaos cannot be forestalled effectively without a functioning justice system. By contrast to these seemingly disruptive transitions, there are many

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¹ Larry Diamond has been chronicling the recession of democracy in *Foreign Affairs* since 2008. The Democratic Rollback, <https://www.foreignaffairs.com/articles/2008-03-02/democratic-rollback>; Democracy in Decline, <https://www.foreignaffairs.com/articles/world/2016-06-13/democracy-decline>. In more partisan terms, David Frum narrated a cautionary tale of potential autocracy for the U.S. in the March 2017 issue of *The Atlantic*. <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/>

governments which go through a routine transition of legislative and executive power on a regular basis. Those democratic systems, however, usually have relatively firm judicial tenure so that the political transitions do not affect the judiciary except in rather long-term gradual processes.

I. Judicial Transitions in Stable Democracies

A. The British and U.S. Experiences

The importance of judicial independence was emphasized by Alexander Hamilton in Federalist #78 as part of the debate over ratification of the U.S. Constitution in 1788. The idea of separation of powers is attributed to Montesquieu but the legislative and executive functions were blended in most European parliamentary systems including that of Great Britain. Nevertheless, British history includes pre-American protection of tenure for judges. The website of the British Judiciary includes this historical note:

The fundamental concept of judicial independence came into being in England and Wales in 1701 with the enactment of the Act of Settlement. This statute formally recognised the principles of security of judicial tenure by establishing that High Court Judges and Lords Justice of Appeal hold office during good behaviour. Appropriate and formal mechanisms had to be in place before a judge could be removed.

With life tenure and a limited degree of control by the Executive, both American and British judiciaries are reasonably immune from rapid transition. Accountability is obtained through being required to explain oneself and by peer review from other judges, academics, and political commentators.

The norm for U.S. federal transitions is one of gradual change with a few exceptions. For example, the U.S. Supreme Court underwent a gradual shift on free speech and race issues following World War I. When the Great Depression of the 1930s brought attempts to enact federal legislation for industrial regulation and social welfare, the Supreme Court initially resisted but then capitulated in 1937. In the following four years, President Roosevelt was able to appoint 7 of the 9 Justices to the Court and social welfare was alive and well until the Republican era of the 1980s.

The Warren Court era of the 1960s brought many reforms in race relations and the criminal justice system but then came another shift. From 1968 to 1992, Republicans won the Presidency in all elections other than the one 4-year term of Jimmy Carter, and Carter had no appointments to the Court. In that 24-year period, Republican (conservative) Presidents appointed 8 Justices (and the one holdover, Byron White, was not particularly liberal). With that record, one would assume that there were radical changes to the constitutional law espoused by the Court. Changes, however, were gradual but in some instances significant. In addition, some Republican nominees, following the tradition of Earl Warren, turned noticeably liberal once on the Court – the most prominent examples being Harry Blackmun and John Paul Stevens – while others moved markedly to the middle – among the latter notably were Sandra Day O’Connor, David Souter, and Anthony Kennedy. Indeed, those three formed a rather solid middle of the Court and are best-known for the “joint opinion” which slightly modified abortion doctrine in 1992.

Following 1992, the Court has been roughly evenly divided, producing some rather interesting results. For a number of years, the Court had 3 conservatives (Rehnquist, Scalia, Thomas), 3 liberals

(Brennan, Blackmun, Stevens), and 3 in the middle (O'Connor, Souter, Kennedy). Then with the replacements of Rehnquist, Blackmun, Stevens, Souter, and O'Connor, the Court suddenly had 4 liberals and 4 conservatives so that it seemed the only person whose vote counted was Justice Kennedy.

Under the leadership of Chief Justice Roberts, however, the Court has produced a surprising degree of unanimity (many more 8-1 or 7-2 decisions than might be expected from the pre-appointment political inclinations attributed to the appointees). An easy way to describe the surprising degree of consensus on the Roberts Court is that 70% of the cases prior to 2017 were decided with no more than two dissents, and indeed a majority were unanimous.

9-0	8-1	7-2	6-3	5-4
51%	8%	11%	10%	20%

The history of the U.S. Supreme Court illustrates one very interesting phenomenon. Although the process of getting to the Court is very political, once on the bench the Justices take on very different roles. There has been a significant degree of shift in the apparent inclinations of many appointees – usually in a more “liberal” direction (whatever that means) but not always so.

The British system of governance was exported during the Age of Empire to the far reaches of the British Commonwealth. Today, there are very stable systems of governance in Canada, Australia, New Zealand, Malaysia, and many others. The reinvented Commonwealth with 53 member nation-states proclaims a “common heritage in language, culture, law, education and democratic traditions” allowing them to “work together in an atmosphere of greater trust and understanding than generally prevails among nations.”² Although this background is not itself a guarantee of peace and stability, as witnessed in Sierra Leone and Sri Lanka, it provides at least a starting point of expectations for popular trust.

B. The Continental Experience

With the obvious exception of Great Britain, most of the European judicial systems are built around the basics of the civil law model. In this model, law school graduates typically choose one of several routes in the profession, one of which may be the judicial route. A mildly unflattering depiction is provided by the U.S. Federal Judicial Center:

Judges typically enter judicial service at the lower levels of the judiciary – they enter directly from law school after passing state qualifying examinations. Judicial service is analogous to a career in civil service in the United States, with judges moving up the court hierarchy based on seniority and merit. The standard image of the civil-law judge is one of “a civil servant who performs important but essentially uncreative functions.”

Despite this initial unflattering assessment, the Federal Judicial Center goes on to recognize that the many gaps and ambiguities in civil codes cry out for interpretation and that the civil-law judges take on an increasingly important role in building a coherent body of law.

For our purposes here, the interesting issue is the extent to which the professional judiciary is

² <http://www.commonwealthgovernance.org/commonwealth-governance/the-commonwealth>.

subject to influence by executive ministerial decisions. The Minister of Justice in many countries has the power to move a judge from one court to another, and indeed in some instances to remove the judge altogether. Without the prospect of life tenure, therefore, judges are part of a 3-way political discussion/negotiation with the executive and legislature. Indeed, in the classic parliamentary system, all three branches are in constant consultation despite the concept of separation of powers elaborated by Montesquieu.

Some observers believe that the political reality of Western Europe assures judicial independence despite the formal administrative structure. Indeed, on paper prior to 2006, the British system with the role of the Lord Chancellor resembled the continental traditions in many ways.

The European Court of Human Rights (ECHR) has taken steps to move civil law courts in the direction of more transparency, greater reliance on counsel, and most notably toward judicial independence. In two cases from France, the ECHR attempted to curtail the role of executive officials in judicial proceedings. In a 1998 case from the Court of Cassation (*Cour de Cassation*), the ECHR held that the criminal defendants had not received a fair hearing on appeal from their convictions. The appellate procedures of the Court of Cassation included two departures from adversarial processes, a report from one judge which was not disclosed to the parties before the hearing and the participation behind closed doors of an “Advocate General” appointed by the prosecutor.³ The ECHR held that the proceedings were “not reconcilable with the requirements of a fair trial.”

In addition to the “regular” court system that culminates with the *Cour de Cassation*, France also has a separate system of “Administrative Courts” which are a product of the Napoleonic Code and are emulated in a number of Western European countries. Their role is to deal with challenges to government institutions, which in France include universities and hospitals. These courts report up to the *Conseil d’Etat* rather than the *Cour de Cassation*.

The procedures in the *Conseil d’Etat* were very similar to those in the *Cour de Cassation*. A reporting judge prepared a preliminary report which was reviewed by an official known as the Government Commissioner. The Commissioner could then make suggestions for changes. The difference between the Government Commissioner and the Advocate-General, however, was that the former was appointed from among the judges themselves. This difference was almost determinative for the ECHR but not quite – the “appearance” of bias was too much to swallow.⁴

Following these two cases, France has made extensive changes to the processes of the *Cour de Cassation* but the *Conseil d’Etat* has resisted modifications, adhering to traditions stemming from the Napoleonic Code.⁵

³ Case Of Reinhardt And Slimane-Kaïd v. France, (1998-11 Eur. Ct. H.R. 640).

⁴ Kress v. France, ECHR 39594/98 (2001).

⁵ Mitchel Lasser, *The European Pasteurization of French Law*, 90 Cornell L. Rev. 995, 1000 (2005).

II. Corruption, Despotism, and the Lack of Judicial Independence

Judicial Independence serves as a bellwether of the health of a society. This is not a claim that an independent judiciary can prevent despotism or autocracy; rather the lack of an independent judiciary occurs as a result of despotic actions by government. David Frum quoted a Hungarian observer as saying “The benefit of controlling a modern state is less the power to persecute the innocent, more the power to protect the guilty.”⁶ By contrast to Hungary, the Kremlin rather openly persecutes its detractors, either violently or in the courts. Both methods of control are available in a country where the populace no longer trusts the courts.

There are several organizations with codes that promote the independence of judges. Many of these are collected on the website of the International Commission of Jurists,⁷ although the ICJ does not itself promulgate a code. Perhaps the most influential code is that of the International Bar Association, which emphasizes independence from the executive branch.⁸ The International Association of Judicial Independence and World Peace, a group of volunteer lawyers and professors, states that “Judicial Independence is essential for democracy, liberty, world peace, and International Trade.”⁹

To understand how judicial independence works to promote a stable society, consider the meaning of the Rule of Law. Some hallmarks of law were set out by Lon Fuller in his famous book *The Morality of Law*. Fuller's multiple criteria for the rule of law could be summarized as the need for predictability and uniformity in application of rules. For a society to function smoothly and peacefully, people must know what to expect, which means that the law needs to be

- visible and
- applied uniformly.

It may not be obvious why Lady Justice is usually presented blindfolded – who wants a decision maker who doesn't know what's going on around her? But the blindfold is so that she doesn't know who the parties are in any given dispute. She applies the law according to the scales in her hand, not according to the persons before her or even her own preferences.

More recently, the watchwords for justice have become “transparency and accountability.” Transparency International promotes “a world in which government, politics, business, civil society and the daily lives of people are free of corruption.” TI's Corruption Perception Index ranks countries in reliance on each country's “analysts, businesspeople and experts.” Meanwhile, the World Bank ranks countries on Worldwide Governance Indicators. It is not the least surprising that the correlations between corruption and Rule of Law are striking, nor that the industrialized nations of Europe, North America, and Australia rank rather well on both. Interestingly, however, the U.S. ranks only in the 75-90th percentile on corruption while it ranks near the top on Rule of Law.

⁶ <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872>.

⁷ <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards>.

⁸ See www.ibanet.org for Minimum Standards of Judicial Independence (2008).

⁹ INT'L ASS'N OF JUDICIAL INDEP. AND WORLD PEACE, <http://www.jiwp.org/> [<https://perma.cc/E5VP-WMYT>].

As TI states, these numbers do not display how the life of the average person in a country fares. But there are indicators of social conditions such as health, education, and employment that do indicate the quality of life by country. Click on the map for World Health Organization's data of life expectancy at birth, and the same countries appear in the same order of rankings as Rule of Law and Corruption (including the U.S. with a lower life expectancy than most of Europe and Canada).

It is tempting to conclude that the Rule of Law effort is fruitless in a society that is plagued by violence and corruption because it is unrealistic to expect people to turn to law when their very lives are at risk on a daily basis. The Rule of Law is designed to create stable social conditions conducive to economic and personal development – in other words, a peaceful and healthy society. Conversely, the Rule of Law is not really possible in conditions under which more powerful actors can operate as they wish with impunity. Part of that reality is expressed in the familiar notion that government must have a “monopoly on the legitimate use of force,” but some more reality is captured in Thomas Paine's comment that “The strength and power of despotism consists wholly in the fear of resistance.”

When developed nations attempt to assist emerging nations with reform of their justice systems, or even when nations attempt to come out from under civil strife, there is a significant difficulty. No justice system can operate in the midst of chaos but chaos is difficult to forestall without a functioning justice system. So where do we start? In general, there are four sets of transitions represented in the list above. First are the two countries where the U.S. forcefully overthrew the existing regime, Afghanistan and Iraq, second are the countries in the Arab Spring and Arab Winter, third are the former communist countries, and fourth are the countries struggling to emerge as independent nations. An example in its own category might be Saudi Arabia, where a few enterprising members of the royal family have attempted some reforms with little discernible success.

III. TRANSITIONAL GOVERNMENTS

At what was thought by some to be the end-point of human development, it seemed that liberal (liberal here meaning simply the idea that power flows from the people to the rulers, nothing to do with political preferences) liberal capitalist democracy had won over all other forms of governance structures. Suddenly, even its foremost advocate recognizes that democracy is in hot water.¹⁰ The rise of anti-government sentiment goes by many names such as populism, nationalism, tribalism – but in all its guises one of its cardinal features is an attack on judicial independence.

Almost 3,000 years ago, Plato observed that “Democracy passes into despotism.” More recently, Alexander Hamilton observed that “Real liberty is neither found in despotism or the extremes of democracy, but in moderate governments.” It can be seen in the following summaries that the trend toward authoritarianism is carried out by despotic means that bypass courts, or at least eliminate the checking function of the judiciary.

¹⁰ “The man who declared the ‘end of history’ fears for democracy's future,” WASH. POST (Feb. 9, 2017) <https://www.washingtonpost.com/news/worldviews/wp/2017/02/09/the-man-who-declared-the-end-of-history-fears-for-democracys-future>.

A. Countries the U.S. Invaded

1. Afghanistan

Reliable estimates indicate that about 80% of all personal disputes in Afghanistan are taken to informal resolution processes such as village or tribal elders. Among the explanations for this are greater trust in local leadership than in the national government's formal judiciary. Subtexts for this lack of trust would include acknowledged corruption within the woefully underpaid judiciary as well as the pressures of tribalism and the continuing insurgency of the Taliban and Haqqani networks.

Meanwhile, the Taliban continue to levy violent attacks against government institutions including the judiciary. In 2016, at least three provincial judges were killed by gunmen, seven prosecutors and judges were killed in a March attack on a courthouse, and another eleven judicial employees were killed by a suicide bomber in May. On Feb 7, 2017, a suicide bombing by ISIS at the Afghan Supreme Court building killed 20 people – it did not kill judges but would certainly make people nervous about going to the formal courts.

Suffice to say that the judiciary in Afghanistan is literally under siege and there is little that can be done until, that is to say if, the country can be stabilized.

2. Iraq

Following the U.S. invasion and ouster of the Baathist regime of Saddam Hussein, the Coalition Provisional Authority made the mistake of dismissing all the former leadership of the military and the executive branch, but it did make the wiser decision of leaving much of the judiciary in place under the leadership of Chief Justice Medhat al-Mahmoud. Unfortunately, the power of CJ Medhat was too well consolidated as he was both Chairman of the Federal Supreme Court as well as Chair of the Supreme Judicial Council, the body responsible for the oversight of the entire Iraqi judiciary. He was not removed from the Supreme Judicial Council until 2013 after parliamentary division of the two roles.

Despite that accretion of too much power in one person, the judiciary functioned reasonably well until the wresting of control in much of the north by the Islamic State (ISIS/ISIL). Under the UN mandate until 2009 and a bilateral arrangement with the U.S. until December 2011, much of the physical reality in the country was dominated by a continuing insurgency.

Violence against lawyers became rather routine by 2007. In April 2007, the UN was reporting that lawyers in Iraq were afraid to take cases involving volatile disputes such as “cases of adultery, honour killings, claims of property, children’s custody and divorces.” “According to the Iraqi Lawyers Association (ILA), at least 210 lawyers and judges had been killed since the US-led invasion in 2003.”¹¹ In May 2007, Senator Graham served his tour of duty as an Air Force Reservist in Iraq and had this observation about the “rule of law” portion of the “surge.”

The number one target of the insurgency are judges. If you're a judge in Iraq you're an incredibly brave person. Because they just don't try to kill you, they try to kill your family. So General Petraeus tried to build a compound in Baghdad for judges. Took an old army base, reinforced it, put housing on base for judges and their families and created a brand new courtroom [and] a detention facility to hold people in the compound to give the judges

¹¹ <http://www.irinnews.org/report/71864/iraq-justice-delayed-lawyers-live-under-threat> (Apr 30, 2007).

confidence that if they did their job they could do it without fear.¹²

To the extent that disputes went to courts during that era, the judiciary functioned without apparent intrusion from the executive, but in addition to the issue of violence there was always Shi'a-Sunni tension apparent in all parts of the government. Meanwhile, the relatively autonomous region of Kurdistan had its own relatively autonomous judicial system.

The departure of U.S. forces in 2011 pursuant to the refusal of the Iraqi government to yield jurisdiction over U.S. service members left the door open for the creation of ISIS. In 2013, Human Rights Watch released a report highly critical of the Iraqi judiciary and law enforcement for their reliance on a "confession-based criminal justice system."¹³ Although the difficulty of investigating coupled with the natural reaction of law enforcement to attacks on their personnel make reliance on confessions understandable, it is easy to see why an NGO would refer to the situation as a "broken justice system."

B. The Arab Spring and other Middle East Nations

Several nations with regime changes in 2011 still face turmoil, both in the judiciary and elsewhere in government. Two, Egypt and Libya, illustrate the problems. Meanwhile, other Middle East nations continue to face serious issues of religious and political divisiveness.

1. Egypt

In Egypt, the Muslim Brotherhood won a parliamentary majority in the first set of elections and Mohammed Morsi won the presidential election, seemingly establishing a Shi'a government. Meanwhile, the courts had declared the Parliament to be unlawfully constituted and returned control of the country to the "interim" military governance. Morsi immediately fired the military leadership and claimed power for himself. Riots during the spring of 2013 led eventually to a military junta that removed Morsi, prompted a new constitution providing for elections held in two phases in October and December 2015, and declared the MB a terrorist organization.

In 2014, more than 1200 Muslim Brotherhood members were sentenced to death following mass "trials" that were roundly condemned by the UN and other watchdog groups. Then those convictions were overturned by the Court of Cassation. Morsi eventually was sentenced to 25 years but that sentence is also being reviewed. Meanwhile, former President Hosni Mubarak was also convicted of crimes involving the deaths of protesters in 2011 but that conviction was also overturned and he was released from prison hospital in 2017.

All this turmoil led one self-professed long-time observer of the Egyptian judiciary to comment that the

Egyptian courts issue one stunning judgment after another. And after each one, I receive the same question from journalists . . . "Is Egypt's judiciary independent?" My answer is always extremely clear: "Well yeah, kinda." Focusing on the "kinda" part of the answer is helpful, because it leads us to understand that the question is a bit miscast. The problems with

¹² <http://www.cbsnews.com/blogs/2007/05/07/couricandco/entry2769338.shtml>.

¹³ Human Rights Watch, "Iraq: A Broken Justice System," <https://www.hrw.org/news/2013/01/31/iraq-broken-justice-system> (Jan. 31, 2013).

Egyptian justice do not lie primarily in direct executive interference in cases.¹⁴

He went on to point out that the Egyptian judiciary had a long tradition of attempted independence within the context of authoritarian regimes, resulting in evolving and often confusing legal positions.

In 2017, legislation was introduced in Parliament that would give the President appointive power over the judicial committees that are responsible for court administration. The Egypt Judges' Club was pushing back against the legislation, prompting what could be another clash between the judiciary and the other branches of government.

2. Libya

Following the overthrow of the Qaddafi regime, with the help of NATO, Libya was subject to internecine strife among its many tribal-based militias. A transitional government attempted to maintain control but elections in 2012 and 2014 were disputed. Following the attack on the U.S. Consulate in Benghazi and death of Ambassador Chris Stevens on September 11, 2012, the country remains a battleground among various groups, some Islamist and others more tribal in orientation. As of early 2017, it would be fair to say that there simply is no functioning judiciary. Dispute resolution occurs through a variety of informal processes.

3. Saudi Arabia

The basic facts of life in Saudi Arabia can be found in two events, the 1945 agreement between FDR and King Saud, and the 1979 near-coup by Islamist clerics. The first established the trade of American protection of the monarchy in return for exclusive oil concessions. The second was the trigger for the royal family's adoption and adherence to the rule of Wahhabist Islam. Wahhabism is the extremely conservative brand of ideology that keeps women at home and punishes offenses with extreme measures such as loss of a hand for theft.

A 2007 effort at judicial reform has yet to bear visible results – the king is still both lawgiver and overseer of the courts. Some progress in women's rights, such as gaining the right to vote, occurred under King Abdullah, who was succeeded by King Salman in 2015 with some backsliding. In 2016, Prince Mohammed became known as a young reformer with significant power and more modern views than most of his elders. It remains to be seen whether his enhanced role as heir to the throne will bear reform fruit.

In 2017, Saudi Arabia seemed to go on an "execution spree," carrying out multiple executions of political dissidents, reportedly including at least 66 beheadings in just over half a year.¹⁵

4. Turkey

The judiciary in Turkey was rocked in early 2014 by dismissal and reassignment of numerous

¹⁴ Nathan J. Brown, *Why do Egyptian courts say the darndest things?* WASH. POST (March 25, 2014); <https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/25/why-do-egyptian-courts-say-the-darndest-things/>

¹⁵ "Saudi Arabia should stop 'bloody execution spree'," <http://www.aljazeera.com/news/2017/07/amnesty-saudi-stop-bloody-execution-spre-170726071519013.html> (26 July 2017).

judges. Apparently, the chaos occurred as a result of a corruption scandal that Prime Minister Erdogan said was engineered by a former ally turned bitter opponent. Erdogan said the judicial shakeup was intended to halt a “foreign plot” that was targeting corruption within the Erdogan government and family. “The judiciary should not go beyond its defined mission and mandate. This is what we’re doing. Anything else is misinformation and disinformation.”¹⁶ In February 2014, the legislature passed measures strengthening the role of the minister of justice, a move that was widely criticized by the international community. Then in December 2014, a number of journalists were arrested and incarcerated in an apparent move to stifle media criticism. In May 2015, two judges ordered the release of the journalists, and the judges were then arrested – apparently for charges related to abuse of power – a move that was condemned by an umbrella organization of European judges and prosecutors.¹⁷

Turkey was making progress toward membership in the EU and is in the pivot point of the flow of refugees from Syria, but the EU heavily criticized these moves as interference with human rights and judicial independence.¹⁸

In June 2016 a Turkish man was convicted of publicly denigrating a state official after comparing Erdogan to Gollum. Then the court appointed a panel of experts to determine whether the Gollum comparison was insulting.¹⁹ Then the judge hearing the case was removed after being accused of participating in the July coup attempt. At latest reports, the insulter has a suspended sentence.

Another purge of judges occurred in July 2016 after the abortive coup attempt. In addition to the removal and detention of 2,745 judges,²⁰ two members of the Constitutional Court were detained along with a UN judge who was part of a panel hearing the appeal of a Rwandan convicted of genocide. The UN body responsible for operation of the International Criminal Tribunals demanded his release in January 2017.²¹ At the same time, a Greek court refused to extradite eight Turkish military personnel who fled to Greece after the coup attempt, citing concerns that the men would not

16

<http://www.telegraph.co.uk/news/worldnews/europe/turkey/10590399/Turkey-continues-with-huge-purge-of-judges-and-police.html>.

¹⁷ Magistrats Europeeens pour la Democratie et les Libertes (MEDEL), *Resolution on the imprisonment of judges and prosecutors in Turkey* (<https://perma.cc/3YZ3-S8TD>).

¹⁸ EU Criticizes Turkey for Backsliding on Judicial Independence, Media Freedoms, WSJ (Nov 10, 2015), <http://www.wsj.com/articles/eu-criticizes-turkey-for-backsliding-on-judicial-independence-media-freedoms-1447142972>.

¹⁹ <http://foreignpolicy.com/2015/12/02/erdogan-on-gollum-meme-we-hates-it-we-hates-it-forever>.

²⁰ <http://in.reuters.com/article/turkey-security-judges-idINKCN0ZW0OZ>.

²¹ <http://www.dw.com/en/un-demands-release-of-turkish-judge-serving-on-war-crimes-panel/a-36331598>.

receive a fair trial in Turkey.²²

C. Former Communist Nations

1. Russia

Obviously, it is difficult for an American with limited contact in Russia to comment credibly on the Russian judiciary. Nevertheless, it is necessary to acknowledge both public perceptions of corruption (tied with Nigeria in the Transparency International index)²³ and public statements about the difficulties of the country's judiciary. Russia has now had a quarter century of nominally democratic institutions, yet according to some observers, the old phenomenon of "telephone justice" is still alive and well.²⁴

The trial of Pussy Riot members who received 2-year prison sentences²⁵ was widely condemned both abroad and by domestic dissidents, including chess champion Gary Kasparov and leading anti-corruption dissident Alexei Navalny. Navalny himself has been in and out of jail on charges ranging from embezzlement to distributing leaflets. His friend Boris Nemtsov was murdered in what many believe to be reprisal for outspoken criticism of the Kremlin and its underworld colleagues.

There were rumors at the time, not now found on the internet, that the Pussy Riot sentence had been known beforehand by political leaders. In December 2013, the Supreme Court of Russia ordered a review of the case, saying lower courts failed to provide full evidence of their guilt and overlooked mitigating factors in sentencing them to two years in prison.²⁶ When President Putin, a few days later, granted a general amnesty under Duma authority for the "20-year anniversary of the post-Communist constitution," many observers commented that the amnesty move seemed to be a publicity effort leading to the Sochi Olympics.²⁷

These issues implicate corruption and free expression with at least a hint of some political pressure on the judiciary. The International Commission of Jurists has reported many times in the last decade on a number of issues within Russia, detailing both internal and external constraints on judicial independence.²⁸

²²

<http://www.aljazeera.com/news/2017/01/greek-court-blocks-extradition-turkey-coup-soldiers-170126142047763.html>; <http://www.cnn.com/2017/01/26/world/greece-wont-extradite-turkish-officers>.

²³ <https://www.transparency.org/country/#RUS>.

²⁴ Alena Ledeneva, *Behind the Facade: "Telephone Justice" in Putin's Russia*, contained in "Dictatorship or Reform? The Rule of Law in Russia" (Foreign Policy Center, 2015), <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/> (<http://perma.cc/UL92-6JHG>).

²⁵ <http://www.bbc.com/news/world-europe-19297373>.

²⁶ <http://www.cbsnews.com/news/top-russian-court-orders-review-of-pussy-riot-case>.

²⁷ <http://www.interpretermag.com/russian-supreme-court-declares-pussy-riot-sentence-unlawful>.

²⁸ https://www.icj.org/search/?fwp_search=russia.

The most specific development regarding judicial independence in the post-USSR is the 2014 report by UN Special Rapporteur on the Independence of Judges and Lawyers Gabriela Knaul:

Ms. Knaul noted that, in Russia, the mindset of judges themselves plays an important role in defining their individual independence. “It seems that some judges are still under the influence of the old Soviet system and keep strong ties with the executive and prosecutorial authorities.”

She also drew attention to the fact that lawyers are unlawfully targeted for discharging their professional functions in some regions of the country, through threats, intimidation, attacks, groundless prosecutions, and in the gravest cases murder.²⁹

Her report concluded with 49 specific recommendations, including taking appointment of judges out of the executive and creating independent procedures for judicial conduct review.³⁰

The UN Human Rights Committee then concluded

The Committee is concerned about the practice of selection, appointment, promotion and dismissal of judges that appears to be subject to extra-procedural influences, including the reported improper influence of court presidents in the appointment procedure as well as the significant role of the Presidential Commission in the selection and appointment process. It is also concerned at the disciplinary system for judges, at reports indicating substantial rates of dismissal of judges and at allegations that disciplinary action can be based on the substance of judicial decision-making such as acquittal. The Committee is further concerned about the low acquittal rate and at the high percentage of acquittals overturned on appeal. It is also concerned at reports of lack of independence and impartiality of ex officio lawyers.

In summary, the judiciary in Russia is still very much in a state of transition. The corruption and violence endemic in the post-Soviet system apparently infects the judiciary in various ways. On the other hand, all of the reports, even including statements from Navalny, indicate that there are reasons for optimism as the judges work through the process of establishing independent systems.

2. Romania

In 2012, this comment shone a spotlight on Romania:

A political crisis has gripped Romania as its left-leaning prime minister, Victor Ponta, slashes and burns his way through constitutional institutions in an effort to eliminate his political competition. In the last few days, Ponta and his center-left Social Liberal Union (USL) party have sacked the speakers of both chambers of parliament, fired the ombudsman, threatened the constitutional court judges with impeachment and prohibited constitutional court from reviewing acts of parliament – all with the aim of making it easier for Ponta to

²⁹ http://www.un.org/apps/news/story.asp?NewsID=44771&Cr=judicial&Cr1=#.Vm8_W_krK71.

³⁰ Report of the Special Rapporteur on the independence of judges and lawyers - Mission to the Russian Federation (A/HRC/26/32/Add.1), <http://www.ohchr.org/EN/Countries/ENACARegion/Pages/RUIndex.aspx>.

remove President Traian Basescu from office.³¹

According to *The Economist* in 2013,

The justice system has been closely monitored by the European Union, which severely criticised Romania over the last couple of years for failing to enact judicial reform. Romania has been recently made progress, but some major issues remain unsolved. The parliament continues to block the prosecution for corruption charges of high-profile politicians.³²

The Ponta government made some progress economically but was riddled with corruption allegations and lost the elections of 2014.³³ At least one observer credits the judiciary with making a major turnaround in the system of corruption:

At the end of ten years of reform, the results are extraordinary: people above the law in the past, are now in prison, convicted for serious corruption offenses; prosecutors conduct investigations in a neutral way, destroying crime networks comprising businessmen, politicians and even judges.³⁴

In 2015 prosecutors sought permission to investigate Ponta on corruption charges but the parliament rejected that effort. Both the President and the President of the High Court criticized the decision as protecting a corrupt regime.³⁵ As of early 2017, reports indicated that Romania was still locked in a pattern of corruption.³⁶

3. Poland

The Rule of Law Institute is a private foundation supported by a number of organizations, including both EU and US entities. It sets its mission to be “promote the development of the rule of law in Poland . . . and through Poland’s historical experience and example we aim to support the democratic transformation process in transitional countries.”³⁷

The UN Human Rights Committee in 2010 commented on a number of matters regarding human rights in Poland, including such matters as hate crimes (especially against the Roma), gender and sexual orientation, domestic violence, and length of pretrial detention. Significantly, the Committee

³¹ Kim Lane Scheppelle Guest Post (4 July 2012), <http://krugman.blogs.nytimes.com/2012/07/05/guest-post-romania-unravels-the-rule-of-law> (<http://perma.cc/H86Z-7D9J>).

³² L.C, Bucharest, *What will happen to Romania’s judiciary?* THE ECONOMIST (Jan 7, 2013), <http://www.economist.com/blogs/easternapproaches/2013/01/romania-2013>.

³³ <http://www.bbc.com/news/world-europe-17776265>.

³⁴ Judge Cristi Danile, *Thoughts on the Romanian Judicial System*, CEELI (October 21, 2014); <http://ceeliinstitute.org/thoughts-on-the-romanian-judicial-system>.

³⁵ <http://www.dw.com/en/romania-rule-of-law-under-attack/a-18521030> (<https://perma.cc/XG6G-ZA87>).

³⁶ <http://henryjacksonsociety.org/2017/01/04/new-report-details-threats-to-the-rule-of-law-in-romania> (<https://perma.cc/R43G-RUH9>).

³⁷ <http://panstwoprawa.org/o-nas/?lang=en> (<https://perma.cc/VDA4-82CD>).

had no comments about the independence of the judiciary beyond urging the appointment of more women judges.³⁸

Then, in a rather sudden surge of conservatism, the right-wing Law and Justice Party won a majority in Parliament in October 2015. The new Parliament “voided” the appointment of several members of the Constitutional Court and substituted five of its own choices in their place. The existing Court declared this move unconstitutional and Parliament responded with legislation requiring decisions by the Court to be made by a 2/3 majority. This prompted the European Parliament to urge Poland to “respect the rule of law.”³⁹ In December 2016, the EU Commission gave Poland two months in which to reverse those changes or face sanctions. The Government immediately responded negatively to that suggestion.⁴⁰

In late July 2017, the Parliament passed legislation that would allow the removal of judges without cause, prompting street protests and threats of aggressive action by the EU if the President signed the legislation. [stay tuned for further developments]

4. China

After years of gradually edging toward judicial independence away from a Soviet model, the Chief Justice of the People’s Court of China came out vigorously in January 2017 against the “trap” of “Western” ideology. “We should resolutely resist erroneous influence from the West: ‘constitutional democracy,’ ‘separation of powers’ and ‘independence of the judiciary.’ We must make clear our stand and dare to show the sword.”

Observers noted that this statement from an otherwise reform-minded jurist was preceded two days before by a stern speech from President Xi Jinping. One outspoken professor at Beijing University pointed out in an internet post, which was quickly removed, that China has a tradition of judicial independence going back about 1000 years before the advent of communist rule.⁴¹

Then just a few days later, another judge of the Supreme People’s Court posted a blog criticizing President Trump for interfering with judicial independence in his statement about the “so-called judge” in the immigration case. Observers indicate that there are significant elements in the China judiciary eager to adopt Western notions of judicial independence.⁴²

D. Africa and South America – Developing Nations

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http://lib.ohchr.org/HRBodies/UPR/_layouts/15/WopiFrame.aspx?sourcedoc=/HRBodies/UPR/Documents/session13/PL/A_HRC_WG.6_13_POL_3_Poland_E.doc&action=default&DefaultItemOpen=1.

39 <http://www.dw.com/en/eu-lawmakers-tell-poland-to-observe-rule-of-law-free-up-court/a-19550822> (<https://perma.cc/K9A5-RKJ3>).

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<http://www.euractiv.com/section/justice-home-affairs/news/poland-rejects-eu-warning-on-constitutional-court-crisis> (<https://perma.cc/Z87M-CSHC>).

41 <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>.

42 <https://www.nytimes.com/2017/02/07/world/asia/donald-trump-judge-china.html>.

1. Ghana

Ghana gained independent country status by the merger of two former colonies in 1957, the first in sub-Saharan Africa to do so. Following a series of coups and suspensions of constitutions, the country seemed to settle into stability in the 1990s. It has had a growing economy as a producer of natural resources and a significant trading partner with countries outside of Africa. This has been accomplished with a note of pride in the judiciary and an apparent lack of corruption. It ranked 61 of 175 countries in the Transparency International corruption index.

Recently, however, the country was rocked by a film apparently depicting widespread practices within the judiciary of taking bribes and sexual favors in trade for decisions. As a result, the Chief Justice suspended seven of the twelve Justices of the Supreme Court and another 22 judges of lower courts.⁴³ Although two Justices retired and one was cleared of wrongdoing, proceedings against the others continue. The Chief Justice acted on advice of the Judicial Council, but the prosecution of the named judges is now in the hands of the Attorney General.⁴⁴

The scandal has resulted in significant delays in judicial proceedings,⁴⁵ and it is not clear how or even whether transition will take place to return the judiciary to its former position of respect.

2. Nigeria

Nigeria is a rather large and complicated country. With an area about twice the size of California, it is the eighth most populous country in the world at almost 200 million people divided among over 250 ethnic groups. The governing structure, democratized from military rule in 1999, is divided among 36 states. The judiciary is mostly based on British common-law, with Shari'a prevailing in the 12 northern states, and some traditional systems. At the federal level, judges are appointed by the President and confirmed by the Senate from recommendations of the National Judicial Council, a 23-member independent body of federal and state judicial officials. Thus, on paper, it would seem that this complex system is set up to ensure a good deal of judicial independence.

The country itself, however, has been plagued by corruption from its initial independence in 1960. Transparency International ranks Nigeria 136 of the 175 countries in its index. Recently, the Governor of Ekiti State accused the judiciary of widespread corruption.⁴⁶ Then the Chief Judge of Kwara State called on the bar to tackle the problem of judicial corruption.

Both the President and the Chief Justice at the federal level have called on the courts to clean up their act:

⁴³

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/ghana/11915763/Ghana-suspends-seven-high-court-judges-over-bribe-taking-film.html>.

⁴⁴

<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Judicial-scandal-22-judges-to-be-prosecuted-381641>.

⁴⁵ <http://www.bbc.com/news/world-africa-34452768>.

⁴⁶ <http://www.nguardiannews.com/2015/10/judiciary-is-corrupt-says-fayose>.

In June [2015], the Chief Justice of Nigeria, Justice Mahmud Mohammed, obviously aware of negative public perception of the institution he heads, said on the occasion of the induction of new judicial officers that ‘the Nigerian judiciary is now more prepared and more poised than ever to rid itself of all the ugly dirt inflicted on her by unscrupulous, fraudulent and corrupt persons occupying judicial positions in Nigeria.’ To achieve this, he cited the Code of Conduct that is in place to guide judicial officers, and the national and state judicial councils that are ‘adequately empowered’ to deal with misconduct.

That oversight of judicial misconduct is in the hands of judicial councils is a good sign. Those councils are better equipped to assert impartial judgment over complaints than would be a purely executive operation.

On Feb 8, 2017, corruption charges were filed against two high-ranking judges. Nigeria will be an interesting case study to watch over the next few years.

3. Kenya

Kenya presents an interesting mix of British, Islamic, and customary law. With support from the UNDP, the country undertook an effort known as the Judiciary Transformation Framework, 2012 – 2016. The judiciary stated its difficulties with candor:

The overweening influences of the Executive created an enfeebled Judiciary, an arm of government strikingly reluctant to play its classical role in the defence and upholding of the constitutional principle of separation of powers. This capture by narrow interests created an institution plagued by corruption and inefficiency – a veritable figure of scorn at odds with the public interest. While many members of its staff worked diligently under extraordinarily difficult circumstances, this has been an institution in the vice-grip of a crisis of confidence.

The Framework did not specifically call for changes in the appointment process but addressed the needs for a new culture of independence, training for judges and other staff, and placed a heavy emphasis on updating resources and technology.

4. Latin America

The principal threat to the judiciary in several Latin American countries is from violence. In Mexico, there have been many attacks on police chiefs, mayors, priests, journalists. In Oct 2016, the judge in the El Chapo case was killed on the street. This was the first death of a judge in 10 years but a 2010 report stated that 21 judges had bodyguards and 78 used armored vehicles.

Colombia has seen an extended period of civil war and unrest among the government, FARC, and other drug cartels. Whether all of that will come to an end with a negotiated settlement with the rebel forces remains to be seen. Venezuela is perhaps complicit with Iran in support of Hezbollah. Argentina has been the recipient of intense criticism over its handling of the investigation into the 1994 bombing of the Argentine Israeli Mutual Association (AMIA) building which killed 85 people and has yet to result in a conviction (although at least two of the suspected perpetrators have been killed in separate incidents).

Most recently, Venezuela has been wracked by deaths in protests over authoritarian steps of the government.

One by one, the markers of Venezuela’s democracy have been pushed aside.

First, the Supreme Court was packed with loyalists of the president, and several opposition lawmakers were blocked from taking their seats. Then, judges overturned laws that the president opposed, and elections for governors around the country were suddenly suspended.

Next, the court ruled in favor of dissolving the legislature entirely, a move that provoked such an outcry in Venezuela and abroad that the decision was soon reversed.⁴⁷

An “election” on July 30, 2017, produced a national “Constituent Assembly” with the authority to rewrite the Constitution.

One interesting aspect of the Venezuela turn to authoritarianism is that it is being led by a noted “left-wing” autocratic rather than the usual “right-wing” autocracy.

Conclusions?

This heading warrants a question mark because there may not be a consistent conclusion to be drawn from all of this. The stable democracies obviously allow for some shifting in the content of their judicial decision making. Although the continental civil-law system purports to rest on codes rather than judicial precedents, it is clear that this is changing. In particular, the impact of the ECHR on European law shows evolutionary transitions in the area of human rights.

With regard to those societies caught in more disruptive transitions, it is unrealistic to expect judicial stability when the entire political and social structure is in some degree of chaos. More disheartening are those instances in which the political system seemed to stabilize and then shifted with an emphasis on remaking the judiciary to fit a new political order. This is hardly a fertile ground in which the Rule of Law could take root and grow.

The range of options for achieving a stable judiciary would seem to be the same as the range of options for achieving peaceful resolution of transitions or international conflicts, none of which is certain to be effective. A country in the midst of a violent civil war may seek assistance from the UN or other powerful allies. A regime that is abusing its own people may be the subject of military intervention under the new-found “Responsibility To Protect” or it may be the subject of economic sanctions, which usually turn out to have more disastrous impact on the people than on the regime. A corrupt regime should be the subject of efforts at “asset recovery,” under which economically stable countries attempt to garner stolen proceeds and maneuver them back into the treasury of the nation from whence they came.

But what to do about a regime such as Russia, which is internally stable but hardly respectful of judicial independence? Probably the most that can be said is that this will be one of the dominant themes of international affairs for the Twenty-First Century (along with climate change and globalized economics). The most likely solution for world-wide compliance with the Rule of Law is some form of global federalism, in which regional trade organizations insist on minimum standards on issues such as labor conditions, education, health care, individual freedoms, and judicial independence.

The best conclusion may be simply the same as the beginning: “No justice system can operate effectively in the midst of chaos but chaos cannot be forestalled effectively without a functioning

⁴⁷ <https://www.nytimes.com/2017/07/29/world/americas/venezuela-nicolas-maduro-constituent-assembly.html>.

justice system.” Somehow, the nations of the world must unite behind the common cause of peace and justice for the simple reason that judicial independence is critical to the modern global order.