

OVERVIEW

PART ONE

Baseline: A View from Within Asian Judiciaries

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

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

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

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

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

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

Three Preliminary Questions

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

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

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

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

What is Judicial Independence?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Is an independent judiciary necessary for the rule of law?

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

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

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

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

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

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

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

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

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

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

Is an independent judiciary necessary for economic growth and development?

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

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

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

Is an independent judiciary necessary for good governance?

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

Is an independent judiciary necessary to combat corruption?

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

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

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

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

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

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

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

Conceptual Framework for Assessing Judicial Independence

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

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

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

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

“Sources” and “Targets” of Influence and Control

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

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

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

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

Sources of Influence and Control—External and Internal

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

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

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

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

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

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

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

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

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

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

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

Targets of Influence and Control—Institutional and Individual

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

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

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

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

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

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

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

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

Five Categories of Assessment

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

The Structure, Organization, Jurisdiction, and Procedures of Courts

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

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

Judicial Selection, Appointment, and Promotion Procedures

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

Judges' Tenure and Removal Mechanisms

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

Judicial Remuneration and Resources for Court Administration

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

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

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

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

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

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

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

PART TWO

Applying the Framework to Five Categories of Assessment

The Structure, Organization, and Jurisdiction of the Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judicial Selection, Appointment, and Promotion Procedures

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

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

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

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

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

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

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

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

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

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

Judges’ Tenure and Removal Mechanisms

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

Judicial Tenure and Mandatory Retirement

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

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

Disciplinary and Removal Procedures

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

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

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

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

Transparency of Disciplinary and Removal Procedures

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

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

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

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

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

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

Judicial Remuneration and Resources For Court Administration

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

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

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

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

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

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

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

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

Judicial Remuneration

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

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

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

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

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

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

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

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

Resources for Court Administration

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

The Sources and Consequences of Inadequate Funding for Judiciaries

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

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

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

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

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

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

Courts in Relation to the Public, Economic Development and Governance

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

Public Opinion

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

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

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

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

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

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

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

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

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

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

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

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

Governance

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

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

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

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

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

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

Economic Development

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

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

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

PART THREE

Recommendations

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

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

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

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

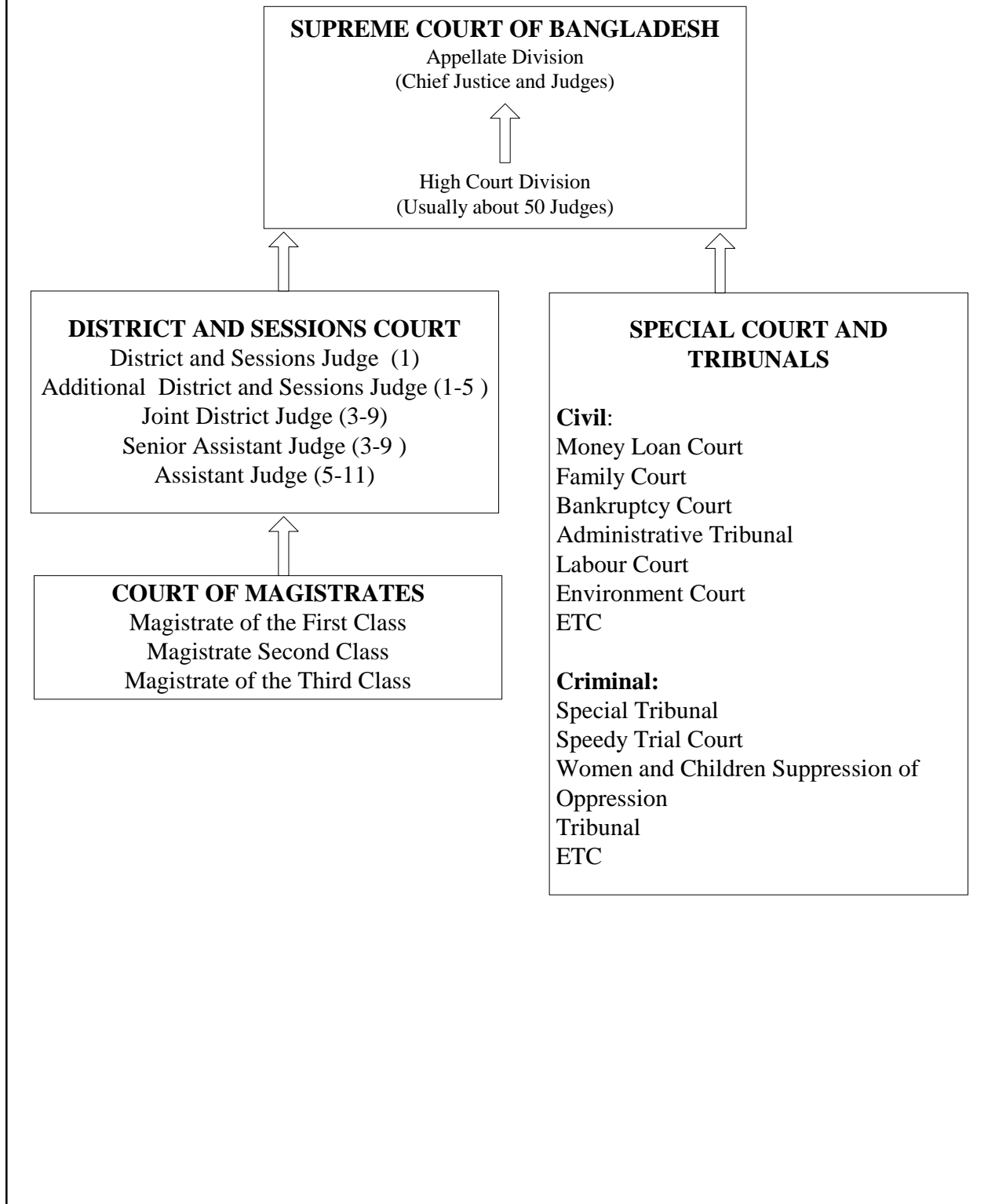
Third, encourage freedom of information within the judiciary and other branches of government, and consider reducing the scope of contempt laws along the lines of Thailand's Administrative Court. The dissemination of credible information increases transparency and accountability and holds the promise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

Finally, consider the array of structural improvements highlighted in the section on "Applying the Framework to Five Categories of Assessment". Unfortunately, no single technical recommendation suggested in this section ensures judicial independence, or even provides an adequate basis for measuring judicial independence. No formal institution or set of institutions ensures judicial independence. Moreover, the composite features of the formal structures of the judiciary at a country-level must be situated with their course of conduct in interacting with the political branches of government.

The independence of the judiciary in Bangladesh has been a contentious issue since the country gained independence in 1971. While political discourse purports commitment to judicial independence, practical measures to address issues related to judicial independence have been too few.

Court Organizational Charts

BANGLADESH



SUPREME COURT OF BANGLADESH

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

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

DISTRICT AND SESSIONS COURT

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

COURT OF MAGISTRATES

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

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

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

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

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

SPECIAL COURT AND TRIBUNALS

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

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

CIVIL

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

- Labour Court
- Environment Court
- ETC

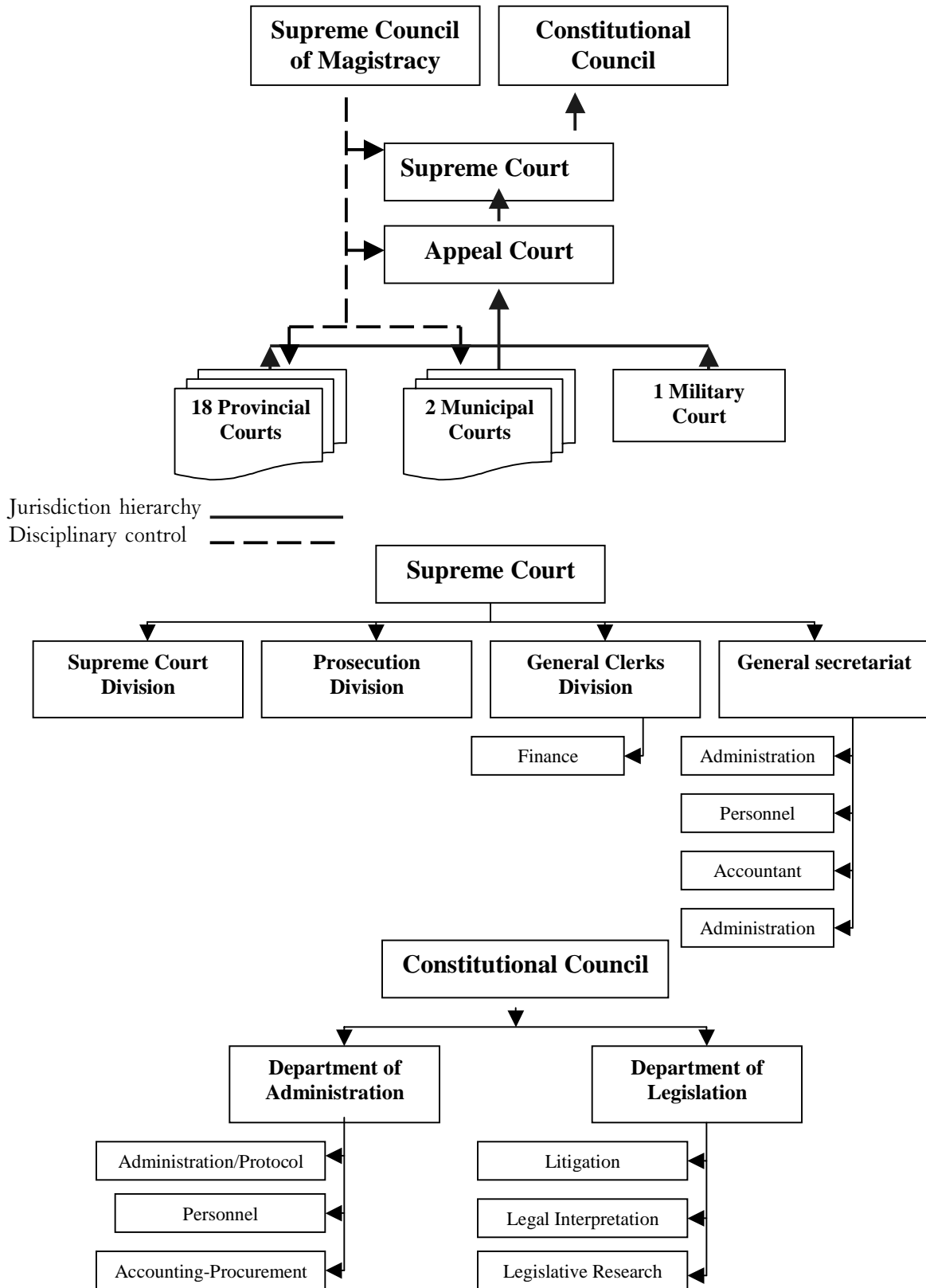
CRIMINAL

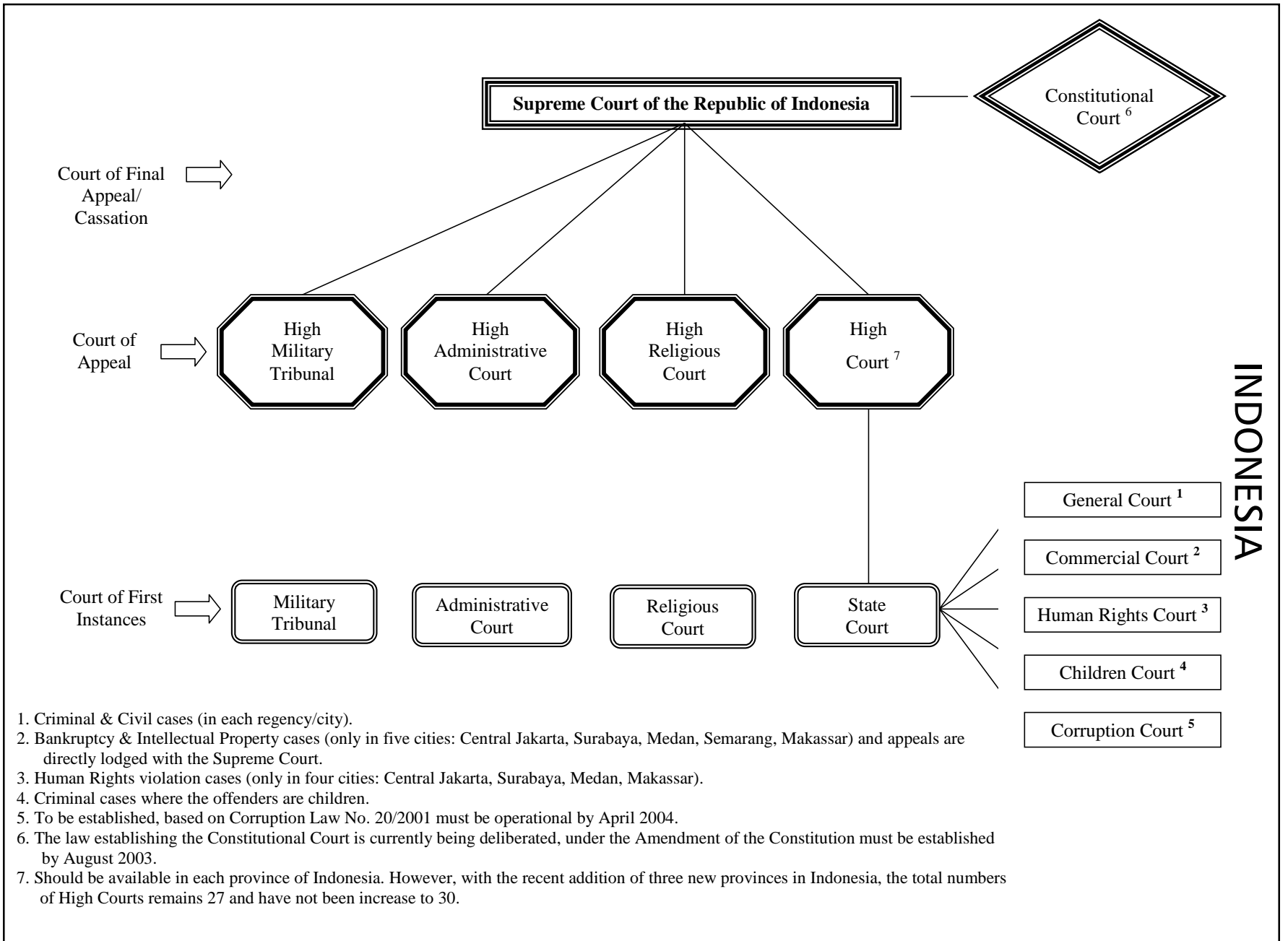
- Special Tribunal
- Speedy Trial Court

- Women and Children Suppression of Oppression Tribunal
- ETC

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

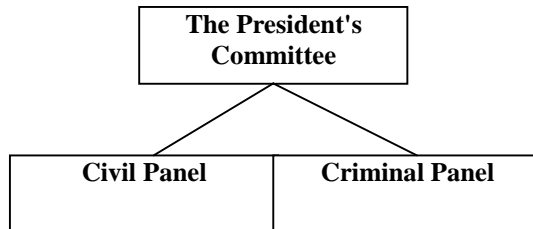
CAMBODIA



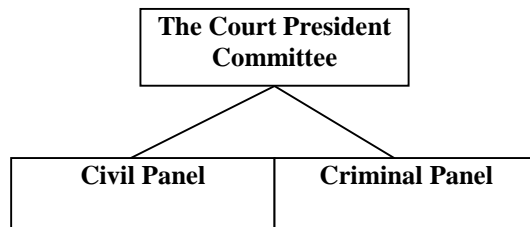


LAO PDR

The Supreme Court



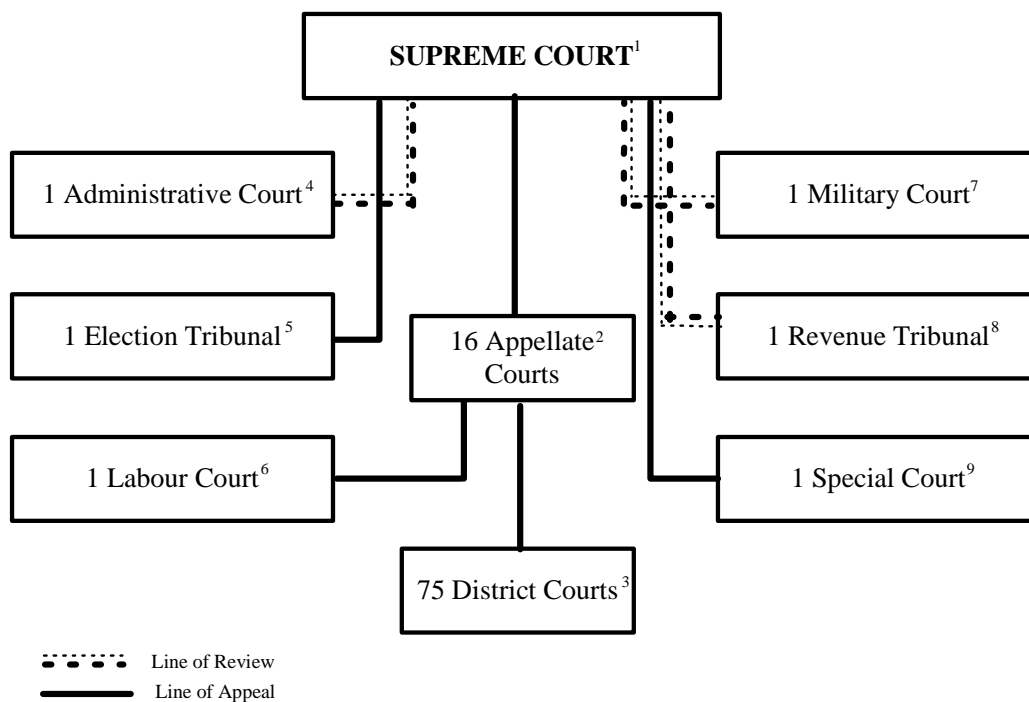
Provincial, Prefecture and Special Zone Courts



The District Courts

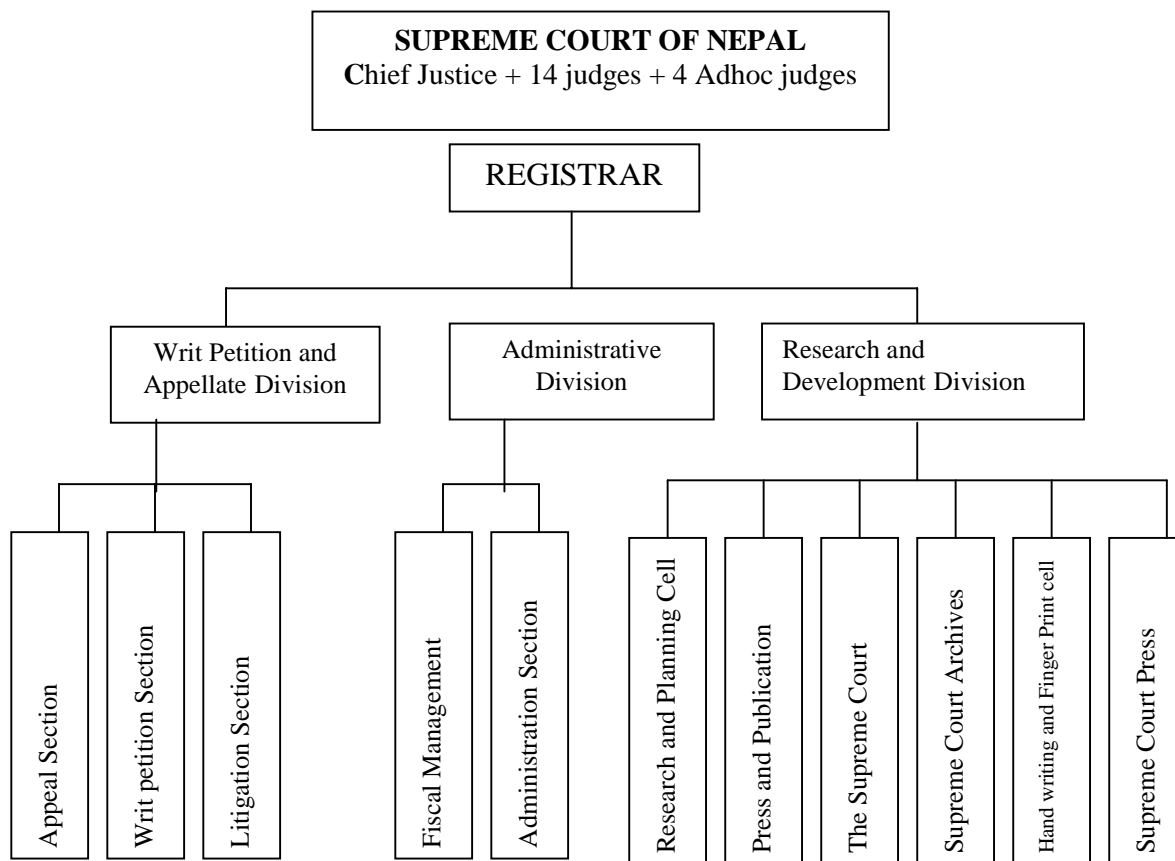
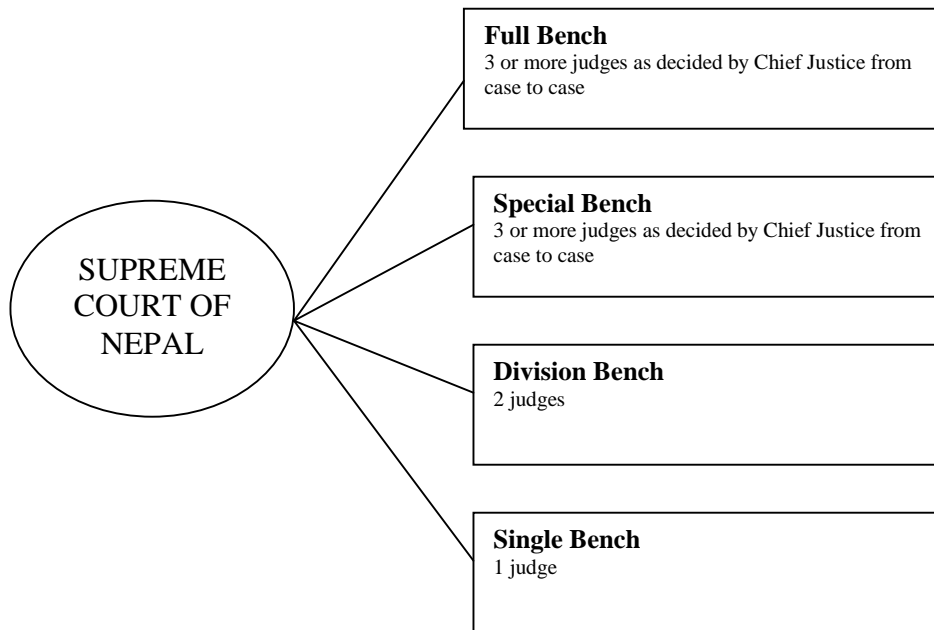
Civil case not exceeding 500, 000 Kip and other cases given by the law	Criminal case punished by sentences not exceeding 2 years imprisonment
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NEPAL

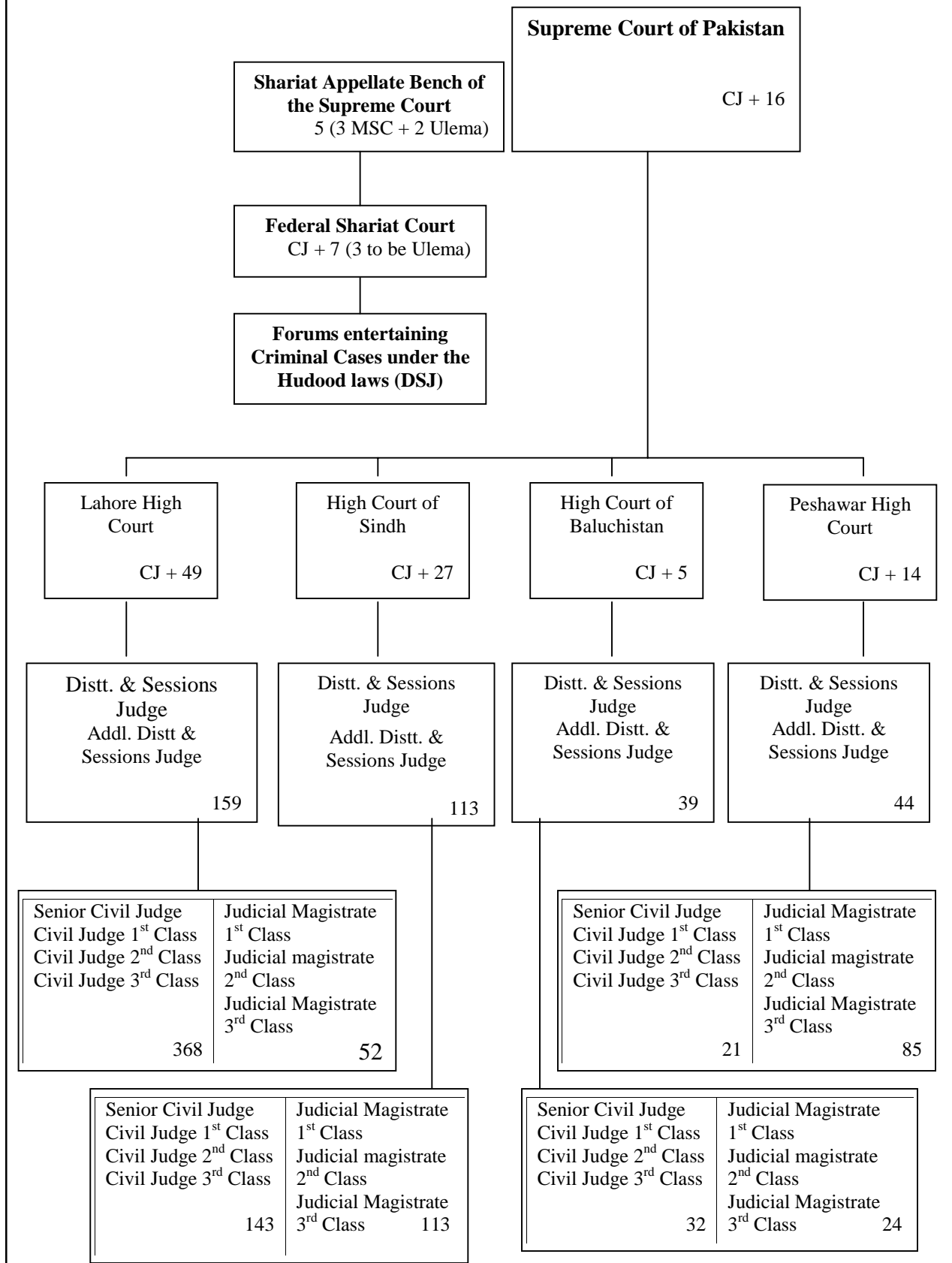


- (1) Contempt of Court cases, Enforcement of Fundamental Rights through writs, Advisory Jurisdiction on legal matters referred by the King, Judicial Review of Constitutional Amendments, Acts and Rules, final Civil and Criminal Appeals from Appellate Courts, Revision of final decision by Appellate Courts,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

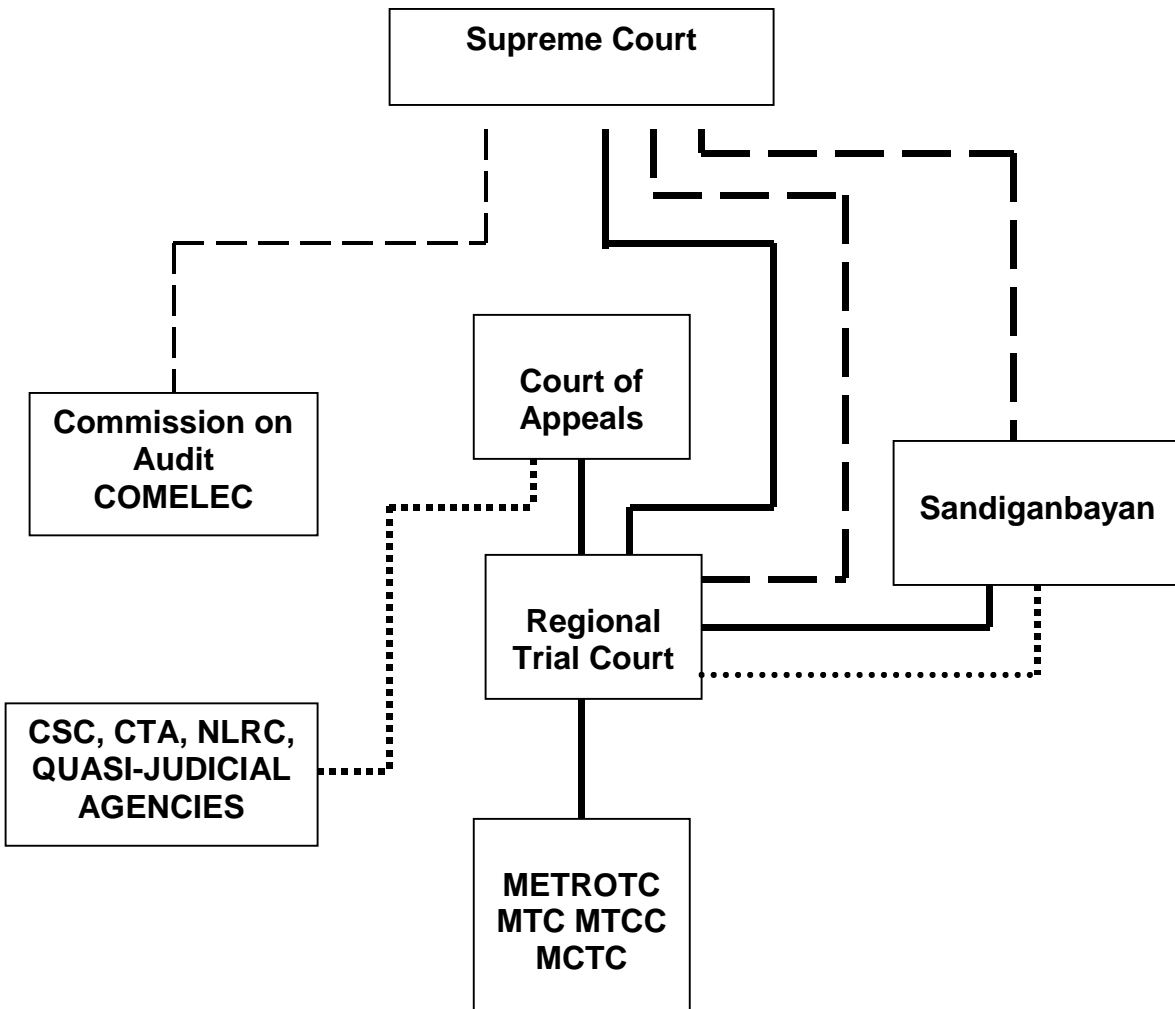
Organizational Structure of Supreme Court of Nepal



PAKISTAN



PHILIPPINES

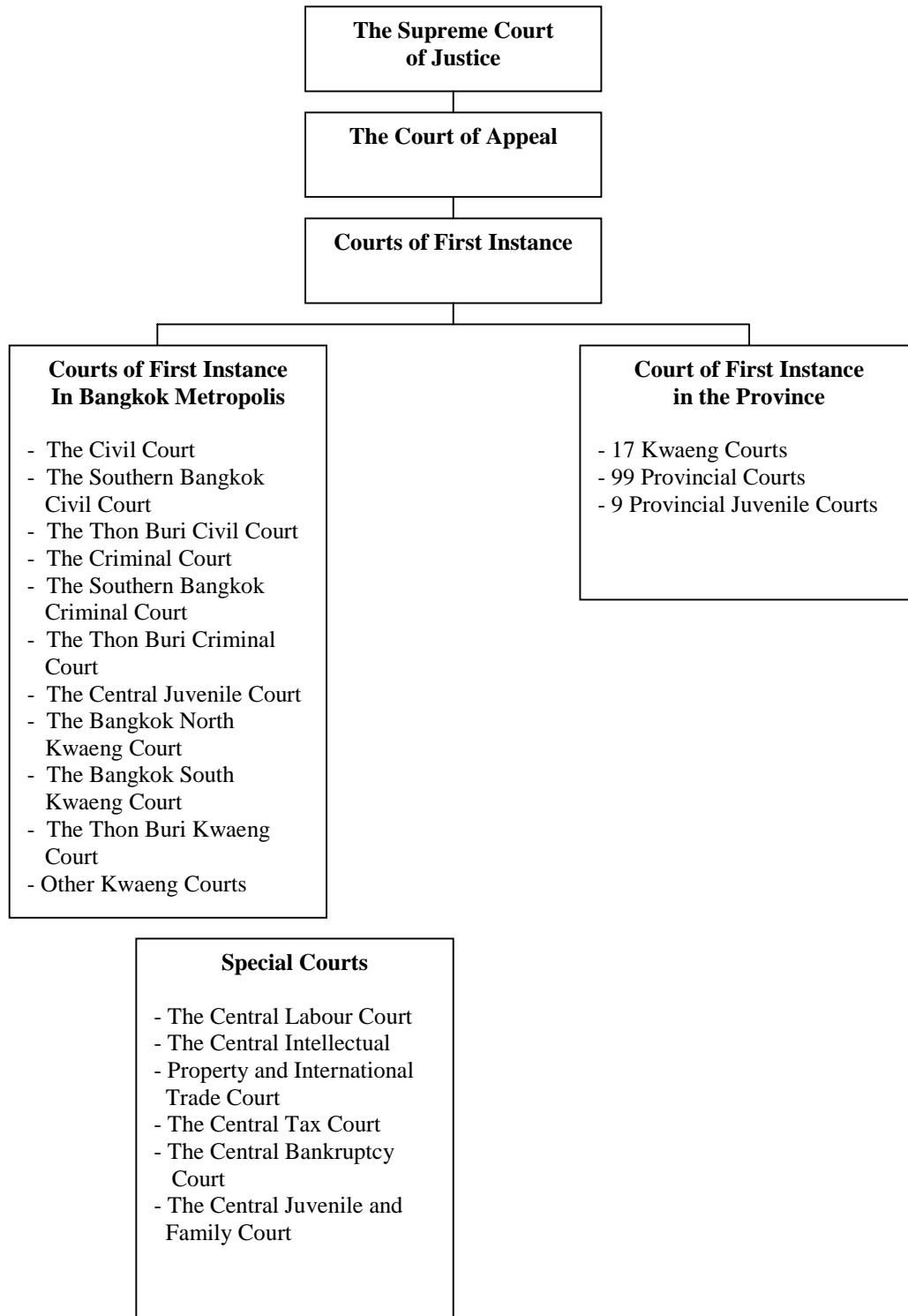


COMELEC = Commission on Elections; CSC = Civil Service Commission; CTA = Court of Tax Appeals; MCTC = Municipal Circuit Trial Court; METROTC = Metropolitan Trial Court; MTC = Municipal Trial Court; MTCC = Municipal Trial Court in Cities; NLRC: Nat'l Labor Relations Commission.

Legend:

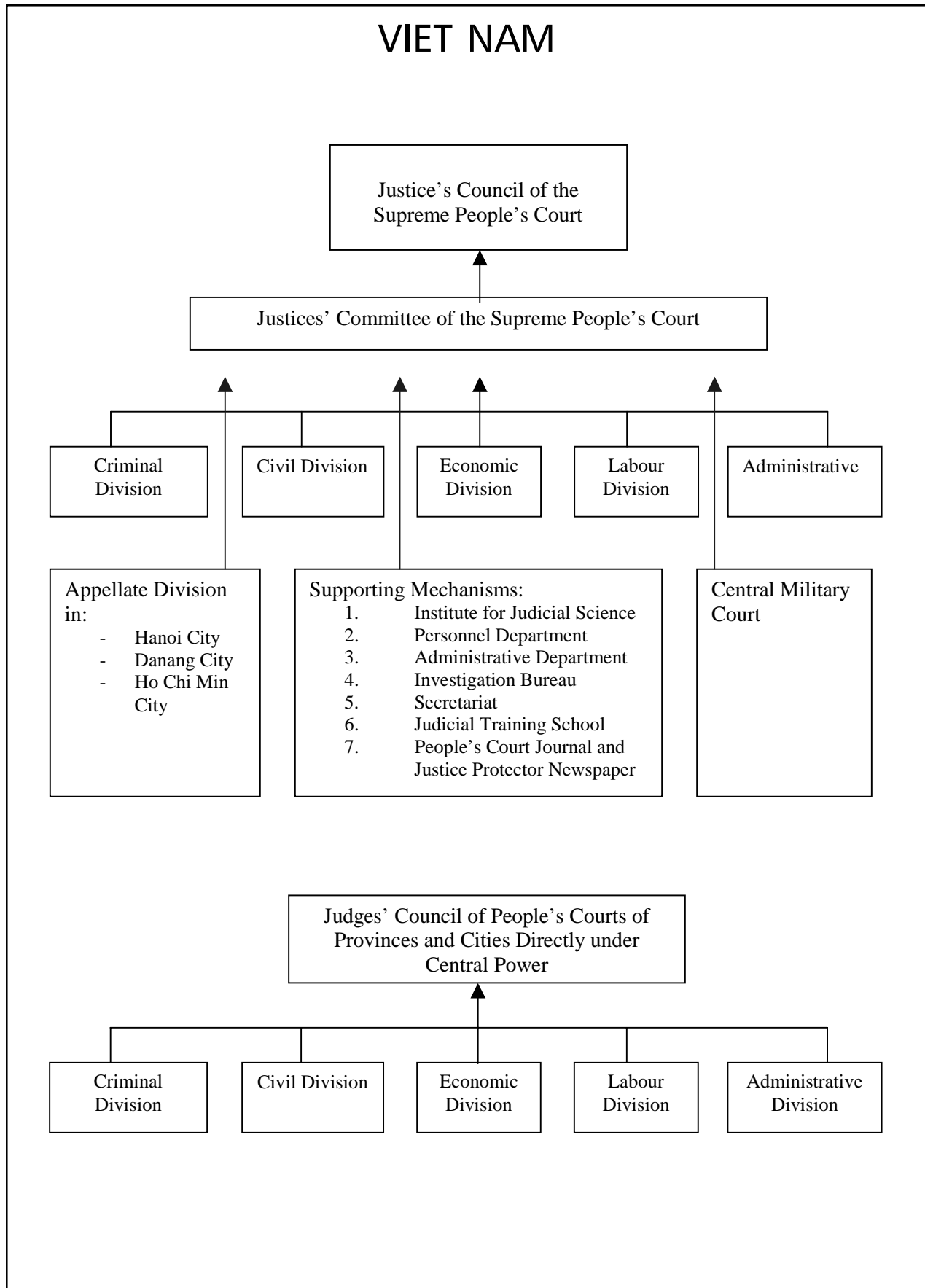
- - - - - Petition for *certiorari* (Rule 65)
- Petition for Review
- - - - - Petition for review on *certiorari* (Rules 45, 122)
- Ordinary appeal (Rules 40, 41, 122); N.B. From the RTC to SC, when *reclusion perpetua* or life imprisonment is imposed for automatic review of death penalty.

THAILAND



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

VIET NAM



External and Internal Pressures by Institutions and Individuals on Judicial Independence

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

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

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