In transition countries, public concerns about the courts tend to focus on perceived corruption and political interference from the executive. However, a recent EBRD study of judicial decisions suggests that judicial activism is contributing to the public perception of judicial bias in the region. This has policy implications for those engaged in legal and institutional reform.
Judicial activism

The last 20 years has seen much debate in developed jurisdictions about the proper role of judges in interpreting the law. Such argument pits traditionalists, who maintain that judges should find meaning within the text of the law, against advocates of judicial activism, who favour interpretative creativity informed by moral and policy considerations. Interpretation of law is not algebra, and reasonable minds can be expected to differ on the meaning of a legal provision in a particular circumstance, especially when it involves abstract concepts such as “reasonableness” or the “public interest”. But, at the same time, it is a fundamental tenet of judicial responsibility that judges be impartial. Judicial interpretation must involve a conscientious search for objective meaning. What drives concerns about judicial activism is the impression of judges preferring a particular outcome to a legal dispute and employing lax interpretative techniques in order to accommodate their preference. It is this manifestation of judicial activism with which the present article is concerned: situations in which judges appear to adopt a results-oriented approach to decision-making, focusing first on outcomes (who should win), rather than on judicial process (what the law means and how to apply it).

In the transition countries of eastern Europe and the former Soviet Union, relatively little attention has been paid to the question of judicial activism and interpretative methodology. Public concerns about the courts tend to focus on the perceived high levels of corruption and political interference from the executive. These problems are
Judicial interpretation must involve a conscientious search for objective meaning.

certainly real: academic studies and reports of international and non-governmental organisations have produced ample evidence of corruption and a lack of judicial independence in many transition countries. However, a recent study by the EBRD of judicial decisions in transition countries suggests that, in addition to corruption and political interference, judicial activism is contributing to the public perception of judicial bias in the region. This has policy implications for those engaged in legal and institutional reform.

The EBRD’s study of judicial decisions

The EBRD’s Legal Transition Programme works with governments in the Commonwealth of Independent States (CIS), eastern Europe, and the southern and eastern Mediterranean (SEMED) region to strengthen commercial law, as well as legal and market institutions, with the objective of improving the investment climate. This work furthers the Bank’s mandate to promote the development of the private sector, and the transition from planned to market economies. One of the LTP’s focus areas is contract enforcement and judicial capacity in commercial law. Work in this field involves EBRD lawyers and consultants implementing technical assistance projects with governments, directed towards such matters as court and legislative reform, judicial training in commercial law and market awareness, and promotion of alternative dispute resolution.

To provide an evidentiary basis for the Bank’s policy dialogue with governments, the LTP undertakes analytical research on the quality of commercial legislation and institutions in its region. From 2010 to 2013, the EBRD and local legal experts from across the region conducted a qualitative assessment of judicial decisions in commercial law matters in the countries of the CIS, south-eastern Europe, Georgia and Mongolia. The study, the EBRD Judicial Decisions Assessment, focused on typical cases in three broad areas: creditor rights, property and shareholder rights, and dealings with regulators. 7

Inferences of partiality

One of the dimensions studied was the inferred impartiality of decisions, based primarily on the face of the record, but also taking into account the surrounding circumstances of the litigation. This was intended to probe corruption and lack of judicial independence.
Courts often appeared to favour natural persons in commercial disputes against legal entities, such as corporations and partnerships.

Impartiality is, of course, a difficult dimension to measure in any categorical way. Yet reasonable inferences can be drawn from reviewing judicial decisions, considering factors such as: specious reasoning; decisions giving the impression of striving for a particular result; special treatment being afforded to one of the parties; procedural irregularities evident in the decisions; and the political and social context of the relevant dispute.

Numerous cases exhibited these characteristics. In many instances there were strong inferences of “telephone justice”. For example, in one decision, a government claim against a business linked to an opposition party was listed for hearing within three weeks, while new matters are typically listed for trial only 12 months after filing. The study concluded that the courts of many countries, especially in the CIS, showed deference to state interests, particularly in relation to litigation in strategic sectors of the economy. Other cases, with no apparent link to government or political power structures, were suggestive of corruption; for example in instances where members of the business elite succeeded in commercial litigation despite the merits of the case being strongly against them. However, many cases of inferred bias were not believed to be associated with either corruption or political interference, but rather with results-based judicial decision-making, where courts’ sympathies were aroused by the social or economic profiles of the litigants.

**Categories of favoured litigant**

Set out below are several categories of apparently “favoured litigant” that emerged from a review of the decisions studied in the Judicial Decisions Assessment, as well as associated research on jurisprudence in the countries concerned, including interviews with judges from the region. Clearly, it is not possible to prove the extent to which subjective considerations are affecting judges’ decisions, and therefore the following is necessarily somewhat impressionistic. Nevertheless, inferences can be drawn by lawyers, investors and the general public about the impartiality of judges’ decisions and the factors that influence them. The following categories do not represent uniform trends across all countries, but are offered as examples of decisions where inferences have been drawn about judges’ outcome preferences determining the decisions. The cases referred to below are not cited, so as not to prejudice the position of the judges concerned.

**Natural persons**

Courts often appeared to favour natural persons in commercial disputes against legal entities, such as corporations and partnerships. An illustration is provided by an Albanian case involving an individual investor who had signed an agreement with a property developer for an option to purchase an apartment off the plan. In order to obtain further financing, the developer granted a mortgage to a bank over the entire building structure. When the developer defaulted on payment, the bank sought to foreclose on the mortgage and take possession of the nearly-completed complex. The individual investor claimed that he had acquired title to the apartment, against which the mortgage was ineffective. The court agreed. Although the mortgage had been registered and conferred an indefeasible title on the bank over the entire complex, the court found that the option to purchase had “passed ownership” of part of the building to the individual investor. A spate of similar rulings followed, which were manifestly contrary to the mortgage law. This resulted in Albanian banks losing confidence in mortgages as a form of security for credit, which adversely affected the liquidity of the market.

**Mortgagors**

Similarly, courts would sometimes strive to avoid foreclosing on a residential mortgage. Moldovan legislation allowed mortgagees to foreclose upon default by obtaining an ordinance from a court, confirming the mortgagee’s right to seize the property. Such ordinances, once granted, could only be set aside on the very limited grounds set out in the mortgage law. However, in a number of cases, mortgagors successfully petitioned the courts to overturn enforcement ordinances on grounds entirely unrelated to those in the mortgage law, such as on general considerations of hardship and injustice. Many decisions did not even refer to the relevant provisions of the mortgage law. The problem was compounded by the fact that, under Moldovan law, the decision to revoke an enforcement ordinance was not appealable. As in Albania, the approach of some judges to this issue
A lack of exposure to the commercial world and poor training can combine to hinder judges’ ability to deal effectively with commercial cases.

contributed to the contraction in the mortgage market in the late 2000s, which had already been hit hard by the global financial crisis.

An alternative theory about the reasons for the apparent partiality of judges is that these instances of apparent “outcome preference” were rather the result of poor understanding of the relevant legislation. Indeed, in all countries in which judicial decisions were analysed there were instances of courts making mistakes about the application of commercial law, which is understandable given the uneven (and sometimes non-existent) training given to judges in these areas. It must be borne in mind that judges in civil law countries are appointed to the bench as young professionals, often with little experience. A lack of exposure to the commercial world and poor training combine to hinder judges’ ability to deal effectively with commercial cases. Nevertheless, residential mortgages are not remote from the ordinary experience of most judges, and the particular provisions concerned were not complex. Further, it was known that in many proceedings the unsuccessful parties (banks) specifically pleaded and clearly explained the mortgage legislation.

**Other debtors**

Some judges appeared to show a predisposition towards debtors generally. A series of Ukrainian decisions were studied in which courts rejected claims by creditors for the repayment of simple debts, on spurious grounds. In one case the debtor claimed he had been absolved from his obligation to make certain monthly payments on leased equipment because he had not received invoices on time in respect of the months concerned. The court accepted this defence, despite the absence of any apparent basis for this in Ukrainian law or in the contract. In another case, a debtor successfully invoked central bank regulations limiting foreign currency loans in order to justify the non-repayment of a debt denominated in US dollars, even though the debt was below the relevant limit (the case was reversed on appeal). Local counsel pointed to a series of decisions apparently motivated by the court’s sympathy for debtors during the financial crisis. Similarly, in Russia, experts noted reluctance on the part of creditors to initiate bankruptcy proceedings. This was attributed, in part, to their concerns about latent court sympathy for debtors and an expectation that creditor-initiated bankruptcy proceedings – as opposed to those initiated by debtors themselves – might not receive an impartial hearing. In Tajikistan, a stark instance of pro-debtor sympathy involved a claim by a creditor for the repayment of a loan, where the debtor was a local charitable organisation providing training to blind people. The charity acknowledged the debt, but the courts at first and second instance found simply that it would be “unfair” in the circumstances to require repayment from an institution that was pursuing social and humanitarian aims. No reference was made to relevant law.

As noted earlier, these categories do not reflect uniform trends across all transition countries, and indeed the opposite was experienced in Armenia: financial institutions, rather than debtors, were perceived as enjoying the courts’ favour. This was said to be a reflection of courts’ deference to the executive, which had in recent years placed a great emphasis on strengthening the financial system. Courts in the Kyrgyz Republic were also perceived as having a more pro-creditor orientation.

**Local parties**

In some countries, courts in regional areas appeared to favour local parties against outsiders. For example, in the Former Yugoslav Republic of Macedonia, certain regional courts decided a string of cases against firms which had their head offices in the capital, Skopje, in circumstances where the merits of the case were considered to have been strongly in favour of such companies. The demonstration of regional sympathies by courts was also identified as an issue in Uzbekistan, where concern about the quality of justice usually focuses on a lack of judicial independence and the overbearing role of the state. In addition, the large number of property law cases in Kosovo, discussed further below, are an example of courts favouring locals against outsiders (in this case, ethnic Albanians over ethnic Serbs). This apparent regional bias could, in theory, be a manifestation of corruption, where local litigants were simply more likely to understand and use local channels and means of bribery than those from outside the region. However, it seems unlikely that such “local knowledge” could not be acquired by a party from elsewhere in the same country.
Judicial activism is antithetical to the rule of law, which posits, at a minimum, a body of rules being applied objectively.

The state

In many decisions, particularly in the CIS, judges were perceived as showing deference to the position of the state over that of private parties. Unlike the previous categories referred to, cases where the state prevails over private parties in dubious circumstances point, *prima facie*, to political interference. While such cases entail instances of results-oriented decision-making (the preferred result being the state’s victory), the desired result is presumed to emanate from the state rather than from the judge. But this presumption may be erroneous.

On the one hand, there is little doubt that, in many transition countries, a lack of judicial independence accounts for a perceived pro-government bias in judicial decisions. An extreme case is Turkmenistan, where separation of powers, is, in practice, very weak, and judges are seen by many as an extension of the administration. The law does not serve as protection from state power, but rather as an instrument for wielding it. In other CIS countries there are, to varying degrees, concerns about a lack of judicial independence from the government, and about the ability of the state to dictate or influence judicial decisions. In some countries judges are appointed for initial terms, and are subject to reappointment based on their performance. This has a chilling effect, whereby judges are reluctant to find against the state out of fear for their career prospects. Even once they are reappointed, judges remain wary about challenging state interests, and appear to internalise an unspoken rule that their job involves protecting state interests.

On the other hand, for some judges in transition countries, socialist perspectives linger. Privately, some judges candidly express the view that the role of the courts is to protect collective interests – personified by the state, as they were formerly by the Communist Party – against the private interests of capital, particularly in sectors which are a large source of government revenue. According to local experts, many judges in Belarus, Russia and Ukraine consider that it is not in the public interest to decide a case in a way which results in substantial losses from public funds. Similarly, cases in which the state seeks to challenge the privatisation of state assets are often perceived to receive a sympathetic ear from judges. A common phenomenon is for courts to apply the more lenient (general civil) statute of limitations, rather than the special, stricter limitation rules that typically apply to
Judges tried to get around the law to achieve a social objective, only to cause grave injustices.

Regulators
Courts in many of the countries studied displayed deference to the arguments of regulators. In cases dealing with challenges to decisions of the tax or customs authorities, courts in some countries gave much greater weight to the arguments of the regulators. In a number of countries, including in southeastern Europe, the competent court has never upheld a complaint from a private business against a decision of the competition authority. However, expert opinion was that these were not always necessarily instances of pro-state bias. In specialist areas, such as taxation and competition law, judges often have little background, experience or training. It was considered that, in such cases, judges often assumed that the decisions of expert regulators were based on a greater understanding of the relevant law and practice than that held by either the private parties’ lawyers or the judges themselves. Here, the unstated judicial position was not that the court should protect state interests or a vulnerable party, but rather that the regulator knows bests, and should therefore prevail.

The problems with judicial activism
Judicial activism has been comprehensively dissected elsewhere. It is sufficient to note three fundamental problems with results-oriented decision making. First, it is antithetical to the rule of law, which posits, at a minimum, a body of rules being applied objectively; activism is a form of bias and, accordingly, there must be an in-principle objection to it. Second, it leads to jurisprudential uncertainty, which undermines public confidence in the courts, which, in transition and developing countries, is already low. This adversely affects the investment climate, further deterring foreign and local investors from full participation in the relevant economies, and impeding economic development. Third, using a moral compass, rather than a legal text, as the touchstone for decision-making often has unintended adverse consequences. Courts
The EBRD’s research suggests that, in many cases involving perceived bias in the judgments of transition courts, decisions are affected not by corruption or political interference but by judicial activism.

A recent illustration of such unintended consequences from the EBRD region is the approach of courts in Kosovo to applications seeking confirmation of title to immovable property, in the years following the conflict with, and eventual independence from, Serbia. The courts regularly accepted such applications in cases where no written contract of sale was produced, in clear breach of Kosovo’s land law. Judges were motivated by a desire to deal practically and (presumably) fairly with the consequences of systematic discrimination against ethnic Albanians that occurred during the Milosevic era, when there had been a prohibition on inter-ethnic property transfers. Many such transfers had taken place informally, without written documentation; a bona fide purchaser thus might not ever have had documentary proof of sale. Further, the ethnic conflict leading to NATO intervention in the late 1990s had resulted in large numbers of records being destroyed. In the 2000s many landowners sought court orders confirming their title to property for the purposes of obtaining credit or various licences, but lacked the required evidence for courts to properly issue decisions confirming their title.

Sympathetic judges devised two solutions to the problem. They would base their decisions confirming title either on a new doctrine of “substantial performance”, backed by oral testimony of a sale transaction, or they would loosely apply principles of adverse possession, extremely favourably to occupiers, confirming title to premises in the existing occupier. A study of this phenomenon undertaken by the Organization for Security and Cooperation in Europe (OSCE) exposed a pattern of flawed reasoning and incorrectly evaluated evidence, as well as unsafe practices, such as appointing temporary representatives for absent respondents to property claims. In their desire to find creative judicial solutions to problems, and to assist the parties whose position they believed was just, judges flagrantly ignored the law, resulting in many landowners being dispossessed. Typically, these were people from the ethnic Serb minority, who were ultimately on the losing side of the conflict in Kosovo. But ethnic Albanians also suffered; many were absentee landowners, having moved to new areas during conflict. They returned to find their family properties had been appropriated by fraudsters. All of this wrought havoc on the economy and poisoned the investment climate. Judges tried to get around the law to achieve a social objective, only to cause grave injustices. Fixing the legal problems surrounding title to real property in Kosovo should have been (and ultimately was) dealt with by the legislature, drawing on the resources available to it, such as a law reform commission and a public service which could properly consider and weigh all of the policy options. Claims which did not satisfy the requirements of Kosovo’s land law should have been rejected, even if many of them had “moral” merit. The OSCE report concluded:

The OSCE does not ignore the reality that, in some cases, parties belonging to different communities could not enter into a written contract due to the discriminatory legislation in force at the time. However, the preferred solution is for the legislative authorities to address the problem directly and offer a solution, rather than for judges or lawyers to employ legal doctrines that do not exist. This judicial creativity can be especially counterproductive, for it not only damages the rule of law but also allows for abuse.
Conclusion

The EBRD’s research suggests that, in many cases involving perceived bias in the judgments of courts in transition countries, decisions are affected not by corruption or political interference but by judicial activism: they appear to be decided by reference to judges’ outcome preferences. Much more research would need to be undertaken on this topic to understand the extent of the problem. However, it is already clear that this is an important consideration in approaching policy dialogue and reform in the region. The failure to take into account judicial activism in analysing concerns about bias in the judiciary may be resulting in the problems of corruption and political interference being overstated, and to insufficient reform measures (such as enhanced training) being taken to improve judicial method. Unlike their counterparts elsewhere, judges in transition countries who incline towards results-oriented decision-making are less adroit at crafting a reasoned framework through which to deliver their preferred outcomes. The quality of decisions can therefore be particularly poor, which is corrosive of public confidence.

The EBRD is working with courts and tribunals in the region to support training in commercial law and judicial skills. It is not easy being a judge in a transition country. Since the fall of communism, commercial legislation has developed very rapidly, often in an uncoordinated and desultory fashion. This has often left large gaps and inconsistencies for judges to deal with in attempting to resolve commercial disputes. Even so, the better judgments in the region convey to the parties an earnest judicial quest for an objective and rational answer to the dispute, unaffected by improper influences or outcome preferences.
Notes


3 See article 14(1), International Covenant on Civil and Political Rights: Everyone is entitled, in criminal and civil matters alike, to “a fair and public hearing by a competent, independent and impartial tribunal established by law”.

4 See Antonin Scalia and Bryan Garner (2012), Reading Law: The Interpretation of Legal Texts.

5 There has been some discussion. For example: “The limits of freedom of contract in foreign and Russian law”, Karapetov A G and Savaliev A I, 2012.


9 See: Trident General Insurance Co Ltd v McNiece Bros Pty Ltd, High Court of Australia (1988) 165 CLR 107, per Dawson J (dissenting), noting in relation to an invitation to make up new rules about privity of contract, that a court is “neither a legislature nor a law reform agency” and that it “would do more harm than good to attempt to reach a right result by the wrong means”.

10 In the early 1920s, German courts began revaluing commercial contracts in response to hyperinflation. They based this on the concept of “good faith” in the Civil Code, which was interpreted as importing concepts of “decency” and “equity”. This approach was described by one contemporary lawyer as completely “extra-legal but given a legal hairstyle”. The legislature had decided not to adopt revaluation as policy, because of the effect this would have had on the economy, and the government’s own debt. But judges sympathised with ordinary creditors (many judges were themselves creditors) whose repayments were wiped out by inflation. They abandoned their long tradition of interpretative rigour, and created a fictitious solution to help their category of favoured litigant. This led to judicial confrontation with the government, resulting in a government back-down on private revaluations, which undermined the political legitimacy of the Weimar Republic. See: Michael Hughes, “Private Equity, Social Inequity: German Judges React to Inflation 1914-24”, Central European History, Vol. 16, No. 1 (Mar 1983), pp. 76-94.


13 Commercial law judicial training programmes have been run in recent years in Albania, Bosnia and Herzegovina, Bulgaria, the Kyrgyz Republic, Moldova, Mongolia, Montenegro, Russia, Serbia and Tajikistan.

14 For example, the EBRD has worked with newly established public procurement review commissions in Albania and Ukraine on approaches to the exercise of discretion in determining complaints about tenders for public contracts.