

Global Libra

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JOE GRATZ

PARIS—As a New Year's gift to those who elected him, France's new president, François Hollande, mired in a seemingly intractable economic malaise and about to embark on a war in an old colonial territory of Francophone Africa, made an announcement, which the French daily *Le Monde* carried as an urgent bulletin. He would put an end to the practice of every ex-president becoming a

member of the Conseil Constitutionnel, the final judicial appeal of French citizens. Beginning with himself, though not extending to his hated predecessor, Nicolas Sarkozy, no exiting president would have the inalienable right to a seat on France's highest court. It was a campaign promise, one of 60 that Hollande made, as French presidents are wont to make in the heat of battle but rarely expected to remem-

ber, let alone keep. But Hollande has been quite meticulous in honoring a number of them. Still, of the 60 pledges, only two had anything to do with France's hide-bound judiciary that has changed little since the Napoleonic Code was established not long after the absolute monarchy was ended by the French Revolution. Even today, in a French court, a defendant who arrives there has already been judged by a *juge d'instruction*, who is both investigator and judge, and must prove his or her innocence. And while one of Hollande's pledges calls for "suppression of *peines-plancher*," or unyielding minimum sentences, even this still awaits legislative action.

Some 6,000 miles to the east, and several weeks later, a Thai court sentenced a magazine editor-cum-labor organizer to 10 years in prison for the crime of *lèse-majesté*, or insulting the king. Of course, it's doubtful that, until the court case came along, King Bhumibol—ailing and apparently barely able to fulfill the duties, which he has performed for what is now approaching 67 years (he's 85 years old)—was even aware of the "insults" hurled at him by this journalist-activist. Still, Somyot Pruksakasemsuk, 51, was sentenced to this horrific sentence for the crime. Oh, and the court threw in another year for good measure for libeling a senior general—probably not a bad gesture by the court since generals have been known to stage coups, taking over the government and the courts. Of course, no coup has ever succeeded without the blessings of His Majesty the King.

As it happens, I knew this king—not well, and not for many decades—but when I traveled with him to Sakon Nakhon in

far northeastern Thailand back in 1976 when he was 49 years old and at peak of his health and power, the people turned out to worship him, as they still do. Many had knelt throughout the night alongside the roads his motorcade was due to pass. In the pitch darkness, they held candles before their faces in hopes that His Majesty would glimpse them as he sped past. "In my heart, he is my King, and I love my King," a 25-year-old farmer, Borworn Rasadoynde, told me. He'd been waiting for hours, kneeling in the village square near his farm. As for the new military government that had been installed after the latest coup a few months earlier and sanctioned by the king, Borworn added, "I'd rather not discuss. I also love democracy, you see." He found it hard to believe the King would sanction any group that did not favor democracy.

DEMOCRACY ≠ JUSTICE

Democracy and justice should go hand-in-hand. But not surprisingly, there is a broad spectrum of both. The nature of democratic governments determines the nature of justice their courts dispense, while at the same time courts all too often reflect and reinforce the failings of the democratic systems supported or endorsed by the political establishment. A government of true checks and balances will often find the judiciary at odds with the ruling elite. But that is all too rare a phenomenon, as even in the western world or the truly democratic systems elsewhere, courts may reinforce a political agenda that is most antithetical to the democratic norms professed by the nation's leaders. And in the vast regions of the world where democracy is still elusive, where

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a variety of autocracies or oligarchies hold sway, there is another parallel system of justice that mirrors the malevolent nature of the nations' governments and leaders. So, effectively, justice—or in its most concrete and immediate iteration, a country's judicial system—can serve as a useful prism to evaluate the level of democracy or responsiveness of a government and its leadership. This gauge—the objectivity of a nation's justices, their willingness to set aside or resist outside forces seeking to sway their deliberations—can often serve as a scale to evaluate the nature of rulers and the command structure they've established to govern.

Above all, the justice system, including criminal and civil justice, is of such central importance since, unlike the legislative or executive branches, it is the unit of government most likely to directly impact the lives of citizens. From the remote village courts to the highest appellate court in the land, the justice system has the ability to touch our every action—how rapidly we drive or where we park our cars, who we marry and divorce, how we organize our businesses and enforce our contracts and obligations, and the safety and security of our streets and our homes. Yet, at the same time, the justice system has little or no direct power of its own. It has no army, no police, and little bureaucracy. It is wholly dependent on others to enforce its will and its pronouncements, indeed to provide it legitimacy. No judges have ever staged a coup d'état on their own, though they have certainly lent an air of legitimacy to such activities and have repeatedly been removed by those who've seized

power. All too often, they are called upon to enforce or interpret statutes that much of humanity finds abhorrent. For many, true justice—not the act of voting—is the ultimate expression of democracy. Without justice, democracy is no more than an empty slogan.

In Thailand, for Borworn, under a monarch who espouses principles as democratic as any found in the most developed nations, democracy translates into justice. "My King knows everyone needs democracy," Borworn concluded our conversation in Sakon Nakhon. Yet justice in remote, rural Thailand is very political indeed, and far from the ideal espoused, at least on paper, by the monarchy and the nation's leadership. One American journal-

ist, working for the *Bangkok Post*, was forced to flee the country in the dead of night two years ago after a general she'd accused in print of corruption planned to have her seized and hauled before a tribunal in his home village "up country." Charged with criminal slander, she could well have landed in the local

jail for a very long time—indeed a potential death sentence. She had all the evidence, which would have held up in any American or British court. But not in Thailand, especially not in rural Thailand where a general's will carries far more weight than truth or any semblance of even-handed justice.

As for Somyot, in the two commentaries that landed him a 10-year prison sentence, the name of the King wasn't even mentioned. The first piece described a family that was plotting to retain power and crush democracy, which the court said clearly described the current King's dy-

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nasty. The second was a yarn about a ghost haunting Thailand, and planning massacres, the specter “clearly” referring to King Bhumibol, according to the court’s ruling. But Somyot hadn’t even written either piece. The offending journalist had prudently fled to neighboring Cambodia. Somyot had simply been the editor of the magazine, *Voice of Thaksin*, that published them. Thaksin Shinawatra is a Thai businessman and politician, who served as prime minister from 2001 until 2006 when he was overthrown in a military coup. His younger sister now holds that post, but the judiciary is still seeking its pound of flesh from her brother who’s been accused of corruption, though millions in the countryside believe he reflects the true will of the people.

JUSTICE, KREMLIN STYLE

In Russia, as in Thailand, the judiciary is hardly independent. They seem to have the best interests in mind of only a small circle around President Vladimir Putin. Today, Russia considers itself democratic. And as I’ve said repeatedly, there are indeed different forms of democracy that often suit the people or the country where they’re found. So, the Israeli form of parliamentary democracy, with its scores of political parties, would hardly be appropriate for the United States or Britain with different democratic traditions. Equally, a quasi-autocratic democracy seems to suit the bulk of the Russian people whose tradition of strong rulers dates back to before Ivan the Terrible. So it should hardly be surprising that its judicial system is only marginally even-handed, and hardly at all when it comes to any issue with political overtones.

Recently, Putin banned the export of Russian orphans to the United States—a purely political reaction to an Ameri-

can law that barred from ever entering the United States anyone connected with the prosecution of whistleblower lawyer Sergei Magnitsky, who died under mysterious circumstances at the age of 37 in a Russian prison in 2009. The problem arose when a number of American adopters, in the final stages of adoption, came to collect the orphans they’d been promised before Putin’s retaliatory ban on adoptions had been ordered. The courts didn’t know what to do. If judges took it on themselves to release the young people, their decision could be overturned, or worse—their careers, even their lives in jeopardy. So the judges bumped the matter upstairs to higher courts where, in Icarus fashion, there were justices who dared fly close to the sun. Of course, even these judges didn’t want their wings melted so they demurred. Some judicial sources suggested that even if approval was won in a lower court, and some bureaucrat could then be persuaded to release the child, a border guard at the airport might keep the parents from boarding their flight. After a month in limbo, the Russian Supreme Court—very much a Kremlin mouthpiece, finally gave its okay, and the first orphans, approved prior to the official government ban on December 31, were able to make their way to America—and freedom.

Of course, in Russia, there is no end to the injustices perpetrated by this warped judicial system—which Putin and his predecessor Dmitri Medvedev have repeatedly pledged, then of course promptly neglected to reform. Hence the continuing pattern of Russian justice—impunity for oligarchs, or at least those who pay obeisance to their Kremlin masters; impunity as well for murderers of journalists who’d often committed no crime but serving as impartial monitors of the excesses or abuses of government,



industry, oligarchs, and any numbers of miscreants attempting to subvert or suborn the common good.

All of this is similar to the system that pre-dated capitalism in Russia and that I experienced first-hand throughout the empire that the Kremlin imposed on half of Europe—only the barest veneer of justice built into a system carefully stage-managed from Moscow. In each case, of course, this surfeit of injustices masqueraded as even-handed justice. And some hit closer to home than others. In Poland, for instance, I twice came into the hands of the public security system. The first case came at a factory that was making golf carts to be exported to the United States and other Western markets. An American trade tribunal had banned their import, charging that

the government was unfairly underpricing the carts by artificially revaluing the local currency, the zloty, in its conversion rate. Since it was a non-convertible Soviet-bloc currency, the government could peg the rate at whatever level it felt most advantageous, usually the rate that made their products more competitive in the West. The golf cart manufacturer, who I contacted, suggested that I come visit the plant to examine the economies of scale it had implemented that would justify their low prices. They were being built in an old military aircraft plant on the outskirts of Warsaw—a plant that existed by that time purely for the manufacture of golf carts, but whose skilled workers had been trained to turn out products with military precision. So I agreed to a visit. The problem was that the plant management

had neglected to communicate my arrival to the guards at the front gate, who still operated on the assumption that they were safeguarding a top-secret military installation. So, when I showed up, they seized me and clapped me in a lockup at the front gate—no phone, no communication. I was clearly an American spy bent on subverting the Polish military-industrial complex. Nor would they entertain my pleas simply to call the president of the plant who was expecting me. He did not oversee his installation's security.

Eventually, of course, someone inside realized that I had not appeared for my rendezvous and had the good sense to call out front to find me. This took hours to sort out. But finally, with few apologies, I was freed and allowed to continue my tour of the top security golf cart plant. The lesson here is a basic one—the fact that the criminal justice system was set up to be so definitively arbitrary was far from unintentional. In so many forms of autocracy, an officer of the law can, and often does, deliberately serve as judge, jury, and executioner, at least in the sense of carrying out a sentence he, or very rare occasions, she has imposed. Such a system of justice is not dissimilar to the system that caused the golf carts to be so apparently underpriced—rather than allow market forces to set the level of the currency system under which it is produced, that price was pegged, arbitrarily by a government with its own arbitrary standards and priorities.

My second brush with Polish justice took place in June 1979, at the conclusion of the return to his native Poland of Pope John Paul II—his first visit since being elevated to the Papacy just eight months earlier. At the end of this visit, which I followed as it wound triumphantly through Poland to the increasing discomfiture of

the ruling Communist leadership, the Pope agreed to receive the traveling press in the home of the Archbishop of Krakow, which he'd vacated just the year before. It was an ancient building, surrounding a vast courtyard just across from the cathedral. The Holy Father appeared on a balcony overlooking the courtyard, where the press assembled and which was accessed via a deep, dark tunnel that traversed the house. Just before the audience began, I had the temerity to suggest to the head of Interpress, the state press agency, that the presence of plainclothes security officers disguised as members of the press corps was inappropriate. We'd spotted them the instant we started our trip, and they'd been following and surveilling us throughout—without ever filing a single word of copy through the press center. The Interpress fellow, exceedingly uncomfortable, brushed me away. But a short time later, as I was leaving via the same tunnel, two burly, plainclothes security folks accosted me and, without a word, began pummeling me—fracturing a rib and shattering my eyeglasses (the worst of the injuries, since I still had to file my story to *The New York Times* that evening). Had several of my colleagues not suddenly appeared, forcing them to flee, I don't know what extreme Polish justice might have reached. Again, no judge involved—merely the public security apparatus functioning as judge and jury, convicting me, then carrying out a most brutal sentence.

In such cases, the justice system has largely ceased to exist with any sense of independence and has instead become subsumed into the executive branch, with the most insidious consequences.

STEERING IN THE WIND

In all too many countries, even those pro-

fessing democracy, the judiciary is less a check on the excesses of the other branches than a tool to maintain control and power. Justice-by-fad is sadly quite a routine practice in a host of nations and can often be accompanied by whiplash for those who must endure its frequent twists and turns.

In July 1977, I was sitting in the front row of a press conference at the Hotel Intercontinental Rawalpindi, down the block from the headquarters of the Pakistan Army, which had just seized power. This bloodless coup had deposed President Zulfikar Ali Bhutto, the junta placing him and his senior ministers under arrest. General Mohammad Zia ul-Haq, leader of the four-man military leadership, was holding his first press conference. He had just named a new civilian attorney general, so one of his priorities was to detail the new system of justice he had in mind for Pakistan—*shariah* justice. What did that consist of, I asked him. “Well, for instance, a thief will have his hand amputated,” he replied evenly. And then proceeded to elaborate, that this would be performed, humanely, by a surgeon. Several reporters began to turn quite green, but the general pressed on with gusto, gathering steam as he went. The skin and flesh would be pared back at the wrist, the wrist bones separated, and the hand removed. None of this made more than a few paragraphs in the local papers the next morning, and hardly seemed to horrify any but the western journalists who’d sat speechless through his entire recitation. This was justice, Pakistani style, or at least Pakistani mili-

tary style, and that was the government that had just been installed. There seemed to be little real understanding that *shariah* justice as applied in such a fashion may not be considered the most humane practice by much of the planet.

Even just last year, during a visit I paid to Saudi Arabia, a number of Shiite dissidents in the Eastern Provinces, many bitter opponents of the way their judicial system was treating them, astonished me by still professing unwavering support for king and country. And indeed, *shariah* law, applied in its most even-handed and benevolent fashion, can be the equal of any western system of jurisprudence.

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ULTIMATE JUSTICE

Certainly, one goal of justice is security with the maintenance of order in which creativity and independence can function, while still maintaining the boundaries that mark a civilized society. One crucial question is whether justice, which varies so broadly in the manner it’s dispensed, can yield tranquility and order. Measuring a country’s justice system can also be an important metric of the viability of the government as a partner or as a guarantor of the security of an individual or a contract. To this day, most international contracts written between a foreign party and a Russian corporation contain a provision for international arbitration of any dispute by a Western judicial body in Stockholm or London. Taking the temperature of a justice system can often be a critical clue in determining how much to risk in the hands of its guardians—be it your life or your wealth.

Indeed, the two can often be most intimately linked. The Inter-American Development Bank has issued a series of studies that suggests a sense of insecurity lowers the value of urban properties in Brazil, costs Uruguay 3.1 percent of GDP, and has seriously impacted metrics as diverse as real estate values, electricity consumption, and employment in Mexico. All are countries battling to achieve a level of justice and security that can only be achieved by a functioning judicial system. They are also nations struggling to build a democratic system that can speed development, build a strong middle class, and lift as many as possible from poverty, which itself can be a breeding ground for challenges to social order.

One central step along this path to a more rational justice system, are the efforts being undertaken in a number of Latin American countries to transform criminal justice from an inquisitorial model, in place since colonial rule, with an adversarial model. The inquisitorial system relies largely on written brief for and against acquittal of an accused, whose fate is determined by a judge. The adversarial system, also known as the accusatorial system, is an oral system, best known in North America and includes oral, public trials; a more robust prosecutor's office and defense bar; more prosecutorial discretion at the pre-trial phase, including plea-bargaining; and greater protections for criminal defendants.

Thea Johnson, a visiting scholar at Stanford Law School who has been study-

ing these systems, is attempting to understand whether a new adversarial model has had any substantial impact on these criminal justice systems, or whether, like so many attempts at "reform," it's a lot of show with little pay-off for human rights, democracy, or the other theoretical goals of these particular reforms that are underway in Ecuador, Peru, Colombia, Mexico, and Costa Rica, though not Cuba or Panama, and only minimally in Uruguay or Paraguay.

All too many developing countries have failed to appreciate the value of working toward the goal of an impartial judiciary. If, as I suggest, justice is so often held hostage to the society in which it functions, a central question revolves around the issue of influence. In truly even-handed systems of justice, there should be no untoward, external influence on the dispensation of justice. But judges hardly operate in a vacuum. Even members of the United States Supreme Court go home each evening to their families, shop in malls, send their children to school, drive and park their cars, and worship in churches or synagogues. They are, and indeed should be, thoroughly responsive to their times. After all, when America's first chief justice, John Jay, took the bench, slavery was not only legal but an accepted way of life in half the United States. Yet this did not prevent the court, eventually, from outlawing school segregation nearly two centuries later. In each case, though, these were decisions freely arrived at.

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BEYOND FRONTIERS

But there's a dark side to judicial independence in much of the world. Because of the nominal independence of the judiciary in most nations, but especially in any self-styled democracy, there's little external influence that can be brought to bear to rectify any suggestion of inequality or injustice. There's no appeal from national courts of last resort in a system that tolerates inequities and injustice. Independent election monitors can oversee electoral improprieties or vote-rigging—though rarely succeed in righting any of them—and other sanctions from steep financial penalties to trade embargoes to other forms of international ostracism can be used to bring into line recalcitrant governments that act with impunity against their own citizens or international norms of behavior. But there's little that can be done to bring into line national, or often more insidious, local systems of justice.

Some supranational courts like the International Court of Justice in The Hague or the International Criminal Court have been used to some effect in cases of genocide or other acts of war and their aftermaths. But all too often, the actions of such an international judicial body require some buy-in from the local governments or, at a minimum, from governments who are inclined to harbor the fugitives and must turn them over for prosecution. Even then, the time lag between crime and punishment is often so prolonged that the defendant dies before the trial can be carried out or is so disabled as to allow him clemency due to age or infirmity. In short, these supranational systems are both expensive and clunky.

Moreover, when the judicial processes of individual nations devolve into score

settling, there is little that can, or probably should, be done by any outside forces, judicial or political. So each new French regime will likely continue the repeated cycle of prosecuting the *ancien régime* of outgoing presidents or their aides for fiscal malfeasance. And more insidiously, many African regimes have proven themselves unwilling or unable to take action against barbaric leaders who slaughter their own people, then escape justice with nearly unrestricted impunity. Transnational justice can and has been invoked in such cases, but with only spotty results. Few countries are prepared to relinquish sufficient sovereignty in this core function of justice to allow any international justice system to flourish uniformly or reliably. Again, as is the case of government systems, the best the West can do is simply to provide a good example to be followed by other nations, still groping their way to a system of full and impartial justice system for all those within their borders—citizens and aliens alike. It is an example, incidentally, where we in the West, especially in the United States, may also be found wanting on all too many occasions.

I have one final pledge to our readers. This year, I intend to devote my Coda to an examination of a broad spectrum of different aspects of government—how effectively they function in working for the people they profess to serve. We begin this spring with the judiciary. But there is a host of other systems down to the humblest villages that touch the lives of individuals and affect their quality of life, often on a daily basis. How they function, or indeed how they might be improved in their operations is an essential aspect of our world that all too often goes unexamined and certainly ill-explained. ●