

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.