

Law and
Policy Reform
at the
Asian
Development
Bank

2003 Edition

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March 2004

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FOREWORD

Since the publication of the last edition of *Law and Policy Reform (LPR) at the Asian Development Bank (ADB)* in December 2002, ADB actively continued with its LPR work across a broad range of areas in its developing member countries (DMCs). Part 1 of this publication is a brief overview of such activities in late 2002 and 2003.

Part 2 of this publication presents the final overview report and country-level summaries of the regional technical assistance (RETA) project No. 5987 for Judicial Independence. As part of ADB's mandate to deepen understanding of and promote knowledge sharing on important development issues, this RETA focused on the subject of judicial independence given the importance of the judiciary in achieving good governance and pro-poor economic growth. An independent judiciary that operates in a transparent and accountable manner is essential to the functioning of a market system that many countries in the region now aspire to. Creation of an enabling environment for the private sector, the functioning of regulatory regimes and a system of rights and duties that gives the poor a stake in the system all assume a functional judicial system run by an independent judiciary that can redress wrongs perpetrated by private parties or the state and uphold the rights granted to citizens under the law.

The project was approved in late 2001 and encompassed nine DMCs: Bangladesh, Cambodia, Indonesia, Lao PDR, Nepal, Pakistan, Philippines, Thailand, and Viet Nam. Two workshops were held

among ADB staff and the Asia Foundation's research team for this project to discuss the approach and substance of the research in March and July 2002 in Bangkok and Manila, respectively. On 6-7 August 2003, an international symposium was held in ADB's Headquarters in Manila to discuss significant issues arising from the country reports. Supreme Court Chief Justices, justices and judges of other courts, Ministers of Law/Justice, other government officials, NGO representatives including bar associations, and experts from around the world were invited. The sensitive nature of some of the issues did not impede frank and open discussions by all the participants, as reflected in this final report. An earlier draft of this report was also shared with Chief Justices of many other countries in the region on the occasion of 10th Conference of Chief Justices of Asia and the Pacific held in Tokyo in September 2003 in conjunction with 18th Biennial Conference of LAWASIA.

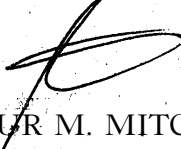
A major characteristic of this project was that it aimed to explore the issue of judicial independence not only from an academic point of view, but also from practical and realistic aspects facing day-to-day operation of the judiciary, such as judicial selection, appointment and promotion procedures, judges' tenure and removal mechanisms, judicial remuneration and resources for court administration. The project also explored the position of the judiciary and the courts in relation to citizens, and their impact on economic development, and governance. The relationship between the citizens and the courts is also being

explored through a small-scale regional technical assistance No. 6063 on Public Opinion Surveys on Judicial Independence and Accountability. Under this SSTA, public polling has already been conducted in two of the RETA participating countries, i.e., Cambodia and Thailand.

Judicial independence is central to sound governance of a nation, and is therefore one of the most critical elements for economic development. The report provides useful information, data, and analysis

on the issues surrounding judicial independence in participating DMCs, and is expected to provide useful inputs for developing practical and effective reform plans by countries in the region.

I would like to thank Mr. Hamid Sharif, Assistant General Counsel, and Mr. Motoo Noguchi, Counsel, in the Office of the General Counsel for planning and implementing this important project, and overseeing the production of this publication.



ARTHUR M. MITCHELL
General Counsel
March 2004

Part I:
Law and Policy Reform
Activities in Support of
Poverty Reduction:
Highlights for 2003

Law and Policy Reform Activities in Support of Poverty Reduction: Highlights for 2003

Introduction

Since 1993, the Asian Development Bank (ADB) has played a key role in law reform, legal and judicial policy reform, legal and judicial institutional reform, and legal empowerment initiatives in the Asia and Pacific Region (this work is collectively referred to by ADB as its “law and policy reform” activities). The Office of the General Counsel (OGC) has, in close partnership with the regional departments of ADB, initiated and administered about 70 projects involving law and policy reform activities. This includes the largest legal and judicial reform program ever undertaken by ADB—the Pakistan Access to Justice Program (AJP), which involves loans of over US\$350 million to work with the government of Pakistan on a battery of judicial, police, administrative and policy reforms.

OGC’s law and policy reform activities reflect ADB’s rededication in 1999 to poverty reduction as its overarching goal pursuant to its Poverty Reduction Strategy. In this strategy, ADB moved from using income levels as the chief indicator of poverty, toward a definition that accentuates equality of rights and opportunity:

“Poverty is a deprivation of essential assets and opportunities to which every human is entitled. Everyone should have access to basic education and primary health services. Poor households have the right to sustain themselves by their labour and be

reasonably rewarded, as well as having some protection from external shocks. Beyond income and basic services, individuals and societies are also poor—and tend to remain so—if they are not empowered to participate in making the decisions that shape their lives.”¹

As a result of the Poverty Reduction Strategy, OGC has refocused its energies toward supporting law and policy reform activities that have an impact on reducing poverty by empowering the poor to contribute to local governance structures and decision-making processes affecting their livelihoods and basic rights. At the same time, OGC has continued to support initiatives designed to strengthen the enabling environment for sustainable economic growth, and improve governance. OGC’s law and policy reform activities have also nurtured change in law and policy reform through regional cooperation efforts.

OGC channels its law and policy reform work into four priority areas through activities that

- (i) strengthen the enabling environment for economic growth,
- (ii) empower the poor by raising awareness of legal rights and obligations and strengthen their ability to contribute to local governance structures and decision-making processes affecting their livelihoods and basic rights,

¹ ADB. 1999. *Fighting Poverty in Asia and the Pacific: The Poverty Reduction Strategy*. Manila.

- (iii) support equality of access to justice and non-discrimination in the application and enforcement of laws and policies, and
- (iv) contribute to regional cooperation in strategic areas of law and policy reform.

These priority areas support poverty reduction through complementary approaches that empower the citizen in their interactions with public and private sector institutions, create more efficient systems of regulation of public goods and services, create and administer more transparent and predictable systems of laws and dispute resolution, and ensure that those laws are implemented and enforced in an equitable and non-discriminatory manner.

Highlights of Law and Policy Reform Activities in 2003

This section describes the major achievements in 2003 in the four priority areas mentioned above.

Strengthen the Enabling Environment for Economic Growth

Shaping New Laws for a Market Economy: OGC's law and policy reform activities have supported strengthening of the enabling environment for private sector economic growth. These include assisting with the building blocks of economic activity such as supporting the drafting of new economic laws in transition economies, or the modernization and harmonization of economic laws in countries where the State and the private sector are assuming new roles. ADB has supported the drafting of new economic laws in virtually all of its developing member countries (DMCs), most recently in the following: People's Republic of China (PRC), the Kyrgyz Republic, Lao People's Democratic Republic, Mongolia, Nepal, Pakistan, and Tajikistan.

In the PRC, for example, OGC has been assisting the National People's Congress achieve its target of establishing in 10 years a legal framework suitable for a market economy. This assistance has included

- (i) legislation drafting support for an anti-monopoly law and research on unification of laws governing corporate organizations; (ii) unification of laws governing foreign invested enterprises and unification of both domestic and foreign invested enterprises under one corporate law system; (iii) land administration, property registration, and secured transaction for financing projects involving land development; and (iv) research and legislation drafting support for proprietary law, land law, and law on land administration.

Strengthening the Judicial System: An impartial and efficient judicial system is a critical element for sustainable economic growth and good governance. In 2003, Supreme Court chief justices, ministers of law and justice, leading academics, and civil society representatives participated in ADB's symposium on Judicial Independence, the final report of which follows. In the Philippines, 2003 also saw the finalization of recommendations for submission to the Philippine Supreme Court on the following: the judiciary's financial and administrative independence and accountability, the judicial nomination process and judicial career development, and the strengthening of the Philippine Judicial Academy's capacity to deliver continuing judicial education. These recommendations followed several consultations, meetings, focus group discussions, and presentations and workshops, which were held nationally, regionally, and with specific stakeholder groups—the recommendations had been presented at various stages of development to test their soundness and acceptability, and to encourage stakeholder inputs into the reform proposals. Technical assistance for improving the administration of the Supreme Court of Indonesia was approved in 2003 and will commence in 2004.

International Trade: Capturing the economic and social benefits of increased trade in goods and services is of central importance to many DMC governments. The Doha Development Round of trade negotiations under the World Trade Organization (WTO) will be a critical round of negotiations as developing countries are seeking significantly enhanced market access for their goods, in particular, agricultural goods. Eighteen DMCs are members of the WTO; 19 DMCs are not members, with 9 of these in the process of acceding to the WTO. In the

case of the PRC, ADB has been providing assistance since the preparation stages of the PRC's accession to the WTO. This assistance included deepening the understanding of government officials of the core areas of the WTO agreements and assisting the then Ministry of Foreign Trade and Commerce with the drafting of key pieces of legislation to ensure its consistency with WTO rules. Subsequent to the PRC's becoming a member of the WTO, OGC has been assisting the PRC government on two major challenges in implementing its WTO obligations: (i) addressing the legal and institutional issues arising with judicial review, and (ii) strengthening the capacity of the court system to conduct judicial review of WTO-related matters.

Training on New Laws and Policies: In 2003, OGC continued to provide training to (i) enhance the performance of public institutions (especially courts, ministries of justice and regulatory institutions) and build responsiveness to citizens' needs and demands; (ii) where necessary, establish market institutions; and (iii) enhance citizens' access to legal information, and formal or informal dispute resolution bodies. ADB has developed a number of approaches to meet the challenge of making training sustainable in DMCs:

- Assisting DMCs in establishing legal training institutions: In Maldives, Mongolia, Nepal, Pakistan and Viet Nam, ADB continues to train staff and develop training materials for continuing legal education institutions that will train judges, prosecutors, lawyers and government officials.
- Developing training curricula for national training institutions: In projects involving legislative and policy reforms, ADB has developed training curricula for national training institutions such as judicial colleges, or university law courses that cover the new laws and policies. Examples in 2003 included a course on the new Cambodian land law reforms for the Judicial Training School in Phnom Penh, and support for establishment of a new law school in the Maldives.
- Accessing training materials through Intranet or Web sites. OGC has also worked with a government department in Thailand to develop a Thai language database of self-train-

ing materials on insolvency and business reorganization for the over 2,000 staff of a government department dispersed across 94 offices. The database is accessible through the Department's intranet and the Internet and allows employees within the organization to easily access notes, checklists, or documents to assist them implement their work.

Making Laws More Transparent: Access to information about laws, court judgments, and policies is a core element of good governance. It allows local entrepreneurs, foreign investors, and citizens to know what the law is and how it has been interpreted in court cases. OGC has worked on both a regional and in-country level on projects that make laws and legal information more transparent. For example, in 2003, ADB completed its assistance to the Tajik Law Reform Commission for harmonizing, publishing, and disseminating a collection of Tajik laws in the Tajik and Russian languages. The collection of over 5,000 legal acts (laws, international agreements, parliamentary and government decrees, and presidential edicts and directives) were published, made available on the Intranet of the Ministry of Justice, and are expected to be made available via the Internet shortly. A similar project is underway in Nepal to create an online legal information system of laws, regulations and court decisions that will be accessible via the Internet.

Empowering the Poor

At the heart of ADB's revised definition of poverty is the critical concept of empowering the poor "to participate in decisions that shape their lives." This involves citizens having the knowledge and resources to interact in an informed manner with employers, other citizens, the State, and with private and public sector institutions in relation to their legal rights and obligations. It also involves the State, or devolved government institution, developing mechanisms that enhance citizens' participation in governance structures at federal, provincial and local levels.

ADB is undertaking pilot studies on the use of legal empowerment activities to gauge whether awareness of legal rights and the means to enforce them may strengthen the socioeconomic impact of development projects in other sectors such as

agrarian reform, irrigation, health or natural resource management and conservation. While the impact of these pilot studies will take more time to assess, the initial findings are encouraging. The following examples demonstrate how legal empowerment activities can empower the poor to know and defend their legal rights in areas as diverse as land rights and labor law.

Land Law Reform: The great majority of land in Cambodia is unregistered. OGC has been involved in two projects in Cambodia to establish a legal system with respect to ownership and related land rights. The implementing mechanisms will resolve the existing uncertainty, disputes and chaos. The first project developed a legal framework for establishing “cadastral commissions,” i.e., administrative bodies responsible for hearing land disputes over unregistered land at the district, provincial and national levels. ADB support included training for commissioners in dispute resolution. From 2002–2003, the commissions received 979 cases, of which 226 have been resolved. Before the establishment of these cadastrals, all disputes over land, whether registered or not, went immediately to the courts.

Both OGC projects raise public awareness of the Land Law and increase people’s access to mechanisms to realize their rights under the new law. Realizing that illiteracy was a barrier to the public’s awareness of the new law, OGC’s assistance included the filming of a public awareness video entitled “Our land,” and a cartoon book of the video. The video was shown everyday on the government TV channel for two weeks and almost weekly since. Approximately 2,500 copies of the cartoon book have been produced in the Khmer language and distributed through nongovernment organizations (NGOs). To help the poor who cannot afford lawyers or who live in remote areas, ADB is also supporting the training of grassroots NGO staff, who could represent them before the commissions.

Bonded Labor: A majority of rural households in significant portions of Sindh Province in Pakistan do not own agricultural or household land. Under the traditional share-cropping tenancy system, the landlord generally makes cash advances for agricultural inputs, consumption, and emergencies, and keeps the ledger of accounts of these transactions. An illiterate tenant is unable to monitor the book-keeping and becomes vulnerable to any manipula-

tion of the accounts by the landlord. The tenant’s debt, whether real or fictitious, accumulates over the years. Because he/she cannot leave the landlord without clearing the debt—as the records by the landlord are maintained—he becomes a bonded laborer.

Under the Sindh Rural Development Project approved in 2003, governance and legal support is one of the project components, and includes the following: (i) preparation and implementation of a large-scale awareness raising and dissemination campaign on issues such as the amended Sindh Tenancy Act, the Land Revenue Act, debt bondage, the importance of registration as a tenant, and national identity cards; (ii) training of government officials on their roles and duties under the legislation to help achieve better implementation of the legislation; (iii) development of a simple account keeping system (a key area of contention regarding implementation of the Sindh Tenancy Act is the lack of proper account keeping of the debts accumulated by tenants); (iv) training in maintaining and updating land records; and (v) training of paralegals and provision of further legal aid to the project’s target groups through the Endowment Fund for Legal Aid under the ongoing AJP in Pakistan.

AJP: ADB’s largest law and policy reform program, AJP, aims to assist the Government of Pakistan to improve access to justice through five inter-related governance objectives:

- Providing a legal basis for judicial, policy and administrative reforms;
- Improving the efficiency, timeliness, and effectiveness in judicial and police services;
- Supporting greater equity and accessibility in justice services for the vulnerable poor;
- Improving predictability and consistency between fiscal and human resource allocation and the mandates of reformed judicial and police institutions at the federal, provincial and local government levels; and
- Ensuring greater transparency and accountability in the performance of the judiciary, the police and administrative justice institutions.

While it is not feasible to assess project impact after 2 years of implementation for a program of this scale, early results from the performance monitoring and evaluation system include :

- **Reduction of Delays in Courts:** In the North West Frontier Province (NWFP) there have been some striking reductions in court cases pending. In the High Court based in Peshawar, the number of cases disposed of in 2002 increased by 222% over those in the previous year (16,158 cases disposed of in 2002 as against 7,260 in 2001). Across the three benches of the High Courts in NWFP, there was an overall reduction in the total cases pending by the end of 2002 of 35% over the number pending at the end of 2001 (10,880 cases versus 16,931 cases in 2001). In the high volume District Courts of NWFP the statistics are even more striking with the District Courts having disposed of 307,400 cases in 2002; a 177% increase over the number of cases disposed of 2001.
- **Monitoring of Judicial Performance and Rewarding Merit:** Member Inspection Teams within the judiciary have the responsibility of both monitoring judicial performance and investigating complaints regarding the District judiciary. For the first time in 2002–2003 all courts within NWFP were inspected and the performance of judges assessed by the Member Inspection Team. An incentive and reward policy that provided monetary rewards to judges on the basis of their performance was established. The policy entailed assessment of the work of the judicial officers against 10 different criteria, which attempted to capture both the qualitative as well as the quantitative aspects of the disposal.
- **Establishment of a Judicial Grievance Procedure:** The grievance redress procedures for citizens to lodge complaints in relation to a member of the judiciary were advertised in local newspapers. As a result, the Member Inspection Teams received 864 complaints during July–December 2002. For 2003, the Peshawar High Court is in the final stages of preparing a similar report providing a more detailed breakdown of the nature and ultimate disposal of these complaints.
- **Creation of a Legal Empowerment Fund:** The AJP includes the creation of a highly innovative special purpose fund—the Access to Justice Development Fund (AJDF)—which is a

statutory endowment created to provide independent budgetary support to the judiciary, particularly the subordinate judiciary, and carry forward other reform objectives of AJP. The rationale for creation of AJDF is rooted in the inadequate funding of the legal and judicial institutions in the country and lack of formal arrangements for funding small-scale reform projects. AJDF has been capitalized by drawing US\$24 million from the AJP loan counterpart funds. In addition, US\$1 million has been allocated by the Government to finance AJDF-related expenditure in the period preceding the accrual of income from investment of the endowment income. Through financing windows, AJDF covers funding for the subordinate courts, legal aid and public awareness efforts, strengthening the quality of legal education in law schools in Pakistan and promoting applied research on the legal and judicial system.

Supporting Equality of Access to Justice and Non-Discrimination in the Application and Enforcement of Laws and Policies

In order for a legal system to impart justice, laws must be drafted, enacted and enforced in a manner that does not discriminate between citizens and provides them with the means, if necessary, to have disputes resolved with reasonable speed and effectiveness through formal or informal mechanisms. ADB has undertaken research and applied the findings in projects that aim to ensure that a citizen's poverty and vulnerability do not also result in legal discrimination that further compounds his/her economic and social marginalization.

Legal Identity Regional Research: OGC has initiated a regional technical assistance project that will explore the relationship between the existence of proof of legal identity—such as through a birth record—and access to resources, services and opportunities in four DMCs: Bangladesh, Cambodia, Timor-Leste and Nepal. It is estimated that annually, 63% of births in South Asia go unregistered, with 22% unregistered in East Asia and the Pacific. Registration of births is lower in rural areas than urban ones, lower for girls than for boys, and lower

for some minority groups. The lack of registration appears to have significant economic, social and political consequences. Unregistered persons are impeded in their capacity as citizens to access services. Proof of legal identity or a birth record is linked in varying degrees across countries to education opportunities (e.g., access to scholarships, participation in exams, buying books), immunization, formal employment in the private and public sector, financial services, social security, access to justice, property rights, participation in the decision-making process through voting, marriage rights, citizenship rights, and inheritance rights. Registration then becomes a fundamental prerequisite for social participation and inclusion. It is also potentially useful in efforts to curb child labor, child marriages, child prostitution and trafficking. On the other hand, compulsory registration also opens up avenues for rent-seeking by officials and has the potential for misuse. The study will explore how a balanced approach to these issues can be taken.

Contributing to Regional Cooperation in Strategic Areas of Law and Policy Reform

ADB has been proactive in giving a regional focus to its research in strategic law and policy reform areas. This has involved commissioning research in selected areas across several DMCs, bringing government officials, lawyers, judges, members of civil society, and academics together to discuss and comment on the research, and publishing and disseminating the findings. In many cases, the ADB law and policy reform activities have led to the creation of formal and informal networks of lawyers and policymakers where they did not previously exist. ADB has also consistently applied its findings from

regional technical assistance research projects to follow-on country loan and technical assistance projects.

Anti-Money Laundering and Combating the Financing of Terrorism: ADB was one of the first international financial institutions to initiate technical assistance activities in the area of anti-money laundering. In December 2000, ADB developed a regional technical assistance that covered nine Asian and Pacific DMCs and was aimed at facilitating the adoption and implementation of internationally accepted standards and accelerating regional cooperation. After the September 11 terrorist attacks in the United States in 2001, the threat of money laundering and terrorist financing were discussed as a priority agenda item at many international and regional fora. The importance of the establishment of an effective national system against these threats became widely accepted.

Since this time, ADB has further strengthened its response to numerous DMC requests for assistance in the drafting of laws; training of personnel to develop capacity to implement and enforce these laws; developing national frameworks for monitoring suspicious financial transactions, and establishing an effective system for international cooperation. In April 2003, ADB issued its policy on combating money laundering and the financing of terrorism, and noted that ADB's activities in these areas were extensions of its work to facilitate poverty reduction, promote good governance and anticorruption, and strengthen the integrity of the national financial sector. The three pillars of the policy are: assisting DMCs in establishing and implementing effective legal and institutional systems; increasing collaboration with other international organizations; and strengthening internal controls to safeguard ADB funds.

Part II:
Judicial Independence Overview
and Country-Level Summaries

Introduction

Presented here are the findings of a multi-country study on judicial independence funded under Regional Technical Assistance No. 5987 by the Asian Development Bank (ADB) and carried out by The Asia Foundation (the Foundation). This report assesses the status of judicial independence and accountability in nine Southeast and South Asian countries: Bangladesh, Cambodia, Indonesia, Lao, People's Democratic Republic, Nepal, Pakistan, Philippines, Thailand, and Viet Nam.

The process leading up to the Final Judicial Independence Symposium, which was held on 6–7 August 2003, included two internal meetings attended by the research team members, ADB staff, and other experts. An inception meeting was held in Bangkok on 22–23 March 2002 and an interim meeting was held at ADB in Manila on 23–26 July 2002. Members of the Asia Foundation project team attended both meetings, as did ADB representatives, Mr. Hamid Sharif, Assistant General Counsel, and Mr. Motoo Noguchi, Counsel, Office of the General Counsel. After the Interim Meeting, a draft of the conceptual framework and methodology was revised to reflect the consensus and understanding reached by the participants at the Interim Meeting. After the Interim Meeting, the country authors (see Appendix 1 for a list of the participating consultants) revised and refined their country-level draft preliminary findings, and the research team leaders, in turn, revised their overview draft preliminary findings.

The findings presented here have been further revised based on presentations and discussions at the Final Judicial Independence Symposium in August, 2003. Revisions reflect the input and perspectives of the high caliber participants in the Symposium,

including chief justices, justices, ministers of justice and law, and eminent members of the profession and civil society, as well as the international and domestic consultants to this conference and the professional staff in the Office of General Counsel at the ADB.

This report consists of two major sections: “Overview” and “Country-Level Summaries.”

Overview

The Overview is divided into three parts and includes three appendixes. Part One of this report establishes a baseline of views both outside the judiciary (e.g., the practicing bar, businesspersons, civil society, academia) as well as inside (e.g., the Asian Chief Justices’ “Beijing Statement of Principles of the Independence of the Judiciary,” and many views sympathetic to judiciaries presented by country authors that grew out of their own experience with judiciaries, interviewing judges, and studying the judiciaries in their respective countries);¹ it raises three questions integral to an inquiry into judicial independence; and it lays out a conceptual framework for assessing judicial independence.

Part Two applies the conceptual framework to the following five categories of assessment: (i) the structure and organization of courts in the respective countries; (ii) procedures for judicial selection, appointment, and promotion; (iii) judges’ tenure and removal mechanisms; (iv) judicial remuneration and resources for court administration; and (v) public confidence in the judiciary and its relationship to economic development and governance. The domestic

¹ Of course, one purpose of the August symposium was to elicit the comments and perspectives of leading Asian jurists.

country consultants used this framework as they conducted the country studies and developed their draft preliminary findings. Their work provides the foundation on which the overview is built.

Part Three provides a brief set of recommendations to supplement the much more detailed recommendations identified in the each of the country-level findings.

Appendix 1 provides an overview of the judicial organization and structure in each of the nine countries. Appendix 2 maps various external and internal pressures that are applied to the institution of the judiciary as well as to individuals within the judiciary. Appendix 3 lists the international and country consultants to this project.

Country-Level Summary

The country-level findings illustrate the rich data set generated by this study. Each country-level report

- (i) introduces the history of the development of the judiciary,
- (ii) sets forth the basic structure of the judiciary,
- (iii) outlines external and internal pressures by and on institutions and individuals that challenge or encourage judicial independence, and
- (iv) situates the judiciary in relation to public perceptions, governance and economic development in each of the respective countries.

In this section, the nine countries are listed in alphabetical order for ease of reference.

OVERVIEW

PART ONE

Baseline: A View from Within Asian Judiciaries

“Justice” is a core principle of religious and cultural traditions across South and Southeast Asia, often dating back from ancient times. In most developing member countries (DMCs) and developed countries in South and Southeast Asia, modern-day versions of courts have existed for several generations. Other forums of third-party dispute resolution have functioned at various levels of formality for centuries. And most countries have, or are developing, reasonably sound laws. Nonetheless, in many countries in the region, judicial systems may be compromised and/or abused by phenomena such as bureaucratic malaise, political interference, bribery and corruption, low standards of professional competence and integrity, inadequate financial resources, and barriers to equal access to justice.

Aware of the potential importance of judicial independence as well as the wide-ranging experiences and views on judicial independence in different countries in Asia, the Judicial Section of LAWASIA and The Asia Foundation co-sponsored a conference series throughout the 1990s. This culminated in 32 chief justices signing the *Beijing Statement of the Independence of the Judiciary in the LAWASIA Region (Beijing Statement)*.¹ The *Beijing Statement* provides a useful baseline of views on judicial independence in the region, and publicly reflects a growing consensus among the most eminent actors within Asian judi-

ciaries on three essential elements or principles of judicial independence. These principles inform and underlie the conceptual framework of this study.

First, courts and individual judges within judicial systems must be (and publicly be perceived to be) impartial in rendering their decisions. They should not have a personal interest—whether due to bribery and corruption, or as a result of undue pressures brought to bear from within or outside of the judiciary—in the outcome of the adjudication of disputes between private parties or between individuals and the government.

Second, judicial decisions must be accepted by the contesting parties and the larger public. In other words, judges and courts should function, and be perceived by the public to function in a manner that ensures the equal application and protection of the rule of law.

Third, judges must be free from *undue* interference from other branches of government as well as from higher court judges within a national judiciary. It is unrealistic and misleading to define “judicial independence” as “totally uninfluenced.” Nevertheless, judicial independence is most at risk when either external or internal forces undermine a judge’s or a judiciary’s capacity to adjudicate as a neutral third party.²

Three Preliminary Questions

Before outlining the conceptual framework used to assess judicial independence, this section raises three preliminary questions: (i) What is judicial independence? (ii) How is judicial independence achieved? (What are the political conditions necessary for judicial independence?) (iii) Is judicial independence nec-

¹ *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region*, sponsored by LAWASIA: The Law Association for Asia and the Pacific, and The Asia Foundation (1998).

² See Martin Shapiro, *Courts* (University of Chicago Press, 1981), Ch. 1.

essary for the rule of law, economic growth and development, good governance, or combating corruption?

What is Judicial Independence?

Despite an abundance of literature on the subject, there is no single agreed upon model of (or precise set of institutional arrangements for) judicial independence. (See, for example, Appendix 1 *infra* where the organizational schemas show enormous diversity in the fit of the judiciary within governance structures among all nine countries participating in this study.) Similarly, despite numerous studies, there is no consensus even on a common definition of “judicial independence.”³ One definitional problem is that judicial independence is a relative, not an absolute, concept. The following definition of “dependency” highlights the relative nature of judicial independence: “[A] person or institution [is] . . . dependent . . . [if] unable to do its job without relying on some other institution or group.”⁴ Judicial independence, then, is not something a judicial system “has” or “does not have.” Rather, a judicial system may have “more of it” or “less of it.”

Since there is no single agreed upon institutional model of judicial independence and the nature of judicial independence itself is relative, the question arises: what is the essence of judicial independence? The Beijing Statement crystallized three characteristics that many jurists, scholars and practitioners would regard as constituent elements of judicial independence. The judiciary is (i) impartial, (ii) its decisions are accepted by the parties and the public, and (iii) it is free from *undue* interference. The story, of course, does not end here. Impartiality is well-defined by the *Beijing Statement*. Clearly, as noted in the *Beijing Statement*, corruption and bribery under-

mine impartiality. The definition also includes “undue pressures . . . within or outside the judiciary.” Thus, for example, some underscore the importance of *merit over politics* in the selection appointment, promotion, transfer, tenure and removal of judges. This issue is contentious in developed and developing countries alike.

The second element—that decisions are accepted by the parties and the public—moves beyond the formal judicial structure and highlights *social legitimacy* as an element of judicial independence. Social legitimacy may be defined as “[the] capacity [of judicial institutions] to engender the belief that they deserve obedience and respect. [L]egitimacy is equivalent to social trust and credibility.”⁵ Legitimacy ultimately justifies the state’s monopoly on all forms of legal force. Some would argue that this is not integral to “independence.” Others would counter that formal judicial independence does not matter if the institution itself is not legitimate.

“Undue interference,” the third dimension in the *Beijing* formulation, is subtle and nuanced. Some institutional configurations on their face seem to expose the judiciary to, rather than insulate it from, the legislative and executive branches. But less obvious impediments through institutional configurations and power plays by government are much more the rule than the exception.

Beyond these constituent elements of judicial independence, the section discussing the necessity of judicial independence for the rule of law, economic growth and development, and good governance and combating corruption) focuses some attention on the actual performance of the judicial system, irrespective of whether the judiciary enjoys a high level of independence or not. This line of inquiry highlights the importance of understanding the specific ways in which judges are not independent and whether such specific constraints impede the system’s ability to deliver justice. If the lack of independence does impede performance in specific ways, then it is necessary to ascertain how and to what extent it is impeded. Just as some are tempted wrongly to judge judicial systems as either “independent” or “not independent,”

3 See, e.g., Peter Russell and David M. O’Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, 2001); United States Agency for International Development (USAID), *USAID Judicial Independence Handbook* (Washington, D.C.: USAID, 2001); World Bank Website, “Judicial Independence, What It Is, How It Can Be Measured, Why It Occurs,” at <http://www.worldbank.org/publicsector/legal/judicialindependence.htm>; J. Mark Ramseyer, “The Puzzling (In)dependence of Courts: A Comparative Approach,” 23 *Journal of Legal Studies* 7 (1994); Yash Vyas, “The Independence of the Judiciary: A Third World Perspective,” *Third World Legal Studies* 127-177 (1992); United Nations, “Basic Principles on the Independence of the Judiciary” (1985); and Shimon Shetreet and Jules Deschenes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985).

4 John Ferejohn, “Independent Judges, Dependent Judiciary: Explaining Judicial Independence,” 72 *Southern California Law Review* 353 (1999).

5 Jose Juan Toharia, “Evaluating Systems of Justice Through Public Opinion: Why, What, Who, How, and What For?” in Erik G. Jensen & Thomas C. Heller, eds., *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press: 2003).

so too many assume that any given structural constraint on independence will necessarily affect the performance of the judiciary across-the-board. This assumption is challenged in the following discussion..

Taking all of these into account, this report, both the Overview and especially the Country-Level Summaries, identifies and stratifies the myriad “pressures”—some of which are positive (e.g., improve judicial accountability) and others of which are negative (e.g., rise to the level of undue interference and/or undermine impartiality and affect actual performance in certain types of cases or all cases).

How is Judicial Independence Achieved? (What are the political conditions necessary for judicial independence?)

Diverse paths to judicial independence must be recognized. Any approach to studying judicial independence across countries must balance uniqueness with commonality. Every legal system in Asia has its own characteristics as well as its own unique history of legal culture and development. Moreover, it is usually impossible to separate judicial reform from broader political, administrative or economic reform. However, there are also generalized and common needs that *may* be related indirectly to judicial independence across virtually all formal legal systems. Generalized needs include improvements in incentive structures and performance standards, effective case management, clear systems of accountability, greater transparency, better professional training and continuing education, and improved human and financial resources. In some DMCs, there are also barriers that relate to public attitudes and values.

The question that is always implicit in discussions about judicial independence is this: why should those who hold power defer to the judiciary? Research has found that even in stable political systems, independence is highly contingent on the complex convergence of variables. Some contend that public support for the judiciary makes it too costly for the executive to ignore. Others argue that judicial independence allows legislators to avoid the blame for unpopular decisions. Alternatively, they argue, judicial independence helps legislators to commit to long-term policies and prevents legislators from going back

on their word. Still others argue that a competitive political system encourages judicial independence. In other words, if the executive, bureaucracy and/or legislature have widely different and competing policy goals *and* are closely competing for power, they may prefer mutual restraint through an independent judiciary rather than “alternating extremism” between their competing policy preferences.⁶ All of these explanations are supportable. One observable fact sticks out among these variables, however. That is, judicial independence seems strongest in competitive political systems. Whether competitive political systems cause judicial independence or whether they are merely correlated with judicial independence is another matter.

Is Judicial Independence Necessary for the Rule of Law, Economic Growth and Development, Good Governance or Combating Corruption? (The empirical evidence)

“Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted.” – Albert Einstein⁷

The symbolic effect of an independent judiciary should not be underestimated. An independent judiciary can be a potent symbol of the restraint of executive power, a check against the over-concentration of power and a guarantor of justice. Still, while the weight of mainstream opinion and doctrinal literature about the multiple goods that judicial independence delivers is well-known and well-settled, the empirical evidence is mixed at best.

The consensus holds that important and overlapping benefits flow from judicial independence, including the following: (i.) judicial independence is a crucial element of the rule of law; (ii.) it contributes positively to a process of stable, well-ordered economic, political, and social change and development in the developing countries of Asia; (iii.) more

⁶ This paragraph benefited from an outstanding synthesis laid out in an email from Dr. Matt Stephenson (Harvard) to Erik Jensen in March, 2003.

⁷ *Brainy Quote* at <http://www.brainyquote.com/quotes/quotes/a/q109908.html>

specifically, it contributes to economic development,⁸ and good governance;⁹ (iv.) it is an important vehicle through which to combat corruption and achieve accountability, predictability, transparency, and public participation in governance; and (v.) it contributes to the institutional infrastructure for ensuring property rights¹⁰ and human rights¹¹ as well as for promoting domestic and international investments.¹²

However, the empirical evidence of the extent to which these goods are delivered through independent judicial bodies is less clear.¹³ Here Albert Einstein's admonishment on the limits to empirical research applies: "Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted." Nevertheless, it is necessary to count many more (or different) things in this field to ascertain the causal connections between an independent judiciary and many perceived goods. Following is a brief survey of current empirical evidence on the connection between (and the necessity for) judicial independence and four perceived goods: the

rule of law, economic growth and development, good governance and counter-corruption.

Is an independent judiciary necessary for the rule of law?

It seems heretical to suggest that an independent judiciary is not necessary to the rule of law. Just as the definition of "independence" is relative (not absolute), so too is the definition of the "rule of law." There is significant agreement on the essential elements of a "thin" (narrow and procedural) definition, but no agreement on a "thick" (broader and substantive) definition.¹⁴ Disagreement about the transnational criteria to assess the scope and depth of "rule of law" is particularly acute regarding issues related to a country's political economy and certain social norms. Such issue clusters include economic governance, regime type, and human rights.

To differentiate between "thick" substantive rule of law that impinges *directly* on the political economy and morality of countries, and "thin" procedural rule of law that *indirectly* relates to such issues, a case-specific approach to judicial independence is illuminating. Chinese legal scholar Hualing Fu provides evidence to support this approach. Hualing argues that the independence, fairness, and competence of the courts in the People's Republic of China (PRC) vary by type of case. Judicial independence may be constrained in criminal cases with serious political overtones; to some extent, in economic cases that affect powerful local enterprises; and in administrative cases in which a strong government department is the defendant. Yet he argues that in a large number of ordinary cases—family cases, most small debt and property cases, and disputes between private companies—judicial independence is not impeded. In the vast majority of cases before the civil courts, then, a "thin" rule of law works.¹⁵ And the resolution of these cases is enormously important to allow citizens to get on with their daily lives.

8 See P.G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right* (University of Virginia Press: 2000). Mahoney hypothesizes that differences in levels of judicial independence provide a partial explanation as to why common law countries experience higher levels of growth than civil law countries. But that hypothesis requires more robust testing. Substantial convergence of civil and common law systems has taken place over the last several decades in both form and text. Yet a difference in the mindset and behavior of common law and civil law judges seems to endure. Mauro Capaletti observed in 1971 that Continental European judges were "psychologically incapable of the value-oriented, quasi-political functions involved in judicial review." Mauro Capalletti, *Judicial Review in the Contemporary World* (1971) at p. 45. In this regard, note that Denmark has had judicial review available since 1990 but has yet to declare even one statute unconstitutional. Louis Favoreu, "Constitutional Review in Europe," in Henkin and Rosenthal, *Constitutionalism and Rights cited in* Lawrence Friedman, *American Law in the 20th Century* (Yale University Press: 2002) at p. 578. Note that some of this psychological/behavioral difference may be eroding in the European Union's very recent era of "super constitutionalism."

9 See *A Framework for Good Governance* (Asian Development Bank: 1995).

10 See L.J. Alston, G.D. Libecap & R. Schneider, "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier," *Journal of Law, Economics and Organization* p. 25-61 (1996) finding mixed results on the impact of titling projects on incentives to invest or improve real property. Cf. Hernando De Soto, *Mystery of Capital: Why Capitalism is Failing Outside the West & Why the Key to Its Success is Right under Our Noses* (Basic Books, 2000).

11 See F.B. Cross, "The Relevance of Law in Human Rights Protection," *International Review of Law and Economics* p. 87-98 (1999). Cross found that whether countries constitutionally protected the right to be free from unreasonable search and seizure was an insignificant factor in determining the extent to which the right was actually protected. The level of judicial independence, however, was a more significant variable in ascertaining the extent of actual protection than whether the right was constitutionally enshrined.

12 See, for example, World Bank, *World Bank Report 2002: Building Institutions for Markets* (Washington, D.C.: World Bank, 2002). See also R. Levine, "Law, Finance and Economic Growth," 8 *Journal of Financial Intermediation* 8 (1999).

13 See generally, Erik G. Jensen & Thomas C. Heller *supra*.

14 For an excellent discussion of these differences and an argument for employing a "thin" definition, with China being the primary point of reference, see Randall Peerenboom, "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating The Rule of Law in China," 23 *Mich. J. Int'l L.* 472 (2002).

15 Hualing Fu, "Putting China's Judiciary Into Perspective: Is It Independent, Competent And Fair?" in Erik G. Jensen & Thomas C. Heller *supra*.

Is an independent judiciary necessary for economic growth and development?

New institutional economic theory supports the proposition in the abstract that an independent judiciary is necessary for economic growth and development.¹⁶ However, based on the body of empirical evidence that is available to date, the best working hypothesis is that there are on-again-off-again connections between the judiciary and economic growth and development. Supporting evidence of the extent to which formal legal institutions are central to economic development is uneven, despite many doctrinal claims that a well functioning judiciary is needed for economic development. For example, PRC has enjoyed high levels of foreign direct investment and growth, and Brazil has a growing credit market where dense information, available through new technologies and databases, substitutes for strong legal institutions. On the other hand, in hyperlexic India we find New Economy actors, in the pursuit of international capitalization, importing and adhering to more rigorous international standards of corporate governance, despite less stringent domestic legal requirements.

The data show inconsistent evidence regarding the centrality of formal legal institutions in the context of economic development. The explanation for this inconsistent evidence is found in common business practice. Economic actors pursue predictability through a portfolio of public and private institutions. Therefore, “legal risk” should be situated in the context of multiple risks that economic actors weigh in assessing business opportunities. With respect to foreign direct investment, for example, at least five types of risk are possible: (i) commercial risk (e.g., fluctuating markets); (ii) political risk (e.g., expropriation); (iii) legal risk (e.g., unpredictable courts); (iv) regulatory risk from administrative action (e.g., capricious rule or decision-making); and (v) social risk (e.g., civil society action against or for certain types of investment). The comparative importance of these five types of risk will vary depending on the country and the type of investment (e.g., long-term versus short-term, sunk-cost intensive versus nimble) that is contemplated.

16 Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press: 1990).

Is an independent judiciary necessary for good governance?

A series of recent empirical studies suggests that there is a strong correlation between governance and positive development outcomes.¹⁷ Generally, “[i]n the absence of good public institutions, growth has been difficult to achieve.”¹⁸ More specifically, empirical evidence finds that the quality of the bureaucracy correlates to economic growth.¹⁹ And even modest improvements in the level of corruption seem to have a significant impact not only on governance, but also on per capita income, reduction of infant mortality, and literacy.²⁰ However, the precise linkage between an independent judiciary and good governance cannot, as yet, be determined. The effectiveness of legal institutions seems to be dependent upon the effectiveness of other institutions. More fine-grained empirical research is needed to understand when and where the connections are strong.²¹

Is an independent judiciary necessary to combat corruption?

Since the level of corruption has a significant impact on good governance and governance is strongly correlated with economic development, this question is significant. The role of the judiciary vis-à-vis corruption has two primary dimensions: one is corruption within the judiciary; the other is the judiciary’s ability to address corruption in other branches of

17 D. Rodik and F. Trebbi, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development,” CID Working Paper No. 97 (Harvard’s Center for International Development: 2002); W. Easterly and R. Levine, “Tropics, Germs and Crops: How Endowments Influence Economic Development,” NBER Working Paper No. 9106 (National Bureau of Economic Research: 2002); S. Engleman and K. Sokoloff, “Factor Endowments, Inequality, and Paths of Development among New World Economies,” *Economia*, 3:41-109 (2002); P. Mauro, “Corruption and Growth,” *Quarterly Journal of Economics* 101:681-713 (1995).

18 Dani Rodik, ed., *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton University Press: 2003) at p. 11.

19 See R.J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (MIT Press: 1997). The effectiveness of legal institutions seems to be dependent upon the effectiveness of other institutions. Thus, the strength of institutions, including legal institutions, makes a difference in governance and growth.

20 D. Kaufman, “Rethinking Governance: Empirical Lessons Challenge Orthodoxy,” (Paper Presented at Stanford University: January 31, 2003).

21 For an interesting analysis of the perverse results of the rule of law in a poorly design separation of powers system Andras Sajó, “How the Rule of Law Killed Hungarian Welfare Reform” *5 East European Constitutional Review* 31–36 (1996).

political administration.²² Judicial independence may be helpful to both. But judicial accountability and transparency are certainly necessary if the judiciary is to fulfill either of these roles. Good empirical data on the causal connections between judiciaries and combating corruption is lacking, as are good measurements of the extent to which the *independence* of the judiciary, within this frame, matters.

Conceptual Framework for Assessing Judicial Independence

Under any definition, judicial independence is multi-dimensional and multifaceted. Accordingly, the conceptual framework for assessing judicial independence, described below, is designed to capture the dynamics that encourage or impede judicial independence.²³ The framework has two parts. The first part focuses on “sources” and “targets” of influence and control over courts and judges. The *sources* of pressure may be *external* and/or *internal* to a judiciary. They may also *target* the *judiciary as an institution* and/or *individual judges*. Hence, *institutional independence of the judiciary* must be considered along side the *judicial independence of individual judges*.

The second part applies this framework of sources and targets of influence and control over courts and judges to five broad categories of indicators for assessing the status of judicial independence, the most serious problems confronting courts in different countries, and reforms that may be designed to strengthen judicial independence. They are: (i) structure, organization, jurisdiction and procedures of courts; (ii) judicial selection, appointment, and promotion procedures; (iii) judges’ tenure and removal mechanisms; (iv) judicial remuneration and resources for court administration; (v) public opinion and confidence in the judiciary and its relationship to economic development and governance.

22 Erik G. Jensen, “Legal and Judicial Reform: The Political Economy Of Diverse Institutional Patterns And Reformers’ Responses” in Erik G. Jensen & Thomas C. Heller *supra*.

23 See also Peter Russell and David M. O’Brien *supra*.

“Sources” and “Targets” of Influence and Control

The relative autonomy of judges—individually and collectively—from other institutions and from other judges must be analyzed within the context of both (i) the *sources of influence and control* and (ii) the *targets of influence and control*. The *sources of influence and control* include both *external* and *internal* pressures that may be exerted on judges and the operation of courts. The relationships between external and internal sources of influence and control, on the one hand, and institutional and individual judicial independence, on the other hand, are illustrated in Table 1.

Table 1: External/Internal Pressures on the Judiciary as an Institution and Individual Judges

Level	External Sources of Pressure	Internal Sources of Pressure
Institutional	Regional governments Civil service bureaucracy Bar associations and interest groups Media and public opinion	Judicial career bureaucracies Judicial councils
Individual	President, legislature, and political parties Civil service bureaucracy Bar associations and interest groups Media and public opinion/ personal attacks	Higher court judges Judicial service bureaucracy Budgeting, caseload, management and other staff

Note that the table is illustrative only. Certainly a prominent source of pressure in the Asian region and elsewhere, for example, is the individual external pressures that may emanate from clan, tribe, caste, social grouping or affiliation, and family. A more detailed diagram of “pressures” at a country-level, is in “Appendix 2: External and Internal Pressures by Institutions and Individuals on Judicial Independence.”

Sources of Influence and Control—External and Internal

In the external category are forces within the government and nongovernment, as well as public and private sectors that may bring pressure on judicial organizations, staff, and their administration. Obviously, courts are vulnerable to the government bodies that create and may modify, or even destroy

them. And judges—whether recruited by election, appointment by elected officials, or selection into career judiciaries—are everywhere subject to political forces aimed at influencing the course and outcome of adjudication. In some Asian countries, the use of the judiciary by power holders to constrain or eliminate political opposition has politicized the judiciary at times and weakened judicial independence. Moreover, in some countries, weak or ineffective political and/or administrative accountability has resulted in political opponents of the government or ordinary citizens litigating issues that are essentially political. This has also resulted in politicization of the judiciary.

Nongovernment forces, especially the media and organized interest groups and associations, may press for greater accountability in judicial performance, or they may target and threaten judges and courts with whom they disagree. In the Philippines, for instance, judges have come under considerable media scrutiny, and in Nepal the bar association has been active in bringing attention to judicial corruption. Judges have resigned or been forced into early retirement due to high-pressured and biased media campaigns, even in well-developed democracies. On the other hand, in some countries, courts have been strengthened by the support of the media, forces opposed to the controlling party in the government, and associations or organizations created to reform and strengthen the rule of law and governance. The important distinction here is between media campaigns that impede judicial independence (e.g., those targeting judges for issuing unpopular decisions) and campaigns that may serve as a check on judicial misbehavior (e.g., those aimed at exposing judicial corruption).

The current trend for greater domestic public pressure to bring top political leaders to account is both a boost and a hindrance to judicial independence. In Thailand, a serving prime minister was brought to trial (but acquitted) by the new Constitutional Court on financial disclosure issues, while in South Korea, *ex post facto* trials of former Presidents on both human rights and corruption grounds are seen often. In Indonesia and Viet Nam, high-profile corruption trials of both government and private sector figures have been the flagships of government anti-corruption campaigns. While these exercises are

intended to persuade the public that even the most powerful are not above the law, they run the risk of becoming politicized—or being perceived of as politically influenced—if the outcome does not satisfy public sentiment. Accordingly, this study does not assume that public pressure and civil society organizations are per se a good (virtuous) or per se a bad (tainted) influence on judicial independence and accountability.

The country-level findings demonstrate that there is no single preferred model of the relationship between judicial independence and the media, organized interest groups, and civic organizations, or with other sources and mechanisms of external influence and control. Instead, they may present challenges and threats to, no less than support structures for, judicial independence.

The internal category includes the mechanisms of influence and control in the recruitment, training, assignment, promotion, and remuneration of judges that may be brought to bear on individual judges within a judiciary. Mechanisms of internal influence and control are especially prominent in civil law countries with career judiciaries, and in countries where the judiciary is simply part of a larger government bureaucracy and civil service. On the other hand, “internal” mechanisms are often, but not always, less prominent in more decentralized, common law judicial systems.

It should be emphasized that external or internal influences and sources of control do not per se violate judicial independence. For instance, within any national judiciary, higher courts generally exert influence over lower courts in terms of overruling decisions and in exercising their supervisory capacity and responsibility in order to ensure the equal protection and application of the law. Nevertheless, higher courts may cross boundaries on their appropriate supervisory role. For example, higher courts and higher court judges may manipulate lower court judges’ recruitment, promotion, and salaries because of their decisions or for purely personal reasons. It is also possible that superior court judges may abuse their power to influence the outcome of individual cases in lower courts. Such internal manipulation and limitations on individual judges’ independence may be particularly problematic in countries that do not

have generalist judges, relatively decentralized judicial structures, and generally strong external political controls.

The crucial point of these examples is to underscore that the manipulation of judges and courts may arise either from external pressures (whether political, economic, or institutional) or due to forces operating internally within a national judiciary. Moreover, some form of external and internal influence is present in all countries, and is necessary to balance judicial independence with accountability.

Not surprisingly, some types of external control are considered unacceptable in some countries but not in others. Likewise, the acceptability of different kinds of internal mechanisms of influence and control will vary across countries. Hence, one of the benefits of this study is to show the varied boundaries of acceptability of external and internal controls in particular countries and within the region as a whole.

Targets of Influence and Control—Institutional and Individual

With respect to the targets of influence and control, those aimed at the institution of a judiciary as a whole must be distinguished from those focused on individual judges for their decisions. In other words, judicial independence embraces both (i) *institutional judicial independence* and (ii) that of *individual judges* in their decision-making.

Notably, there is no exact or necessary correlation between a high or low degree of *institutional* vulnerability to external forces and a high or low degree of *individual* judges' vulnerability. In other words, the institution of the judiciary may enjoy a high degree of independence from interference from other political institutions, while individual judges do not, and vice versa.

For example, judges in some countries as diverse as Australia and Russia have recently confronted considerable, if not almost overwhelming, external political pressures on their institutional independence. Nevertheless, to a greater or lesser degree, they continue to assert considerable judicial independence as individual judges. In Pakistan, for instance, there has been recurring friction between the executive and the Supreme Court over judicial appointments. In 1996, the Supreme Court issued a historic decision in the *The Judges' Case*, in which it asserted its power and

laid down new rules for executive-judicial relations in the appointment of justices. The ruling held, among other matters, that ad hoc judges could not be named to the Court instead of filling permanent positions; acting chief justices could be appointed for a maximum of 90 days and could not consult with the executive branch on the appointment of judges; and the senior-most judge of a high court should be appointed as chief justice, unless there were persuasive reasons for not doing so. Most importantly, the constitutional provision authorizing executive appointment of judges "after consultation" with the chief justice was interpreted to mean that the chief justice's recommendations on judicial appointments were to be considered binding on the executive.

Likewise, in Bangladesh, the Supreme Court's Appellate Division held that a constitutional amendment was not necessary for ensuring the independence of the judiciary in *Masdar Hossain* (1999). Moreover, the Supreme Court issued 12 directives that, when implemented, would strengthen the independence and separation of the judiciary. The government was directed to (i) provide a separate budget for the Supreme Court; (which has been implemented), (ii) separate recruitment of judges from recruitment of the civil service, and (iii) establish a Judicial Service Commission for the recruitment, appointment and promotion of judges, which nonetheless are still performed by the Ministry of Law, Justice and Parliamentary Affairs in consultation with the Supreme Court. In addition, the government was directed to reorganize the judiciary and specifically be barred from ad hoc recruitment and reassignment of judges to work as legal officers for other government ministries. Although three years after the ruling in *Masdar Hossain* the government has failed to implement all of the directives and has repeatedly asked for delays in their implementation, the media and bar association have given them extensive attention and promoted public awareness and debate over the importance of the directives and of a separate independent judiciary.

By contrast, in other countries, such as Japan, the judiciary has a high degree of institutional autonomy and freedom from external political pressures, but the independence of individual judges, at times, may be limited by the controls within the judiciary

itself. This appears especially likely in civil law countries with career judicial systems, where the Chief Justice of the Supreme Court and legal bureaucracy oversee and determine the training, assignment, promotion, and remuneration of judges. Several of the countries in this study have variations of such a system of internal controls and mechanisms.

One notable response to such internal manipulation of judges through promotion and remuneration, along with other perceived problems, has been the creation of independent judicial service commissions or judicial councils. As with other measures highlighted in the discussion of diverse paths to judicial independence, however, there is no single preferred institutional arrangement of judicial governance. On the whole, judicial service commissions and judicial councils have had mixed success, depending on their composition, reform goals, and leadership and loci of the reform impetus. Alternatively, national and local bar associations have adopted initiatives and undertaken activities that, in some places, have improved the caliber and autonomy of those sitting on the bench, contributed to continuing legal training, and advanced the public's legal literacy. But, as to the broader issue, experience shows that there is no single preferred institutional arrangement for judicial governance that will lead to judicial independence. The record is inconclusive.

Five Categories of Assessment

Again, within the framework of sources and targets of influence and control over courts and judges, this study focuses on five broad categories of indicators for assessing the status of judicial independence, the most serious problems confronting courts in different countries, and reforms that may be designed to strengthen judicial independence. They are:

The Structure, Organization, Jurisdiction, and Procedures of Courts

The structure, organization, jurisdiction, and procedures of courts provide the basic architecture for the operation of judiciaries and judges. Institutional and individual judicial independence are affected by the hierarchical structure, inter-court relations, and whether specialized courts or tribunals are established with limited, specialized jurisdiction.²⁴ Since courts

are created and maintained by other political branches, they may be stripped of their jurisdiction; their basic structure and organization altered; or they may even be destroyed by external forces. Those pressures obviously may affect how individual judges conduct their work.

Judicial Selection, Appointment, and Promotion Procedures

Judicial selection, appointment, and promotion procedures govern the recruitment and staffing of courts, and may serve as a primary condition for ensuring judicial accountability. However, judiciaries may be subject to different external and internal pressures depending on whether judges are appointed by the executive and legislative branches, or recruited and promoted from within a career judiciary or from a national civil service system.

Judges' Tenure and Removal Mechanisms

Judges' tenure and removal mechanisms are important for securing both judicial independence and accountability. Judges need not be assured of lifetime tenure, but too limited terms of office may impair the development of judicial independence. No less importantly, criteria for and the processes of discipline and removal also must be established and transparent.

Judicial Remuneration and Resources for Court Administration

Judicial remuneration and resources for court administration are essential to the operations of courts, the conduct of their business, caseload management, and access to justice. But, as the other indicators, judicial remuneration and resources are subject to both external and internal pressures that vary from one judicial system to another.

Public Opinion and Confidence in Judiciary and its Relationship to Economic Development and Governance

Public opinion and confidence in the judiciary and its relationship to economic development and governance is obviously important, but difficult to mea-

²⁴ See, e.g., Burton Atkins, "Alternative Models of Appeal Mobilization in Judicial Hierarchies," 37 *American Journal of Political Science* 780 (1993).

sure and assess. Although public opinion and support for courts is generally diffuse,²⁵ public opinion and perceptions of the legitimacy or, alternatively, corruption of the judiciary and individual judges is central to ensuring both judicial accountability and independence. At the same time, public opinion and perceptions of the judiciary are affected by media coverage, the dissemination of judicial decisions, access to justice, legal literacy, and the performance of courts.

Because judges and courts provide public service, and one that contributes directly to the overall legitimacy of state institutions in the public eye, judicial independence must be balanced—and always remain in tension—with competing concerns about democratic accountability and responsiveness. Thus, judicial accountability must be considered in tandem with judicial independence. Both are equally important and, in a sense, codependent. In general, judiciaries are more likely to expand their independence in ways that will be both substantively beneficial to the rule of law and broadly acceptable to other government institutions and society at large, to the extent that they demonstrate increased accountability both in their decisions, and in the processes of deliberation that produce those decisions. The country-level findings are replete with programs and suggestions to improve the public knowledge and image of judiciaries as well as to strengthen judicial accountability, and thereby, judicial independence. Without increased accountability, public opinion may be a source of support or a basis for opposition to courts and individual judges. The judiciary as an institution may be held in low esteem or perceived to be corrupt. In such a climate, individual judges may be subject to personal assaults and even assassinations, as has occurred in Indonesia, Pakistan and elsewhere.

25 See, e.g., James L. Gibson and Gregory A. Calderia, “The Legitimacy of Transnational Institutions: Compliance, Support and the European Court of Justice,” 39 *American Journal of Political Science* 459 (1995); and James L. Gibson, Vanessa Baird, and Gregory A. Calderia, “On the Legitimacy of National High Courts,” 92 *American Political Science Review* 343 (1998).

PART TWO

Applying the Framework to Five Categories of Assessment

The Structure, Organization, and Jurisdiction of the Courts

The structure, organization, and jurisdiction of courts in South and Southeast Asia reflect each country’s unique historical influences. Although most the DMCs bear some legacy of colonialism, the legacies vary and are diverse. Bangladesh, Pakistan, and to a lesser extent Nepal, continue to reflect the traditions of English common law. By contrast, Cambodia and Viet Nam have been influenced by the Continental system, specifically the French civil law system, combined with socialist and traditional cultural understandings, while Indonesia bears the imprint of Dutch colonization and subtle layers of other influences. The Philippines combines civil and common-law traditions, reflecting a mixed colonial experience with Spain and the United States. Thailand, which was never colonized, imported significantly from European models of judicial governance. In this overview the *structural* differences between civil law and common law systems should not be over-emphasized; nevertheless, these traditions may yield very different *practices*.

The unique legal histories of each country have influenced the structure, organization, jurisdiction, and operation of their respective contemporary judicial systems. They also provide a background explanation for the relative and uneven development of judicial independence in each country and the status of courts as well as for the obstacles to judicial reform.

The historical, legal, and cultural influences in particular countries may profoundly affect the implementation of constitutional provisions and judicial reforms aimed at strengthening judicial independence. A constitutional provision is not necessary for ensuring judicial independence, however, as the judicial experience in New Zealand illustrates. It has also long been understood that unwritten practices and understanding may undermine, if not at least pose considerable tensions for, explicit constitutional provisions regarding the rule of law and the opera-

tion of courts. In several countries, the actual political arrangements and practices diverge from explicit constitutional provisions for judicial independence.

In spite of diverse legal heritages and influences, each of the nine countries in the study has, or is in the process of developing unitary judicial systems. Unitary systems, unlike federal systems, may strengthen, rather than create tensions for, the institutional independence of courts, at least with respect to external pressures, although the power of courts and judicial review tends to be more closely associated with federal systems.

Depending on the system of staffing, appointing, transferring, and disciplining judges, however, unitary judicial systems may pose constraints and restraints on the independence of individual judges, whereas federal and more decentralized judicial systems may enhance the independence of individual judges at the expense of the institutional independence of the judiciary.

Although each of the nine countries has a unitary judicial system, they differ in their structure and in combining special courts, with more limited specialized jurisdiction, alongside regular courts. The basic features of each country's judicial system are highlighted in the following and shown in greater detail in Appendix 1.

Across Southeast and South Asia, there are great variations in terms of access to judges, litigation rates and caseloads, the ratios of judges and lawyers to the general population, and the transparency of judicial systems. In some countries there is little or no infrastructure for caseload management and, hence, no available statistical data on litigation rates and caseloads. Cambodia and Lao People's Democratic Republic (Lao PDR), for example, are suffering from a lack of trained lawyers and have inadequate record keeping. It is estimated, however, that between 1996 and 2000, the judicial system in Lao PDR resolved approximately 2,523 cases, or approximately 500 cases per year. By comparison, the caseloads of other countries' supreme courts appear staggering. They are comparable to the caseloads of courts in advanced industrial countries, such as Japan and the United States. For example, in Bangladesh, it is estimated that its supreme court had 4,200 cases pending in 2000–2001. Likewise, the caseload of the Philippines Supreme Court was 4,010, even though the Philippines is generally considered to be highly litigious.

In June 2002, the Indonesian Supreme Court had 16,726 cases. There are only 237 judges for Nepal's population of close to 24 million, and roughly 660,000 cases pending in the courts.

There is also considerable variation in the ratio of judges and lawyers to the general population in countries within the region. However, some similarly situated countries are comparable. For instance, in Nepal, there is approximately one judge per 100,000 people. Likewise, Pakistan has one judge for every 70,000 to 100,000 people, depending on the region. By contrast, in Viet Nam there is one judge for about every 24,400 people. In the Philippines, where there is one judge for every 22,054 people, the ratio of judges to lawyers is 1:29 and the ratio of lawyers to the population is 1:1,587.

Furthermore, there are great variations in the transparency of judicial systems in the nine countries. In several countries the judicial process and judicial decisions have virtually no transparency, while in other countries transparency is much stronger. In the Philippines, for example, the civil code requires publication of laws and legislation before they take effect, thereby permitting public comment. Separate rules of the Philippine Supreme Court require the publication of judicial decisions in *The Court Systems Journal*. They are also made available by a private publishing company, as is done in the United States and other countries. The Philippines Supreme Court decisions are also available on the Internet, part of an increasing trend for national courts to make their decisions immediately and readily available. Notably, the Philippines Supreme Court also has established a public information office to assist the press and media with access to and understanding of judicial decisions and developments.

A number of conclusions about the status of judicial independence may be drawn from this survey of the structure and organization of courts in the nine countries. First, the trend toward unitary judicial structures and organizations may promote the institutional independence of courts. Strong hierarchical controls within the judiciary, particularly, as discussed in the next section, over judicial appointments, promotion, transfers, and disciplinary actions, however, may put pressure—sometimes undue pressure—on individual judges.

Second, in spite of insulating judges in unitary court systems, the institutional independence and individual judges' independence may still be compromised by external government influences and controls, whether by the military, or a controlling single political party apparatus that parallels and monitors judges at every level.

Third, in a number of countries, the structure and procedures of courts promote severe caseload problems. As in Bangladesh, Indonesia, and elsewhere, some of these problems could be readily addressed by limiting the number of appeals and instituting discretionary jurisdiction for appellate courts. In these and most other courts in the study, there is a need for improving caseload management, introducing and/or improving computer technology, and, as will be further discussed, improving the basic infrastructure for judicial administration.

Fourth, with the exception of the Philippines, to some extent, most of the countries' judicial systems, procedures, and decisions do not provide satisfactory levels of transparency and accessibility for the public. Judicial independence, at the institutional and individual judge levels, requires transparency, public understanding, criticism, and debate—all of which are essential to securing both judicial independence and judicial accountability.

Judicial Selection, Appointment, and Promotion Procedures

The selection, appointment, and promotion procedures, as well as the transparency of those procedures, are important for both securing judicial independence and promoting public understanding and confidence in the courts. Judicial independence and accountability, however, may be secured through a variety of institutional arrangements.

In general, countries with career judiciaries—that is, with the selection, appointment, and promotion of judges from within a judicial career system or civil service—tend to promote the institutional independence of courts. At the same time, career judicial systems may invest a great deal of control in, for example, the chief justice and/or judicial service commission, which in turn may constrain and punish the independence of individual judges.

Non-career judicial selection and promotion procedures—whether through appointment by the executive, legislature, or some combination, as well as by partisan and nonpartisan elections—tend to promote judicial accountability to external forces, such as the government, political parties, interest groups, and the public. Still, they do so at the price of limiting, though not abolishing, the independence of courts as a whole and of individual judges.²⁶

Within South and Southeast Asia, most countries employ some form of career judiciary or mixed career and non-career mechanisms for judicial selection and appointments, depending on the level of court involved. The exceptions are in countries in which the executive and/or legislature and political parties determine the selection, appointment, and promotion of judges, as in Cambodia, Lao PDR, and Viet Nam. In these countries, the legal training, standards, and qualifications of judges tend to be lower than in countries with career judicial systems.

There also are variations among the judicial systems depending on the level of court, the prescribed constitutional or legal guidelines, and the actual practice in selecting, appointing, and promoting judges. It is useful, therefore, to briefly compare (i) countries with overall non-career judicial appointment processes, (ii) countries in which judicial recruitment and promotion are part of the larger civil service system, and (iii) countries with separate independent judicial career systems. Among the countries with non-career judiciaries are Cambodia, Lao PDR, and Viet Nam. Countries that include judgeships, at some or all levels, within their larger civil service systems are Bangladesh and Indonesia. Nepal, Pakistan, Philippines, and Thailand have separate judicial career systems, more closely modeled after those in Western Europe. As the country-level findings illustrate, there are significant differences among all three types and differentiation within each type.

While there are individual unique characteristics among the countries in the processes for recruiting

26 See, e.g., Donald Kommers, "Autonomy versus Accountability: The German Judiciary," in Peter Russell and David M. O'Brien, eds., *Judicial Independence in the Age of Democracy*, pp. 131-154. See also, Owen G. Abbe and Paul S. Herrinson, "How Judicial Election Campaigns Have Changed," *Judicature* 85: 286-295 (May-June 2002).

and promoting judges, there are three striking common denominators within the region. First, in most countries in South and Southeast Asia, even those that base judicial recruitment on open civil service examinations, there are no published criteria or guidelines for judicial appointments. Even in countries that employ civil service examinations, the criteria for judicial appointments remain opaque.

Second, the problem of the lack of transparency also relates to the process of selection, appointment, and promotion. Whether those processes are controlled by bodies external to the judiciary—for example, by the executive and legislative branches or political parties—or more centralized and internalized within the judiciary itself—in particular under the control of the chief justice—the actual process appears hidden and is little understood by the public. Thus, the lack of transparency in these processes does not inspire public confidence in the courts.

Third, a number of countries face a serious problem in filling vacancies in rural areas. Although this is related to the lack of transparency, it is also undoubtedly connected with other problems, such as low salaries and lack of incentives for recruiting judges for “less desirable parts of a country.” This appears to be a particular problem in a number of diverse countries where judicial facilities in rural areas are virtually non-existent and judges may fear for their own personal safety and lives.

Judges’ Tenure and Removal Mechanisms

Judicial tenure and the mechanisms for disciplining and removing judges are as important for securing judicial independence as the processes for selecting, appointing, and promoting judges. Tenure on the bench contributes to insulating judges from external pressures and to their independence on the bench. So too, mechanisms for disciplining and removing judges are necessary for ensuring judicial accountability and preventing the miscarriage of justice due to impairments and disabilities on the bench. However, judicial tenures that are too short; mandatory retirement at relatively young ages, and ad hoc, arbitrary and opaque procedures for disciplining and removing judges may undermine the prestige of judgeships and the institutional independence of the courts.

Judicial Tenure and Mandatory Retirement

In Asia, fixed term appointments for judges generally appear to severely limit service on the bench, thereby undercutting individual judges’ independence and thwarting the opportunity for individual judges to gain experience on the bench that will contribute to the institutional independence of the courts. Mandatory retirement age limitations are generally less restrictive and quite common. Nevertheless, an early mandatory retirement age may have some of these negative attributes as well.

In some countries, all judges serve fixed-term appointments that appear too short for the development of individual judges’ independence on the bench. In other countries, the tenures of high court judges—the chief justice and members of the Constitutional Court—are severely limited. In still other countries, mandatory retirement ages vary widely, depending on the level of the court. The variation and discrepancies among levels of courts within particular judicial systems do not bode well for the prestige and independence of judges. The problems presented for the prestige and independence of judgeships by fixed terms and very early mandatory retirement ages are compounded in some countries by the practice of reappointing retired judges and ad hoc or additional judges to high courts in order to assist with caseload backlogs. Another variation on the reappointment of judges to the courts is the executive’s reemployment of judges in advisory capacities or as heads of quasi-judicial commissions, especially when such post-retirement positions are not filled through transparent procedures.

Disciplinary and Removal Procedures

The standards and procedures for disciplining and removing judges vary considerably across countries in the region. In some countries such as Nepal, standards are established based on a 19-point code of judicial conduct, though they do not appear consistently and vigorously enforced. But, in most countries in Southeast Asia the criteria for disciplining and removing judges remains unclear and ambiguous.

The authority for disciplining and removing judges varies as well. In some countries, the chief justice or judicial council is responsible, whereas in

others, external institutions are responsible. Judges in different countries are therefore exposed to different internal and external mechanisms of influence and accountability, or some combination of the two. In several countries, the disciplining and removal processes for high and lower court judges diverge. They thereby balance authority and accountability between the judiciary itself and other political branches, per the following examples.

Disciplinary actions vary widely from docking salaries, transfers to undesirable locations, temporary suspensions, and removal from the bench.

Transparency of Disciplinary and Removal Procedures

In general, the judicial disciplinary and removal procedures in most countries in the region lack transparency, media scrutiny, and public participation. In some countries there are no clearly established standards, guidelines, or criteria. In other countries, where there are explicit and published standards or codes of judicial conduct, the process remains opaque and there is little or no public involvement. Still other countries require confidentiality for disciplinary proceedings in order to protect the integrity of judges and the dignity of judgeships against frivolous and unproven allegations.

Clearly, interests in transparency and confidentiality in disciplinary proceedings must be balanced, especially during investigations of alleged judicial misconduct. At a minimum, though, the basis for final disciplinary actions should be publicly known and available in codes of judicial conduct.

Judicial complaint and discipline councils are used in some countries. Such judicial councils have been useful in advancing judicial independence and accountability in some European countries, especially in Western Europe. If they provide for public input and participation, they may also contribute to the public's understanding of the role of courts and to judicial accountability. Judicial councils, however, are not always responsive and do not necessarily guarantee improved judicial accountability or public confidence in the courts.

In summary, uniform standards might contribute to promoting the independence of individual judges and of the judiciary as an institution, even if they distinguish between lower and higher court judges, along with longer fixed terms and, in some countries, extended mandatory retirement ages. How-

ever, the bases and processes for disciplining and removing judges need to be clearly established if both judicial independence and accountability are to be secured and maintained. Some balance also should be drawn between multiple possible disciplinary actions and the imposition of the single sanction of removal from the bench.

Both systems may undermine the independence of individual judges. Multiple sanctions may render judges too vulnerable, while a single sanction may not in practice assure judicial accountability and address problems arising from impairments and disabilities that fall short of all but the most egregious judicial misconduct. Where disciplinary proceedings are confidential, as in the Philippines and elsewhere, the Supreme Court or appropriate body is expected to subsequently publish the final decisions and explanations for disciplinary actions.

Judicial Remuneration and Resources For Court Administration

Obviously, judicial remuneration must be adequate and competitive. If salaries are not adequate, the quality of the bench suffers, as does its image. However, there is not necessarily a connection between high judicial salaries and judicial performance. Even in affluent countries judges complain about receiving inadequate compensation relative to leading practitioners.²⁷ Nevertheless, in most of the countries participating in this study, the question of remuneration is not one of relative levels of comfort. The issue is much more acute. That is, does the remuneration constitute a living wage? At a very minimum, "adequate" remuneration must provide a "living wage." In some judiciaries, like those in Cambodia, Lao PDR, and Viet Nam, for example, remuneration is so low that judges often work second jobs in order to support their families. Another dimension of "adequacy" may be the extent to which the remuneration allows judges to maintain a minimally respectable standard of living roughly commensurate to their level of responsibilities and status. Lower court judges' salaries in most of the countries participating in this study fail to meet the "minimally respectable standard of living" test.

²⁷ See, e.g. Chief Justice William H. Rehnquist, "Annual State of the Judiciary Report – 2003," (Washington, D.C.: January 1, 2003), advocating an increase in the salaries of federal judges.

Similarly, there must be adequate resources for the operation of courts—for courthouses, caseload management, record keeping, and making judicial decisions—public, available, and accountable. If not, access to justice is delayed and often denied. Courts are (and are publicly perceived to be) inefficient and ineffective. As a result, the status of courts and judges is low or diminished and lacking in prestige. In turn, the rule of law is not held in high public regard.

There are wide variations in the financial resources and support given to judiciaries in South and Southeast Asia. However, in most countries included in this study, judges are poorly paid. To be sure, these countries are relatively poor and economically disadvantaged. Nonetheless, financial support for courts and judges in most DMCs is generally inadequate. Moreover, in many of the DMCs, the governments' commitment to ensuring adequate fiscal support for courts has weakened over time, thereby inviting corruption and undermining the rule of law; the protection of private property; and the equal application of the laws.

Inadequate government funding for the judiciary reflects a longer historical trajectory in the larger political economy of competition for and capture of public funds. Thus, courts in most countries around the world are relatively low government priorities. They typically receive only a small percentage of the national budget. That is certainly the situation in South and Southeast Asia. In Viet Nam, for example, the cost of administering the courts accounts to only 0.0074% of the country's gross domestic product. In Lao PDR and some other countries, such data is not publicly available or even collected accurately, which attests to the low priority given to the courts.

An indication of the low funding for courts in the region are the percentages of the total government budget allocations devoted to the judiciary in the following countries:

Year	Country	Percentage of Government Budget
2000	Philippines	1.07
2000	Nepal	0.40
2000	Cambodia	0.30
2000	Pakistan	less than 1 %

The inadequacies in judicial remuneration and fiscal resources for judicial infrastructures and court administration are evident when examining each within the context of individual countries and within the region as a whole.

Judicial Remuneration

The importance of adequate judicial remuneration and fiscal resources for court administration was summed up by Singapore's then President Lee Kuan Yew when he said "You pay peanuts, you get monkeys." The disparities in judicial remuneration among the countries in this study are striking. Moreover, in most countries in South and Southeast Asia, judicial salaries are not only low but seriously inadequate. In some countries they are not even at subsistence levels. In most other countries, the low judicial remuneration creates serious problems for staffing and operating courts. Even more crucially, the low salaries of lower court judges have had a serious impact on judicial recruitment. As an extreme illustration of such recruitment problems, many lower court judge-ships in some countries are vacant due to lack of applicants, brought about by inadequate judicial remuneration.

In Thailand, as in the Philippines, judges are paid relatively well compared to judges in Cambodia, Lao PDR, and Viet Nam. Still, the average judicial salary is approximately US\$2,000 per month, or US\$36,000 per year. Likewise, in Bangladesh, Nepal, and Pakistan, judges receive inadequate compensation, though relatively higher than the salaries of judges in Southeast Asia. High court judges in Pakistan, for instance, receive only US\$1,400 per month, or about US\$16,800 per year, plus certain benefits, and other superior court judges earn slightly less.

Judicial remuneration in countries in Southeast Asia—in particular in Cambodia, Lao PDR, and Viet Nam—is the lowest in the region and barely at or below basic subsistence levels.

In most of the countries studied, the problems resulting from low and inadequate judicial salaries are compounded by discrepancies in the salaries and benefits provided to higher and lower court judges. It is not uncommon for Supreme Court justices and high court judges to receive ten to twenty times the

salary of lower court judges and to receive special benefits, such as a government car and housing.

As a result of disparities within a judiciary in the salaries of high and lower court judges, the prestige of lower court judgeships is diminished. Accordingly, they tend to be more vulnerable to manipulation and corruption. The recruitment of judges for lower courts, particularly in rural areas, is also rendered exceedingly difficult, if not impossible. Low judicial salaries have resulted in the inability of governments to fill judicial vacancies and, therefore, to provide the public with timely and effective access to justice.

Given the litany of woes regarding judicial remuneration that has been oft-recounted over the last two decades, how can this rather fatalistic cycle of under-compensation be broken? The answer lies in hard research on judicial efficiencies and effectiveness, user and non-user surveys, budget analysis, and restructuring judicial incentives. The Asia Foundation in Pakistan, with funding from the ADB, carried out such research.²⁸ That research, among other things, exploded the myth that increasing the judicial salaries would dislocate the judicial budget. Three reforms phased and implemented simultaneously can disprove traditional budgetary calculations: first, realistically improve judicial efficiency; second, rigorously implement judicial performance standards; and third, significantly increase salaries. Where salaries are raised without corresponding performance standards, a reform opportunity is missed. Where caseloads are increased and judicial salaries are wholly inadequate, the incentives to perform are entirely incompatible with the demand to perform. To set targets for judicial efficiency, one activity is useful, another is essential. It is useful to carry out a delay reduction pilot program. To make such an activity useful, however, it is essential to conduct case-file analysis to ascertain the composition of the backlog, why dominant sets of cases are in the system, and how they may be effectively disposed. Through the use of other methodologies such as interviews and questionnaires, it is also necessary to ascertain why users and potential users access or avoid the courts. Thus, *efficiency* is balanced with *effectiveness and le-*

gitimacy. Armed with this research and analysis, judiciaries have a rational and persuasive basis to argue for increased resource allocation. The benefits of this package of reforms, of course, should extend to the public through improved service delivery and corresponding improved legitimacy of the institution.

Resources for Court Administration

Throughout the nine countries studied, court facilities and the resources for judicial administration are demonstrably inadequate. As a result, most of the countries confront basic infrastructure problems. The infrastructure problems differ according to country and in terms of their severity. Common problems include: (i) infrastructure (lack of an adequate number of courthouses and courtrooms and the need for improving the conditions of existing judicial facilities), (ii) training (the need to provide adequate training for staff in legal research and caseload management), (iii) libraries and computers (the need for funding to establish and/or maintain libraries and computers for legal research and the dissemination of judicial opinions), (iv) record maintenance and case management (inadequate resources for record maintenance and caseload management), and (v) basic security (inadequate resources for providing basic security for the judiciary as an institution and for individual judges).

The Sources and Consequences of Inadequate Funding for Judiciaries

The common source of inadequate funding for the judiciaries in South and Southeast Asia, with the exception of Singapore, is the low priority given by governments to their judicial systems. Most of these countries are admittedly under severe budgetary constraints. Nonetheless, in some countries, governments have repeatedly failed to respond to international and domestic demands for judicial reforms and efforts to improve the integrity of their judicial systems.

In most of the countries studied, the judicial budget is under the control of the Ministry of Justice. In some countries, however, budgetary control is being transferred to the Supreme Court. While giving the judiciary control over its budget, rather than having it under the control of the Ministry of Justice in the executive branch, may ostensibly en-

²⁸ Supporting Access To Justice Under The Local Government Plan Small Scale Technical Assistance (SSSTA 3640-PAK: December, 2002).

hance the institutional autonomy and independence of the judiciary, under either system judicial budgets are ultimately allocated by national legislatures and reflect their priorities. It appears, in the absence of the government's commitment to improving the administration of justice, to matter little whether judicial budgets are determined solely by the judiciary or by a ministry of justice. In other words, no judiciary's control over its budget is absolute. In every country around the world, judicial budgets are ultimately allocated directly or indirectly by a national legislature. Such external influences are necessary to ensure judicial accountability. They do not necessarily diminish the institutional independence of courts.

Moreover, where judiciaries have greater influence over their budgets than those under the supervision of a ministry of justice, there is no evidence that allocations for addressing infrastructure problems or improving the administration of justice will be significantly greater. In some countries, the judiciary generates, through filing fees, for example, substantial funding, or receives supplemental funding from regional and/or local governments. Yet, even in countries in which courts generate substantial funds for their operation through filing fees and donations for judicial reform, judicial budgets are overwhelmingly spent for judicial salaries and personnel services.

Obviously, the low priority and government commitment to providing adequate judicial remuneration and resources for the administration of courts impacts the status of courts and judges as well as judicial independence at the institutional and individual levels. It also has implications for public perceptions of and confidence in the performance of the judiciary in particular countries and in the region. And, unfortunately, the pre-existing low commitment of governments to increase resources to the judiciary is exacerbated by the fact that most judiciaries are unable to effectively engage in the normal budget and planning cycle. Often, judiciaries do not have professional managers who understand the way public finance and planning works

Courts in Relation to the Public, Economic Development and Governance

There are a number of trends or at least common challenges across the countries participating in this study.

Public Opinion

- a. The Quantum and Quality of Public Opinion Polling Data Varies Greatly across Participating DMCs, but Generally the Quantum is Growing and the Quality is Improving. At the high end of the spectrum in public opinion polling, extensive time series data in the Philippines has included questions on public opinion about the judiciary every 6 months for the last 15 years. Indonesia and Thailand have also seen a rapidly growing body of public opinion polling activity. And, we have extensive data about public impressions of the judiciary in Pakistan from a survey carried out by ADB and The Asia Foundation. A middle range of countries in this activity include Bangladesh, Cambodia, and Nepal. Viet Nam has one such public opinion poll that is instructive, but was carried out by the Ministry of Justice itself. There is no public opinion data from Lao PDR.

The quality of the data varies, but is improving. As highlighted, two polls taken in Pakistan about impressions of the judiciary yielded seemingly inapposite results. In one, 100% of those polled felt the judiciary was corrupt. In another much more detailed and careful survey, however, courts were the preferred forum for those who "sought justice"—more so than traditional dispute resolution mechanisms, the bureaucracy and other forums. In yet another example, academics in Thailand have been at the forefront of path-breaking empirical work, including polling, to analyze the parameters of corruption. Their polling on corruption is much more carefully constructed, with significant amounts of local detail, so that the results can become a useful tool in designing reform programs. Finally, ADB and The Asia Foundation are jointly supporting public opinion polling in five countries to probe on questions related to judicial independence. This survey significantly improves on most of the polling instruments used to date.

It is hoped that the trend toward more fine-grained polling will continue. For example, the results of opinion polling vary significantly depending on the way questions are framed and the sequence in which they are asked. It is said

that “those who can, do, and those who can’t, discuss methodology.” This received wisdom should be jettisoned in the domain of public opinion polling about judiciaries where there has been far too much “doing” and not enough probative focus on methodology. What is the programmatic value of a worldwide national-level public opinion poll about governance if the methodology employed is suspect? If, for example, a polling group goes into a country and conducts a focus group or 20 in-depth interviews with businesspersons and then extrapolates global rankings on an array of governance ills, for example, how representative is the sampling? How useful is the information to designing reform initiatives? Clearly, it is necessary to focus on methodology, carefully crafted questions, and careful analysis when eliciting and measuring public opinion.

- b. **Familiarity with the Courts Generally Breeds Respect: Users’ Opinion More Positive than Non-Users.** Data in one ADB-funded poll in Pakistan showed that users of the courts tend to have a higher opinion of the courts than non-users. In Nepal, public opinion polling strongly supported this view. The “familiarity breeds respect” phenomenon is entirely consistent with research carried out elsewhere.²⁹
- c. **Information about What the Judiciary Does and Why is Expanding.** More and better information is a necessary but insufficient factor that can contribute to an environment in which judicial independence is strengthened. Judicial accountability through increased information flows can strengthen the public image of the courts and contribute to the legitimacy of the institution. The extent to which information provides building blocks for legitimacy depends on three factors: the amount and quality of information that citizens have about the judiciary and related institutions, the quality of information that is disseminated about the judiciary through the media and other sources, and the extent to which the information penetrates the public’s conscious-

ness. Publishing court decisions and accurate statistics about court performance, and expanding the availability of legal literacy materials are generally all very positive developments across the region. In Viet Nam, for example, an encouraging increase of information is now available in the print media, both generalist publications as well as publications more useful to law professionals. Most countries now publish their courts’ decisions. Only in the post-Suharto era has this begun to happen in Indonesia. Hopefully, Lao PDR will begin to publish its civil court decisions in the near future. Another dimension of the quality of information available about judiciaries is the need to improve the quality of legal education and the capacity of the academy to critically comment on jurisprudence. This is a need across most of the participating countries.

- d. **The Media is a Potential Blessing and a Potential Curse to Judicial Independence.** In Cambodia, the media plays a potentially constructive role in the implementation of laws. Thailand’s media has opened considerably over the last decade in ways that parallel improvements in overall governance in the country during that period. The correlation is strong, but the causation, again, is much more difficult to assess. One may posit, at the least, a virtuous cycle in Thailand’s governance. Openness of the media is part of that dynamic. On the other hand, Philippines’ experience points to concerns about media responsibility. A version of “envelopmental journalism” (journalists who take bribes for stories or to keep quiet) is practiced to a greater or lesser extent, throughout Asia, so corruption in the media is an issue as it covers the judiciary. More generalized sensationalism and the failure of media responsibility to, for example, cross-check sources is another problem. Not all problems in the media involve culpability, however. Several reports pointed out the lack of capacity of the media to understand legal problems and procedures, a problem that does not involve culpability.
- e. **Overly Broad and Restrictive Contempt Laws Impede Critical Analysis of Court Decisions.** A more refined balance should be

²⁹ See, e.g., Herbert M. Kritzer and John Voelker, “Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts,” 82 *Judicature* 58-64 (1998).

struck between legitimate concerns about undue external influence on cases and potential defamation of those involved in legal actions (both court personnel and litigants) and the need for critical scrutiny and analysis of court decisions. Most of the country-level draft preliminary findings raised concerns about the chilling effect of overly broad contempt laws on expression. In this respect, the rules of court, developed by the new Administrative Court in Thailand and promulgated in 1999, deserves consideration as a model:

Any person who criticizes a trial or adjudication of an Administrative Court in good faith and by an academic means shall not be guilty of an offense of contempt of Court or defamation of the Court or judge.

Moreover, the Thai Administrative Court's practice is as exemplary as its rules: although not required by the Constitution, the court has declined to invoke contempt of court for public discussion of its decisions.

- f. **Liberally Granting Injunctive Relief Negatively Affects Public Opinion, Governance and Economic Development.** A number of countries are taking measures to limit the granting of injunctive relief. Generally, this is a very positive trend that should have crosscutting, positive effects on public opinion, governance and economic development.

Governance

- a. **In Assessing the Judiciary's Role during Political Transitions, the Delicate and Difficult Balance between Assertiveness and Restraint Must be Appreciated.** The complexity of countries' political transitions and the role of the judiciary therein must be appreciated. The greatest political challenge to strengthening judicial independence is that it is to a significant degree contingent upon a competitive political process in an environment that has achieved a relatively stable equilibrium. Junctures at which the judiciary plays a lead role in political transitions are relatively rare. The Pakistan Supreme Court has been criticized for not being sufficiently assertive, while the Philippine Supreme

Court has been criticized for being too assertive in ratifying "people power." The counterarguments to these criticisms are substantial. It is well beyond the scope of this exercise to argue the merits of either side. As a general matter, however, given the highly contingent nature of judicial independence and patterns of governance in the region, expectations among some about the assertive role of the judiciary in political transitions are wholly unrealistic.

- b. **Contributing to Basic Security Through, for example, Restraining the Police is an Important but Difficult Role for the Judiciary.** Many reports highlight the need for more effective relationships between the judiciary and the police. Restraining police behavior is an important but difficult role. Yet, especially for vulnerable groups, this may be the most visible evidence of judiciary's effectiveness.
- c. **Strengthening Capacities to Enforce Judgments Requires Attention Across Countries.** The Lao PDR findings provide excellent detail about enforcement problems. All countries face this issue to a greater or lesser extent. Empirical studies on this important issue are scant and incomplete. Yet, clearly, the capacity to enforce judgments is a central feature that bears on the judiciaries' role in governance and its legitimacy. Hans Kelsen, the famous German legal philosopher once defined a legal system as "a normative system backed by the credible threat of physical force." Without a credible threat that judgments will be enforced, a core element of legal systems is left wanting.
- d. **Bureaucratically Embedded Judiciaries should be Realistically Assessed and the Complexity of their Institutional Evolution Appreciated.** The most bureaucratically embedded judiciaries participating in the study are, from least to most, Thailand, Viet Nam, Cambodia and Lao PDR. Thailand is a country that has, with its 1997 reforms, embarked on a serious transition. The creation of the Constitutional Court and the Administrative Court, among other entities, has meant a partial break in its strong tradition of a bureaucratic judiciary. The preceding section which discussed the necessity of

judicial independence for the rule of law, economic growth and development, good governance, or combating corruption raised the distinction between narrow and broad conceptions of the rule of law and the importance of non-political decisions related to everyday life: inheritance, small debt, family matters, etc. Therefore, bureaucratically embedded judiciaries should be assessed for the extent to which the system performs in this domain as well.

- e. **Combating Judicial Corruption and Corruption in Other Branches of Government.** To combat judicial corruption, most of the country reports highlight the need for improved transparency in judicial proceedings, including the publication of decisions and statistics on judicial performance. Moreover, many of the measures that advocate procedural transparency in the first four parts of this assessment—for example, the selection, appointment and dismissal of judges—are closely related to this issue. Finally, perceptions of corruption in the judiciary should be addressed. The “familiarity breeds respect” phenomenon shows that users of the courts perceive lower levels of corruption than non-users. Therefore, while a sensitive issue, the installation of an information officer such as the Philippines has done, may be a way to project the actual work of the court.

Across countries, the capacity of the judiciary to put a rein on corruption in high-level politics in other branches of government is relatively weak and uneven, characterized by “two steps forward, one step back.” This does not *prima facie* constitute a failure of the judiciary to perform. Rather, it may well spring from unrealistic expectations of the judiciary, given political realities in many countries.

Economic Development

- a. **Specialized Commercial Courts with Judges Recruited Ad Hoc and Outside the Judicial Cadre Do Not Work.** Experience in countries participating in this study is consistent with experiences in other developing countries. That is, specialized courts staffed by judges who do not belong to the judicial cadre fail. This has been the experience most notably

in Bangladesh’s “Money Court,” and in Indonesia. This is why the commercial court reforms that are being implemented in Pakistan do not require separate courts staffed by ex-cadre judges, but rather commercial *benches* of the regular courts staffed by judges within the cadre who have specialized knowledge of commercial matters.

- b. **Arbitration, Mediation, and Informal Risk Mitigation are Preferred to Litigation and are Widely Practiced Across Countries.** International arbitration tends to be preferred to the courts, which are often systematically avoided by business. Some countries like Bangladesh have improved their arbitration law and practice, while others, like Pakistan, especially in the power sector, seem to be backsliding and introducing legal uncertainty as to the enforcement of arbitration clauses.
- c. **Accessing the Courts to Manipulate Negotiation is a Technique Used in Some Countries.** Accessing the courts through strategies designed to frustrate the legitimate and speedy resolution of business disputes is a practice highlighted in countries such as Bangladesh, Nepal, and Pakistan. Such strategies are common in commercial litigation globally. The difference is the extent to which judges are either unable or unwilling to take control and reign in the excessiveness of this practice.
- d. **Some Important Economic Decisions seem Inspired by “Economic Nationalism” and Protectionism and are Out of Step with Broader National Interests in Economic Development.** The dynamics of “economic nationalism” seem apparent in certain jurisprudence in Indonesia (e.g., the *Manulife* case handed down by the commercial court) and at least two cases in the Philippines (*Board of Investment vs. Garcia* and *Manila Prince Hotel*). This problem correlates to shortcomings at the political level where governments fail to generate popular support and consensus for economic liberalization. Another corollary problem is that many projects employ non-transparent procedures, widely perceived by the public to be corrupt. Thus, to a certain extent, courts bear an unfair burden and may actually represent the popular ire against such projects.

PART THREE

Recommendations

The preceding analysis implies a diversity of recommendations. This study often stresses the need to consider diverse political paths to judicial independence. Therefore, close attention should be paid to the individually tailored recommendations in the country-level studies. Nonetheless, this section outlines in the most generalized fashion sets of recommendations to consider, and a sequence by which to pursue the recommendations.

First, baseline research is needed on what legal systems actually do. Ascertain what types of cases are in the system and why, and what types of cases are not in the system and why. The research agenda must include hard budgetary analysis as well. It must also test and develop ways to improve efficiency. As discussed, one important benchmark of whether a judiciary is both independent and legitimate is the extent to which its decisions are accepted. Therefore, research should also focus on the extent to which civil decisions are self-enforced by the parties or imposed by the state. Finally, it should develop a regimen of judicial performance standards that adheres to and maximizes incentive compatibility as earlier suggested. This research provides the bases for reforms such as improved judicial efficiency and effectiveness, implementation of judicial performance standards, and increased judicial salaries.

Second, and complementary to the first, get as much information about what the legal system is doing out into the public domain through annual reports, public addresses on the state of the judiciary,

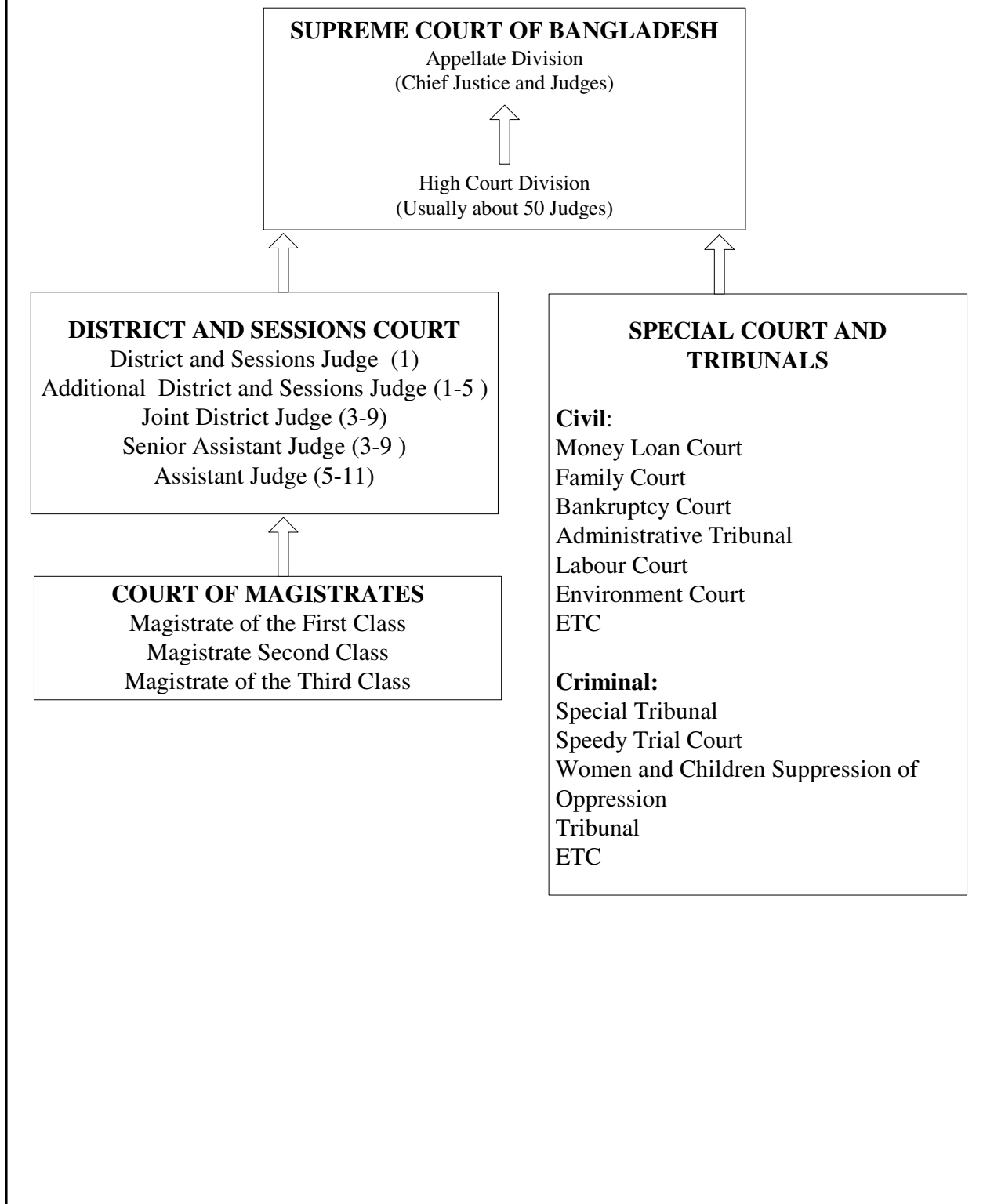
publication of judicial decisions on the Internet and elsewhere, publication of judicial budget information, and, perhaps, even consider a public information officer such as the position that has been created in the Philippines. Within this information set, pay attention to the type of information that enhances the case for allocation of greater resources to the judiciary vis-à-vis other branches of government.

Third, encourage freedom of information within the judiciary and other branches of government, and consider reducing the scope of contempt laws along the lines of Thailand's Administrative Court. The dissemination of credible information increases transparency and accountability and holds the promise of strengthening the legitimacy of the judiciary against attacks. It may also strengthen the courts' case for structural reform and the promotion of integrity and control over personnel practices.

Finally, consider the array of structural improvements highlighted in the section on "Applying the Framework to Five Categories of Assessment". Unfortunately, no single technical recommendation suggested in this section ensures judicial independence, or even provides an adequate basis for measuring judicial independence. No formal institution or set of institutions ensures judicial independence. Moreover, the composite features of the formal structures of the judiciary at a country-level must be situated with their course of conduct in interacting with the political branches of government. The independence of the judiciary in Bangladesh has been a contentious issue since the country gained independence in 1971. While political discourse purports commitment to judicial independence, practical measures to address issues related to judicial independence have been too few.

Court Organizational Charts

BANGLADESH



SUPREME COURT OF BANGLADESH

Appellate Division (CJ + Judges) Hears appeals from judgments of the High Court Division. Two Benches of 3 and 4 Judges, though full bench of all the 7 Judges hears important matters. Statutory Appeal only on three matters, for others appeals only if leave to appeal is granted. Only Senior Advocates have automatic rights of appearance, others can argue cases with permission. ?

High Court Division (Usually about 50 Judges) Judges sit as Division Benches of 2 Judges, and Single Bench of 1 Judge, as assigned by the CJ. Usually each Bench has one exclusive jurisdiction: writ, criminal, civil, company, etc. Original Jurisdiction in constitutional, company, contempt, parliamentary election and admiralty matters. On other matters, hear only appeals from District Court, Special Courts and Tribunals.

DISTRICT AND SESSIONS COURT

- Has both Civil and Criminal Jurisdictions.
- The District and Sessions Judge heads the District Judiciary.
- The country is currently divided into 61 District Courts.
- Additional District and Sessions Judges have the same jurisdiction as the District Judges, but the District Judge is the administrative head of the district judiciary.
- In civil matters Joint District Judge has unlimited pecuniary jurisdiction while the pecuniary jurisdiction of Senior Assistant and Assistant Judge is Taka 400,000 and Taka 200,000, respectively.
- In criminal matters, Joint District Judge hears cases punishable with imprisonment of upto 10 years.
- Crimes punishable with longer than 10 years of imprisonment are heard by the Additional District Judge and the District Judge.

COURT OF MAGISTRATES

Magistrates are members of the administrative service of the republic and part of the Executive

Organ. The members of the administrative service are appointed as Magistrates for 3-7 years, usually during the initial period of their career, later reverting back to administrative duties in Ministries.

Over the years amendments of laws and enactments of new laws have seen gradual increase in the penal power of magistrates and, consequently, more and more criminal cases are tried in the Courts of Magistrates, rather than the district judiciary.

The Supreme Court has directed, in 1999, that Magistrates be made part of the judiciary. Currently, there are about 600 Magistrates from the executive organ, performing judicial function as Magistrates and the Government insists that it may take another 5-6 years to replace these Magistrates with Judges. Currently, special Magistrates in Metropolitan cities have power to punish/sentence with life imprisonment.

- Magistrate of the first class: hears criminal cases punishable with imprisonment upto 5 years and fine
- Magistrate second class: hears criminal cases punishable with imprisonment upto 3 years and fine
- Magistrate of the third class: hears criminal cases punishable with imprisonment upto 2 years and fine

SPECIAL COURT AND TRIBUNALS

Increasingly more and more specialized courts and tribunals are being set up with specified, subject-matter, jurisdictions.

However, this has not mean recruitment of judges for these special courts but Additional District Judge or Joint District Judges, depending on the court/tribunal, are transferred to these Courts/Tribunals as Judges. There are hardly adequate resource allocation for these courts and tribunals, which are often housed at depilated buildings and because of the frequent transfer of judges between 'district court' and these specialized courts and tribunals, there is always dearth of special skill and expertise.

CIVIL

- Money Loan Court
- Family Court
- Bankruptcy Court
- Administrative Tribunal

- Labour Court
- Environment Court
- ETC

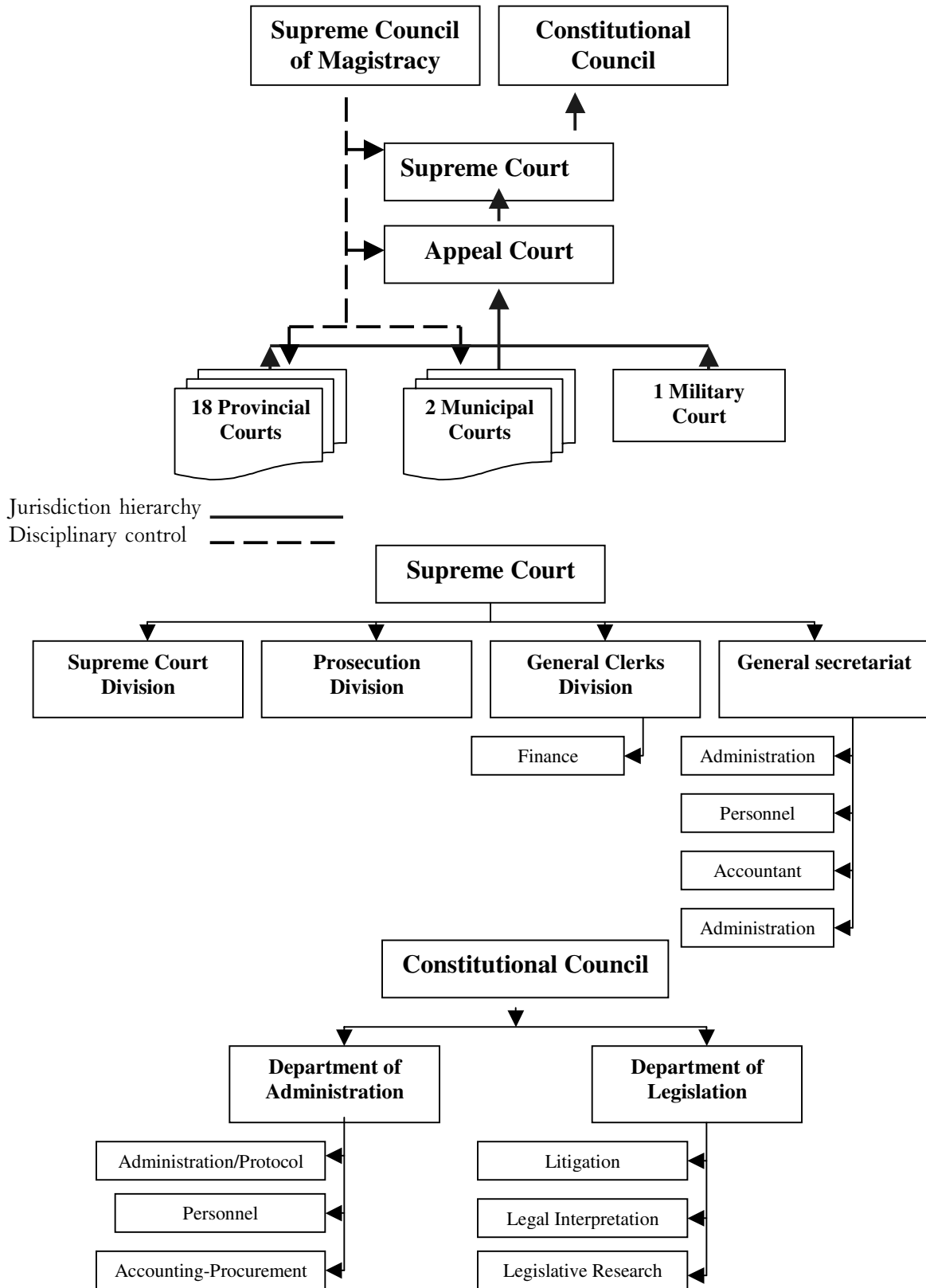
CRIMINAL

- Special Tribunal
- Speedy Trial Court

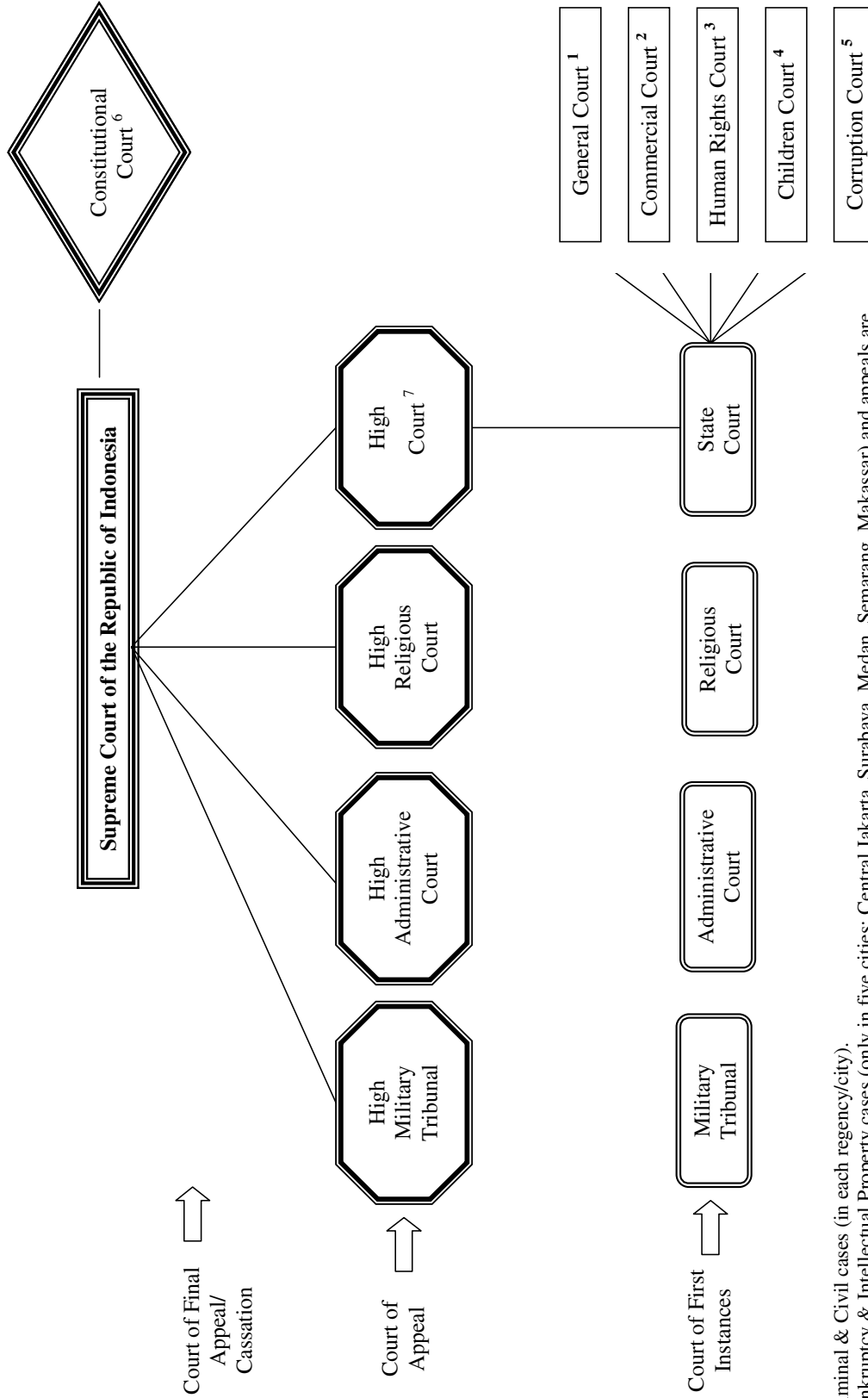
- Women and Children Suppression of Oppression Tribunal
- ETC

Some of these courts and tribunals have their own appeal tier, and the High Court Division hears appeals against judgments of these Appellate Courts/ Appeal Tribunals.

CAMBODIA



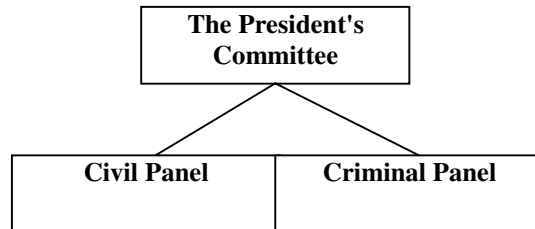
INDONESIA



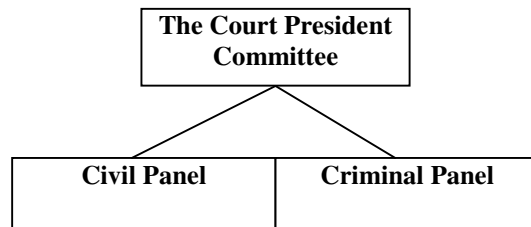
1. Criminal & Civil cases (in each regency/city).
2. Bankruptcy & Intellectual Property cases (only in five cities: Central Jakarta, Surabaya, Medan, Semarang, Makassar) and appeals are directly lodged with the Supreme Court.
3. Human Rights violation cases (only in four cities: Central Jakarta, Surabaya, Medan, Makassar).
4. Criminal cases where the offenders are children.
5. To be established, based on Corruption Law No. 20/2001 must be operational by April 2004.
6. The law establishing the Constitutional Court is currently being deliberated, under the Amendment of the Constitution must be established by August 2003.
7. Should be available in each province of Indonesia. However, with the recent addition of three new provinces in Indonesia, the total numbers of High Courts remains 27 and have not been increase to 30.

LAO PDR

The Supreme Court



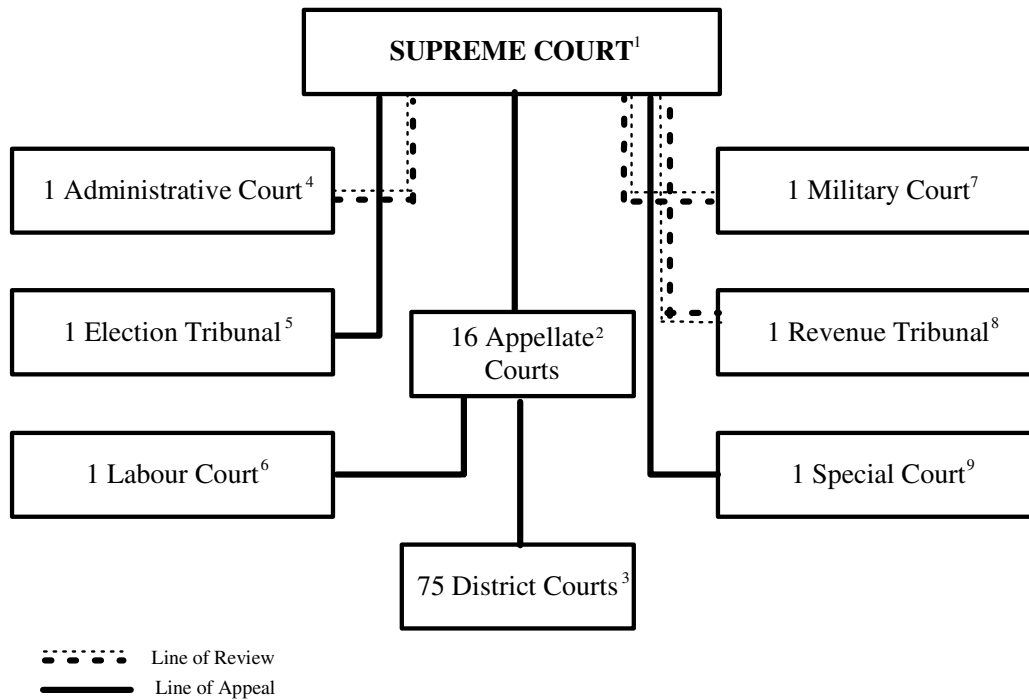
Provincial, Prefecture and Special Zone Courts



The District Courts

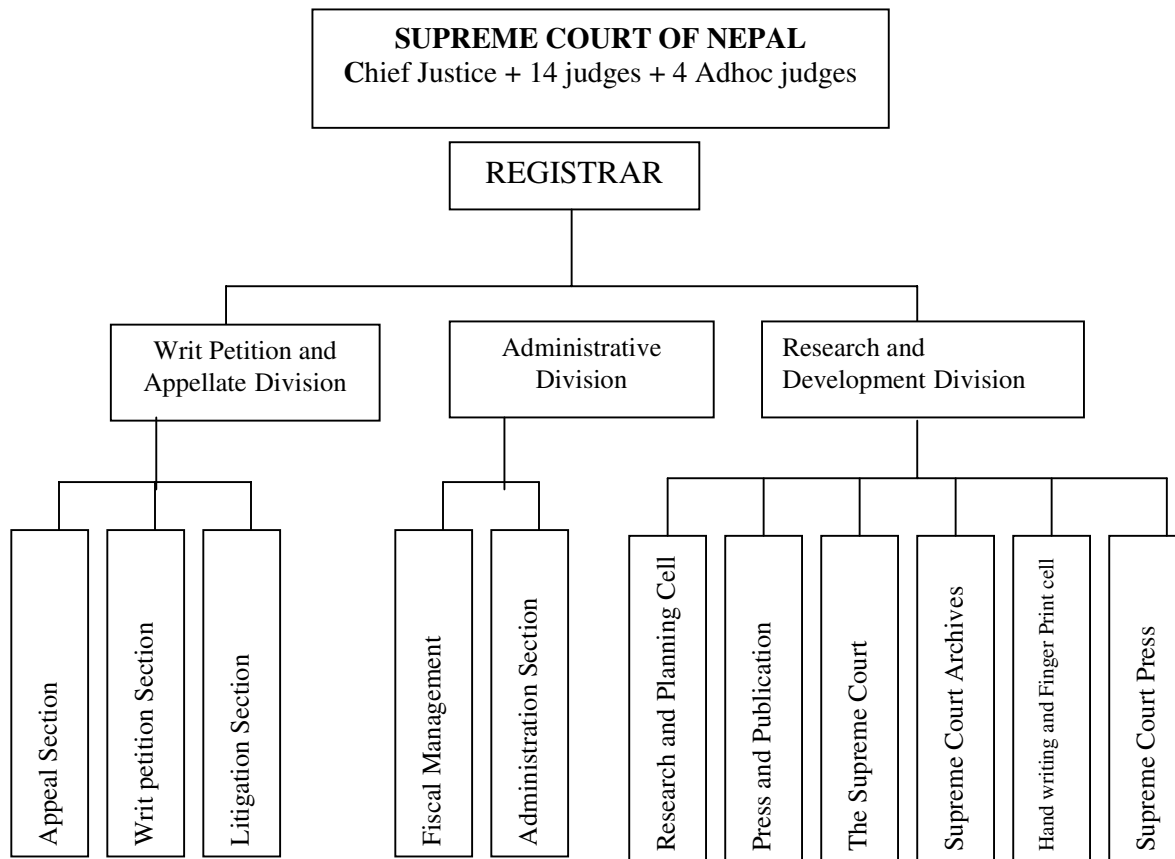
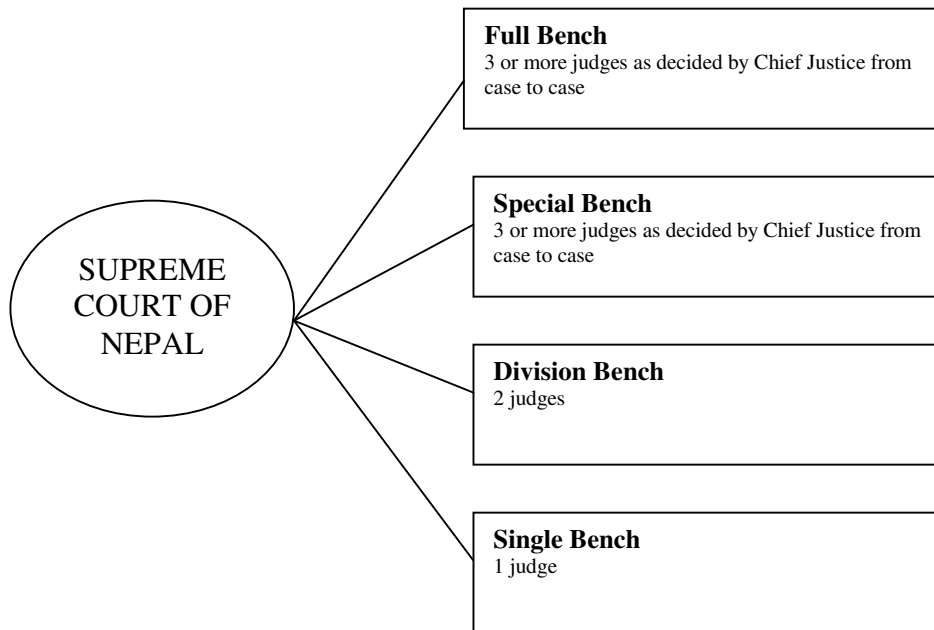
Civil case not exceeding 500, 000 Kip and other cases given by the law	Criminal case punished by sentences not exceeding 2 years imprisonment
------------------------------------------------------------------------	------------------------------------------------------------------------

NEPAL

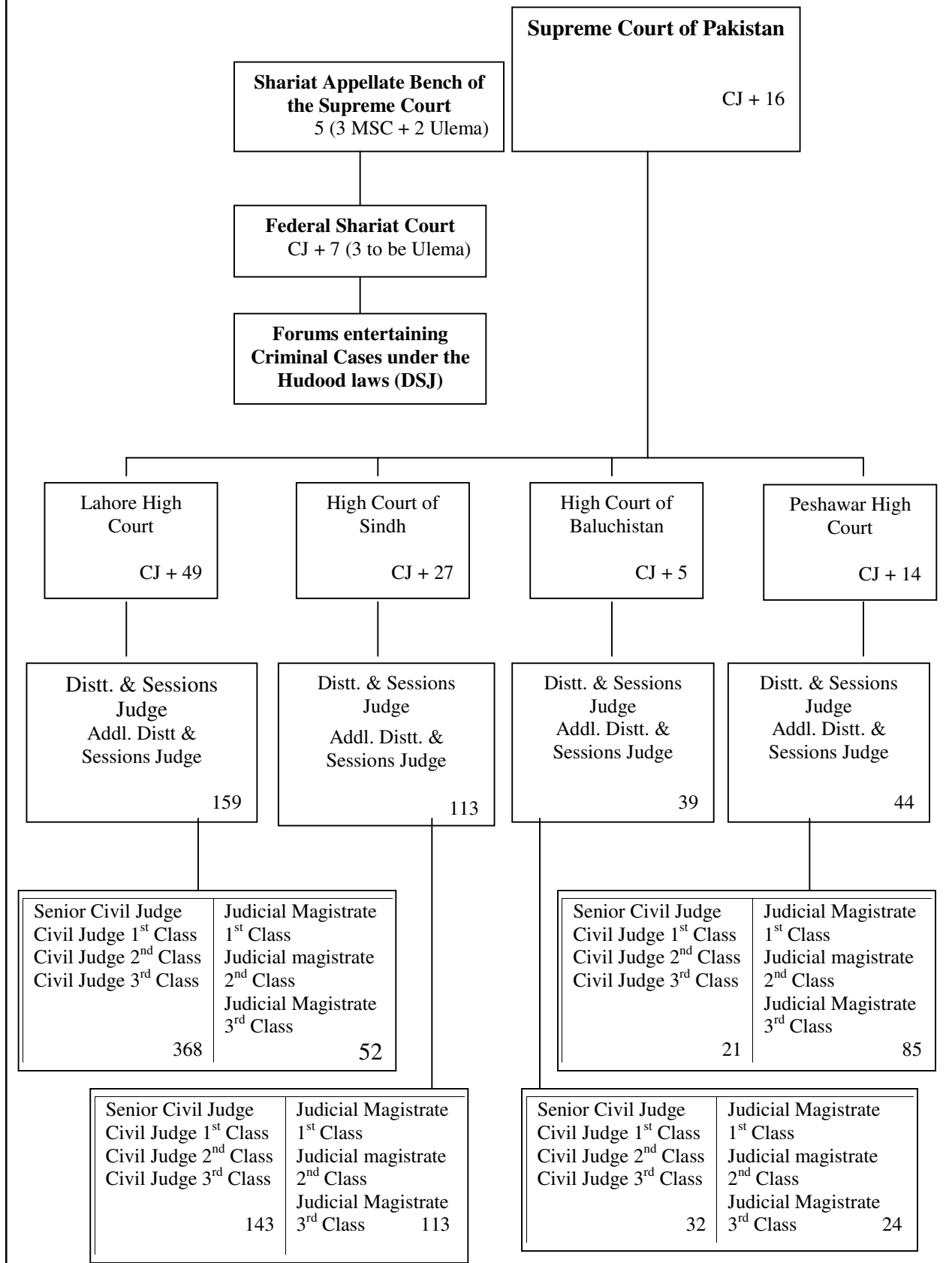


- (1) Contempt of Court cases, Enforcement of Fundamental Rights through writs, Advisory Jurisdiction on legal matters referred by the King, Judicial Review of Constitutional Amendments, Acts and Rules, final Civil and Criminal Appeals from Appellate Courts, Revision of final decision by Appellate Courts, Appeals from Election Court and Special Court, Review of decisions by Administrative Court, Revenue Tribunal, Military Court.
- (2) Civil and Criminal Appeals from District Courts under its jurisdiction, Enforcement of civil rights through writs and injunctions, Appeals from Labour Court and appeals against the decisions of other quasi judicial bodies such as Land Revenue Officer and Land Reform Officer, Contempt of Court, Original Jurisdiction on cases specified by specific laws, cases transferred from district court.
- (3) Court of first instance and court of general jurisdiction - both on civil and criminal matters, Contempt of court.
- (4) Appointment, dismissal and promotion disputes of civil servants.
- (5) Election disputes. Election Court is not a standing court. It is created by His Majesty's Government on the recommendation of Election Commission to decide election disputes as and when necessary.
- (6) Labour Disputes.
- (7) Military offences
- (8) Appeals against decisions of tax authorities
- (9) Corruption cases, offences against the state, offences under Anti-terrorist Act, drug trafficking and drug abuse.

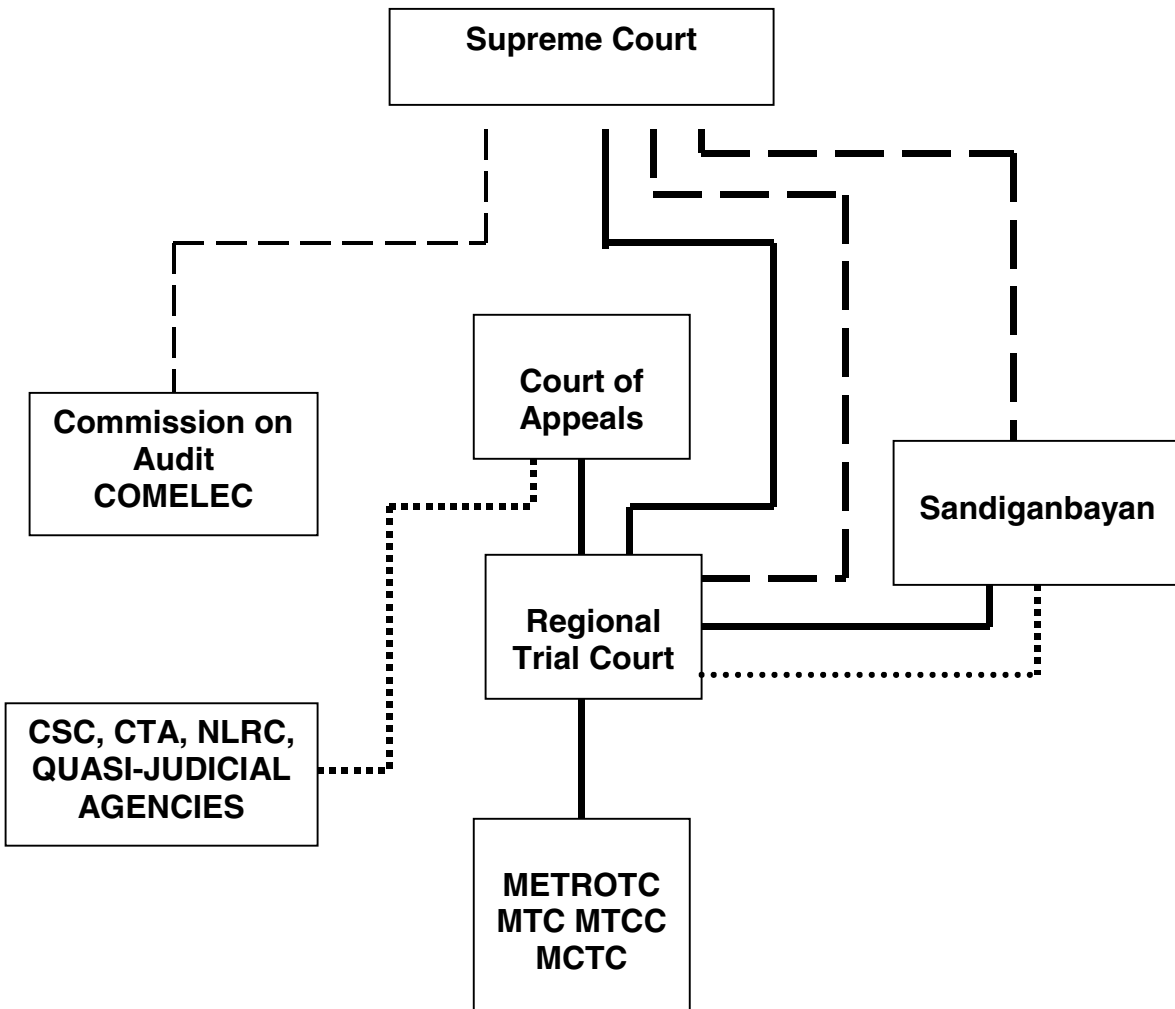
Organizational Structure of Supreme Court of Nepal



PAKISTAN



PHILIPPINES

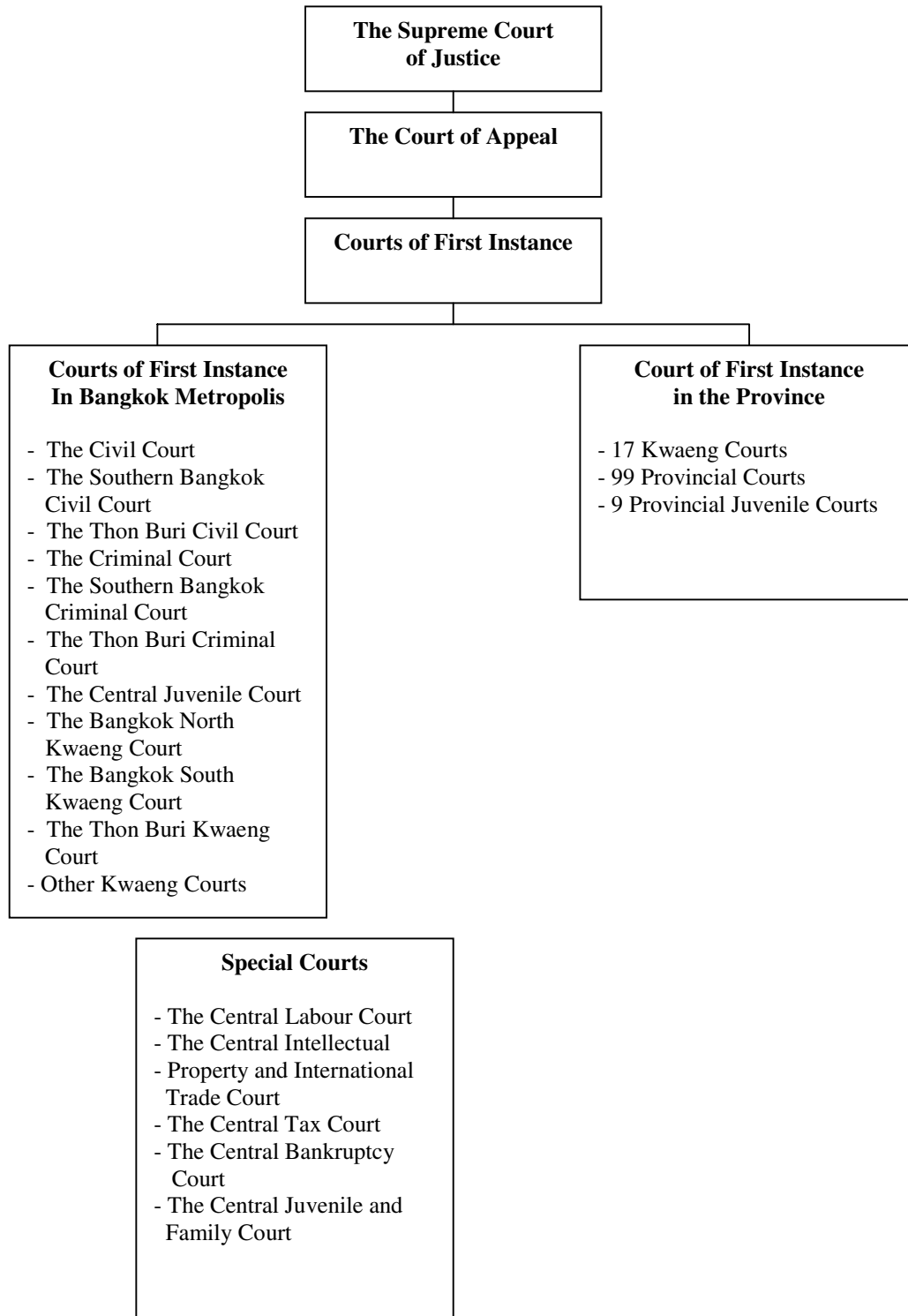


COMELEC = Commission on Elections; CSC = Civil Service Commission; CTA = Court of Tax Appeals; MCTC = Municipal Circuit Trial Court; METROTC = Metropolitan Trial Court; MTC = Municipal Trial Court; MTCC = Municipal Trial Court in Cities; NLRC: Nat'l Labor Relations Commission.

Legend:

- - - - - Petition for *certiorari* (Rule 65)
- Petition for Review
- - - - - Petition for review on *certiorari* (Rules 45, 122)
- Ordinary appeal (Rules 40, 41, 122); N.B. From the RTC to SC, when *reclusion perpetua* or life imprisonment is imposed for automatic review of death penalty.

THAILAND



Source: Law Society of Thailand, Lawyer's Diary 2002

External and Internal Pressures by Institutions and Individuals on Judicial Independence

Country	Target	External Sources of Pressure	Internal Sources of Pressure
Bangladesh	Institutional	President, prime minister, and parliament control court budget and appointment of magistrates	Chief justice and supreme oversee promotion and discipline of subordinate judges
	Individual	Civil service system and bureaucracy Ministry of Justice and Civil Service System Appointment of temporary “special sessions” judges Bribery and corruption	Supreme court oversees staff and performance reviews Short tenures; mandatory retirement at age 57 Little transparency for promotion, discipline, and reassignment of judges Low judicial compensation Inadequate court facilities and infrastructure, especially in rural areas
Cambodia	Institutional	Political parties broker appointments to the courts Ministry of Justice oversees budget for the judiciary	Chief Justice and Supreme Council of Magistracy oversees judicial operations
	Individual	Political Parties No established and transparent standards for promotion and transfer Local politicians’ influence, personal attacks and bribery	Supreme Council of Magistracy oversees lower courts Very limited terms of office for judges Inadequate dissemination of higher court decisions Subsistence salaries Inadequate court facilities and infrastructure
Indonesia	Institutional	Lack of limits on appeals Lack of information about judicial reasoning Poor recognition of “separation” of powers Concern about lack of judicial independence and independent bar	Backlog in court cases Poor judicial salaries and court resources Mandatory retirement and judicial age Overburdened Supreme Court Political cooption of judges through judicial recruitment Corruption in transfers and promotions
Lao PDR	Institutional	President, legislature, and Lao PDR Revolutionary Party control judicial operations	President of Constitutional Court exercises oversight
	Individual	Ministry of Justice controls budget Lao PDR Revolutionary Party and provincial party leaders Personal attacks and inadequate security for courts and judges	President of Constitutional Court oversight of judiciary Limited (5 year) terms with same status as other civil servants Inadequate dissemination of high court rulings No established and transparent standards for appointments, promotion, and discipline Substandard salaries Inadequate court facilities infrastructure- libraries, case management
Nepal	Institutional	King and Judicial Council determines appointments Appointment of ad hoc justices for fixed terms Control over budget by the Ministries of Justice and Finance Civil Service Commission and bureaucracy Bar association and media	Judicial Council and Coordination Committee oversee appointments, assignments, and discipline Chief Justice must retire after 7 years Supreme Court prepares budget subject to external approval Judicial service bureaucracy
	Individual	Civil Service Commission and His Magistracy’s Government Bar association and law schools Personal attacks and inadequate security for courts and judges, especially in rural areas	Chief justice and Judicial Council exercise oversight Established code but lack of transparency for disciplinary actions Reliance on fee system and grants for judicial infrastructure and reform Low judicial salaries Inadequate court facilities, particularly in rural areas

Country	Target	External Sources of Pressure	Internal Sources of Pressure
Pakistan	Institutional	Bar, Press Political system generates insufficient pressure for judicial independence	Chief Justice and high court judges oversee appointments, assignments, and promotions in superior courts High court judges oversee transfer, and discipline of subordinate judiciary and control budget once it is approved
	Individual	Public Service Commission, President and regional governments, as well as two major political parties Public threats of violence, ethnic group conflicts, death threats, and inadequate security for courts and judges Powerful bar members may bully individual lower court judges	Chief Justice and high court judges oversee lower court judges and their transfer and discipline Inadequate salaries Poor facilities and infrastructure, particularly in rural areas
Philippines	Institutional	President, legislature, and political parties, media Department of Budget Management has final control over budget	Judicial Bar Council and bureaucratic staff make recommendations on judicial appointments and assignments Lack of transparency in processes of Judicial Bar Council Supreme Court controls judiciary's budget subject to Dept. of Budget Management authorization
	Individual	President with Judicial Bar Council Local/regional governments' financial support Bribery, corruption, media	Judicial Bar Council exercises oversight Supreme Court has disciplinary authority but lacks transparency High court supervision and docking of lower court judges salaries Inadequate salaries for recruiting, especially for rural areas Inadequate court facilities and infrastructure, especially in rural areas
Thailand	Institutional	President, legislature, and political parties Career Civil Service system and bureaucracy Ministry of Justice controls budget	Chief justice and higher court judges, along with Judicial Service Commission, determines appointments and assignments from career civil service
	Individual	President, legislature, bar associations Bribery and corruption	Judicial Service Commission and staff oversee promotions and assignments Reappointment possible after mandatory retirement Lack of transparency in promotion and reassignment Low salaries Inadequate court facilities and infrastructure, particularly in rural areas
Viet Nam	Institutional	President and National Assembly have appointment powers Provincial and local party leaders oversee the appointment, performance and discipline of lower court judges	Supreme court controls budget and oversees lower court judges
	Individual	National Assembly and local party officials influence and may discipline lower court judges and punish particular judicial decisions Local party officials and public opinion	Chief Justice and Central Committee on Judicial Selection oversees appointments and assignments Limited (5 year) terms, with automatic reappointment, and national assembly elections Lower court judges have same status as other civil servants No established or transparent standards for appointment, promotion, or discipline Substandard salaries

Judicial Independence Study Team

International Consultants

Dr. David M. O'Brien
Spicer Professor of Government and Foreign
Affairs University of Virginia

Mr. Erik Jensen
Senior Law Advisor, The Asia Foundation
Co-Director, Rule of Law Program
Stanford University Law School

Domestic Country Consultants

Mr. Sok Sam Oeum
Executive Director, Cambodian Defenders
Project Cambodia

Mr. Mardjono Reksodiputro
Professor of Law, University of Indonesia
Indonesia

Mr. Soupho Phengkhay
Private Legal Advisor and Consultant
Lao People's Democratic Republic

Team of Researchers at the University of the
Philippines, Philippines

Mr. Somchai Hom
Lao People's Democratic Republic, Senior Law-
yer, Internet Law Consultants, Thailand

Dr. James Klein
Representative, The Asia Foundation
Thailand

Mr. Phan Nguyen Toan
Managing Director, Leadco
Viet Nam

Mr. Shahdeen Malik
Advisor, Bangladesh Legal Aid and Services
Trust (BLAST)
Bangladesh

Mr. Purna Man Shakya
Professor, Tribhuvan University
Nepal

Mr. Syed Mohammed Feisal Hussain Naqvi
Partner, Bhandari & Naqvi
Pakistan

COUNTRY-LEVEL SUMMARIES

BANGLADESH

Present-day Bangladesh, formerly called East Pakistan, was originally a province of Pakistan. Its boundaries were created in 1947 after India and Pakistan received their independence from the United Kingdom. But political and linguistic differences, coupled with exploitation, resulted in major frictions between these two provinces. Awami League, the party spearheading East Pakistan's autonomy movement in the 1960s, won an overwhelming majority in the first assembly elections of 1970. Attempts to crush the autonomy movement led to a bloody civil war, culminating in the independence of Bangladesh in December 1971.

Two dynamics have restricted the independence of the judiciary in independent Bangladesh. The first is the penchant for military rule during almost half of the period since independence. The second is the increasing politicization of every dimension of public life since Bangladesh's "return of democracy" in 1991 and the extent to which political violence and intimidation is practiced without regard for legal sanctions. After the last military ruler was ousted in 1990, three elections were held in Bangladesh (1991, 1996, and 2001), leading twice to the formation of a parliamentary government by the Bangladesh Nationalist Party (1991 and 2001) and once by Awami League (1996). However, those elected, generally, have not been very sympathetic to an independent judiciary or rule-of-law-based governance.

The issue of judicial independence has recently been poised around the case of *Secretary, Ministry of Finance v. Masdar Hossain*, a major judgment rendered in late 1999. Written by the retiring Chief Justice of the Appellate Division of Bangladesh's Supreme Court, the decision must be constitutionally enforced by the country's authorities.

Structure of the Judiciary

Bangladesh's Constitution came into force on 16 December 1972, the first anniversary of the country's independence. It contains fairly stringent safeguards for the independence of the judiciary in Article 95 (Appointment of Judges), Article 96 (Removal of Judges), and Article 99 (Prohibition on Further Employment of Judges), although the formal separation of powers is not emphatically articulated. Over the years, its safeguards for judicial independence, rather than being strengthened and consolidated, have been diluted through a number of constitutional amendments.

The highest court in Bangladesh, the Supreme Court, is composed of two divisions: the Appellate Divisions and the High Court Division. The functions of the two are distinct, and separate appointments of judges are made to each. The Chief Justice of the Supreme Court sits in the Appellate Division and is the Chief Justice of Bangladesh; there is no separate Chief Justice of the High Court Division. The judges of the Supreme Court are appointed by the President, sometimes in consultation with the Chief Justice. While some chief justices in the past have insisted on being consulted on these appointments, others were not so exacting, leading to "political" appointments by the party in power.

The lower judiciary in Bangladesh is divided into two: first, there are District Courts and Sessions Courts, with 10–30 judges sitting in each of the country's 61 districts. Then there are also the Courts of Magistrates. The judges of the District Courts are under the jurisdiction of the Supreme Court and belong to the Bangladesh civil service, while judges in the Courts of Magistrates are members of the

country's administrative cadre, which is responsible for the general administration of its territories. Magistrates are controlled not by the judicial branch, but by the Ministry of Establishment and by the government. Magistrate judges are typically transferred to their magisterial posts for 3–10 years during the course of their employment with the government, and thereafter are reverted back to their old administrative positions.

As political tensions between the two leading parties usually run high, this sometimes leads to efforts to control and use the magistracy and criminal justice system to harass political opponents and, conversely, to absolve whichever party is in power of wrongdoing. Too often, changes in government result in the dismissal of criminal and corruption cases against members of the newly instated ruling party and the institutionalization of dozens of criminal and corruption cases against ministers and important bureaucrats from the last government. Even though magistrate judges usually do not have legal backgrounds, there has been a gradual increase in their penal powers; currently 80% of criminal cases are tried by magistrates.

Delivered in 1999, *Masdar Hossain* is the most important judgment for ensuring the separation of the judiciary and its independence in Bangladesh. The decision, issued by the Supreme Court's Appellate Division, involved a judge, Hossain, who, representing 400 judges from subordinate courts, claimed that these judges and courts were part of the judiciary and therefore could not be controlled as if they were part of the Bangladesh civil service, as the 1981 Bangladesh civil service rules said they should be. The High Court Division agreed, striking down the 1981 rule as unconstitutional, and when the government appealed, the Appellate Division affirmed.

In so doing, the Appellate Division directed the government to create a Judicial Service Commission (JSC), a separate institution run by judges that would control the appointment, promotion, and transfer of judicial officials in consultation with the Supreme Court. In addition, the Appellate Division also issued 12 directives to ensure the independence of the judiciary. While normally a constitutional amendment would be the best guarantee of this, such an amend-

ment is unlikely to be enacted by Bangladesh's current parliament—although it does have the required two-thirds majority (with its coalition partners) for such an amendment to pass.

Internal Individual Pressures

Lack of Interaction with Other Courts

Lack of interaction of the judges in Bangladesh with their counterparts in other countries is a possible factor for their rather insular understanding of law. Of course, the courts' scarce resources limit the opportunities for such interactions. And, the very limited judicial interaction with foreign courts, when it does occur, is arranged in hierarchical order. This means that older judges, who are usually less amenable to fresh ideas and have less time left on the bench, undertake such interactions most often, receiving the most limited results possible.

Internal Institutional Pressures

Lack of Popular Access to Justice

Unlike neighboring India, where legal aid, access to justice, and alternative dispute resolution were largely judge-pioneered initiatives, the situation is completely different in Bangladesh. The very wide powers of the highest court to deliver justice have been underutilized. Less than a dozen *suo moto* cases during the last 10 years have succeeded, perhaps reflecting judicial conservatism.

External Individual Pressures

Overlapping Competencies

Often, judges from the subordinate judiciary are recruited by executive branch ministries to work as their legal officers. Generally, ministries do not have legal officers of their own, and the public prosecution service is an ad hoc arrangement. Arguably, judicial independence is compromised when a person acts as

both a prosecutor and a judge. Law officers have to defend government positions, while judges might rule against the government. A directive of the *Masdar Hossain* judgment calls for the separation of roles of judge and prosecutor. Unfortunately, so far this directive has not been carried out.

External Institutional Pressures

Masdar Hossain Directives

As part of *Masdar Hossain*, the Appellate Division ruled that the judiciary cannot be treated as part of the Bangladesh civil service, but should be on par with other administrative or executive-branch services, which was not the case before. The Court also instructed the government to form a JSC for the recruitment and promotion of judges. These functions are currently being performed by the Ministry of Law, Justice, and Parliamentary Affairs, though in consultation with the Supreme Court. The Rules for formation of the JSC were to be promulgated by the President, whose authorization came from Article 115 of the Constitution. The magistracy, under the directives of the decision, was also to become part of the judiciary, and criminal court judges were likewise to become members of the judiciary and not the administrative service, as was the case before. The status of the magistracy is a nettlesome political issue. This is so because some allege that control over the magistracy and the criminal justice system is seen as an integral ingredient that potentially supports the political branches of government.

Granting of Extensions in Implementing Directives

The government has sought, and the Appellate Division has granted, a number of extensions in time for the implementation of the Supreme Court's directives. Formally and officially, the government is committed to implementing these directives, which would also include some changes in the criminal procedural laws. However, these repeated extensions suggest continuing challenges to the ultimate implementation of the directives.

The Judiciary and Good Governance

Since the late 1990s, the Supreme Court has increasingly assumed an activist role and has expanded the ambit of judicial review. Government actions in a number of areas and the constitutionality of laws are increasingly being challenged. This is perceived positively and is enhancing the prestige of the Supreme Court in Bangladesh. In fact, popular dissatisfaction with the judiciary does not seem to encompass the Supreme Court, which is generally held in high regard.

Public Perceptions of the Judiciary

The Supreme Court does not generally initiate reforms in terms of its own functioning, even though it has rulemaking powers over a number of procedural matters that could be used to streamline the disposal of cases and to make the judiciary more user-friendly. The burden of ongoing responsibilities and the necessity to deal with a huge backlog of cases have prevented the Supreme Court from initiating further reforms.

Delays in the disposal of cases and endemic corruption are believed to be two things seriously undermining the credibility of the judicial system in Bangladesh. Irrespective of the probity of Transparency International's Corruption Index, which lists Bangladesh at the bottom of its list as the most corrupt country, as a general proposition in Bangladesh or any other country, major improvements in the judiciary would be unrealistic unless there is an overall change in corrupt practices in other sectors of government as well.

Accountability could be strengthened by more and better information on (i) how cases proceed through the courts and the length of time it takes for litigants to get their cases resolved, (ii) how access to the judiciary can be gained, (iii) what the complaint procedure regarding the functioning of the judiciary or individual judges is, and (iv) how cases are initiated or disposed of. Having available information on these and related issues could go a long way to restoring public confidence in Bangladesh's courts, as well as providing a greater means for accountability.

The ongoing Judicial and Legal Capacity Building Project, funded by the World Bank, is looking into delays in case and court management. The World Bank Project, the major component of which is devoted to infrastructure matters, may indicate avenues where further intervention is needed, particularly in making information available.

The Judiciary and Economic Development

In general, the role of the judiciary in economic development is marginal. Because of its poor results and lengthy procedures, the judiciary is viewed as being an obstacle to business. As with many countries around the region, Bangladesh has set up specialized courts to deal with specialized commercial issues. A Money Loan Court was established in 1990, for example, to resolve disputes about lending between banks and debtors. (Prior to the Money Loan Court's establishment, the appellant from a judgment had to deposit half the decreed amount in court.) However, less than 10% of the cases filed in the Money Loan Court are resolved. Nonetheless, some analysts believe that courts may be more "facilitative" of economic growth and development in the future. Evidence for this, they say, can be found in a 2002 High Court decision finding that, under the new Arbitration Act of 2001, courts would discontinue the previously widespread practice of liberally issuing temporary injunctions. The court, taking stock of the purpose of the Arbitration Act to resolve commercial disputes, held that courts had no power to issue injunctions in arbitral proceedings. Nevertheless, as a general matter, the role of the judiciary in promoting and protecting legitimate economic interests is minimal and courts are generally not accessed by the business community to resolve their disputes.

Recommendations

Along with lack of official information about the functioning of courts, there is a conspicuous silence in legal academia's research on the judiciary in

Bangladesh. Nor is pressure for judicial independence generated by civil society. The Bangladesh Bar, though organized through annual elections by the member-advocates, has a minimal effect on the reform agenda and does not undertake any research of its own. In fact, only a handful of institutions carry out *any* legal research in the country, and public funding for legal education is lower than in any other area. Structural and functional judicial independence by themselves may not be enough to help Bangladesh *and other countries* if there is no credible constituency sufficiently interested in such reform.

First, the citizenry and government must have more respect for judicial decisions. This would go a long way in centralizing the notions of the rule of law, defining the limits of government, creating parameters of accountability, and ensuring other necessary preconditions for an ordered and predictable society. Moreover, interference with judicial decisions impedes the development of all of these critical needs.

Second, providing Bangladesh with immediate technical assistance for carrying out the directives of the Masdar Hossain judgment, particularly knowledge of how the functional separation of powers is initiated and implemented in other countries, should be seriously considered. The creation of the JSC implies a drastic expansion of administrative responsibilities for the Supreme Court, a burden that it is currently ill-suited to shoulder. The rudimentary technical competence of the administration of the Supreme Court is an area of concern, and courts in general are in need of more technical assistance.

Third, the appointment of judges of the Supreme Court, currently done by the President, is susceptible to external influences in a selection process that is nontransparent. A change in the system of selecting and appointing judges of the High Court Division is another aspect requiring attention. Finally, the courts themselves must encourage ordinary citizens to seek justice through their chambers. At present, lower courts are mistrusted and the judiciary in general, if it is to be effective, must encourage and support citizens' access to justice.

CAMBODIA

Given that Cambodia was a French colony from 1863 to 1953, French law naturally once formed the basis of its legal system. This system was destroyed when the Khmer Rouge came to power in 1975—as lawyers were executed, legal texts were destroyed, and courts and law faculties were burned down—only to be reintroduced by Viet Nam in 1980. The legal system in effect from 1980 to 1993 was a modified form of the French system, mixed with heavy socialist influences, particularly on the judiciary. Under this mixed system, Cambodia’s judiciary was far from independent. The Ministry of Justice, an arm of the executive branch, funded the courts, and appointed, promoted, and disciplined all judges, many of whom had only the most rudimentary legal education.

In 1992, in accordance with the Paris Agreement, Cambodia was to be governed by the Supreme National Council, which in turn delegated much of its powers to the United Nations Transitional Authority for Cambodia (UNTAC). The latter organization, responsible for maintaining law and order and supervising the judicial process in the country, set up an UNTAC Code to govern criminal law in the country. This code has never been nullified. Meanwhile, French-inspired State of Cambodia (SOC) law was concurrently used. It too has never been nullified and is still followed today. Arguably, in some respects, it is even more powerful than UNTAC Law.

In 1993, Cambodia adopted a new Constitution that enshrined the separation of powers and the principles of liberal democracy. In addition to establishing an independent judiciary, it called for this independence to be guaranteed by the King. A spe-

cial body, the Supreme Council of the Magistracy (SCM), with equal power to the other branches of government and an autonomous budget, was to be set up to assist the King in fulfilling this duty. However, only in 1998, after a delay of 5 years, was this Council established. The King has never attended its meetings, instead delegating his chairmanship to the President of the Senate. This policy has been criticized by civil society groups, who view the King’s action of assigning a member of the legislature to chair the state’s supreme judicial body as violating judicial independence and the separation of powers.

Structure of the Judiciary

Separate from but parallel to the SCM, which is responsible for ensuring the judiciary’s independence and for taking disciplinary actions against judges and prosecutors, the Constitution also established a Constitutional Council to safeguard respect for the Constitution and to interpret both the Constitution and the laws passed by the legislature. Below the Constitutional Council sit the Supreme Court and an Appellate Court. Neither court has the power of judicial review. Both function simply as courts of last appeal. The Appellate Courts consider both matters of fact and of law. The Supreme Court reviews only matters of law.

Although the *structure* of the legal system has been established, the comprehensive laws that are to form its *basis* are still very much in the process of being written. Many new laws are yet to be passed under the Constitution of 1993, which provides that

the old law will remain in force when there has been no replacement with a new law. The government is currently allowing Japanese experts to help draft the Civil Code and Civil Procedure Code, while a French expert has prepared a draft Penal Code based on the current French Penal Code. The French have also helped the Ministry of Justice draft the Law on Criminal Procedure. In January 2002, the Parliament passed amendments to the UNTAC and SOC Codes in order to improve criminal law in the interim.

Internal Individual Pressures

Dearth of Lawyers and Restrictions of the Bar

In a country of 11 million, there are at present only 249 registered members of the Bar, of whom 197 are practicing. An applicant may gain admission to the bar through one of two methods. Either an applicant must have a bachelor of law degree and 2 years' experience, or a new law graduate, if admitted through an examination process, must undergo training at the lawyer's training center for at least 8 months and then will be admitted to the bar upon successful completion of an exit exam. The bar council narrowly interprets the requirement of 2 years' experience. Thus, for the first type of admission, working for a government ministry counts towards this requirement, whereas working for a nongovernment organization, even in a legal capacity, does not. This is unfortunate because many potential candidates with legal backgrounds work for nongovernment organizations. Those who are not bar members cannot do legal work.

Loyalty of Judges to the Executive Branch

Before 1993, judges and prosecutors were appointed by the Communist Party and had little legal education. Those appointed by the Ministry of Justice who are still in office tend to be loyal to the Ministry.

Salaries

Judges and prosecutors have very low salaries, ranging from US\$20 to US\$40 per month, and these are not adjusted for inflation. For the judiciary to receive

the same prestige and respect as other branches of government, judges' salaries must be in line with those earned by senior members of the executive and legislative branches. In addition, judicial salaries are still paid by the Ministry of Justice, which is also responsible, in addition to managing its own operations, for paying for the courts and prosecutors. The funds for all of the Ministry's operations come to only 0.3% of Cambodia's total national budget, a very small amount.

Internal Institutional Pressures

President of the Supreme Court

According to Article 134 of the Constitution, the president of the Supreme Court is also to be the chair of the Disciplinary Action Committee of the SCM. Because this person in effect has to punish his colleagues, the role breeds conflict with his judicial duties.

The Role of Investigating Judges

Neither the Constitution nor UNTAC Law provides for investigating judges, but they are permitted under SOC Law. Unlike in France, however, the positions of investigating and trial judges are interchangeable in Cambodia in civil cases (not in criminal cases), due to the limited pool of judges available. A conflict occurs when the judge investigating a case and the judge trying it is the same individual.

No Lawyers on the NEC

None of the five members of the National Election Commission is a lawyer. The National Election Commission delegates its power to resolve electoral disputes to the Commune Electoral Committees, of which no member is a lawyer.

Differing Legal Backgrounds for the Judiciary

In the past, under Cambodia's socialist governments, many students were sent to study in communist countries. Many of these students are now working within the government, especially in the Ministry of

Justice. There are also some lawyers in Cambodia who have returned home after studying in common law countries. The variety of legal experience, however, has resulted in vastly differing interpretations of Cambodian law.

External Individual Pressures

Judicial Tenure and Removal

Even though the SCM is constitutionally permitted to appoint judges and prosecutors, the Ministry of Justice, which had this role historically, still wants to retain power over them. Until the Draft Law on the Statute of Magistrates is passed, this conflict will continue. Also, judges have no effective means of control over court clerks, who are and will continue to be appointed by the Ministry of Justice.

Appointment and Promotion of Judges

Since 1993, the appointment of judges has been politically brokered. Each political faction vying for power wants to have its own judges installed, and in 1993 candidates were thus nominated according to a quota system agreed upon between the factions. Prior to 1993, promotions were handled by the Ministry of Justice. After 1993, it was to be done by SCM. But there are no clearly established rules. Due to pressure, most judges retain political party affiliations. Those who do not belong to a political party often feel isolated and believe that their chances of promotion are diminished.

External Institutional Pressures

Lack of a Civil Procedure Code

There is no civil procedure code in Cambodia, and judges must therefore use the criminal procedure code to proceed with civil cases.

Legislative Pressure on the SCM

Article 128 of the Constitution established the King as the guarantor of judicial independence and the SCM to assist him. However, the Constitution also

says that the King can “reign but not rule,” a phrase that has been interpreted by the King to mean that he cannot be responsible for personally ensuring the independence of the judiciary. Because of his poor health, the King has delegated his powers to Samdech Chea Sim, the Chairman of the Senate, thus allowing another branch of government to exert pressure on the judiciary. In fact, he has requested an amendment to the Constitution, to remove him from the role as chairman of the SCM .

Executive Pressure on the SCM

Another person who by law is a member of the SCM is the Minister of Justice, an executive branch official.

Conflict of Laws

Judges are unclear about which law to use in deciding cases. In many instances, new laws have not been written, and in some situations, such as those having to do with criminal procedure, UNTAC and SOC laws contradict each other, leading to general confusion as to which regime to follow. Other laws cause confusion as well. For example, even though prosecutors lack the manpower to carry out judgments, the law mandates that this is their responsibility. Consequently, the police have no budget for enforcing judgments and do not consider it to be their duty. As a result, the winning party to a court case is often left to pay police salaries and meals in order to get their judgment enforced.

Lack of Complaint Procedure for the Constitutional Council

In accordance with the Constitution, only the King, the president of the Senate, the president of the National Assembly, the prime minister, one-fourth of the Senate acting together, one-tenth of the Assembly acting together, or other courts can ask the Constitutional Court to review the constitutionality of a legal provision. Ordinary citizens have no right to file a petition to the Constitutional Court. A complaint can only be sent to the Constitutional Court by litigating parties if both the lower court and the Supreme Court agree to it after reviewing the complaint. Moreover, the Constitutional Court can only

review laws that appear to contradict the Constitution; it does not have the power to adjudicate disputes arising out of inconsistencies in the law that do not raise constitutional questions.

Public Confidence in the Judiciary

Very little survey data exists on the public's confidence in the judiciary in Cambodia. Yet a famous Cambodian proverb—"the thief goes free while the complainant is convicted"—might go a long way towards explaining the public's perception of the judiciary. Courts are often seen as leading to further problems, not justice. Mob killings, usually of alleged thieves and robbers, is a sure sign that ordinary people have little confidence in the judicial system and are willing to take justice into their own hands.

In December 2000, hundreds of people were re-arrested when the Prime Minister issued an order for the arrest of all suspects and prisoners previously released on bail or acquitted by the courts. This act signals that the government itself does not have confidence in the judicial system.

Moreover, consistent problems in criminal and court procedures continue to undermine public confidence. There is evidence that the media's coverage may be strengthening the implementation (and use) of the laws for justice. However, the media has limited reach in Cambodia and it is highly susceptible to influence by political parties and public officials.

The Judiciary and Good Governance

The reputation of Cambodia's courts for corruption is well known. At the beginning of proceedings, clerks often ask for extra money for stamps, over and above the set price. This practice is well known to all actors in the legal system, but it is tolerated as "a habit." Implicit in this toleration is the notion that justice officials are entitled to extract extra money from those they serve in order to supplement their inadequate salaries, despite the fact that corruption strongly undermines public confidence. The most defining relationship between the judiciary and governance

in Cambodia continues to be that the judiciary is viewed as an embedded part of the bureaucracy.

The Judiciary and Economic Development

Private foreign investors also do not tend to trust the Cambodian justice system. Typically, investor contracts stipulate that disputes are to be resolved in courts in a neighboring foreign country, such as Singapore, Thailand, or Viet Nam. . By contrast, unscrupulous investors, who prefer countries with poor legal systems, seem to be particularly prevalent in Cambodia. Moreover, investor confidence has been further undermined by the practice of applying criminal sanctions, including arrest and imprisonment, in cases of breach of contract and disputes arising from leases.

Another issue which has hindered economic development relates to property rights. When the Khmer Rouge came to power in 1975, all private land was confiscated. People fled to the countryside, only to have their property taken over. Land grabbing by those with political influence continues. In addition to an incomplete legal regime for the protection of private property, Cambodia suffers from widespread corruption in the granting of ownership titles, and many people do not know how to get their old land back.

Recommendations

Cambodia has a long way to go before its judiciary becomes independent and gains the respect of the country's citizens. Before that can happen, the structure and functioning of the Supreme Council of the Magistracy should be changed. If the Constitution is not amended to remove the King from his duties as chairman of SCM, then he needs to appoint a representative to that position for a fixed term who is not from either the executive or the legislative branches of government. It goes without saying that no one should be allowed to simultaneously hold positions of influence in more than one branch of government.

At present, the Constitutional Council hardly functions; multiple key reforms must be implemented in order to ensure that the Constitution is properly safeguarded. Lower down in the court hierarchy, the

old court system should be replaced with a new law that outlines the structure of the courts, creates judicial autonomy, and provides a separate budget for the judiciary. Moreover, the role of the Supreme Court should be clarified because presently the Supreme Court does not recognize its own authority to interpret and nullify laws.

A report of the Special Representative of the Secretary-General for Human Rights in Cambodia, dated September 2002, stated that:

Cambodia's judicial system remains weak and highly prone to pressures that include corruption, executive interference, and influence peddling. Reform

efforts are progressing slowly, or have stalled. Key appointees are in many cases individuals with strong political affiliations, reflecting a tendency for those in power to exert control over court decisions. The Government repeats many times that judicial reform is a priority, but political will to translate these promises into action is in serious question.

A change in the court structure, adoption of the Statute of the Magistrates, an improvement in facilities, recruiting a more educated bar, improving the law on criminal procedure, and lessening the influence of the Ministry of Justice are priorities, if the Cambodia's judicial system is to have any hope of improving.

INDONESIA

Historically, the Indonesian judiciary was dependent on the government. And, in the years leading up to democracy, it became increasingly corrupt. During the “New Order” government under Soeharto, the judiciary was not independent at all and, in fact, was cleverly used to strengthen executive power, thereby undermining judicial independence. In the period after Soeharto’s rule, during the so-called “Reformation Era” governments of Habibie, Abdurahman Wahid, and Megawati Soekarnoputri, Indonesia’s judiciary attained formal independence through the passage of several important constitutional amendments. Whether this independence has taken effect in practice, however, remains to be seen.

The recent constitutional amendments supporting judicial independence were enacted by the People’s Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR). Some have argued that changing the Constitution to impose reform from above came at the expense of neglecting other important reforms from below. For instance, although Indonesia’s judiciary is now formally independent, corruption still ranks prominently among the problems of both the courts and government agencies. Reform efforts are underway. For example, the establishment of a Judicial Commission is intended to introduce a system of accountability. Nonetheless, corruption greatly jeopardizes any formal judicial independence that may exist on paper.

Structure of the Judiciary

Indonesia’s judicial power, based on Article 24 of its Constitution of 1945, grants independence to the judiciary, which is to be overseen by the Supreme Court. Amended in 2001, Article 24 now also contains a new provision that guarantees the judiciary the “in-

dependent power to enforce law and justice.” The recent constitutional amendments also created a Constitutional Court, which has the power to review the constitutionality of laws, to decide cases that are in violation of the Constitution—but only when they are submitted to it by parliament—and to resolve disputes between different government agencies. The soon to be created Judicial Commission will be the body responsible for nominating judges to the Supreme Court. These nominations, however, are subject to approval by parliament.

During Dutch rule, Indonesia’s courts were divided into three separate jurisdictions: Dutch East Indies government courts, autonomous indigenous courts, and indigenous criminal courts. Dutch judges tried cases between European citizens, while Indonesian judges presided over indigenous cases. In general, there was a scarcity of indigenous jurists during this period, in part because Indonesia’s first law school was only founded in 1924. Ever since 1909, though, students from the indigenous elite who had mastered Dutch and completed some legal education had been allowed to work as court clerks.

Indonesia’s current divisions split the judiciary into four legal jurisdictions: (i) a general jurisdiction covering civil disputes and criminal cases; (ii) a religious jurisdiction covering marriage, divorce, and inheritance under Islamic law; (iii) a military jurisdiction; and (iv) a state administrative jurisdiction covering suits between private citizens and government officials. All four legal jurisdictions have their own courts, but ultimately answer to one Supreme Court, with the procedures of the military courts differing slightly. Appeals from religious courts are also handled by High Religious Courts, unless the subject matter is outside their jurisdiction. Directly below the Supreme Court are the High Courts for each

jurisdiction and under them the Courts of First Instance, situated in the various district capitals. Although Indonesia recognizes only four jurisdictions, one of the recent amendments to the Constitution provided for the establishment of special courts under the jurisdiction of the District Courts. Currently there is a Human Rights Court, a Commercial Court, a Children's Court, and a Tax Court.

Altogether, there are 326 general Courts of First Instances, 26 High Courts, and 305 Religious Courts in Indonesia. Fifty-one justices sit on the Supreme Court, and there are about 6,000 judges in all four jurisdictions at the appellate level and below. As of 1992, there were 26 state law schools and as many as 220 private law schools in the country, which together graduate an estimated 13,000 new law school graduates annually.

Internal Institutional Pressures

Backlog of Cases

In the 1960s, there was almost never any backlog of cases in the courts of first instance or the appeals courts. Cases were decided upon on an average time of 6 months. Since then, the backlog of cases has grown exponentially. In June 2002, 16,726 cases were pending before the Supreme Court alone. The maximum caseload that the Supreme Court could handle in a year, with all 51 of its justices working full time, is about 12,500 cases.¹ Several reasons for the enormous backlogs have been raised, including the courts' weakness in managing a high volume of cases, the lack of an orderly system for classifying cases once they enter the courts, and the poor supporting facilities and poorly trained administrative staff working in the courts.

Poor Judicial Salaries and Court Resources

The judiciary is under a so-called "two roof" system whereby judicial salaries are determined by the executive while on professional matters judges answer

¹ However, a Supreme Court Justice noted that it is rare for the Supreme Court to be operating with all 51 justices.

to the judiciary. This "two-roof" policy has had a negative effect on courts' budgets. Starting in 2004, upon completion of the transition from a "two-roof" to a "one-roof" system, it is expected that all budgets for high courts and district courts will be set by the judicial branch. Unfortunately, although it is clear that courts are currently under funded, to date there has been very little research conducted on what a reasonable level of resources for courts would be. Inadequate funding for the courts, in turn, has been used as an excuse to extract extra "fees" from litigants in addition to legitimate required payments.

Mandatory Retirement and Judicial Age

In general, the retirement age for judges is 60, while for High Court judges it is 63 and for Supreme Court justices it is 65. The way the judicial hierarchy is currently structured, judges attain their positions on the bench at appellate courts or at the Supreme Court at a relatively old age. While the recent appointment of non-career justices has injected reformists into the system, generally the impediments to reform in Indonesia's highest courts remain substantial.

Internal Individual Pressures

Overburdened Supreme Court

Because there are no restrictions on cassation of cases to the Supreme Court, the workload of the justices is growing perpetually heavier. This may create legal uncertainty, delays, and a general lack of clarity. It also makes it possible for contradictions to be issued by the different tribunals within the Supreme Court (there are 51 justices in total, sitting in 17 tribunals).

Political Cooption of Judges through Judicial Recruitment

Indonesia has a career judiciary and its members are generally promoted from within its own ranks, although the law does provide for some non-career judges to be recruited at the Supreme Court level. Since the appointment of 10 non-career justices in June 2003, currently 18 of the 51 justices are non-career. (And, as of July 2003, 9 positions were va-

cant; so the tally of sitting justices is 24 career, 18 non-career. Hence, the pressure is on this unprecedented number of non-career justices to perform.) Complaints are frequently heard that the judicial recruitment process lacks transparency. Moreover, judges are often forced to protect the government's political interests in cases coming before their courts. The Supreme Court, which maintains direct control over the lower courts, is considered a politically co-opted institution because the appointment of its Chief Justice and the other justices is currently done by the President (although in consultation with the other Supreme Court members and the Minister of Justice and Human Rights, an executive branch official). In the future, Supreme Court justices, in accordance with recent changes, will be confirmed by parliament from a list of candidates nominated by the new Judicial Commission.

Corruption in Transfers and Promotions

Promotion of judges almost always involves a mandatory transfer to another part of the country. Since Indonesia has an expansive territory, this policy is necessary to ensure judicial coverage of remote areas. However, corruption sometimes allows judges who offer bribes to remain in their current location or to be transferred to a more favorable one. Moreover, this leads to an uneven distribution of judges, with a surplus in one region and a deficiency in another. Those provinces experiencing communal conflicts and insurgencies face the worst deficiencies.

External Individual Pressures

Poor Recognition of "Separation of Powers"

The separation of powers doctrine is replaced by the "balance of power" doctrine, meaning that the party in power dictates the rules of the game. The judiciary is partly controlled by the executive branch's Department of Justice and Human Rights, but it has no check over the executive branch. The executive branch also controls judicial funding and salaries, until the "one-roof" system becomes effective.

Concern about Lack of Judicial Independence and Independent Bar

There is generally a lack of serious concern about judicial independence among members of the legal profession, though some members of the legal profession have urged the Supreme Court to expose the names of lawyers who have colluded with judges and court officials. This problem is exacerbated by the fact that there is no single bar for lawyers in Indonesia.

External Institutional Pressures

Lack of Limits on Appeals

The law does not seem to impose any limits (except regarding time) on whether, and under what circumstances, cases can be appealed. This means that litigants who lack trust in the fairness of judicial rulings will invariably try to obtain a more favorable ruling from a higher judge, which results in the filing of too many appeals.

Lack of Information about Judicial Reasoning

Judicial decisions are not readily disseminated in written form. Select court decisions are sometimes published in *Varia Peradilan*, a law journal produced by the Association of Indonesian Judges. Compilations of select Supreme Court decisions are also published, although not regularly, by the Supreme Court. But the circulation of these journals is often limited and they are difficult to find. The Supreme Court is currently developing a method to provide greater public access to its decisions but for the time being these are still not readily available.

Public Perceptions of the Judiciary

The predominant public perception of the judiciary is strongly negative. In a 2001 Asia Foundation survey, 62% of citizens said they would avoid going to the courts at all costs. In the past, people could only whisper about corruption in the judiciary. Today, the mass media (and the Internet) create an environment

in which critics are able to openly accuse the judiciary of corruption. However, the media reports are not always truthful. And courts, for their part, have no way of countering these reports. They do not have any public relations officers and most judges avoid the press at all costs. While the media has had a demoralizing effect on judges, it may also have a positive effect in that it may discourage litigants and their lawyers from trying to corrupt members of the judiciary in the first place.

The Indonesian people feel that the Supreme Court should be more active in speaking out against any lack of impartiality on the part of judges. Historically, the Supreme Court has not made any serious efforts to address such issues or to engage in a dialogue with the public. In July 2003, however, it was reported that the Supreme Court requested disciplinary action against 11 judges, including the termination of three. Backlog and liberal and frequent appeals contribute to mistrust.

The Indonesian Institute for Independent Judiciary, in collaboration with the Supreme Court, is finalizing its institutional audit of the Supreme Court of Indonesia. Although independent assessments by outside researchers have been conducted in the past, the study is the first of its kind to be conducted through a collaborative working relationship between the Supreme Court and a local nongovernment organization with a special focus on judicial reform. The study report and process through which it was developed serve as a model for future partnerships of this kind between civil society organizations and justice sector institutions in addressing issues of institutional reform.

The Judiciary and Good Governance

Citizens tend to feel that lower courts are especially contradictory and inaccurate in applying the law. The criticism that is most frequently leveled against the judicial service focuses on court delay and bias among judges. But it is also believed that lower court judges lack sufficient knowledge of the law and the professional skills necessary to deliver fair judgments—especially in commercial law cases. This makes good governance a greater challenge, especially when gov-

ernment policies are challenged through the rungs of the lower courts.

The Judiciary and Economic Development

Government agencies complain that poor respect for courts is a significant factor in discouraging investment in Indonesia. To overcome its economic crises, the country needs an increase in the number of international business transactions occurring within its borders. However, the local perception of the courts is also well known to outside investors. Public mistrust of the courts stems from unprofessional behavior on the part of prosecutors and other advocates, who often seek favor with judges to secure positive rulings for their clients.

At the onset of its 1999 monetary crisis, Indonesia established a Commercial Court on the recommendation of the National Development Planning Agency (*Bappenas*) and the World Bank. Initially, the Commercial Court handled bankruptcy and insolvency applications. Its jurisdiction can be extended to other commercial and intellectual property matters as well. Appeals from the Commercial Court proceed directly to the Supreme Court. The Commercial Court (intended to be a “model court,” with select judges, open judicial administration, and filing [court]) fees 50 times higher than those of other courts) has been an unmitigated disappointment. It has produced some highly questionable bankruptcy judgments, the latest of which is a bankruptcy ruling against PT Asuransi Jiwa Manulife Indonesia, the local subsidiary of the Canadian insurer Manulife, which the court declared bankrupt on grounds that it failed to pay dividends to Indonesian shareholders. The judgment overlooked the fact that the company was not insolvent—it had enough assets to cover the “debt” (an unpaid dividend, whose withholding was authorized by shareholders) in dispute.

Recommendations

The four most important problems facing the justice system in Indonesia are lack of resources, corruption, the high number of unsolved cases, and the lack of technical skills among judicial officials. It is impera-

tive that more research on judicial reform is conducted, to identify problems and inform the implementation of appropriate and effective solutions.

In general, some short-term recommendations include establishing a Judicial Commission with the authority to impose sanctions on judges, creating a Legal Profession Supervisory Board that will impose disciplinary sanctions for violations of work standards and professional ethics by members of the bar, and creating a Legal Profession Education Accreditation Board to improve education and training facilities for future lawyers, judges, prosecutors, and other legal professionals.

Additionally, a line-item in the state's budget, specifically allocating resources *directly* to the judiciary (not through the Ministry of Justice), would go a long way toward ensuring more adequate resources for the courts. Budgets should be allocated based on caseloads, not based on seniority or patronage. Also, increasing the transparency of promotion and transfer procedures for judges would be a welcome check on the corrupt practices of those occupying the bench. At the present time, it is still too early to assess whether the constitutional amendments and reforms of the "Reformation Era" will actually have an effect on judicial independence in Indonesia.

LAO PEOPLE'S DEMOCRATIC REPUBLIC

Lao People's Democratic Republic (Lao PDR) maintains a closed judicial system based on traditional customs, French norms, and communist practices. Prior to 1975, the Kingdom of Lao PDR had a legal system built squarely on the French model. When the Lao PDR was founded in 1975, a system based on the Soviet model was adopted instead. For the most part, the judicial system in Lao PDR remains rudimentary. For example, the traditional custom of a judge not accepting a case unless it was brought to him by the chief of the village is still followed today. There are only about 50 laws on the books, along with hundreds of decrees and regulations, but this does not necessarily comprise a functioning legal framework.

A serious assessment of Lao PDR's judiciary is complicated by several factors. First, since judges' qualifications are not a matter of public record, no assessments can be made regarding their expertise. Most judges at the Vientiane Municipality People's Court have some legal training, but they became judges after completing a one-year apprenticeship, without passing a bar examination. The situation at other courts throughout the country is much worse. A second problem is that the Lao PDR legal system cannot enforce legal judgments. In criminal cases, a guilty defendant is sent to a "re-education camp" run by the Ministry of Security, not by the Ministry of Justice, because the latter does not have the means, much less the authority, to enforce the judgments of the courts.

Structure of the Judiciary

In August 1991, Lao PDR adopted a new Constitution. However, 1975, the year the Communists came to power, still seems to be the watershed year as far as

the legal system is concerned. Prior to 1975, the Lao PDR court system was divided into three tiers: Provincial Courts, three Appellate Courts, and the Supreme Court, which was also known as the Court of Cassation. Although the structure resembled the French judicial system, in practice, no dispute was heard in these courts concerning civil or commercial matters unless it was brought to the judge by the Village Chief. This traditional custom still applies in civil cases today.

After 1975, in accordance with Article 65 of its Constitution, the Public People's Courts became the chief judicial organs of Lao PDR, while the Office of the Public Prosecutor became the state's main investigative arm. This structure resembled the legal system of the Soviet Union. The Office of the Public Prosecutor is an independent state agency responsible for monitoring adherence to the law, and its most important duty is to bring those accused of wrongdoing before the courts.

The country's 130 People's Courts maintain general jurisdiction over its 140 districts and can look into both civil and criminal matters. Above the People's Courts, there are 16 Provincial Courts, one Prefecture Court, and one Special Zones People's Court, as well as Military Courts. All of these courts are granted general jurisdiction and can look into both civil and criminal matters. No special courts, such as Juvenile Courts, currently exist. Above these courts is an Appellate Court, which is the final decision-maker in a matter, unless the Supreme People's Court decides to take the case, which it can only do on limited grounds. The Appellate Court handles questions of both law and fact.

Administration of the judiciary and the drafting of new laws and regulations are overseen by the Ministry of Justice, but information about this process

remains scarce, at best. The Ministry of Justice decides the number of judges for local courts and organizes their promotions. The law does not determine how many judges will sit in each district court or even on the Supreme People's Court, the country's highest judicial organ, where there are presently nine judges. Moreover, court decisions and judgments are not published. The judges for the People's Courts are recommended for their positions by the Ministry of Justice and confirmed by the Standing Committee of the National Assembly. Like the Public Prosecutor General, they serve for a term of 5 years.

To assist with local administration in settling disputes at the village level, a Dispute Settlement Unit was established in 1997 to promote local justice in each village. This unit consists of the village chief and up to three senior people from each village.

Internal Individual Pressures

Too Few Judges

At present there are only 194 judges in the country: 9 in the People's Supreme Court, 95 in the Provincial, Prefecture, and Special Zone People's Courts, and about 90 in the district courts. As mentioned, the exact number of judges in the People's Courts is uncertain. Apart from the lack of *skilled* judges, therefore, Lao PDR also suffers from a lack of *enough* judges, in particular in the district people's courts. No one knows exactly how many judges work there because this information is not made public. Most judges selected for the People's Courts come from a range of backgrounds other than law, including teachers, police, civil servants, and civil society members.

Poor Materials and Legal Inconsistency

As many laws, decrees and regulations are not readily available, the judges often back up their judgments essentially with their common sense and professional conscience. This may lead to rulings that are inconsistent with the law, thereby creating bad precedent, frustration, and a reluctance to go to the courts.

Internal Institutional Pressures

Poorly Trained Judiciary

Since information about the judiciary is not a matter of public record in Lao PDR, it is difficult to assess the educational qualifications of judges. The fact that no definite assessment can be made regarding the level of their experience suggests there is still a lack of qualified and skilled judges at all levels of the court system. A law school was established by the Ministry of Justice in Vientiane in 1986, but the need for better-educated judges persists. Most of the judges employed in the Vientiane Municipality People's Court have completed legal training at the law school, which was only recently transformed into a post-secondary level institution. After the completion of their studies there, judges must undergo one year of on-the-job training.

External Institutional Pressures

Poor Enforcement of Legal Judgments

The lack of enforcement of court judgments creates insurmountable problems. Criminal judgments are enforced by sending defendants to a "reeducation camp" under the control of the Ministry of Security. The Ministry of Justice seems to have some power to supervise the enforcement of civil judgments. However, a disproportionate number of court decisions remain unenforced. As of May 2001, 2,519 court decisions were pending enforcement, comprising 1,265 civil and 1,254 criminal cases.

Judgment Enforcers not Trained in Law

The enforcement of judgments in civil cases and in criminal cases for the compensation of damages and fines is the responsibility of the judgment enforcement officers in each local People's Court. Most of the judgment enforcement officers are not trained in law. They are civil servant employees hired to carry out court decisions. In addition to the lack of legal training, the judgment enforcement personnel are insufficient in number.

Weak or Non-Existent Bar

The Lao PDR Bar Association was founded in 1991 and suspended in 1992, apparently because its members, who were educated according to the French legal system, overcharged their clients. The Ministry of Justice reestablished the Lao PDR Bar Association in 2000. There are currently 21 members of the bar. They are restrained in their ability to act as lawyers in the courts and access case files, but they can give advice.

Executive Interference

The Ministry of Justice recommends judges to be appointed to the Standing Committee of the National Assembly, which is responsible for approving these recommendations. Judges are promoted and removed by the Ministry of Justice, thus allowing the executive to interfere in judicial functioning.

External Individual Pressures

Lack of Lifetime Tenure

Judges at all levels in the People's Courts are not professional lifetime judges and do not have lifetime tenure. Rather, appointments are made for a period of 5 years from among lower level legal officials. Moreover, judges are of the same status as all other civil servants and have no special immunity. For these reasons, few seek careers in the judiciary.

No Judicial Police Force

There is no judicial police force to assist the courts in executing their judgments. In short, the courts are not supported by the auxiliary services to enforce their own decisions and cannot deal effectively with a defendant's refusal to comply.

Lack of Appellate Procedure

The law provides that judgments of the local courts—that is, of the Provincial, Prefecture and Special Zone Courts at the appellate level, and the Supreme People's Court of First Instance—are absolutely final and not

subject to appeal. However, there has been no definite statement on the interpretation of that provision and in practice it is not enforced, as appeals to the Public Prosecutor General and to the National Assembly are permitted. Consequently, the Public Prosecutor General and the National Assembly are often asked to review judgments, a practice that leads to delays, unreliability and uncertainty. As a result, the public is reluctant to go to court. It also calls into question the separation of powers.

Judiciary and Economy

The Economic Arbitration Organization (EAO) seems to be the most relevant ancillary institution focused on economic development. Established in 1995 and embedded institutionally in the Ministry of Justice, the EAO settles disputes arising from agricultural production, industry, trade and services that encourage and promote foreign, local, and commercial investments. However, arbitration awards are not final, binding, or enforceable. A court must still certify the EAO's award before it can be enforced. Litigants who are either dissatisfied with the arbitral award or interested in prolonging the litigation will take the matter to court, where they are allowed to initiate proceedings *de novo*. This practice has created a general perception that arbitration is expensive, redundant, and ineffectual. Moreover, like the courts, the EAO has no effective means to enforce its arbitration awards. In any event, demand for such economic arbitration seems rather light. From 1995 to 2000 there were a total of 197 cases, including 140 disputes between domestic business units, 50 disputes between domestic and foreign businesses, and only 7 disputes between 2 foreign businesses. The total value of these economic disputes was approximately US\$1.8 million. Of the 197 matters before the EAO, 101 were resolved, 26 went unresolved, and 70 were withdrawn by the parties before a decision was reached.

Judiciary and Governance

The goals of the People's Courts as enshrined in law are quite clear: to conduct case proceedings to strengthen legality and the social order, and to eliminate and prevent infractions and violations of the law. The Courts are charged with (i) protecting the "Fruit

of the Revolution,” meaning the political, economic and cultural goals of the regime, including its governing units, social organizations, and enterprises; (ii) punishing and educating violators of the law; (iii) discovering the causes and conditions leading to wrongful acts; and (iv) enhancing the political and legal conscience of citizens. Given that the Lao PDR legal system is closed, it is unclear how the courts actually work. Because of the lack of data, the effect of the judiciary on overall governance in the country is also unclear. All information about the regulation of actors within the legal system is closed.

Public Perceptions of the Judiciary

The dissemination of laws to the public is rare, and only happens through radio and television twice a week. Several journals pertaining to matters of law are published, but these are targeted at legal professionals, government officials, and law schools, and are rarely placed before, much less explained to, the public. No court decisions are ever published. Recently, a UNDP project has attempted to publish parts of Lao PDR Supreme Court opinions, but these cannot be disseminated in full.

Recommendations

In two separate five-year plans (1991–1995 and 1996–2000) the Ministry of Justice has been candid regarding the weaknesses of Lao PDR’s judicial institutions. Not only has it advocated for reorganizing the courts, but also of the courts’ staffing with people who are competent in judicial affairs. The judicial plan established for 2005–2010 calls for four main activities: (i) improvement of the judicial system, (ii) codification and strengthening of legal drafting and standardization of all legal documents, (iii) inserting the study of law into the curriculums of high schools and universities and disseminating the laws of the land in general, and (iv) upgrading the education of all legal officers and staff. The present state of the laws and the judiciary are outdated and inadequate to meet the needs of the country.

The government can help by making information about the judiciary publicly available and by making the judicial system more transparent. It also needs to create a better method for enforcing court judgments, if these courts are to be effective and to gain the respect of the citizenry. To make its legal system function effectively, Lao PDR faces many challenges.

NEPAL

Nepal's first written Constitution was adopted in 1948. Since then, due to the influence of India's legal system, Nepal's legal system has increasingly reflected common law features. The courts are guided by adversarial procedures and a system of precedent. Nepal's fifth and current Constitution, promulgated in 1990, promotes a strong and independent judiciary. The courts in Nepal are responsible not only for settling disputes between private parties, but also for enforcing constitutional and legal limits on the government.

Over time, however, the judiciary has faced criticism from the media, the political parties, and the Bar for its lack of performance and accountability. The judicial leadership has been accused of being passive and soft on questionable behavior of judges, and of failing to take disciplinary actions. The judiciary has also faced criticism for failing to effectively resolve corporate disputes and complicated issues of international banking.

Nepal's judiciary is divided into three levels—the Supreme Court at the apex, 16 Appellate Courts, and 75 District Courts. These courts are of general jurisdiction, handling both civil and criminal cases. In addition to these regular courts, the Constitution also enables Parliament to create special courts such as an Administrative Court, a Labor Court, a Military Court, a Revenue Tribunal, and courts to handle matters related to offenses against the state, terrorism, corruption, and human trafficking.

External Institutional Pressures

Appointment of Judges

His Majesty the King formally appoints judges to the Supreme, Appellate and District Courts on the

recommendation of the Judicial Council, and in the case of the Chief Justice of the Supreme Court, the Constitutional Council. The Judicial and Constitutional Councils are independent constitutional bodies.¹ Under the Constitution, the King is a nominal head and exerts no political will of his own. Rather, he simply appoints the candidates recommended by the Judicial Council and the Constitutional Council.

Nepal does not have constitutional provisions requiring legislative approval of members recommended by the judicial and constitutional councils. As such, the legislature has no role in the selection, appointment, and promotion of judges in Nepal. The appointment and promotion process also does not include the practice of conducting public hearings. This issue has drawn the attention of the people and political parties in Nepal. There are cases of informal public hearings conducted by civil society groups prior to appointments to constitutional bodies, such as the Election Commission and the Commission for Investigation of Abuse of Authority. Civil society may soon demand the same for judicial appointments, at least at the Supreme Court level.

A review of the Judicial Council's selection and appointment process over the last 10 years reveals that there is hardly any government influence on judicial appointments and promotions. Most judges are selected on the basis of seniority. There have been cases where the government has successfully pushed their candidates from within the Bar, but this practice has

¹ The Judicial Council is chaired by the Chief Justice and includes the Minister of Justice, two senior judges of the Supreme Court, and a distinguished jurist nominated by the King. The Constitutional Council is chaired by the Prime Minister, and includes the Chief Justice, the Speaker of the House of Representatives, the Chairman of the National Assembly, and, significantly, the opposition party leader in the House of Representatives. At the time of making recommendations for the appointment of the Chief Justice, the Minister of Law, Justice and Parliamentary Affairs and one Senior Justice of the Supreme Court also serve as members of the Constitutional Council.

been controlled through the introduction of the Coordination Committee, which serves as an intermediary body to select and recommend candidates to the Judicial Council.

In most cases the Judicial Council makes decisions through unanimous consent. Complaints, though unsubstantiated, allege political bargains between the judiciary and the government in the selection and promotion of judges. In addition, the Council has established the practice of verifying the integrity, capability, and character of judicial candidates through the institutions where they are currently employed as well as the concerned courts. Some criticize the implementation of this practice as a threat to the independence and impartiality of judges at the lower level.

The use of seniority as the predominant criteria in judicial appointments and promotions has been criticized for failing to provide incentives for hard work. In recent years, the Bar has expressed concern that the appointment of the Chief Justice on the basis of seniority alone has led to a number of short-term appointments in rapid succession (because Supreme Court justices must retire at age 65), resulting in ineffective leadership and instability. The Judicial Council, however, adheres to this practice as it reduces the scope for manipulation in the appointment and promotion of career judges.

Transfers of Judges

The transfer of judges is one of the most controversial issues in Nepal's judicial administration. Not all District Courts and Appellate Courts are equally desirable. For example, a transfer to a District Court in the far west in the upper Himalayas could mean enduring harsh weather, separating from family members, living a forlorn life, not having meaningful cases, losing security due to the Maoist insurgency problem, and the possibility of contracting disease. Hence, transfer is a matter of great concern to judges. The law, however, does provide financial incentive in the form of a special allowance for serving in remote districts. While the Judicial Council has initiated the practice of recording reasons for transfer decisions, there is still a demand for increased transparency and objectivity in transfer decisions.

Disciplinary Action and Impeachment of Judges

Judges may be impeached or removed any time for incompetence, misbehavior, or failure to discharge the duties of the office in good faith. However, there are no provisions for punishments such as demotions, grade reductions, fines, etc. Removal is the only available punitive action against judges. In Nepal there has been no instance of impeachment of a Supreme Court judge. At the lower court there have been 13 cases of resignation by judges who have been accused of corruption and misbehavior, and asked to resign on the threat of dismissal by the Judicial Council. There are only two cases where district judges were removed for misconduct.

The Judicial Council has been accused of being lax in taking disciplinary action against delinquent judges. It lacks the staff and skills to undertake meaningful investigations. Moreover, the Judicial Council has not been adequately advertised as a disciplining body for delinquent judges. People aggrieved by judges are generally unaware that the Judicial Council exists and serves as a body with which to file complaints. Finally, the Judicial Council is not required to report its activities to any other body. This has been noted as a serious gap in ensuring its accountability.

Budget

The annual expenses of the Nepalese judiciary are paid out of the consolidated government budget of Nepal. Over the last 10 years, the judiciary's share of the total budget of the country has remained at around 0.4 %. The Ministry of Finance has final approval over the judiciary's annual budget before it is presented to Parliament. The Ministry has been aggressive in terms of cutting funds for the judiciary, particularly funds related to administrative expenses and the construction and maintenance of courts. Many courts do not have their own buildings and continue to operate under leaking roofs in rented residential buildings. Other areas that have suffered due to budget limitations include human resource development/judicial training, record maintenance and security, office equipment, and library facilities.

The Constitution, however, clearly provides that the salary and benefits of the Supreme Court, Appellate Court, and District Court judges shall not be altered to their disadvantage. Therefore, even Parliament cannot enact legislation to reduce the salaries already available to judges. Salaries of Nepali judges are relatively high. In a country with per-capita income of US\$170 per annum, a district judge receives almost US\$3,400 per annum; an appellate judge receives almost US\$3,900 per annum; and a Supreme Court judge receives almost US\$4,800 per annum.

Quality of Legal Professionals and Legal Education

There is significant concern about the quality of service provided by legal professionals. The knowledge, skills and efficiency of advocates are inadequate to deal with modern cases of a corporate nature. The quality of legal education provided in law schools and the lack of opportunity for continuing legal education after enrollment in the Bar Council have posed major constraints. Most of the law schools outside the Kathmandu valley lack qualified teachers and adequate library facilities.

Internal Institutional Pressures

Case Load

There are only 237 judges for Nepal's total population of about 24 million, and roughly 660,000 cases pending in Nepal's courts. The lack of judges causes considerable delays in dispute resolution and has led to a decrease in public confidence in the judiciary. Interestingly, over the last 5 years the backlog of cases in many of Nepal's hill districts, which have been affected by the Maoist insurgency, has in fact decreased. Many disputes have been forcibly settled by the people's courts of the Maoist insurgents. In such cases, the parties are forced to withdraw their cases from the regular courts.

Transparency of Decisions

Publication of court decisions is often delayed due to bureaucratic inefficiencies and lack of incentives. Moreover, the distribution of law reporters is extremely

ineffective and centralized, making the discovery of case law a difficult task. Although the Supreme Court has a web page on the Internet, the practice of posting decisions has not yet begun. The Supreme Court has, however, provided judgments to the Nepal Bar Association for posting on its website for the last two years. This is indicative of the judiciary's lack of resources.

Code of Conduct

The Nepali judiciary has a code of conduct that, although not legally enforceable, is morally binding and impacts decisions regarding transfers and promotions. On the whole, compliance with the code of conduct has been high. Judges generally remove themselves from disputes involving their family and friends, avoid involvement in political controversies, and steer clear of activities that would compromise the dignity of the court. Judges also fulfill their responsibility to file statements of property.

Internal Individual Pressures

Ad hoc Judges

There is a provision in Nepal's Constitution for ad hoc judges in the Supreme, Appellate, and District Courts in order to dispose of the backlog of cases. These ad hoc judges hold their position for a fixed term, unless they are appointed to fill a vacant post of a permanent judge or their term is renewed. This provision is commonly used as a means of putting newly appointed judges on probation before they are confirmed as permanent judges. However, it also has the effect of making new recruits feel insecure and therefore vulnerable to the influences of senior judges.

Judges Bureaucratic and Hierarchical

A common complaint about career judges is that they have a tendency to be bureaucratic and hierarchical in the decision-making process. They tend to follow the instructions of their superiors and are more compliance-oriented than creative-minded.

Retirement

Appellate and District Court judges retire at age 63; Supreme Court justices retire at 65. Mandatory early

retirement has caused many judges to look for alternative, post retirement employment opportunities. This development is considered a threat to the independence of the judiciary. At the same time, judges and lawyers reject the idea of life tenure, as they believe it would lead to stagnation.

Public Confidence in the Judiciary

There is a general perception in Nepal that the courts are not free from corruption. However, a recent public opinion poll on the judiciary revealed vast differences in perceptions between litigants who had direct experience with the courts and the general public, with litigants tending to have much higher opinions of the courts. More than 80% of the litigants interviewed perceived the courts to be fair and impartial. Only 10% admitted to having bribed court officials. In contrast, more than 50% of the general public believed that the courts are corrupt.

Among those with access to the courts (the well-to-do and well-educated), the judiciary is viewed as an independent institution, free from the influence and control of the government. This confidence in the judiciary has come about due to bold court decisions on major issues of public concern. As the Supreme Court has increasingly asserted itself as a guardian of fundamental human rights, more and more people have flocked to its corridors with petitions for relief.

For those marginalized without access to the courts (the vast majority of Nepal's population) the courts are viewed as complicated, costly, and incomprehensible. These people tend to approach informal institutions, such as local government and community organizations, for justice because they are cheap, informal, accessible, and quick in rendering decisions.

The Constitution of Nepal does not provide for public participation in judicial processes. Judges are neither elected nor accountable to the people. Citizens do not participate in jury trials like in the United States. The participation of civil society is limited to having free access to court hearings. Press coverage of judicial proceedings on matters of public interest has substantially increased over the last 10 years. Most of the major daily newspapers and media operations now have journalists with legal backgrounds

to report on legal cases. Improvements in legal journalism have had a positive impact and have helped ease tensions between the media and the judiciary.

The Judiciary and Good Governance

Nepal's Constitution carved out a very significant role for the courts (especially the Supreme Court and Appellate Courts) to ensure good governance. The Constitution mandates that the courts ensure the rule of law and enforce constitutionally guaranteed human rights. The higher courts have been assigned a significant role in resolving private – public disputes. Judicial review of administrative actions and the enforcement of fundamental rights top the list of writ petitions filed at the Supreme Court and the Appellate Courts. The courts' performance in the field of judicial review has been commendable. While strict enforcement of the rule of law and constitutional norms has often irritated government officials and politicians, the courts have received recognition for upholding their duties in this regard.

The Judiciary and Economic Development

Thus far, courts in Nepal have not played an effective role in economic development by creating an enabling legal environment for business. The reliability and predictability of court decisions is a key factor in building the confidence of foreign investors. The business community is experiencing a crisis of confidence because the courts cannot ensure the enforcement of contracts. As a result, foreign investors do not accept the jurisdiction of Nepalese courts to settle their business-related disputes. In most of the major joint venture agreements, dispute settlement clauses require arbitration in foreign jurisdictions, governed by foreign laws.

Recommendations

Short-Term Programs in Priority Order

- Strengthen accountability and transparency in judicial appointments through such measures as introducing a merit-based system for recruiting

career judges at the District Court level; developing an appointment system for Supreme Court judges that ensures that a newly appointed Chief Justice remains in office for at least 4 years; increasing the retirement age for judges by at least 3 years; developing a system of judicial complaints that can be accessed by the public; and developing a graduated system of punishments for violations of the code of conduct, including disciplinary measures less severe than dismissal.

- Conduct a needs assessment and build the capacity of the Judicial Council to enable it to better fulfill its role in overseeing the appointment, transfer, and disciplining of Appellate and District Court judges.
- Improve public perceptions and awareness about judicial independence through awareness campaigns and outreach programs.
- Develop and enforce a court management plan to increase the efficiency of the courts.
- Improve information access, networking, and discovery of case law through faster publication of case reports, posting decisions on the Supreme Court website, and other measures.

Long-Term Programs in Priority Order

- Strengthen human resources through such measures as improving the quality of legal education in Nepal and developing a training academy for new judges.
- Increase access to justice by enforcing local dispute settlement provisions in the Local Self Governance Act, training local mediation/arbitration boards, and strengthening legal aid and legal literacy programs.
- Increase the financial autonomy of the judiciary by passing a constitutional amendment to ensure at least one percent of the national budget is allocated for the judiciary.
- Review and reform procedural laws to improve court performance, including introducing a mediation law for the out-of-court settlement of disputes, separating the civil and criminal procedure codes, and enforcing informal dispute settlement at the local level.
- Enhance the physical infrastructure of the judiciary by providing new and improved buildings, secure court compounds, well-equipped court secretariats and library systems, and facilities for preservation of records.

PAKISTAN

Pakistan's judiciary has inherited a divided legacy. On one hand, its High Courts and Supreme Court (collectively the "Superior Judiciary") represent a tradition of independence and fairness that dates back centuries. This tradition's history can be traced back, much like the courts of England, to the Common Law. On the other hand, the independence of the subordinate judiciary is only a recent development. The subordinate courts grew out of a bureaucratic structure; they arose from the administration put in place by the British rulers of India whose goal was to extract revenues from the Indian subcontinent. The differences between these two judicial tiers are no longer as extreme as they once were, but the subordinate judiciary is still handicapped, at least in the public's view, by its origins as a bureaucratic tool. It bears noting that the judiciary in Pakistan is not unified, and the superior and subordinate judiciaries are totally distinct.

Internal Institutional Pressures

Salaries

The salaries of judges at every level of the judicial hierarchy are the single most important source of influence on the independence of the judiciary. For the subordinate judiciary, salaries are abysmally low. At entry level, a civil court judge gets paid roughly the same amount as a chauffeur in Karachi. With respect to the superior judiciary, the situation has somewhat improved, due to a series of salary increases over the past decade. Given the vast powers that the superior judiciary exercises, however, judges' salaries are still at the low end of the scale, especially by historical comparisons. In real terms, a High Court judge

makes less than 5% of the equivalent judicial salary a century ago.

Infrastructure

The judicial infrastructure for the superior judiciary reflects the level of judicial salaries. It is minimally adequate, but far from satisfactory. At the subordinate level, the infrastructure again reflects salary levels—it is grossly inadequate. Every single report published on the judiciary in Pakistan notes the terrible facilities provided to the subordinate judiciary, which, nonetheless, is the main source of justice for Pakistan's 140 million citizens.

When infrastructure and salaries are examined together, the emerging picture is that of a country with a massively under-funded and ignored judiciary. Indeed, the judiciary gets allocated less than 1% of the budget in every province. This minimal level of funding clearly indicates that justice is not, or has rarely been, a high priority of the Pakistani government.

Internal Individual Pressures

Transfers, Promotions and Discipline (Subordinate Judiciary)

Chief Justices have total discretion with respect to the transfer of subordinate court judges (who can be transferred against their will). Indeed, one of the main potential sources of interference in the work of the subordinate judiciary is the exercise of administrative powers by the High Court. In practice, these administrative powers can only be exercised by the Chief Justice in each province, but even then their exercise is not subject to any check or balance. This discretion is only slightly more restrained in matters

relating to promotions and disciplinary procedures, but the potential for abuse nonetheless remains. Accordingly, subordinate court judges have a vested interest in ensuring that they do not take any steps to alienate any member of the superior judiciary.

Concentration of Powers in Chief Justices

As a consequence of several decisions in the past decade, the judiciary has managed to seize a fair degree of independence from the executive, at least in the matter of appointments to the superior judiciary. The exercise and protection of this independence, however, falls solely on the shoulders of the Chief Justice of Pakistan, as well as the four Chief Justices of the various provinces. This concentration of power, combined with the formidable administrative powers over the subordinate judiciary already vested in the Chief Justices, makes for a potent and potentially problematic combination.

No Security of Tenure for Federal Shariat Court Judges

Judges of the Federal Shariat Court do not have security of tenure, but instead hold their office at the pleasure of the President. This provision is contrary to the independence of the judiciary.

External Institutional Pressures

Budgetary Controls

Since there is no constitutionally or statutorily-mandated budgetary sum reserved for the judiciary, the funds allocated to it are subject to executive control. The fact that all provinces as well as the Federal Government allocate less than 1% of their respective budgets to the judiciary proves that this power has been used to weaken the judiciary. Additional funding to the judiciary, preferably either statutorily or constitutionally-guaranteed at some minimum level, is therefore a vital necessity.

Institutional/Executive Violence

The threat of violence is one that all judges must confront. In the case of Pakistan, judges must not only worry about individual violence, but also intimidation and/or violence from the executive branch. In 1997, the Nawaz Sharif Government organized the storming of the Supreme Court by a mob of its supporters. More recently, the Musharraf regime physically restrained several judges from taking an oath of allegiance to the new regime. Obviously, intimidation of this sort represents an institutional breakdown beyond the control of the judiciary.

The Media

Discussion of cases in the media is greatly restricted by Pakistan's contempt laws, which proscribe all opinions on pending cases. Nevertheless, there have been instances in which media pressure has forced the judiciary's hand. The most troublesome of such cases have been blasphemy cases where public hysteria has been quick to condemn both alleged blasphemers and anyone who chooses to speak out in their defense.

External Individual Pressures

Promotion/Appointment (Superior Judiciary)

The appointment of judges to the Supreme Court has always been made from the ranks of High Court judges. Supreme Court appointments are much prized, not only because of the added glamour and prestige of the Supreme Court, but also because Supreme Court judges have a mandatory retirement age 3 years greater than High Court judges. Theoretically, there is minimal scope for executive interference in the appointment process. However, recent decisions have shown that junior judges of the High Court can leapfrog more senior judges and land in

the Supreme Court in accordance with the wishes of the executive branch. Appointment to the Supreme Court, especially combined with the differential in retirement ages, is therefore a source of executive interference that has resulted in damage to the independence of the judiciary.

Physical Security

Judges, particularly members of the subordinate judiciary, are constantly faced with threats of violence at the individual level. These threats may come from locally influential landlords or organized terrorist and sectarian groups. For example, more than 70 judges reportedly refused to try one particular group of alleged sectarian terrorists. Such threats are far less of a factor at the level of the superior judiciary but not entirely absent. In 1997, a retired High Court judge who had acquitted an individual of blasphemy charges was murdered by religious extremists.

Bar Leaders

One problem that is particularly severe in the subordinate judiciary is that of intimidation by local lawyers. Pakistani culture gives great importance to seniority and age. Thus, when relatively inexperienced judges are confronted with lawyers who have several decades more legal experience, there is tremendous pressure on the judges to accommodate senior counsel. This pressure is also present with respect to members of local bar associations.

Biraderi Ethnic Group

Pakistani society is a society that is ethnically divided into clans and sub-clans, known as *biraderis* (literally, ‘brotherhood’). These ethnic distinctions have become progressively less important with time, but local judges in the subordinate judiciary may be affected by *biraderi* loyalties or enmities when adjudicating cases.

The Judiciary and Good Governance

During its half-century of existence, Pakistan has oscillated from dictatorship to democracy and back again. Each period of dictatorship, whether justified or not, represents a setback in the judiciary’s development. But the oscillation between paradigms has failed to break the judiciary’s back. The Pakistan country report argues that the judiciary continues to fight for its independence, and in the last decade of democracy (1988–1999) made a number of courageous and bold decisions that enhanced its independence while protecting the fundamental rights of Pakistanis. For example, the judiciary consistently held that the dissolution of Parliament by the President was subject to judicial review and in 1993, actually set aside the dissolution of Parliament as illegal. In 1996, the *Judges Case* radically changed the mode of appointment of judges with the judiciary effectively wresting control of judicial appointments away from the executive branch. Then in 1998, the judiciary struck down the suspension of fundamental rights by the Nawaz Sharif government and also struck down a proposal to set up military courts.

Notwithstanding these developments, there is much work still left for the judiciary to do. For example, in an unprecedented move, the Supreme Court Bar Association of Pakistan announced that it would no longer challenge constitutional issues of public importance before the Supreme Court because the judiciary had lost its independence. Whether such public excoriation is justified and the extent to which the judiciary should be exonerated of culpability with respect to the collapse of democratic institutions in Pakistan remains a contentious question.

Public Perceptions

While Pakistan lacks a time series on public perceptions of the judiciary, the data available suggest two seemingly divergent perceptions. One World Bank

study found that more than half of the respondents thought that the judiciary was 100% corrupt. On the other hand, despite the widespread belief in corruption in the lower judiciary, another survey carried out by the Asia Foundation for the Asian Development Bank (ADB) found that the judiciary (rather than the executive branch or informal institutions such as tribal *jirgas* and *panchayats*) was the preferred mode of dispute resolution for those seeking “justice.”¹ Those interested in a speedy resolution of their disputes preferred to approach their local *panchayats* rather than the civil courts. Overall, the *panchayats* were marginally favored over the lower courts in terms of public satisfaction as a dispute resolution mechanism. Still, the extent of interest among the general public in the judiciary is noteworthy. Moreover, confidence in the system is greater among those who actually access the system: 81% of litigants found the courts to be at least somewhat trustworthy while only 47% of would-be litigants stated that they had some trust in the courts.²

Economic Development

During Pakistan’s episodes of political instability, the judiciary has for the most part refused to protect private business and investors from the whims and depredations of the executive branch. The judiciary has often even aided the executive when it has attempted to manipulate economic law to suit its current needs. For example, the judiciary failed to protest Zulfikar Ali Bhutto’s 1970s nationalization of major industries without any proper compensation. More recently, the judicial branch assisted in the Nawaz Sharif government’s attempts to forcibly renegotiate government contracts with private power companies.³

1 ADB. 2001. *Technical Assistance to the Islamic Republic of Pakistan for Supporting Access to Justice Under the Local Government Plan*. Manila (Small Scale Technical Assistance [SSTA 3640-PAK], Executive Summary, p. 12).

2 These findings are drawn from another survey carried out by the Asia Foundation for ADB’s Integrated Report on Pakistan’s Legal and Judicial Reform Project, Integrated Report, Pakistan Legal & Judicial Reform Project (Sept. 1999), pp. 229-241.

3 The Lahore High Court passed an interim order reducing the price that a major power producer was to receive per unit of electricity by 90%. In another case, a civil court in Lahore passed an interim injunction restraining Hubco from encashing bank guarantees given by WAPDA, the national electricity utility.

Although the link between an efficient judiciary and economic development is not monolithic, certain cases seem to introduce new levels of legal uncertainty in the economic sphere that become difficult to manage without a well-functioning judiciary. This seems to have been the case with the controversy over price renegotiations between the Nawaz Sharif government and the Hub Power Company (Hubco), which had many foreign investors. The Supreme Court of Pakistan issued a judgment holding that the dispute between Hubco and the Government of Pakistan could not be referred to arbitration because the allegations of fraud and criminal conduct in the case were not “arbitrable.” The Supreme Court essentially restricted the freedom of investors to choose how to resolve disputes. This decision has broad implications for long-term foreign investment in Pakistan generally, and the power industry in particular, since, as a general matter, corruption/fraud can almost *always* be plausibly *alleged* in the negotiation of power contracts. Irrespective of the merits of this string of litigation, the jurisprudence elevated legal uncertainty from the perspective of the international investment community and now factors robustly in risk mitigation strategies regarding doing business in Pakistan.

Recommendations

Many of the following recommendations have been or will be implemented under the ADB-funded Access to Justice Program. These recommendations are set forth for illustrative purposes, to suggest interventions that other countries may also wish to consider.

Judicial Selection, Appointment and Promotion Procedure

As discussed in the Report, the ratio of judges to population in Pakistan is one of the lowest in the world. Existing vacancies must be filled and the number of judicial posts increased dramatically. Current appointment procedures, as established under the 1996 *Judges Case*, place too much power in the hands of the Chief Justice, whose opinion on appointments is binding on the executive branch. The consultation process should be extended to include the next two most senior judges as well as the Chief Justice. Re-

garding promotion decisions, any discretion lends itself to manipulation, thereby increasing political pressure on judges. It would, therefore, be preferable for seniority to be the sole criteria for all promotions at the High Court and Supreme Court levels. To improve the efficacy of civil judges, the current stand-and-stare training method should be replaced with a comprehensive multi-year training program. Additionally, the minimum requirements for entering the civil judiciary should be increased to include, for example, at least 5 years of practical legal experience.

Judges' Tenure and Removal Mechanisms

Currently, Chief Justices and other judges handle all administrative duties in their courts. Ideally, the judiciary should have professional, full-time managers to deal with administrative matters. Alternatively, each High Court could have a Judicial Ombudsman.⁴ This office would be filled by a sitting High Court Judge, who would focus solely on administrative matters. The Judicial Ombudsman would then be assisted in his administrative duties by a full time staff. The 3-year gap between the retirement ages for High Court and Supreme Court judges should be eliminated. Equalizing the retirement age would remove a source of tension, whereby High Court judges facing retirement anxiously jockey for promotion, allowing for executive interference. Article 200 of the Constitution was modified through the Fifth Amendment to allow judges to be transferred for up to a period of 2 years without their consent. That provision was introduced for the sole purpose of intimidating the judiciary and should be removed.

Judicial Remuneration and Resources for Court Administration

Judicial salaries need to be raised dramatically in order to attract competent judges and to discourage malfeasance. Performance-related bonuses are not recommended because the discretion involved in evaluating performance can lead to corruption. In addition to increasing judicial salaries, the amount of money spent on the judicial infrastructure should be increased. A judicial development fund could be es-

tablished to manage funding for such issues as legal empowerment and the infrastructure of the subordinate judiciary. It is anticipated that such a fund will be established and supported by a US\$25 million grant from the Government of Pakistan.

Public Perception, Economic Development, and Governance

The lack of public awareness of the legal system and legal rights hinders public confidence in the judiciary and the judiciary's ability to foster economic development. If funding is available to increase public knowledge of the law, it should be directed towards nongovernment organizations with proven track record in that field. In addition, the government should work to support, improve, and establish new law schools in Pakistan.

⁴ See Integrated Report, Pakistan Legal and Judicial Reform Project (Sept. 1999), pp. 79—80 (footnote 2).

PHILIPPINES

The judicial system in the Philippines has recently become more independent. The extent to which greater independence improves public perceptions, however, remains uncertain. In general, the average Filipino lacks knowledge concerning his own judicial system, a fact that points to the stark gap between the formal rules that citizens are told they must follow and the actual practices by which they live. Courts should normally be evaluated on the strength of their reasoning, but in the Philippines they are often instead judged based on their “politics.” Unlike executive and legislative officials, however, judges are not accountable to the public. On the whole, judicial reforms in the Philippines are ambitious and ongoing. The work of insulating judges from outside influences must continue.

Structure of the Judiciary

The Philippines, with its constitutional separation of powers resembling the United States, has a judicial structure that is hierarchical and unitary. Not only is the judicial power strictly “vested in one Supreme Court and in such lower courts as may be established by law,” but the Constitution also provides that the “Supreme Court shall have administrative supervision over all courts and the personnel thereof” (Article VIII, Sec. 6). Below the Supreme Court, which is comprised of 15 justices, sits the Court of Appeals (CA), which consists of a presiding justice and 52 associate justices—all of them appointed by the president. Below these are 13 Regional Trial Courts (RTCs) (which in turn may have a number of branches), one for each of the country’s judicial regions, and then several different kinds of local trial courts: Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts. There

are also specialized courts, which act as special tribunals. These include, among others, Family Courts, Heinous Crimes Courts, Special Commercial Courts, and Shari’a (Islamic law) courts. There is also court-referred mediation and the use of alternative dispute resolution (ADR) is being institutionalized.

Appeals in the Philippines are granted by special enabling laws. Thus, where no such law exists, appeals are not permitted. Most appeals must be filed within 15 days of a judgment, and the CA—not only the Supreme Court—could refuse to grant *cert* if it wishes.

Interestingly, a great many positions on the bench remain unfilled, especially in the lower courts. In 2001, for example, there were a total of 2,221 sitting judges in the Philippines and 867 judicial vacancies. In comparison, there were a total of 46,000 lawyers in the country.

The 1987 Constitution established the Judicial and Bar Council (“JBC”) in response to the deposed President Marcos’s concentration of powers in the hands of the president and the emasculation of the judiciary. The JBC is an institution designed to insulate judicial appointments from politics.¹ It symbolizes a rejection of the American-inspired system, whereby the President nominates a candidate who is then subjected to confirmation hearings before Congress. Once the JBC was established, all judicial appointments went through a two-step process. First, there was supposed to be a nonpolitical screening of candidates by the JBC, which is responsible for post-

¹ The membership of the Judicial and Bar Council is as follows: two members come from the legislature, the chairpersons of the committee on justice in both Congress and the Senate. Other members include the Chief Justice as ex officio chair, the Secretary of Justice as vice chair, and a retired justice of the Supreme Court. All others are appointed by the President and include the following: a representative from academe, the president of the Integrated Bar of the Philippines, and a representative from the private sector.

ing the available judicial vacancies, processing applications, reviewing files and making nominations, and finally endorsing for the President a “short-list” of three to five nominees. The second stage is explicitly political in that the President selects a judge from this final short-list.

The Office of the Court Administrator (OCA) was created to help deal with the management of the lower courts, which was transferred from the executive branch to the Supreme Court. Before the 1973 Constitution, the Supreme Court only had the power to hear and decide cases—it did not administer the lower courts. The transfer of this function to the Supreme Courts required the creation of an agency to help the Court with its new administrative burden. The OCA wields power over lower courts, especially in deciding the future of RTC judges. It can move judges to different locales and has powers to discipline members of the lower judiciary.

Internal Institutional Pressures

Politicization of the JBC

The JBC has been criticized in the past for politicizing the courts. Despite being established to guarantee neutrality, critics contend that nominees still need “*padrinos*” (backers) to be nominated. Structurally, the JBC is capable of exerting pressure on individual judges—for example, lower court judges seeking a promotion and “outsiders” seeking an appointment to the bench. Some critics propose abolishing the JBC and reverting to the system of having presidential nominations and congressional confirmation of judges. Such a model calls for the openly political selection of judges by elected politicians, rather than non-transparent selection by un-elected bodies such as the JBC. As this comparative study abundantly demonstrates, however, there is no guarantee that in practice such an appointments system would work better.

Internal Individual Pressures

Careerism in the Judiciary

The Philippine Judicial Academy (“PhilJa”) is a relatively new institution also set on guaranteeing judicial independence. On the positive side, it has professionalized the training of judges, and has created a “common space”—or institutional forum—for the otherwise relatively isolated judges laboring in seclusion in their chambers, allowing them to exchange experiences with fellow judges. By fostering an *esprit de corps* that engenders the shared ethic of judges, the PhilJa psychologically strengthens individual judicial resolve to abide by the law. These laudable efforts to strengthen the judiciary tend to reinforce the notion that being a judge is a “career.” At the Supreme Court, there is a good balance between the “career judges” and the “outsiders.” However, some argue that the creation of a “career judiciary” elsewhere might not only convert the judges into bureaucrats, but it might also strengthen the control of bureaucrats over the judges. On the other hand, those same critics argue that judges who were lawyers before joining the bench, and who theoretically can resume being lawyers afterwards, have a greater sense of independence than career administrators. The evidence either way is inconclusive.

Court Spokesperson

The Supreme Court recently appointed an official spokesperson. During the early 1990s, Supreme Court justices, given the nature of their office and of their own training, did not respond to attacks by the media. Now a court spokesperson responds to media queries with more liberty and flexibility than the justices, allowing judges to be judges and not politicians. Hypothetically, the danger is that a flamboyant spokesperson will be appointed in the future. Such a spokesperson, unlike the justices, may be more attuned to the popular pulse and be truly savvy with

the media. Thus, such a spokesperson might be able to wield power over the judges who, by temperament and ethics, shy away from interviews, cameras and microphones. This danger notwithstanding, the experience to date has been positive.

External Individual Pressures

Local Government Allowances for Judges

Mayors provide an allowance to the local judges, and also provide facilities. These allowances must be institutionalized, that is to say, shifted away from municipal coffers and brought into a central fund disbursed by the Supreme Court, through the OCA. Otherwise they merely foster clientilism by the local mayors over the judges, and undermine judicial independence. (As of this writing, the pending law upgrading judicial salaries prohibits lower court judges from receiving such allowances from local government units, but the practice is still followed.)

Overworking of the Office of the Court Administrator

Through the creation of the OCA, the Supreme Court has given up the majority of its supervisory role over the functioning of lower courts. But the OCA, which has only about 530 employees, cannot be expected to serve the interests of 20,000 lower court employees. There are also some administrative functions, such as the disciplining of judges, that cannot be reviewed by the OCA itself; it would be best to leave these for the high court. To curtail bottlenecks, inefficiency, and delays, the Supreme Court must devolve some of its responsibilities, particularly over mundane issues, to the lower courts.

Death Threats and Actual Assassination of Judges

On 28 September 2002, an RTC judge in Pangasinan was shot on his way home from court, after having

received several death threats. The Philippine Judges Association issued a statement noting that two other RTC judges, both in the Ilocos Region, had been killed in the line of duty. As of this writing, no leads or arrests have been reported.

Media Pressure

The growth of “democratic space” after the fall of Marcos fostered a vigilant press; privately organized single-cause interest groups; and a flourishing industry of public opinion polling. Some argue that these “non-institutional checks” on the judiciary impede independence. They argue that when a judge is called upon to decide a case under the glare of television cameras, his reputation and career are also put on the line. The balance is difficult. Before, the courts were so independent of the public that they could be aloof and unaccountable. Today, some argue, the judges are made so accountable that their independence is imperiled.

External Institutional Pressures

Congressional Control and Executive Influence over the Budget

On paper, the judiciary enjoys fiscal autonomy—in fact, the Constitution states that its budget shall never fall below the previous year’s and that its funding shall be released automatically and without delay. Still, in practice, all budgetary proposals have to be cleared by the executive branch’s Department of Budget and Management and then submitted to, and defended before, Congress. Executive budgetary oversight does not pose a grave threat to judicial independence in non-political cases, but in highly political cases it does. One example was the case of Mark Jimenez, a friend and ally of the former President whose extradition to the United States was at first blocked by the courts.

Public Distrust of Courts

In a 1996 survey conducted by the Makati Business Club, less than 20% of respondents rated the Supreme Court's performance as satisfactory, while 77% found it unsatisfactory. As for the overall court system, 4% found its performance satisfactory compared to 92% who did not.

Public Perceptions of the Judiciary

In the Philippines, some argue that the media wields so much power in mobilizing public opinion about judicial decisions, that the courts are vulnerable to becoming a “judiciary by referendum.” Because judges are not elected, it is often the media as well as public opinion that hold them accountable. But the dark side of this “accountability” occurs when courts are judged not according to the rigor and quality of their verdicts, or on the deeper values they purport to advance, but on whether the public's chosen “good guys” won or lost. Some scholars, among others, worry about growing public pressure on the courts.

The Judiciary and Good Governance

The Supreme Court has performed a legitimating function in the Philippines in the recent past. The transition between ousted President Joseph E. Estrada and his successor, President Gloria Macapagal-Arroyo, would not have been possible, or at the very least would not have been peaceful, had it not been for the Supreme Court.

A good sign as far as good governance is concerned is that the Philippines seems to have fully embraced “checks and balances.” In the Philippines, the Constitution also allows, on top of the traditional tripartite separation of powers, for the establishment of several other independent institutions to guarantee good governance—the Constitutional Commissions, the Commission on Human Rights, etc.—agencies that investigate and restrain other offices of government. Yet these devices have not always worked.

The Judiciary and Economic Development

In a 1999 survey by the Economist Intelligence Unit, 75% of managers of international firms doing business in the Philippines tagged the courts to be “capricious” in the way they dispense with justice. On the whole, the judiciary is accused of being too populist and unaware to the economic consequences of its verdicts. The Supreme Court, moreover, has recently been criticized for too often second-guessing both the economic judgment of government managers and foreign businessmen. On the other hand, it is difficult to quantify, much less confirm, whether Court decisions unsympathetic to business interests have actually had an impact on business—at least one beyond that on the parties immediately involved in the dispute. In March 2002, an off-the-cuff comment by the U.S. Ambassador to the Philippines saying that corruption in the courts has been a deterrent to foreign investment prompted a letter from a Supreme Court spokesman, allegedly on behalf of the Chief Justice, asking the ambassador to make specific complaints to the Court for it to act upon.

Most critiques of the judiciary on the part of economic interests fall into two categories: First, in resolving disputes, the courts are slow, inefficient and corrupt. Second, in interpreting settled doctrine, the courts have changed the rules mid-stream. In a recent boost to economic interests, the RTCs are now mandated to hear commercial fraud cases and other business related cases that would otherwise be heard by a securities and exchange commission.

Two decisions of the Philippine Supreme Court may highlight certain tendencies towards “economic nationalism,” suggesting that judicial independence is not necessarily a panacea for economic growth and development. First, in *Board of Investments v. Garcia*, the Court reversed a petrochemical plant investor's decision to relocate a proposed plant, citing the duty of the state to “develop a self-reliant and independent national economy effectively controlled by Filipinos.” The decision went on to offer policy arguments to explain why the investor's decision was bad for the nation. Strong dissenting opinions

argued for judicial restraint, citing the dangers of “government by the judiciary.” Second, in the *Manila Prince Hotel* case, another highly controversial decision about the sale of the historic Manila Hotel, the Court held that the losing bidder, a Filipino company, had the right to match *post hoc* the winning bid of a Malaysian company. In support of this decision, the court cited a clause in the Constitution that gave Filipinos a “preference” in the “grant of rights, privileges, and concessions.”

Recommendations

One major problem that has held up the efficiency of the judicial system and needs to be fixed is the strange appeals process. Judgments issued by courts still require writs of execution from the courts to be executed. In the meantime, a judgment can be appealed until there are no more remedies on which appeal can be sought. But higher courts do not have to take the appeals. The legislature must pass laws to curtail this process so that litigants will accept their judgments and not try to cut corners through endless appeals.

The Philippines should, as it is, popularize its ADR system. ADR currently exists, but it is not well publicized and is not often used to “supplement” the judicial process. An ADR bill has passed the lower house and is now being considered by the Senate. An executive order is currently being discussed that would create ADR units in quasi-judicial bodies.

And the Supreme Court, through Philja is actively promoting court-referred mediation with several pilot projects in Metro Manila, Davao, and Cebu.

The extent to which the JBC is politicized is hotly contested. The non-transparency of the JBC, however, in the selection of candidates should be reformed. A positive recent development is opening interviews of candidates to the public (at the level of Supreme Court, Court of Appeals and Sandiganbayan).

Promotion and tenure of judges is controlled by the Supreme Court. Critics may argue that this puts pressure on lower level judges to conform in their judicial views to be as much like the Supreme Court as possible.

Perhaps a Special Disciplinary Committee should be created to handle disciplinary cases at all levels—and also make these cases public, so as to give the courts more transparency.

Finally, courts have little power over the budgets allotted to them. In reality, budgets are set for the judiciary by the executive branch’s Department of Budget and Management. The low salaries fail to attract the best and the brightest to the judiciary. As a result, one third of the positions on the judicial bench remain unfilled. Low judicial salaries also mean that judges are willing to receive as much as 25% of their pay from local governments, which they are allowed to do by law. However, this leads to corruption, not increased judicial independence. To improve this situation, reform legislation is currently being considered to make the judiciary fiscally independent.

THAILAND

Thailand is in the process of implementing dramatic reforms to its entire judiciary. In the early 1980s, progressive jurists, government officials, and members of civil society in Thailand began critically reexamining the country's legal system. By the mid-1990s, they had articulated a series of structural reforms to ensure judicial independence and more accountable and transparent governance. These recommendations became an integral part of the new Constitution that was adopted in Thailand on 10 October 1997. Under its guidance, significant and far-reaching judicial changes are presently taking place throughout the country. They are the most significant changes to the judiciary to have occurred in Thailand since 1892, when the Ministry of Justice was established and the court system first began to be centralized and westernized.

Structure of the Judiciary

The new 1997 Constitution institutes a variety of reforms to enhance judicial independence, due process, and the protection of civil, political, and economic rights in Thailand. First, it mandates the separation of power by removing the courts from the control of the executive branch's Ministry of Justice. Equally importantly, the Constitution provides the judiciary with the power of judicial review, which under the 1991 Constitution had been vested in the executive and under the previous 1946 Constitution in the legislative branch of government. Indeed, the 1997 Constitution established a special Constitutional Court to guarantee judicial review. In addition, it has reorganized Thailand's court system according to a new structure, creating four distinct, independent courts: the Constitutional Court, the Administrative Courts, the Courts of Justice, and the Military Court.

The Constitutional Court

The 15-member Constitutional Court is the first (and only) judicial body in Thailand with the power of judicial review. It is responsible for adjudicating the constitutionality of parliamentary acts, the constitutionality of laws, the governance of constitutional bodies, and the removal of officials from office. The Court's jurisdiction is slightly limited, however. It is not empowered to rule on the constitutionality of regulations, orders, and rules issued by the executive, but only on laws passed by the legislature. Still, the Constitutional Court serves as the Achilles' heel of the judicial reform process, as only it can ensure that the reforms mandated by the Constitution are not eroded by political expediency. Its 15 justices vote to appoint one of their members as President of the Court, and the Court has an independent Secretariat that reports directly to the President.

Administrative Courts

Prior to the establishment of the Administrative Courts in 2000, Thai citizens had no recourse to seek legal redress against their government. Previously, the government had established a Petition Council to hear citizen complaints, but the Council did not have the power to enforce judgments. Rather, the power to enforce judgments rested with the Prime Minister and as such was seen to be a political decision, meaning that few citizens bothered with the Council. The new Administrative Courts provide a way for ordinary citizens to seek redress in their disputes with state agencies, local government organizations, or state officials who are under government supervision. These courts consist of two tiers: there is a 26-member Supreme Administrative Court located in Bangkok, and, under it, several Administrative Courts

of First Instance, which include a Central Administrative Court in Bangkok and 16 (proposed) Regional Administrative Courts in Thailand's major provincial capitals.

The Courts of Justice

Thailand's ordinary courts are called Courts of Justice, and for the first time in their history they are independent of the executive branch. These courts were removed from the Ministry of Justice's jurisdiction, and the Ministry itself was reorganized. Courts of Justice adjudicate all civil and criminal cases, except those that fall within the jurisdiction of the other courts mentioned above. They consist of the Courts of First Instance, the Appeals Court, and the Supreme Court, as well as a series of specialized courts—for example, a Juvenile and Family Court, a Labor Court, a Bankruptcy Court, a Tax Court, and an Intellectual Property and International Trade Court. The Courts of Justice have an independent secretariat and, on paper at least, autonomy over their budgets, personnel, and activities. Their judges are drawn from members of the Thai Bar who have passed the annual competitive exam and who subsequently complete a one-year training and mentorship program.

Internal Individual Pressures

Problems of Legal Education and Court Culture

Thai law schools provide future lawyers and judges with little understanding of the social context or reasoning underlying the laws. Students merely memorize codes and administrative rules and regulations without reference to how either codes or lawyers themselves function within the legal system.

Conformity in Court Cultures

The strict hierarchy of the courts means that Supreme Court judges are all promoted from the lower courts. Many analysts believe, however, that the desire by lower-level judges to maintain good standing in the eyes of their seniors often compromises judicial

decisions, influencing lower-level judges to adjust to the conservative corporate culture of their superiors, which is almost always based on “rule by law” traditions.

Internal Institutional Pressures

Unanimity in the Constitutional Court

The Constitutional Court's internal procedures are held hostage by the rule of unanimity. All procedures are subject to the unanimous approval of all 15 justices, thus allowing a single justice to determine the fate of important reforms. The inability to change court procedures means that decisions often come out opposite to the way they would otherwise. For example, according to the procedure for counting majority votes, decisions in cases involving multiple legal issues may differ from cases that involve a single issue considered on its own. Moreover, because each justice who votes in a ruling is mandated by the current procedural rules to explain his position in his own written opinion, even the simplest case can come out to be hundreds of pages in length, wasting valuable time and resources.

Staffing and Budget of the Constitutional Court

Professional staffing of the Constitutional Court remains problematic due to both budgetary limitations and the lack of human resources in Thailand with expertise in constitutional law. In theory, the Constitutional Court should also have autonomy over its budget, staffing, and internal procedures. In reality, and contrary to Sections 75 and 270 of the Constitution, the executive branch, acting through its Budget Bureau, can restrict the Court's budget.

Staffing and the Budgetary Problems at the Administrative Court

The Administrative Courts have an independent Secretariat reporting to the President of the Supreme Administrative Court, and, on paper at least, should have autonomy over their budgets, staffing, and internal procedures. In reality, these courts face similar

problems to the Constitutional Court. Their budgets are restricted by the executive branch and there are staffing problems due not only to budgetary limitations, but also to the lack of national human resources with expertise in administrative case law.

External Individual Pressures

Public Perception of Administrative Court

Currently, neither the public nor lawyers adequately understand either the Administrative Court's procedures or legal powers, which may eventually lead to a crisis of confidence in the Court.

Access to Justice

Access to justice and to the court system in Thailand is not easy. One procedural obstacle continues to be court fees. Often, a plaintiff will be required to submit a court fee of 2.5% of a claim (but not higher than Baht200,000), which may be too high for many plaintiffs and exceeds the amount in neighboring countries. The courts, as part of their extensive reform efforts, have recently introduced draft legislation to significantly reduce this obstacle. Less easy to address however, are the problems citizens face in accessing competent legal representation. Although lawyer fees are low, poor people still cannot afford to hire their lawyer of choice, and the lawyers actually available for the courts to appoint tend to be of poor quality or young and inexperienced.

Corruption of Judicial Officials

Due to the lack of sound judicial ethics, poor pay, and nontransparent methods of holding judges accountable, some judges were (and continue to be) open to corruption from both officials and ordinary citizens. In a survey conducted in 2000, 31% of citizens who had a case before the court during the previous 2 years indicated they had been advised to offer a bribe to settle the case in their favor. While most bribes were paid to individuals outside the judiciary, in 4.3% of all cases, respondents allege to have handed the payment over to a judge or a court official directly.

External Institutional Pressures

Limits on the Constitutional Court

The Constitutional Court does not serve as a court of last appeal and its decisions are not retroactive. Rather, its decisions are applicable only to the cases brought before it and to all future decisions, but they are not applicable to previous cases where a final judgment of the Supreme Court has already been rendered. This means that during litigation, a court or litigant must apply to the Constitutional Court before a regular court rules on a final appeal. The Constitutional Court never serves as the court of final appeal on decisions issued by the Supreme Court.

Selection of Judges for the Constitutional Court

The drafters of the 1997 Constitution created a system for selecting Constitutional Court justices from both the judiciary and experts in law, political science, and public administration. Of the seven justices who are to come from the judiciary, five are nominated by the Supreme Court and two by the Supreme Administrative Court, but without the advice and consent of the Senate. The other eight justices who have non-judicial backgrounds are nominated by a 13-member selection committee and confirmed by the Senate. The system was designed to discourage political interference in the selection of justices, who have single, nine-year terms of office. Nonetheless, a loophole enables the government to veto the nomination of non-judicial candidates. Based on the March 2003 confirmation of four new justices by the Senate, analysts believe the government has now engineered a majority on the Court. Eight justices now share the government's philosophy, and the Court is split between those who advocate the traditional Thai philosophy of "rule by law" and those in the minority who wish to pursue a "rule of law" agenda.

Selection of Judges for Administrative Court

The Judicial Commission of the Administrative Courts controls the selection, appointment, and

promotion of Administrative Court judges. Judges may remain in office until retirement at age 70. One-third of the judges must be nominated from among non-judicial officials who have expertise in law, political science, or public administration. With only three members of the Commission coming from outside the judiciary, the government does not have the same veto power over nominees to the Judicial Commission that it has been able to exercise to veto “non-judicial” justices for the Constitutional Court. Nonetheless, some fear that, with the Judicial Commission dominated by “old-school jurists” from the Courts of Justice, judges will have to rely heavily on their capacity to play internal politics in a complex web of patron-client relationships, which may compromise the independence of their decisions.

Public Perceptions of the Judiciary

Although perceptions of the Thai judiciary are evolving, there remains a discord in the public’s mind between the traditional community mechanisms that are intended to secure justice and the state mechanisms intended to enforce the bureaucracy’s control over society. Thai citizens perceive the judiciary to be a part of the state apparatus, which they feel serves to protect state interests and elite privileges. It is widely thought that wealthy people and those of high social status receive special consideration while the poor are always penalized to the full extent of the law. Moreover, ordinary citizens view the courts as remote and inaccessible institutions and judges as government officials who are socially and professionally intimate with the administration. As a result, courts are seen as something to be avoided. Over the last 25 years, reformers within government, backed by a strong civil society movement, have worked hard to transform this image of the judiciary in Thailand. These efforts have sought to make the judiciary more responsive to the needs of citizens rather than the state. Many Thai understand that important reforms were promulgated because of the 1997 Constitution. In practice, however, many of these reforms remain little more than new ideals that advocates of change must continue to pursue vigorously.

The Judiciary and Good Governance

Today, governance in Thailand must be viewed within the context of the emerging conflict that has arisen between those who promote the Thai legal tradition of “rule by law” and those who promote the “rule of law” tradition mandated by the 1997 Constitution. Recent governance reforms have intensified this conflict. During the era of the absolute monarchy and the subsequent decades of military rule, judges were relatively free from political interference, even though courts were a part of the executive branch. This is because the majority of judges, traditionally drawn from the elite, subscribed to the government’s “rule by law” tradition. Elites and common citizens were by nature treated differently. Given that the views of judges and state officials were generally similar, there was usually little need for government to interfere overtly with the courts or for the courts to interfere with government. It is too early to tell whether this is changing, but the new powers of judicial review given to Thai courts allow a greater check on government abuses than existed ever before.

The Judiciary and Economic Development

Proponents of “rule by law” argue that their system enabled Thailand to achieve a decade of double-digit growth, pulling the nation into the global economy and significantly reducing the percentage of its citizens living in poverty. Nevertheless, that legal philosophy also contributed to the growth of inefficient state enterprises, monopolies controlled by favored elites, corruption, tariff barriers, and policies that prevented the emergence of a level playing field for non-elites. It also allowed for the implementation of development policies that ignored their environmental impacts and the interests of local communities. Many analysts conclude that the collapse of the “rule by law” economy in July 1997 directly contributed to civil society’s success in lobbying parliament to promulgate the “rule of law”-oriented Constitution in October 1997.

Recommendations

Through the legal reform movement and the constitutional drafting process, Thailand has created its own detailed list of recommendations—not only for ensuring judicial independence, but also for promoting justice and good governance. These recommendations are highly detailed. They refer to specific legal amendments and technical tasks that must be undertaken to improve the courts in order to meet the needs of modern Thai society in a participatory, transparent, and accountable way. In addition to pursuing the faithful implementation of these reforms, there are three specific recommendations that the Thai government might also consider.

First, though the Constitution was adopted several years ago, progress in reform has been very recent. Those who drafted the Constitution were aware that reforms cannot happen overnight, and therefore a timeframe has been set up for the reform agenda. For example, the Administrative Courts have been functioning only since 2000, and changes in trial procedures in the Courts of Justice were introduced only in 2002. Obviously, the most important recommendation for Thailand is to continue to ensure that the

faithful implementation of its reform agenda occurs on schedule.

Second, the various courts need to conduct a series of rapid assessments to determine their progress in the implementation of judicial reforms, which they should do in partnership with a neutral, non-judicial organization, such as a think tank or a law school. They should highlight the achievements to date, identify remaining bottlenecks, and recommend solutions to further obstacles. In addition, Thai law schools and the Judicial Training Institute need to revise their curriculums to place far more emphasis on legal ethics and to provide lawyers and jurists with a greater appreciation of the role of law in a democratic society.

Finally, Thai society needs to revisit the debates that led to the promulgation of the 1997 Constitution to resolve the emerging conflict within the judiciary over whether Thailand is to pursue systems of justice and governance under the traditional “rule by law” philosophy or according to the new “rule of law” agenda, as mandated by the 1997 Constitution. Ultimately, the fundamental problem with judicial independence in Thailand lies in the attitude both of members of the judiciary and the general public about the role of law in a democratic society.

VIET NAM

The Ordinance on Judges and Jurors of the People's Courts, originally promulgated on 14 March 1993, marked a big change in the institution of the judiciary in Viet Nam. The ordinance replaced the practice of electing judges, which had existed for more than 30 years, with appointments.

Since 1993, judges have been appointed for two terms. The practical implementation of the appointment of judges has demonstrated that, in general, the ordinance has worked quite effectively. However, having been promulgated at a time when there was little experience in appointing judges in Viet Nam, many provisions of the ordinance are too simple or contain irrationalities that limit the effectiveness of appointments. Since 1993, major changes have occurred in Viet Nam's court system. From 1995, in addition to criminal, civil, and family cases, Viet Nam's courts now also decide economic, administrative, and labor cases. District courts have been given wider trial jurisdiction. In this context, Viet Nam urgently needs a contingent of highly competent judges who have strong professional skills and legal knowledge.

In addition, at the VIIth, VIIIth, and IXth Congresses of the Viet Nam Communist Party, judicial reform was constantly raised on a deeper and wider basis. At the moment, judicial reform is one of the main areas of focus in the overall reform of social life and the creation of the socialist state of law of the people, by the people, and for the people in Viet Nam. Apart from administrative reform, judicial reform requires three major elements—rules, procedures, and human resources. Ensuring judicial independence is within the scope of judicial reform.

Most recently, the 2002 Law on Organisation of the Courts contains one very basic change: the administrative management of the courts has been

transferred from the Ministry of Justice to the Supreme People's Court. Furthermore, the Ordinance on Judges and People's Juror was passed by the Standing Committee of the National Assembly on 4 October 2002 replacing the 1993 Ordinance on Judges and People's Jurors. This change could have substantial impacts on the selection and appointment of judges to courts of different levels.

All the foregoing preconditions highlight the need to study judicial independence with a view to addressing those dimensions that have impact on impartiality. Judges are persons who adjudicate cases under the jurisdiction of courts, on behalf of the State. Based on a study of actual experiences, the following are the internal and external elements of judicial independence in Viet Nam:

Internal Elements

Institutional Elements

Interests of Judges

One of the key reasons judges oscillate in the performance of their task is the irrational salary regime. Judges at the various court levels enjoy vastly different salary regimes. According to the current regime, it takes 31 years for a district judge earn an amount equal to a third level provincial judge. And, he will never reach the entry level salary of a supreme judge.

Given the current cost of living in Viet Nam, that income is sufficient for a single judge, but cannot cover his family expenditures. The current salary structure does not attract law school graduates to apply for judicial positions and leads many court staff to resign. Low salaries also impact the professional conduct of judges.

Understanding these shortcomings, the Supreme Court is cooperating with the Government to amend the salary scheme of the judicial system.

Judicial Budget

Funds allocated to the courts from the State budget often fail to materialize. For example, in fiscal year 1999, the budget for the judiciary accounted for only 0.074% of the gross domestic product. As for the general judiciary, the Ministry of Justice reported that only 16% of judges have their own offices; the rest are required to share space. Ninety-five percent of judges do not know how to use a computer because they don't have one and 78% of the courts don't even have a library. Judges often lack access to basic legal materials—laws, higher court judgments, and commentaries—which are needed for consistent and well-founded decision making.

Limited budgets result in inadequate physical working conditions that undermine respect for the judiciary, both in the judges' own eyes and in those of the public. This may limit the judiciary's ability to provide the security needed to stem intimidation. Severe under-funding nearly always has an impact on the judiciary, and in Viet Nam it is clearly seen to affect its independence.

Due to the lack of trained legal professionals, there was a time when 60% of judges (mostly at the district level) were comprised of military officers and political cadres who underwent a short training program on general laws. Bachelors of law night classes were also tapped after completing these minimal requirements. Even now, 400 of Viet Nam's 3,751 judges do not have bachelor of laws degrees, meaning that they only have college degrees or short-term professional training certificates.

Tenure

A 5-year term is too short to provide the requisite security of tenure. Thus, a judge may project into the future and allow his decision making to be influenced by what and whom he thinks will serve him best. Judges often feel constrained during their term of office not to offend those who may have influence over their reappointment.

Individual Elements

Judicial Capacity

The professional criteria for selecting judicial candidates could have quite a direct and important impact on the quality of judges, and thereby on the quality of adjudication. However, provisions specifying the criteria in current regulations are still insufficient. Due to their lack of capacity and experience, judges, especially in the District courts, often consult leading judges of their own or of higher courts on how to rule in cases. This is the most important internal individual factor affecting judicial independence.

External Elements

Institutional Elements

Communist Party

At present, the Supreme Court is accountable to the National Assembly. The judges are appointed for 5-year terms. Many are apparently Communist Party members and therefore are accountable to both the party and the National Assembly. Important steps are now being taken to strengthen judicial independence within this institutional context.

Procuracy and Investigation Body

There is a tendency in complicated cases for the investigation body, the court, and procuracy to have a "triangle discussion meeting" to agree on how to manage the trial. This practice may create opportunities for external elements to affect the adjudication process. Another external pressure is that courts usually makes judgments based on indictments in criminal cases or conclusions in civil, economic, labor, or administrative cases.

Executive Organs

Executive interference in judicial decision making also occurs occasionally. There have been cases of provincial People's Committees abrogating sentences of

local courts. Recently, the chair of a Provincial People's Committee sent an official letter to the chair of a Provincial Court requesting the "disciplinary action or punishment" of a judge who issued a judgment in an administrative case contrary to the interests of one department under his People's Committee. Judicial impartiality and independence are affected by the involvement of the State's bodies in court judgments.

Media

The media has so far functioned as an advocate for an independent judiciary, especially through educating the public about judicial issues and playing a liaison role between the judiciary and the public. The media also compensates for deficiencies in official transparency when it publishes the names of judges who issue incorrect judgments or tend to abuse their judicial power. Investigative journalism has proven effective in curbing corruption, and has resulted in criminal penalties.

However, to some extent, the media contributes negatively to judicial independence. Sometimes, it describes and provides opinions on open cases, thereby influencing public opinion.

Other Institutions

Many nongovernment organizations also play an important role in holding courts accountable and advocating on behalf of the judiciary.

Individual Elements

Judge Selection Procedure and Council of Judicial Selection

Current regulations do not provide detailed guidelines on how frequently the Council of Judicial Selection (CJS) should convene for review meetings and the time limit for its submission of selection results to the Chief Justice of the Supreme Court.

The composition of CJS is not well suited to select the best-qualified candidates. The number of members is fixed, but from a professional point of view, it could not be said that all members are capable of their task.

As in most other decision-making bodies in Viet Nam, CJS is run by consensus, creating opportunities for local government to stop appointments, should it feel the need. Hence, there is an incentive for local and provincial judges to consider the needs of local government when deciding cases of political interest.

In terms of disciplining and removing judges, the law is silent on the procedures for assessing whether a judge has violated a regulation. There is no clear guidance on how to justify if a judge is no longer qualified to perform his duties.

Public Perceptions of the Judiciary

In 2000, based on a survey on "Legal awareness to serve state management," it was found that only 628/904 or 69.5% of the interviewees trusted Viet Nam's judiciary and would use the courts to resolve their disputes. The rest expressed a lack of confidence in the judiciary because of corruption, the amount of time and money needed, and other factors.

The Judiciary and Good Governance

With a weak judiciary, people do not want to engage in legal matters or have any contact with judicial organs. It is dangerous for governance because the laws are not respected, and people resort to the "laws of the jungle" rather than the "laws of nation". They take legal actions to competent administrative authorities because they believe such authorities have higher levels of professional knowledge and skills than judges.

The Judiciary and Economic Development

The capacity of judges, especially local ones, to understand new economic concepts is inadequate. Legal procedures and proceedings are complicated and lengthy (usually an economic case takes 4 months for the first instance hearing and 2–4 months more for the appeal process). Due to these factors, foreign investors are hesitant to refer their cases to Vietnamese courts. Thus, most joint venture contracts specify that disputes are to be arbitrated through the Singaporean International Arbitration Center or other foreign venues for dispute settlement. Even Vietnam-

ese enterprises try to select other venues for resolving their disputes. Additional difficulties and delays seek to secure the enforcement of decisions rendered by the courts. Moreover, the courts still have a bias in favor of state enterprises, making private enterprises feel insecure. This situation decreases the country's prestige and ability to attract foreign investment.

Recommendations

- Shift smoothly the court administration from the Ministry of Justice to the Supreme Court (which is already in process).

- Reform radically the salary and allowance system of judges and upgrade all judicial facilities.
- Create a legal basis for wide circulation of court decisions and judgments.
- Ensure that in deciding cases and during court proceedings, judges and people's jurors shall be independent and obey only the law.
- Design appropriate administrative and managerial structures for the court system.
- Improve and complete procedural laws.