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## **Judicial independence in transitional countries**

**Luu Tien Dung, January 2003**



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## Executive Summary



**This comparative analysis will focus on the similarities of countries in transition with special examination of Viet Nam as a case study. The study examines transitional countries in which there are far-reaching changes in the nature of the judiciary - change in the political and economic regime (Soviet Union/ Eastern Europe), change in building up new democracies (in Latin America, Africa, Indonesia), and change in the structure of the economy (China/Viet Nam). The role of an independent judiciary has been recognized as a key tool for the rule of law, human rights protection and economic reforms.**

Judicial independence is guaranteed by the Constitution in almost all transitional countries. The judiciary becomes more active in the preparation of the judicial budget, but it still lacks adequate funds for proper performance. There is also a lack of adequate respect and support from other branches and, in some transitional countries, a lack of public confidence in the judiciary.

Judges in many transitional countries now enjoy life tenure or a relatively long term of office and have gained a higher status. They may also enjoy a higher salary, although generally judicial remuneration is not adequate. Because of this, courts are not able to hire well-qualified lawyers. More dangerously, there is widespread judicial corruption in many transitional countries.

Nomination and appointment procedures are also of importance since professionally qualified judges are less likely to be unduly influenced. In addition, a transparent and participatory appointment procedure can help judges to be independent from those who nominate and appoint them. There is a trend in a number of transitional countries towards judicial appointment becoming more merit-based and transparent.

Judicial independence needs to go hand in hand with judicial accountability. Judicial accountability would help the judiciary in establishing public confidence in the court system. This accountability is also needed to fight judicial corruption and to enhance the quality of the judicial services. Judicial independence and accountability should be balanced.

The Constitution of Viet Nam guarantees that judges are independent when adjudicating cases. The judiciary has become more independent from the executive since it took over the management of the local courts from the executive in October 2002. It has gained more jurisdiction and authority. However, it holds multidimensional accountabilities: to the party leadership, to the bodies elected by the

people and to the litigants of cases. This strong judicial bureaucracy can undermine internal independence, especially when judicial 'bosses' control the promotion and appointment of judges who have to seek reappointment every five years. Separate judicial salary scales are provided but judges still have relatively low status and receive inadequate remuneration. Judicial appointment is carried out by selection committees comprised of both judicial and non-judicial representatives, but the process needs to be more open and transparent. The past and ongoing donor assistance, initiated by UNDP in 1995, has had an effect on some recent positive changes. New political will concerning judicial reform indicates a promising future towards the enhancement of judicial independence and performance, and has created a momentum for a new chapter of donor intervention.

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## Introduction

### Countries in Transition

**In the international literature on economics and political science, the expression 'countries in transition' is used somewhat broadly. Initially, economists used the expression to refer to the changes that began to take place in the countries that are successors to the former Soviet Union after the fall of Communism.**

Bosnia, Serbia-Montenegro, Macedonia, following the cessation of civil war in different degrees, are generally regarded as transitional countries. South Africa is also described as a country in transition as there was a change in the nature of the regime in 1994 and a new Constitution has been adopted following the end of apartheid. In Latin America, Peru today could be regarded as a country in transition, as were several other countries following the fall of dictatorships and the restoration of democracy. However, even though Brazil has elected a socialist President, signifying a major change in public opinion, it is not described as being in transition because this change in regime followed normal democratic elections and was not the consequence of any upheaval in the country.

Generally speaking, the expression 'transition' is used, mainly by political scientists, in the context of changes that have followed the fall of regimes, usually when dictatorial regimes have given way to more democratic ones, but this usage has been extended to contexts where previously rigid structures, such as those governing the economy, are giving way to more liberal, market-friendly structures and associated features of liberal democracy.

Those countries that have established new governments following the end of armed conflict or civil wars are also described as countries in transition. Angola, Burundi and the Democratic Republic of the Congo are among the African countries that are described as being in transition. Likewise in Asia, Afghanistan, East Timor and Indonesia are placed in this category even though the causes that have led to systemic changes in the nature of governance in each of these countries are very different. In the case of Afghanistan, the Taliban regime and its institutions have been dismantled and new structures are to be put in place. East Timor emerged as the youngest member state of the United Nations, following a UN-managed referendum and a UN transitional administration.

Indonesia is described as being in transition because it witnessed the end of 32 years of authoritarian government under President Suharto, and the 1999 elections, generally regarded as reasonably free and fair, elected a new parliament and a new government to office. The

popular revolt of students and others against President Suharto was, in its turn, triggered by the economic crisis and the adverse consequences of lack of transparency in governance. South Korea, Malaysia and Thailand were also affected by the Asian economic crisis but they are not generally placed in the category of countries in transition.

China and Viet Nam are often described as countries in transition because of the shift in their economic policies towards more market-friendly and liberal economic regimes. Even though there has been no major change in the political arrangements in these countries in which the paramount position of the Communist Party remains intact, there are far-reaching changes occurring in the economy and society of those countries that warrant the description of these countries as being in transition.

It must be clearly understood that in the context of changes that are occurring in several countries with reference to the independence of the judiciary, the primary focus of this study is by and large on changes which are far-reaching and significant enough to bring about fundamental changes in the nature and characteristics of regimes in those countries. To that extent, and because the changes that are occurring have extensive consequences, the countries that are making those changes are regarded as being in transition. However, there is political dynamism and change in all countries in the world, and as such, all countries are in some form of transition. Nevertheless, for the purposes of this study, we examine those transitional countries in which there are far-reaching changes in the nature of the judiciary occasioned by both a change in the nature of the regime, as in the case of the Soviet Union and Eastern European countries, or a change in the structure of the economy, as in the case of China and Viet Nam.

The role of the judiciary is increasingly significant and recognized as a key tool for building the rule of law, human rights protection and economic reform. During the 1990s great efforts have been undertaken by countries in transition regarding the role of judicial reform in the enhancement of their independence. The donor community has spent significant resources to support reforms in this sector and it is widely recognized that the judiciaries in transitional countries have become more independent. However, much more needs to be done.

This paper will analyze some internationally recognized key elements of the independence of the judiciary, especially the Basic Principles on the Independence of the Judiciary endorsed by the

General Assembly of the United Nations in 1985, with a comparative look at practical experience from some transitional countries carried out during the last decade in the field of the promotion of the independence of the judiciary. The paper will focus on the similarities of the countries in adopting international standards of the independence of the judiciary and the similarities of the remaining issues with some lessons learnt and recommendations for further promotion of judicial independence. The case of Viet Nam, the country of this Fellow, will also be analyzed.

## Judicial Independence

### A Look at Transitional Countries from an International Standards Perspective

**It is widely recognized that in pre-transition regimes, the judiciary was subject to multiple pressures. In former Soviet republics, including East European former socialist countries, the judiciary did not enjoy independence from other branches of government. The judiciary was perceived to protect the interests of the ruling power. Judges were dependent on judicial, executive and party bosses.**

The pre-transition legacy

- The judiciary in pre-transition regimes was 'dependent' or 'compromised' rather than independent
- It failed to protect the rule of law and human rights.

'Telephone law' was part of the 'legal framework' of these countries, whereby the party and government leaders would habitually contact the judges to direct the outcome of a case. Judges, like others in official positions, had to be party members and they could not ignore the advice/instruction dictated by the party line. Judges were appointed for fixed terms, usually for five years, and the office could be terminated at any time. How long judges were kept in office, and whether their terms were extended, depended on how well they executed their decisions in the light of given instructions. The judicial budget was a part of the government budget, and all benefits for judges, ranging from the houses/apartments to tuition fees for their children, were subsidized by the executive. The judiciary was not perceived as an independent and impartial body accessible by the public to seek justice and protect their legitimate rights. Instead, the people used the courts only when they had no alternative. All these factors have set a foundation for the *dependence of the judiciary* in many transitional countries.

During the period of dictatorship and brutal repression that took place in South Africa and many Latin American countries, such as Argentina, Chile, El Salvador, Honduras, Haiti, Guatemala, and in Indonesia, the judiciary in those regions was seen as a body that had to compromise with the regimes run by the powerful dictators in order to co-survive peacefully. The judiciary failed to be the guardian of the Constitution and a protector of human rights. The judiciary was a subsidiary branch or under control of the dominating executive power. The status and salaries of judges were very low. Their tenures were not secured. Little attention was paid to education and training of judges. The qualifications for judicial officials were low. In many countries, judicial corruption was not unusual. Due to the bad image



of the courts the public had lost confidence in the rule of law and justice.

The judiciary in the pre-transition phase failed to protect the rule of law and human rights, which have widely been recognized as essential in any democratic society. Wherever the rule of law does not prevail and human rights are undermined or violated, sooner or later the people will stand up to fight for exactly what they desire as human beings, and as a result the authoritarian and dictatorial regime must give way to a more democratic one.

#### *Judicial independence and the rule of law*

In almost all transitional countries, the concept of the rule of law has been reflected either in their constitutions or statutes. There are two aspects of the rule of law that are important: First, the law should govern the people and the people should obey the law, and second, the law must be capable of being obeyed (good laws).<sup>(1)</sup> This made the rule of law different from 'rule by law', which was the case in South Africa under the apartheid regime and in Afghanistan under Taliban authority, where the people were ruled by 'bad' laws. In order to maintain the rule of law, an institution, independent from the legislative or executive or other forces, impartial and free from interference or influence is required. A competent and independent judiciary can make a bad law become a good law, while an incompetent and dependent judiciary can make a good law become a bad one. The redefinition of the role and status of the judiciary starts from here.

#### *Judicial independence and human rights protection*

The lessons learned from the 'bad practices' dealing with human rights violations in some countries pre-transition allow existing rulers to draw upon internationally recognized fundamental human rights and the instruments for the protection of those rights. Globalization requires recognition and compliance with international standards, including the instruments for the protection of human rights. More than ever, there is now an increased demand for human rights realization and democracy in transitional countries.

The Charter of the United Nations<sup>(2)</sup> clearly declares the determination "to establish conditions under which justice and respect for the obligation arising from treaties and other sources of international law can be maintained" (Article 1 (3)) and the aim to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 55 (c)). Although the independence of the judiciary was not mentioned in the Charter, the overall

(1) Raz, «The Rule of Law and Its Virtue» in «Liberty and the Rule of Law» (Cunningham ed.), A&M Press: Texas, 1979. See more on the elements of the rule of law at Walker, «The Rule of Law: Foundation of Constitutional Democracy», Melbourne University Press, 1988 at 21; and Mason Hills, «The Rule of Law and Democracy in Hong Kong – Comparative analysis of British Liberalism and Chinese Socialism», at <http://www.murdoch.edu.au/elaw/v1n2/mhills.txt> Basically, the rule of law requires that (i) laws should prohibit and protect against private violence and coercion, general lawlessness and anarchy; (ii) both government and individuals must be bound by the same laws; (iii) laws must be certain, equal, clear and stable; (iv) laws must be in light of informed public opinion and general social values; (v) existence of institutions and procedures capable to speedily enforce the law; (vi) existence of independent judiciary; (vii) judicial review of administration acts and actions; (viii) existence of independent legal profession; (ix) natural justice (procedural fairness); (x) easy access to court with reasonable cost; (xi) enforcement of the law must be impartial and honest; and (xii) existence of enlightened public opinion—a public spirit or attitude favouring the application of the rule of law. See the material of the XXth Annual Conference of the Canadian Prosecution Service «The Prosecution Function in the XXIst Century, available on line at (<http://www.odpp.nsw.gov.au/Speeches/Canadian%20Conference%202000.htm>)

(2) The full text of the Charter is available on line at <http://www.un.org/aboutun/charter/>

(3) See Report of the Special Rapporteur on independence of judges and lawyers, E/CN.4/1995/39 February 1995, available on line at <http://www1.umn.edu/humanrts/commission/thematic51/39.htm>

(4) See full text of the Declaration at <http://www.un.org/Overview/rights.html>

(5) See more on the role of the judiciary for human rights protections at «The Role of the Judiciary in the Protection of Human Rights,» edited by Eugene Cotran and Adel Omar Sherif, Kluwer Law International, 1997.

(6) See full text of the Covenant at <http://www.tufts.edu/departments/fletcher/multi/texts/BH498.txt>

(7) These principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See full text of the Principles at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)

(8) See full text of the Standards at <http://www.ibanet.org/pdf/HRIMinimumStandards.pdf>

conception of 'justice' embodied in the Charter and in the works of the United Nations incorporates respect for human rights and is conditional upon judicial independence and impartiality as such.<sup>(3)</sup>

The 1948 Universal Declaration of Human Rights<sup>(4)</sup> clearly provides for an independent judiciary in Article 10, which reads; "Everyone is entitled in full equality to a fair and public hearing by an *independent and impartial tribunal*, in the determination of his rights and obligations and of any criminal charge against him." A number of other articles in the Declaration also emphasize, directly or indirectly, the importance of judicial independence in human rights protection by declaring the principle of equality before the law and equal protection of the law (Art. 7), the right to an effective remedy (Art. 8) and the principle of presumption of innocence (Art. 11). Ultimately, these very fundamental rights must be secured by an independent judiciary.<sup>(5)</sup>

This duty is also found in Article 14 of the International Covenant on Civil and Political Rights<sup>(6)</sup>, which explicitly states that "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a *competent, independent and impartial tribunal* established by law."

Having acknowledged the importance of judicial independence, most transitional countries started to pay attention to enhancing judicial independence from the initial stage of building a new democracy and the rule of law. Where can they look to build an independent judiciary? What is judicial independence? What are the essentials for the independence of the judiciary and how to guarantee its independence?

### International documents on judicial independence

The key international documents on judicial independence are as follow:

- The United Nations Basic Principles on the Independence of the Judiciary<sup>(7)</sup> (hereafter called Basic Principles), endorsed by General Assembly in 1985;
- The Syracuse Draft Principle on Independence of the Judiciary which was prepared by a Committee of Jurists and the International Commission of Jurists at Syracuse, Sicily on 25<sup>th</sup> – 29<sup>th</sup> May, 1981 (hereafter called the Syracuse Principles);
- The International Bar Association Minimum Standards of Judicial Independence (1982)<sup>(8)</sup> (hereafter called IBA Standards);

(9) Singhvi Declaration, 25 *CJIL Bulletin* (Special Issue on Judicial Independence) (Geneva: Center for Independence of Judges and Lawyers, 1989)

(10) See full text of the Charter at <http://www.iaj-uim.org/ENG/07.html>

(11) See full text of the Statements at <http://www.law.murdoch.edu.au/icjwa/beijst.htm>

- Montreal Universal Declaration on the Independence of Justice (1983);
- Singhvi Draft Universal Declaration of Justice (1989)<sup>(9)</sup> (hereafter called Singhvi's Draft);
- The Universal Charter of the Judge by the International Association of Judges (1999)<sup>(10)</sup> (hereafter called Charter of the Judge);
- Beijing Statements of the independence of the judiciary (1995)<sup>(11)</sup> (hereafter called Beijing Statements).

The following section will focus on the essential elements of judicial independence which are internationally recognized, and are as follows: (i) Institutional and financial arrangements for the judicial autonomy, and (ii) Personal guarantees, including security of tenure, adequate remuneration, judicial appointment, and judicial accountability.

### 2.1 Institutional arrangements for the judicial autonomy

*"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*

*2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, direct or indirect, from any quarter or for any reasons.*

*3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."<sup>(12)</sup>*

(12) Basic Principles, 2, *supra* note 7

### Independence and Impartiality

This principle is considered as a cornerstone definition of judicial independence. Judges must be impartial and independent and free in determining the facts and applying the laws to the facts independently without being influenced by any source. There are two aspects of judicial independence: external and internal. External independence of the judiciary implies that the judiciary must be independent of any outside institutions, including legislative, executive, political parties, other legal professions, press, civil societies, litigants, or any other "forces outside of the judiciary itself that can encroach on the autonomy of the judiciary collectively or of the individual judge."<sup>(13)</sup> Internal independence means that judges must be independent of colleagues,<sup>(14)</sup> including their horizontal and vertical bosses, and even of their own personal desires. Judges may share the facts of the cases and discuss specific relevant legal issues

(13) Petter H., Russell, and David M., O'Brien (eds.), «Judicial Independence in The Age of Democracy,» University Press of Virginia, 2001, at 11.

(14) Bangalore Principles of Judicial Conduct 2002

with colleagues, including senior judges, but this consultation process must be regarded as advisory and never as authoritarian instruction.

(15) Basic principles (2) and IBA Minimum Standards on Judicial Independence (1(c))

Impartiality requires that in the discharge of his judicial duty a judge is answerable to the law and his conscience only.<sup>(15)</sup> A judge has a duty to impartially assess the facts of the case before him and apply the relevant law without any improper influence from any source. Dr. L.M. Singhvi in his report to the UN has defined the impartiality as “a freedom from bias, prejudice and partisanship, and it means not favouring one more than another, it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do right.”<sup>(16)</sup>

(16) Report of Special Rapporteur on independence of judges and lawyers, E/CN.4/Sub.2/1995/18/Add.1.1

The concept of impartiality is distinct from but interrelated with the concept of independence. The concept of independence relates to the duty of outsiders not to interfere with the judges, while the concept of impartiality is the internal duty of the judiciary not to be influenced by any source. The impartiality must be maintained during the whole process of the adjudication. It should not be limited only to the decision of the judge, since an impartial outcome would hardly be achieved without an impartial process of adjudication. A judge has to make sure that his or her conduct is perceived by the litigants of the case and any others as impartial. He or she must avoid any circumstance that would lead to the undermining of his/her impartiality or would make the public perceive that he or she might not be impartial. The Bangalore Principles have listed a number of situations when a judge should withdraw from the case to protect the impartiality requirement, such as (i) when he or she has actual bias or prejudice concerning a party or personal knowledge of disputes on evidential facts concerning the proceedings; (ii) when he or she previously served as a lawyer or was a material witness in the matter in controversy; (iii) when he or she or a member of his or her family has an economic interest in the outcome of the case.<sup>(17)</sup>

(17) Bangalore Principles, 2.5, *supra* note 14

### **Legal authority: Judicial terrain should be immune from trespass by other agents.**

The next essential element for the autonomy of the judiciary is the exclusive legal authority of the judiciary. This comprises three components: (i) the judiciary should be authorized to deal with all matters of a judicial nature; (ii) the judiciary should have the exclusive authority to decide whether a matter submitted to it is under its jurisdiction; (iii) the final decisions of the judiciary are not subject to revision of any other institutions or powers.

(18) In some jurisdictions, the concept of separation of powers is not directly stated in the Constitution. For examples, the Norwegian Constitution just determines that judges shall act independently in deciding each individual case, and that neither the executive nor any other authority can instruct the courts as to how they should decide specific cases. Decisions made by the Supreme Court cannot be reviewed by any other authority. Although nothing about the independence of the judiciary can be found in any provision of the Constitution, no one doubts that the principle of judicial independence is secured in that country. NOU 1999:19 *Domstolene I samfunnet*, 399-400

(19) See the Constitutions of Russia (on line at <http://www.supcourt.ru/EN/rc.htm>), Art. 6 of the Belarus Constitution (on line at <http://www.president.gov.by/eng/map/const.shtml>), Lithuania (on line at <http://www.lrkt.lt/>), Moldova (on line at <http://www.ccrm.rol.md/>), Art. 2 (1) of the Czech Constitution (on line at <http://www.concourt.cz/>), Slovenia (on line at <http://www.sigov.si/us/eus-ds.html>), Georgia (on line at <http://www.constcourt.gov.ge/>), South Africa, and many others. Globally speaking, by 1996, 74 percent of countries had either full or qualified provisions for separation of powers. See Linda Camp Keith, *Judicial Independence and Human Rights Protection around the World*, at 198, *Judicature*, Volume 85, Number 4 January-February 2002

(20) It is easy to find a common clause in any constitution of new democracies: The Constitution of the Republic of South Africa, section 165 (1); The Constitution of the Federation of Russia, section 118 (1); The Constitution of the Czech Republic, section 81; The Constitution of Belarus, section 110; The Constitution of the Republic of South Africa in section 165(5) even requires other branches to «assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.»

These core principles of independence, impartiality and legal authority of the judiciary have been taken into account in transitional countries when they rewrite their constitutions or statutes. The Basic Principles and other international documents on judicial independence do not require that the concept of separation of powers be recognized as a pre-requisite for the independence of the judiciary. Prior to 1994, South Africa also adopted the Montesquieu idea of separation of powers but the rule of law did not prevail and the judiciary failed to be independent.<sup>(18)</sup>

Many transitional countries have adopted the principle of separation of powers in the Constitution as a constitutional guarantee of the independence of the judiciary.<sup>(19)</sup> In some others, such as China and Viet Nam, the separation of powers is not recognized, but the concept of separation (or division) of functions is admitted. This shows that in transitional countries, regardless of whether the concept of separation of powers is recognized or not, the judiciary is clearly stated in the Constitution as an important power along with legislative and executive powers. The basic principles regarding the judiciary, such as the independence of the judiciary (or of the judges), the impartiality, jurisdictions of the judiciary and the exclusive authority of the judiciary are generally stated in the constitution of the transitional countries. The common reading is that the judiciary in those countries is constitutionally recognized as a separate and independent body with the exclusive mandate to handle judicial matters according to law.<sup>(20)</sup>

The most significant changes in institutional arrangements for judicial independence in many transitional countries are as follows:

- The incorporation of basic principles of judicial autonomy into the local constitutions or legislations of the transitional countries have been made. The judiciary is no longer a tool to protect the power of the executive. This has made the judiciary seem more separate and independent from the other branches of powers and from political wings than before. Generally speaking, judges are now no longer bound to an affiliation with a specific political party.
- The legal authority of the judiciary has been expanded. In post Soviet Union and former Eastern European socialist countries the judiciary can now review the constitutionality of the legislative and executive legal normative acts and actions and *habeas corpus* petitions. The powerful jurisdiction of the former procuratorate in making an arrest or detention decision has been transferred to the judiciary.

(21) Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, E/CN.4/2001/65/Add.1 8 February 2001, at 14

(22) *Ibid.*, at 3

(23) As a result, the government withdrew this threat. Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, E/CN.4/2001/65/Add.3 8 Feb. 2001. See more about the threats to the judicial autonomy and judges at Dato' Param Cumaraswamy, *A Global View on The Independence of The Judiciary: Attack, Danger and Today's Status*, prepared for the Triennial Conference of Judges in Trondheim, Norway June 4-6, 1998. The author pointed out that in 49 countries identified, 572 cases on attacks on judges and lawyers have been noted between January and December 1996. Of these numbers, 26 were killed, 97 prosecuted, arrested, detained or even tortured, two disappeared, 32 physically attacked, 97 verbally threatened and 324 professionally obstructed and/or sanctioned. Eighty-six of them wished to remain anonymous.

(24) Larkins C., «Judicial Independence and Democratization: A Theoretical and Conceptual Analysis» (1996) 44

(25) This information was obtained during the author's visit to the Supreme Court of Russia and the Supreme Court of Hungary in April 2002. Also see Peter H. Solomon, Jr., *Courts in Russia, Independence, Power, and Accountability*, a paper delivered at the 9<sup>th</sup> Annual Conference on the Individuals vs. the State in Budapest, May 3-5, 2001, at 14; available on line at <http://www.ceu.hu/legal/Solomon.htm>

(26) Magistrates in South African District Courts are not perceived to be independent because of their past status under apartheid rule. See Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, E/CN.4/2001/65/Add.2 25 January 2001

Despite significant institutional changes towards enhancing the judicial autonomy, the judiciary in transitional countries still lacks status and the respect of other branches. Its legitimacy is weak and its financial resources are inadequate. It is widely recognized that the status of the judges in transitional countries has been improved, but not as much as expected. This is due to the historically low status of judges in most of the transitional countries.

### *Lack of adequate respect*

The judiciaries in some transitional countries still do not enjoy adequate respect from other branches. For example, the principle of judicial independence in Belarus is systematically undermined by the government. The President of Belarus is reported to have stated in 1996 that: "Under the Constitution, the judiciary is in essence part of the Presidency. Yes, the courts are declared to be independent, but it is the President who appoints and dismisses judges. Thanks to that, it is easier for the President to pursue his policies through the judiciary."<sup>(21)</sup> The recent removal of a Belarusian Justice, Mr. Pastukhov, without appropriate procedure is a clear violation of the duty to respect the independence of the judiciary.<sup>(22)</sup> The attempt by the Government of the Slovak Republic in 2000 to remove the Chief Justice of the Supreme Court, Dr. Harabin, from his office without adequate procedure called for the visit of the UN Special Rapporteur to the site for intervention.<sup>(23)</sup>

### *Lack of adequate legitimacy*

The next problem many judiciaries in transitional countries face is lack of adequate legitimacy. The judiciary must be perceived by the public as the appropriate body to determine what is right or wrong.<sup>(24)</sup> 'Appropriate' in this sense refers to the independence and the impartiality of the judiciary. Without doubt, the courts in the transitional countries have improved their legitimacy during recent years, having reformed the judiciary and improved their performance. In many transitional countries, such as Russia and Hungary, the number of cases brought before the courts during recent years has significantly increased.<sup>(25)</sup> To some extent this speaks of increased public confidence in the judiciary although it still falls short of what is desirable. There are a number of reasons why judges in the transitional countries are not perceived as independent or sufficiently impartial. Historically, judges used to have dependent status under the old regimes (the cases of Russia and former Soviet countries and of South Africa).<sup>(26)</sup> Secondly, current inadequate conditions of the judiciary have forced courts to rely upon subsidies

(27) Many courts in Russia and other post Soviet countries still have to rely on the subsidies of the local governments, therefore they are perceived dependent upon them. See Peter H. Solomon, Jr., *supra* note 25.

(28) See more about the causes and consequences of judicial corruption at Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Causes and Consequences*, available on line at (<http://www.undcat.org/pdf/crime/gpacpublications/cicp14.pdf> )

(29) No one can say that the Indonesian judiciary is perceived by the public as an independent and impartial judicial body when most of the judicial officials are believed to be corrupt. See more about the judicial corruption in Indonesia at: Indonesia Corruption Watch, *Lifting the Lid on the Justice «Mafia»- Research into Patterns of Corruption within the Justice Sector»* June 2002 (Mimeo). The Mexican courts fail to gain public confidence because of the fact that about 50-70 percent of the judges are taking bribes. See Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, E/CN.4/2002/72/Add/1 24 January 2002.

(30) See Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 *Am. J. Comp. L.* 793, at 797-99 (1997); and at Jerome A. Cohen, *Free Journalists: The Key to Law Reform in China*, A Talk by Jerome Cohen hosted by the Journalism and Media Studies Center, The University of Hong Kong November 13, 2001 (<http://jmsc.hku.hk/documents/Cohen/cohentranscript.doc>)

(31) Jerome A. Cohen, *Free Journalists: The Key to Law Reform in China*. *Ibid*

(32) In a view put forward by the Center for the Independence of Judges and Lawyers, part of the judgment of Malaysian courts is «more partisan than judicial». See Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, E/CN.4/2001/65 1 February 2001, at 33.

(33) Basic Principles, 7, *supra* note 7.

from local governments.<sup>(27)</sup> Third, widespread judicial corruption in many transitional and developing countries<sup>(28)</sup> has led to a decrease of public confidence in the judiciary.<sup>(29)</sup> The independent status accorded to a judge carries the assumption that the judge is impartial. Without the impartiality, judicial independence would be a disaster for the parties involved in the case and destroy the rule of law.

Another reason for the lack of adequate legitimacy is that in some jurisdictions, such as China, judges need to refer difficult or sensitive cases to a party-controlled political-legal committee<sup>(30)</sup> for consideration. This has also created a perception that the judiciary is not really independent. Professor Jerome Cohen, one of the foremost experts on Chinese law in the United States, used the following example to illustrate lack of judicial independence in China. The Government of China, persuading the Canadian Government to hand over a criminal to China, promised that the death penalty would not be applied to the accused by the court.<sup>(31)</sup> In some other cases, such as in Malaysia, there can be a partisan bias to some court judgments.<sup>(32)</sup>

Institutional guarantees are crucial in establishing judicial autonomy. However, they alone do not work. A dictator can easily ignore written rules. There must be greater awareness by both political leaders and the public, of the significance of an independent judiciary. Both the governors and the governed must understand why they need an independent judiciary to protect their rights and interests, and that it will be mutually beneficial. Political commitments and respect are equally of crucial importance for judicial autonomy.

## 2.2 Financial arrangements for judicial autonomy

*“It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”<sup>(33)</sup>*

Adequate resources are needed by the judiciary for the *proper* performance of judicial tasks. Proper performance implies performance in an independent and impartial manner. Without adequate resources, a judiciary would not be able to function independently and impartially. This section will look at how judiciaries in transitional countries are involved in the process of preparation of, and decision-making on, the budget of the judiciary. As described below, significant steps have been undertaken in transitional countries to improve budget allocations for the judiciary.

It is recommended that the judiciary's budget should be estimated and decided upon by a competent authority in collaboration with the

(34) Article 25 of the Syracuse Draft Principles; Para 2.42 of the Universal Declaration on the Independence of Judges; Para 34 of the Singhvi Draft; Beijing Statements, 37, *supra* note 11.

(35) Nicholson R.D, *Judicial Independence and Accountability: Can they Co-exist*, 1993 Australia Law Journal, 404.

(36) Sir Nicolas Brown-Wilkinson, *Independence of the Judiciary in the 1980s*, 1988 Public Law, at 44.

judiciary.<sup>(34)</sup> Justice R.D. Nicholson of Austria has emphasized the importance of the role of the judiciary in the budget allocation for the judiciary by saying: “the preparation of judicial estimates by anyone not acting under the direction of the Judiciary and the exercise of control by the Government over the way in which the Courts expend the funds granted to them necessarily poses a potential threat to Judicial Independence.”<sup>(35)</sup>

There are several ways of preparing a budget for and by the judiciary. The first approach is to delegate to the judiciary the power to estimate and present its budget to the parliament. The rationale is that the judiciary is in a better position to estimate how much is needed for its proper performance, and that judicial control over its budget preserves its independence. In the United States of America, the Judicial Conference prepares a budget, which has to be transmitted to Congress without alteration by the executive branch, which may comment on estimation but may not amend it. Congress then fixes the total budget and the Judicial Conference is accountable directly to Congress for its expenditure.<sup>(36)</sup> In Japan, the judicial budget is prepared by the judiciary, then revised and submitted by the executive to the legislature; however, the judiciary is allowed to defend its proposal when discussing the matter in parliament.

The judiciary becomes more proactive in the preparation of the judicial budget. However, the lack of funds for the judiciary is a common problem for transitional countries

An approach that has widely been practised is that the executive branch, usually via the Ministry of Justice, is deeply involved in the preparation or clearance of the judicial budget. The executive deems that the judiciary is not capable of preparing a budget properly and that the executive is more familiar with issues relating to budget estimation and allocation. The issue of who should prepare the judicial budget depends on who administers the judiciary. For a long period, it was generally quite common that the responsibility for the administration of the courts fell to the executive branch via the Ministry of Justice, including allocation of financial resources and other facilities, recruitment of judicial staff, provision of training, etc. Court administration by the executive has raised concerns about possible undue control of, or influence on, the judicial activities of the courts. Since 1939, the Federal Courts of the United States have been administered by the Administrative Office of Courts under the Supreme Court.<sup>(37)</sup> Recently, a number of European countries have

(37) Information obtained during the author’s visit to this Office in 1997.



(38) Information obtained by the author's visit to the Supreme Courts of Denmark and Sweden in 1997.

(39) Study by the Norwegian Law Courts Commission in 1996 on the organization of the central courts administration, the appointment of judges, the new complain and disciplinary procedure for judges, the temporary judges, extra-judicial activities. Summary in English at NOU 1999: 19, *Domstolene I samfunnet*, at 396-418.

(40) Information obtained during the author's visit to the Supreme Courts of Russia and Hungary in April, 2002.

(41) See Sumanta Banerjee, *Judging the Judges*, Economic and Political Weekly, December 14, 2002.

(42) The Supreme Court of Viet Nam has resumed its function managing the local courts since October, 2002 after the control under the Ministry of Justice over the previous decade.

(43) Section 33 of the Federal Constitution Law on Judicial System of the Russian Federation, adopted on October 23, 1996, available at [www.supcourt.ru/EN/jsystem.htm](http://www.supcourt.ru/EN/jsystem.htm)

(44) The budget of the Hungarian Judiciary is prepared by the National Council of Justice, the composition of which is dominated by judges. Information based on the author's visit to the Supreme Court of Hungary in April, 2002.

(45) The judiciary budget in Bulgaria is prepared by the Supreme Judicial Council of Justice. See Edwin Rekosh, *Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia*, in «Guidance for Promoting Judicial Independence and Impartiality,» USAID, January 2002, at 65; at [www.ifes.org/rule\\_of\\_law/judicial\\_independence.pdf](http://www.ifes.org/rule_of_law/judicial_independence.pdf)

(46) Margaret Popkin, *Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective*, in «Guidance for Promoting Judicial Independence and Impartiality,» USAID, January 2002, at 121; [www.ifes.org/rule\\_of\\_law/judicialindependence.pdf](http://www.ifes.org/rule_of_law/judicialindependence.pdf)

(47) Jennifer Widner, *Judicial Independence in Common Law Africa, A Comparative Perspective*, «Guidance for Promoting Judicial Independence and Impartiality,» USAID, January 2002, at 48; [www.ifes.org/rule\\_of\\_law/judicial\\_independence.pdf](http://www.ifes.org/rule_of_law/judicial_independence.pdf)

(48) Guidance for promoting judicial independence and impartiality, at 26

(49) Margaret Popkin, *supra* note 46, at 121

carried out judicial reforms to address this concern. Denmark has shifted court administration from the Ministry of Justice to a more independent body. Swedish courts are administered by the National Courts Administration, which has a relatively independent status.<sup>(38)</sup> Norway has recently carried out an in-depth study on, *inter alia*, the organization of the courts, which resulted in the removal of the court administration function from the Ministry of Justice to a newly created Court Administration in order to secure the independence of the judiciary.<sup>(39)</sup> Russia has also removed this function from the Ministry of Justice to an independent department of court administration attached to the Supreme Court. Hungary has established an independent National Council of Justice to manage the courts.<sup>(40)</sup> The Supreme Court of India, through the process of judicial review, took over the administration of the judiciary from the executive.<sup>(41)</sup> China and Viet Nam have also revised their statutes to follow this trend.<sup>(42)</sup>

There are currently two main approaches in budget estimations in transitional countries. First, the executive prepares the budget in collaboration with the judiciary. In Russia and Ukraine the executive is responsible for the preparation of the judicial budget but it has to work closely with the judiciary. Any attempt to cut the allocated budget for the judiciary must have the consent of the All-Russian Congress of Judges or the Council of Judges of the Russian Federation.<sup>(43)</sup>

The second approach is that the judicial budget is prepared by the judiciary and submitted to the executive. The executive may then amend it before submitting it to parliament. This approach is followed by India, Hungary,<sup>(44)</sup> Bulgaria,<sup>(45)</sup> Georgia, and some other Eastern European, Latin American<sup>(46)</sup> and African<sup>(47)</sup> countries. This trend shows that the judiciary has gained more influence and command of the judicial budget allocation.

In some Latin American countries, such as in Costa Rica, the budget for the judiciary is guaranteed through the Constitution as a percentage of the national budget.<sup>(48)</sup> Some other countries have increased or have committed to increase the judicial budget. For example in Argentina, the judicial budget has increased by more than 50 percent in the past six years. Chile is set to double the budget for the courts in a five-year plan.<sup>(49)</sup>

However, a large number of transitional countries face the problem of lack of funds for the judiciary. In Russia and in Ukraine, funds allocated to courts in the state budgets have often failed to materialize, forcing courts to rely on local government and

(50) Peter H. Solomon, Jr. and Todd S. Foglesong, *Courts in Transition in Russia: Challenge of Judicial Reform*, Boulder: Westview Press 2000, 37-39

(51) Margaret Popkin, *supra* note 46, at 121

(52) Jennifer Widner, *supra* note 47, at 48

occasionally private sources for assistance.<sup>(50)</sup> In Latin America, budget proposals are sometimes reduced (for example in the Dominican Republic), or not released (for example in Paraguay) by the executive branch due to insufficient resources.<sup>(51)</sup> More dangerously, in some African countries the budget proposals prepared by the judiciary are reduced by the government for political reasons.<sup>(52)</sup>

In short, judiciaries in many transitional countries are allowed to actively participate in preparing the judicial budget. However, because of a lack of national budgets or political commitments, judiciaries in many transitional countries still lack adequate funds for their operations. More attention should be paid to the judicial budget to enable the judiciary to function as properly as is required.

Institutional and budget guarantees are mainly to secure the autonomy of the judiciary as an institution. There is another component of the security for judicial independence: personal autonomy, meaning that judges should be adequately secured to act independently and impartially.

### 2.3 Security of office

*“The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law”<sup>(53)</sup>*

(53) Basic Principles, 11-12, *supra* note 7.

#### Tenure or long term of office

During the period of transition, many transitional countries have adopted the separation of power concept and provided judges with life tenure or long term of office. This is recognized as one of the most important factors to ensure judicial independence.

This concept requires that judges must be appointed for life or for such a fixed period of time as not to endanger their independence. Having a life tenure is the optimal option since judges do not have to face reappointment or reelection. A qualitative study recently conducted on judiciaries in a number of transitional countries showed that judges without life tenure comply with government preference more frequently than life tenured judges.<sup>(54)</sup>

Judges in Russia have unlimited terms of office, except for judges of district (city) people’s courts and judges of military courts of

(54) Erick S. Herron and Kirk A. Randazzo, *Judicial Institutions and the Evolution of Independent Courts in New Democracies*, available on line at <http://www.isatmsu.edu/CERS/herron.htm>

(55) Section 11 of the Judges' Status Law of the Russian Federation, available on line at <http://www.supcourt.ru/EN/jstatus.htm> .

(56) See Report of the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, E/CN.4/2001/65/Add.1 dated Feb. 8, 2001.

(57) See Edwin Rekosh, *supra* note 45, at 60.

(58) For examples, in Estonia: life, in Azerbaijan: 10 years, in Belarus: 11 years, in Czech Republic: 10 years, in Georgia: 10 years, in Lithuania: 9 years, in Moldova: six years, in Slovenia: nine years. See Herron and Randazzo, *supra* note 54, at 7.

(59) Margaret Popkin, *supra* note 46, at 106.

(60) *Ibid*, at 107.

(61) *Ibid*, at 111.

(62) *Ibid*, at 113.

garrisons, who initially are appointed for a three year term after which they may be reappointed for an indefinite term.<sup>(55)</sup> Judges in Belarus are appointed for an initial period of five years, after which, if they have performed well, they are reappointed for life.<sup>(56)</sup> Bulgaria, Hungary, Ukraine and Slovakia follow the same pattern: first five years of probation and then a possible indefinite term.<sup>(57)</sup> Judges in Georgia are not secured with life tenure, but they can enjoy renewable 10-year terms. These are big changes in the judiciaries in transitional countries in order to bring the judges a much higher independent status. Constitutional judges are not guaranteed life tenure but they enjoy a relatively long term of office.<sup>(58)</sup>

In Latin America, there have been a number of significant efforts to increase the terms of judicial office. El Salvador Supreme Court judges now enjoy nine-year terms instead of five years as in the past.<sup>(59)</sup> Chilean Justices do not have to be removed without cause since they are guaranteed permanent tenure with mandatory retirement at age 75.<sup>(60)</sup> In Argentina, judicial appointments are indefinite, subject only to the requirement of good behaviour.<sup>(61)</sup> In Paraguay, judges enjoy tenure after two five-year terms. The Dominican Republic also provides tenure for judges with mandatory retirement at a certain age.<sup>(62)</sup> However, judges of some other countries in this region still face shorter terms. For example, the Supreme Court justices in Guatemala have to seek reappointment after each five-year term.

I do not agree with the argument that a short term of office increases the accountability of judges, while life tenure or a long term of office creates an incentive for judicial corruption. I argue that life tenure or a long term of office will decrease the possibility of judicial corruption because it will encourage litigants or concerned parties to be of the opinion that it is more difficult to offer bribes to a judge who has a good career; and it is more likely that judges will be more reluctant to accept bribes in order to protect that career. I argue that life tenure or a long term of office should be recognized as one of the most essential elements for securing judicial independence. A short term of office for judges is not the best tool for holding judges accountable or fighting against judicial corruption.

It is more likely that short-term judges may be more easily influenced. The possible influences may come not only directly from those with the power to decide the retention, but also from other sources, such as politicians, media, public opinion and so forth. For those transitional countries where judicial candidates or judges are not sufficiently well qualified or there is a high degree of judicial

corruption, life tenure with mandatory retirement should be applied after a probation period.

### Limited grounds for removal

*“Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists...Judges shall be subject to suspension or removal only for a reason of incapacity or behaviour that render them unfit to discharge their duties.”<sup>(63)</sup>*

(63) Basic Principles, 12 and 18, *supra* note 7.

The security of office requirement must also include a guarantee to judges against their removal from office during their terms. Judges cannot be removed from office for any reasons other than incapacity or misbehaviour. Incapacity and misbehaviour should be interpreted in a strict manner. Incapacity should mean any physical or mental constraints<sup>(64)</sup> that make judges incapable of carrying out adjudication. Merely having a number of cases reversed by the higher courts should not be interpreted as ‘incapacity’ and therefore grounds for removal as long as judges have acted in good faith. Misbehaviour should mean only crimes or offences or gross or repeated acts of neglect<sup>(65)</sup> that make judges unfit for a judicial seat.

(64) IBA Minimum Standards, 30, *supra* note 8.

(65) *Ibid.*

The Basic Principles are silent about the transfer or secondment of judges. However this issue is also related to the security of office requirement, since these actions may be used as an indirect way of removing a judge from his office. Therefore, transfer or secondment of judges must also be consistent with this requirement and should not be misused as a hidden tool to punish a judge. Some jurisdictions, such as Thailand, have provided for a rule whereby judges can be seconded or transferred in order to avoid their building up powerful relations that might lead to corruption.<sup>(66)</sup> To ensure that judges can act independently without fear of being removed from an existing job, it is suggested that judges should not be transferred or seconded to another position or another court without their consent, and the transfer procedure must be transparent.

(66) This information was obtained during the author’s visits to Supreme Court of Thailand in 1990s.

In addition, the promotion of judges should also be carefully considered, since it may be used to get rid of an unwanted judge. Promotion is supposed to be used to encourage judges to work efficiently and effectively. In some jurisdictions a judge can be promoted only with his consent. Any promotion system may lead to the establishment of personal connections and relationships, both horizontally and vertically. As a result, those interdependent linkages may be used to influence judges. Therefore, judicial promotion should not be widely encouraged, even for a good purpose. If it exists, the promotion should be based on objective factors, in

particular ability and integrity, and the promotion procedure must be transparent, with the consent of the judge required.

### **Due process of removal and discipline**

*“All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”*

Any disciplinary measure must be carefully examined and considered before making a decision. This includes two elements: grounds for discipline and procedure for application. In order to avoid misuse of disciplinary measures for judges, it is required that statutes and/or codes of conduct provide in detail the grounds for judicial discipline. Secondly, any disciplinary process should include the process of filing complaints, investigation and decision-making. This process must be transparent, fair and accessible. A judge who is to be removed must have the right to a fair hearing,<sup>(67)</sup> and the decision-making body should be independent.

(67) Basic Principles, 17-20, *supra* note 7, and Beijing Statements, 26, *supra* note 11

In order to ensure that the judges are independent of the executive, it is suggested that the composition of such a body should not be dominated by that same executive. There should also be the significant involvement of non-judicial institutions to ensure that the judiciary is not totally isolated from the public. Representation from local judges is also required to ensure that local judges are not controlled by superior judges.

(68) Basic Principles, 1, *supra* note 7.

(69) IBA Minimum Standards, 15.b, *supra* note 8.

### **2.4 Adequate remuneration**

*“...adequate remuneration [for judges] shall be adequately secured by law.”<sup>(68)</sup>*

*“Judicial salaries cannot be decreased during the judges’ service except as a coherent part of overall public economic measure.”<sup>(69)</sup>*

(70) This information was obtained by the author during his visits to Singapore Supreme Court in 1995

(71) In England, by 1992, the High Court judges were drawing more than the Permanent Secretaries - \$84,300 for High Court Judges, \$97,000 for Lords of Appeal and \$93,000 for Lord Justices of Appeal, with \$82,780 for Permanent Secretaries. In Japan, since 1988, judicial salaries are kept higher than salaries of the non-judicial employees. See «Financial autonomy of the Indian Judiciary», *supra* note 52, available on line at <http://lawmin.nic.in/ncrwc/finalreport/v2b2-1.htm>

Judges must be guaranteed an adequate salary to ensure that they will decide cases impartially and without any bias to gain personal benefits. It is not easy to follow the Singapore example, where a Supreme Court judge earns US\$500,000 a year,<sup>(70)</sup> or the example of other developed countries,<sup>(71)</sup> but it is not acceptable that in some countries judges cannot even meet the basic living standards for their families, or even for themselves.

(72) M. Dakolias, *Court Performance Around the World A Comparative Perspective* (Washington, World Bank Technical Paper No 430, 1999); and World Bank, *World Development Report, The State in a Changing World, 1997* (Washington: World Bank, 1998) at 214-15 Tbl.1. and Hon. Sandra E. Oxner, *The Quality of Judges*, (Saint Petersburg, Russia, World Bank Technical Paper at a World Bank Conference on «Empowerment, Security and Opportunity Through Law and Justice», on line at [http://www4.worldbank.org/legal/ljr\\_01/doc/Oxner.pdf](http://www4.worldbank.org/legal/ljr_01/doc/Oxner.pdf)

(73) Margaret Popkin, *supra* note 46, at 123

(74) For example, judicial salaries in Romania range from US\$150 to US\$450 per month and are among the highest salaries paid by the State. *Ibid*, at 35

(75) Mark K. Dietrich, *Legal and Judicial Reform in Central Europe and the Former Soviet Union-Voices from Five Countries*, at 30; available on line at [http://www4.worldbank.org/legal/publications/LJR\\_ECA.pdf](http://www4.worldbank.org/legal/publications/LJR_ECA.pdf)

(76) It is estimated that about 80 percent of the court staff are women, who seem to have accepted the low salaries. *Ibid*, at 31

(77) Jennifer Widner, *supra* note 47, at 49

(78) *Ibid*, at 59

Having recognized that adequate payment for judges is of importance for promoting a healthy judiciary, many transitional countries have a separate salary scale and level for judges. In Brazil, salaries of commercial court judges are 33 times the average net salary. In Ecuador judges earn 18 times the average net salary; in Hungary twice the national average; in Panama 10 times the average salary; in Peru 14 times the average.<sup>(72)</sup> A number of Latin America countries, such as the Dominican Republic, Costa Rica, El Salvador, Guatemala and Panama have recently increased judicial salaries to promote the attractiveness and independence of the judiciary.<sup>(73)</sup> Georgia and Romania have also tried to increase judges' salaries,<sup>(74)</sup> but they face payment problems.

Other transitional countries are particularly resistant to paying judges well. A typical judicial salary in Russia is US\$140 per month, and in Kyrgyzstan it is US\$30 per month.<sup>(75)</sup> In Poland the salary is so low that most male jurists are reluctant to work for the judiciary.<sup>(76)</sup> Many African judicial salaries are still not attractive and pensions cannot even cover the living expenses of retired judges.<sup>(77)</sup>

Low salaries alone can undermine the independence and impartiality of judges. As human beings, judges also have to survive and meet basic living standards for their families. How can they act impartially if their salaries cannot cover minimum living standards and they cannot afford education fees and medical expenses for their children? This creates a situation that opens the door for corruption and bias.

Inadequate pay also makes the judiciary less attractive for well-qualified lawyers. Increasing judicial salaries is one of the key factors in improving the quality of justice. The salary reforms in some transitional countries, such as Hungary and Romania, have contributed towards making the courts more effective. For example, in 1997, after the increase in judicial salaries, there were 4,000 applications for the 120 places available on a mandatory training programme for future judges in Romania.<sup>(78)</sup>

One can argue that a lack of funds is the main reason for the low remuneration for judges but I argue that a lack of adequate understanding of the importance of judicial independence is the main reason. I do not think that a country, regardless of how poor it is, cannot afford adequate payment for its judiciary. A corrupt or poorly functioning judiciary may well end up costing a country much more than any amount of funding a government might have allocated.

How adequate should the remuneration for judges be? This is a practical question and much depends on the specific economic

conditions of each country. 'Adequate pay' in terms of the security of judicial independence should be understood as a salary whereby a judge can meet social and family needs in the country where he/she lives, without additional resources being required. 'Adequate pay' does not mean the highest pay. And 'adequate pay' or even 'good pay' alone does not work without the other elements of the personal guarantees. A judge, if she or he is relatively well paid, may still be paid less than private lawyers, but their prestigious status in society, secured tenure and other personal guarantees can prevent them from being influenced.

There is a need for increased awareness within governments of the importance of adequate remuneration for judges. Investment in judges will be recovered by the justice that an incorrupt and properly functioning judiciary will bring to the society.

## 2.5 Judicial Appointment

"Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."<sup>(79)</sup>

<sup>(79)</sup> Basic Principles, 10, *supra* note 7.

The Universal Charter of the Judge emphasizes "objective and transparent" criteria.<sup>(80)</sup> The Beijing Statements consider competence, integrity and independence as the key criteria for judicial officials.<sup>(81)</sup>

<sup>(80)</sup> Art .9 of the Universal Charter.

<sup>(81)</sup> Beijing Statements, 11 and 12, *supra* note 11.

The procedure of judicial appointment also plays an important role in ensuring a properly functioning and independent judiciary. There are two components relating to the appointment/selection issue: first, the qualifications/criteria and second, the procedure of nomination and appointment.

### Criteria

This paper argues that along with integrity, independence and other criteria, much more attention should be paid to the professional competence criterion. Judges can be capable of acting independently only when they are professionally confident about solving the cases on their hands. Without adequate legal background, training or professional qualifications, it is more likely that judges need to refer to colleagues or bosses, or even to merely flip a coin<sup>(82)</sup>

<sup>(82)</sup> Rabelais' Judge Bridle goose did decide cases by tossing a coin. See Hon. Sandra E. Oxner, *supra* note 72, at 39

(83) A Manhattan judge asked courtroom spectators to vote on which of two conflicting witnesses to believe. *Ibid*, at 39

(84) Ukraine district judges often consult judges of higher courts for advice on how to rule cases correctly and they usually follow the advice they get. See Edwin Rekosh, *supra* note 45, at 56

(85) NOU 1999: 19, *supra* note 18, at 405

or to consult spectators in the court room.<sup>(83)</sup> In transitional countries, where legal practice and a culture of being dependent on what is said and instructed by a higher authority may still exist in some jurisdictions,<sup>(84)</sup> adequate professional qualification is crucial in the process of helping judges become more proactive and independent. The clearer the judges are about how the case should be decided in both questions of fact and law, the less influenced they may be. Even in developed countries, the professionalism of judicial appointment is an important issue. The recently conducted study of the Norwegian Law Courts Commission regarding the reform of the judicial appointment system suggested that the applicants for a judgeship must have, *inter alia*, the appropriate degree of professionalism, and that the appointment process itself should be executed with as high a degree of professionalism as possible.<sup>(85)</sup> In addition, while it is sometimes difficult to test other criteria, such as integrity, independence, honesty, etc., professional capacity may serve as a fair and transparent qualification. Higher levels of professionalism required for judicial appointment would also reduce the political affiliations of judgeships.

Georgia has adopted an examination-based selection procedure to ensure the transparent and merit-based process of judicial appointments. The exams include two parts: 100 computer-graded multiple choice questions with a mandatory pass rate of 75%, and an essay part. The exam questions were carefully prepared and kept secret. Interestingly, the pass rate of the first exam was only 47 out of a total of several hundred examinees and none of the sitting judges in the group passed. This process was widely regarded as fair and transparent and encouraging for talented lawyers, since it displays qualifications without bias.

Professional competence requires a candidate to have a certain level of legal education (usually at university level) and a certain period of working experience in the legal sector. Common law countries do not require pre-appointment professional training, while most of the civil law countries do. Having a law degree was considered a professional requirement for a judgeship in most of the transitional countries before the transition. A number of the transitional countries, such as Romania, Chile, Viet Nam, etc. now require that, in addition to an academic degree, a candidate must go through a short-term training course in judicial skills. This is a positive trend that enhances the professional skills of future judges. However, it seems



expensive and its efficiency should be considered since ultimately not all graduates from such courses will be appointed to a judgeship. What may be more reasonable is that these kinds of courses should only be required for newly appointed judges after their appointment and before commencement of the judgeship career.

Traditionally, working experience means a certain period of working in the legal field. Common law countries, such the United States, the United Kingdom, Canada, Australia and New Zealand require that judicial candidates are practicing lawyers such as advocates, barristers or attorneys at law. Most of the civil law countries adopt the career path, which means that judicial candidates come from among judicial clerks or judges of the lower courts. Some countries mix these approaches, opening the court doors for any candidate regardless of their profession.

#### *Procedure*

The nomination and appointment procedure is also relevant to judicial independence. It is recognized that a sound nomination and selection process would pick the best candidates and eliminate or reduce the political flavour of the judicial appointment. Many European countries and developing Asian, African and South American countries have required candidates for the judicial profession to pass competitive examinations.<sup>(86)</sup>

(86) Edwin Rekosh, *supra* note 45, footnote 141

A common practice in most of the transitional countries is to set up a selection committee or judicial councils to nominate candidates for judgeship. This approach is used in Russia, Ukraine, Slovakia, Hungary and in a number of other Eastern European countries,<sup>(87)</sup> as well as in many Latin American and African countries.<sup>(88)</sup>

(87) *Ibid*, at 56

(88) Margaret Popkin, *supra* note 46, at 109. Jennifer Widner, *supra* note 47, at 47

This is widely recognized as a positive step towards a merit-based judicial appointment. The issue here is who dominates the judicial appointment process? Who are the members of the selecting committees? Most of the transitional countries attempt to involve representatives from both the judiciary and non-judicial institutions such as other legal professions, judicial councils or selection committees to balance the independence and accountability of the judiciary, as analyzed in an earlier part of this paper regarding the removal procedure.

The selection and appointment process should be transparent. Transparency does not only mean diversity in the judicial and non-judicial representation in the selection committee or judicial councils, but also the diversity in the methods of nominating names for the selection commissions or judicial councils. The short-list

process, if any, should also be transparent and participatory, as should be the process of nomination within the selection committee of the judicial council. Transparency also requires publicizing the names of the judicial candidates for public comments, if any. This would be a meaningful participatory approach.

### *Failure to select the best for judgeships*

Despite all these efforts, the judiciaries in transitional countries face a common problem: the failure to recruit the most qualified lawyers for the judiciary. In Eastern European countries, the best young law graduates tend to seek careers in private practice or see a judgeship as a stepping stone for learning the practice and building up contacts in order to move into a lucrative position as a private attorney or in some other capacity within the legal profession. In Poland, most of the judges are women, not because of 'good gender consideration' but because of the low status and salaries.<sup>(89)</sup> In 1997, Romania was not able to fill the 1,200 judicial seats until the salary for judges was increased. Even in Hungary, where salaries are competitive and a prestigious status has been achieved, there is a high drop-off rate among the most competent judges for the more attractive positions within the private sector.<sup>(90)</sup> A similar situation is found in many Latin American countries. Despite judicial salaries being significantly improved, they remain far too low to attract qualified lawyers working in other legal professions.<sup>(91)</sup> In Pakistan, a judgeship in the subordinate courts is seen as the last choice for law graduates.<sup>(92)</sup>

Another reason for the failure to recruit the best-qualified candidates for the judiciary is a lack of transparency in judicial appointments. This lack of transparency is reflected both in the criteria and the procedure by which the appointment process is implemented in most jurisdictions. Transparency is crucially needed during the process of nomination and selection (or appointment) to ensure that it is conducted fairly, impartially and that those appointed are the best candidates. A transparent appointment process would also ensure that the appointment does not undermine judicial independence. Judicial vacancies should also be widely announced or advertised.<sup>(93)</sup>

I argue that more attention should be paid to the professional criteria for judgeships. Some sorts of professional criteria should be provided to guide the selection process. Process of nomination, selection and appointment should be more open and transparent and involve the participation of judicial and non-judicial institutions.

(89) Mark K. Dietrich, *supra* note 75, at 31

(90) Edwin Rekosh, *supra* note 45, at 59.

(91) Margaret Popkin, *supra* note 46, at 103

(92) Sandra Oxner, *supra* note 72, at 15

(93) Since 1994 reform, Chile has advertised judicial vacancies to encourage lawyers to apply. Candidates are evaluated based on their background and tests of professional knowledge and ability. As a result the most qualified candidates have been selected and they feel more independent because they know they were selected on merit not because of political, family or friendship ties. Margaret Popkin, *supra* note 46, at 110

(94) See more about comparative aspects of judicial accountability in M.Cappelletti, «Who Watches the Watchman? A Comparative Study on Judicial Responsibility» in S. Shetreet and J. Deschenes, eds. *Judicial Independence: The Contemporary Debate* (Netherlands: Nijhoff, 1985 at 570.

(95) J.S. Verma, *Ensuring Accountability and the Rule of Law: the Role of the Judiciary*, Report of the Inaugural Conference of the Asian Center for Democratic Governance, 7-8 January 2001, New Delhi, India, available on line at <http://www.ned.org/ackg/inaugural/session3.html>

(96) Linn Hambergren, «*Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals*», in «Guidance for Promoting Judicial Independence and Impartiality,» Technical Publication Series of the Office of Democracy and Governance USAID, January 2002, at 65; available on line at [http://www.ifes.org/rule\\_of\\_law/judicial\\_independence.pdf](http://www.ifes.org/rule_of_law/judicial_independence.pdf)

## 2.6 Judicial accountability

Judicial independence must go hand in hand with judicial accountability.<sup>(94)</sup> Judicial independence and accountability must be balanced. Judicial insularity is needed, although this should not mean fostering a situation whereby the judiciary is left to do whatever it wants, including taking bribes or doing a bad job. The judiciary also needs to be seen as a service to the public so that the latter can use it with confidence that their interests will be served, and in a timely manner. It is inexcusable that, in some jurisdictions, the first court hearings came after almost 15 years.<sup>(95)</sup>

Linn Hambergren<sup>(96)</sup> suggests that the demands for greater judicial accountability are based on, *inter alia*, the more important role and greater powers that the judiciaries have recently acquired in deciding what the law is and in solving conflicts not only between individuals, but also between the government and citizens. Therefore, the more powers judiciaries have, the more accountability there is, which combats corruption, and the more they improve their quality, the more they ensure that there is public understanding that, in turn, protects their good image.

This paper argues that the more independent judiciaries become, the more accountability should be provided to prevent the judiciaries from being uncontrolled, provided that the decree of accountability does not endanger the independence. Judicial independence and accountability should be balanced.

It is not always easy to accommodate both the independence and the accountability of the judiciary simultaneously. In some jurisdictions, the principle of judicial independence is given higher priority whereas in others, judicial accountability is a bigger concern. Judicial accountability must be understood differently from accountability of the legislative or executive or any other agencies. Judges are accountable to the extent of deciding the cases fairly and impartially. They are accountable for how they justify their decisions. As long as judges decide the facts and apply laws independently and impartially, they must be exempted from any responsibility, since their judgments and decisions are subject to scrutiny by the appellate courts. They must not be penalized for having their decisions reversed by the higher courts. If judges commit crimes, or are alleged to have behaved inappropriately, they should be subject

to removal or disciplinary measures provided by the law. Judicial accountability should be understood in this way.

Judicial accountability is usually mentioned and discussed when and where judicial corruption is a concern. There is a perception of the existence of a high rate of corruption among judges and judicial officers in the transitional and developing countries.<sup>(97)</sup> Some expressed the view that in those jurisdictions you are unlikely to win the case unless you have political or family influence or a bribe is paid.<sup>(98)</sup> In an attempt to fight judicial corruption, Ukraine has removed the judicial immunity clause. Russia also tried to hold judges more accountable by preparing a reform to reduce the lifetime tenure of judges to a 12-year term. However, corruption cannot be reduced merely by reducing judicial terms of office, and in fact a reduction of the tenure can seriously undermine judicial independence. This is why the Russian reform proposal was rejected by President Putin, who recognizes the importance of independent courts in themselves, as well as a mechanism for improving the economy,<sup>(99)</sup> although he has demanded more judicial accountability.

Judicial accountability should be maintained through transparency. This process should include the selection and appointment procedure, the method of assignment of cases and judicial reasoning as well removal, discipline and suspension processes. The public needs to know what is going on behind the closed doors of the judiciary. The more transparent and accessible this process is, the more accountable the judiciary becomes. If the selection and appointment process is more transparent, open and participatory, the judiciary can employ more competent, independent and impartial judges. This is especially important in jurisdictions where the judiciary controls the process of judicial selection, appointment, transfer, removal and discipline.<sup>(100)</sup> Without transparent process and procedure of judicial administration and management, the judiciary may cover up misconduct or be reluctant to impose the adequate disciplinary measures in order to 'protect' the reputation of the judiciary, or personal relationships. If the assignment of cases is random, there is less chance of bias, corruption and interference. If judges are required to respond to all arguments of the prosecutors and defence lawyers in their decisions, they must be more careful when reasoning and deciding cases. If their judgments and decisions are published for a wide audience, they are less likely to deliver unsound and unreasonable outcomes. If the removal, suspension and disciplinary procedures are transparent and accessible to public scrutiny, the corruption and misbehaviour of bad judges cannot be 'protected' behind closed judicial doors. These measures do not

(97) Study reports of USAID and IFES in Bulgaria, Hungary, Poland, Romania, Russia, Slovakia, and Ukraine have suggested this. See Edwin Rekosh, *supra* note 45, at 61-62. See also Mark K. Dietrich, *supra* note 75, at 21.

(98) Mark K. Dietrich, *supra* note 75, at 21

(99) Peter H. Solomon, Jr., *Courts in Russia, Independence, Power, and Accountability*, *supra* note 25, at 13.

(100) India is also concerned about this. See Sumanta Banerjee, *Judging the Judges*, *Economic and Political Weekly*, December 14, 2002. The author described a number of acts of impropriety by some of the most senior judges and allegedly inadequate disciplinary measures imposed by the Supreme Court of India.

undermine judicial independence but instead enhance the independence of judges.

Finally, there should be a code of judicial conduct available to guide the ethical behaviour of judges and to serve as grounds for judicial discipline. The code of judicial conduct should take into account the Bangalore Principles of Judicial Conduct.

## Judicial Independence in Viet Nam

**It has been widely recognized that there have been significant improvements in the legal environment in Viet Nam since the *Doi Moi* (renovation) was launched in 1986. The major changes happened during the 1990s, especially after the adoption of the 1992 Constitution, formally recognizing the transition from a centrally planned economy to a market economy with socialist orientation. Along with the promulgation of a significant number of market-friendly laws to facilitate the market economy, the concept of rule of law was introduced and incorporated in the new version of the 1992 Constitution revised in 2001.<sup>(101)</sup> The role of the judiciary in Viet Nam has been strengthened to meet these new changes.**

(101) The Constitution 1992 (revised) in the section 12 states that the State of the Socialist Republic of Viet Nam is a socialist rule of law state of the people, by the people, and for the people.

(102) The Constitution 1992 (revised), section 127.

### 3.1. Institutional arrangements

The judicial power is vested in three types of courts:<sup>(102)</sup>

- Ordinary Courts of Law: The people's courts, ranging from the Supreme People's Court at the top to the Provincial People's Court in each province and District People's Courts at the district level. Military Tribunals; and
- Special Tribunals, which may be established under special circumstances by the National Assembly.

#### *Jurisdiction*

The people's courts are authorized to deal with criminal cases, civil cases, marriage and family cases, labour cases, economic cases, administrative cases and other additional matters to be provided by law.<sup>(103)</sup> The military tribunals have the jurisdiction to hear all kinds of cases, including criminal, civil, economic, commercial and administrative, where the nature of the case involves military force or the accused or a party in the case is a person serving in the military.<sup>(104)</sup> The constitutional clause on the possibility of the establishment of special tribunals under special circumstances is vague. However, one assumption is that these kinds of tribunals may be needed for war time or during a state of emergency.

(103) Art. 1 of the Law on Organization of People's Courts 2002

(104) Some have argued that the jurisdiction of the military tribunals should be limited to the criminal cases, where the accused is a person serving in the military, but not extended to other non-criminal disputes to ensure impartiality and a fair trial for civilians. Some others suggest the re-consideration of the existence of the military tribunals during peace time.

Before *Doi Moi* the judicial system was similar to the judicial model of the former Soviet Union. The courts had a narrow scope of jurisdiction. Only criminal cases and disputes of a civil nature were subject to judicial review. As a result of the new market economy demand, the jurisdiction of the courts has been expanded to hear disputes relating to economic and commercial transactions, labour conflicts between employees and employers and the review of certain types of decisions made by the executive agencies. However, in comparison with judiciaries of other countries, the judiciary of Viet Nam is still narrowly defined. It is not authorized to hear

constitutional matters, such as review of the constitutionality of the legislation or legality of other legal normative acts promulgated by government agencies, or even interpretation of what the law is. The concept of the review of the constitutionality of the laws promulgated by the National Assembly is not recognized in Viet Nam since laws are made by the highest state power. The mandate of interpretation of laws is vested in the Standing Committee of the National Assembly.<sup>(105)</sup> What the court can do is to ‘apply the laws’ without interpretation of how the law should be understood. Whenever the court faces difficulties in understanding a specific clause or article of a law, the court needs to refer to the Standing Committee for interpretation.<sup>(106)</sup> *Habeas corpus* petitions are also not subject to judicial review.<sup>(107)</sup>

(105) The Constitution 1992 (revised), section 91

(106) In fact this authority is very rarely used. The author does not recall any case where the Standing Committee interpreted a specific law clause.

(107) The procuratorate organs have powerful authorities in deciding the arrest and detention during the investigation stage. Any petitions on arrest or detentions should be sent to and dealt with by the procuratorate organs. The courts step in only after the case file is transferred from the procuratorate organs.

The rule of law and a newly introduced market economy have called for the expansion of the jurisdictions of the judiciary. Judicial review of administrative actions was introduced and now is going to be extended. The judiciary becomes more independent from the executive since October 2002 when it took over the management of the local courts from the Ministry of Justice. The Constitution requires that judicial decisions must be respected.

#### *Exclusive authority*

The exclusive authority of the judiciary is secured in the Constitution by recognizing that the Supreme People’s Court is the highest judicial body of the nation. All ordinary and military courts are under the Supreme People’s Court. Special tribunals or other courts to be established by law are also presumed to be under the umbrella of the Supreme People’s Court, unless otherwise prescribed by the act of the establishment of such tribunals or courts.<sup>(108)</sup> In addition to this, the Constitution also states that the final decisions of the courts must be respected by all state organs, institutions, organizations and citizens, and seriously implemented by concerned parties.<sup>(109)</sup> These provisions imply that the final judicial judgments and decisions are not subject to review by legislative, executive or any other institutions.

(108) The Constitution 1992 (revised), section 134

(109) The Constitution 1992 (revised), section 136

#### *Independence clause*

The principle of judicial independence is also guaranteed by the Constitution. As mentioned above, a concept of separation of powers is not recognized in Viet Nam but there is a separation of functions among the executive, legislative and judicial bodies. The Constitution

(110) People's assessors are laymen elected by the local people's councils and participating in a trial only at the first instance. Usually a trial panel is composed of a professional judge and two people's assessors in almost all cases. Assessors decide both question of facts and laws.

(111) The Constitution 1992 (revised), section 130

(112) As it was translated in the English version of the Constitution 1992 posted in a website of the Viet Nam Embassy in US, at <http://www.vietnamembassy-usa.org/learn/gov-constitution10.php3>. Please note that recent amendments are not incorporated in this version.

(113) The Constitution 1992 (revised), section 4

(114) Resolution 08 of the Politburo issued on January 2, 2002.

(115) *Ho Chi Minh City established the Steering Committee for adjudication of Nam Cam case*, VnExpress on line, posed on 12 September, 2002 at <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9C0212/> This is a very famous ongoing criminal case, where the accused, named Nam Cam, used to control all "black society" in Ho Chi Minh City for a long period under the cover-ups and umbrella of many policemen, including several vice-ministers.

(116) The Constitution 1992 (revised), section 4

does not explicitly state that the judiciary must be seen as an independent institution. However, it guarantees the independence of judges in deciding cases: *"During the adjudication [of cases], judges and assessors<sup>(110)</sup> are independent and shall only obey the law."*<sup>(111)</sup> There is no definition of what "during the adjudication" means. The Vietnamese version reads as follows: *"Khi xet xu, Tham phan va Hoi tham doc lap va chi tuan theo phap luat."* The translation "Khi xet xu" as *"During a trial"*<sup>(112)</sup> may raise some concerns that judges are guaranteed independence only during the trial or hearing and that the guarantee is not extended beyond that, for example, during pre-trial sections, etc. I argue that the definition of "during the adjudication" should be understood as the whole process of judicial tasks, ranging from the registration of case files to the final decisions.

**Party vs. Judiciary: There is no doubt that there is a relationship between the Party and the Judiciary. The steering role of the Party should be understood and carried out so as to provide the judiciary with general policy guidance to ensure that adjudication is properly carried out according to the law and not as to instruct to judges on what the sentence should be.**

### Party leadership

Since the Party is the force leading the state and society,<sup>(113)</sup> as proclaimed in the Constitution, there is a relationship between the Party leadership and the judiciary. Basically, the Party leadership is to focus on making policy and direction for the judiciary so that the latter can perform its work better. The best example of this is a recently adopted resolution by the Party Politburo on key important tasks of the justice sector, that urges the judiciary to comply with the democratic principles of fair trial.<sup>(114)</sup> In deciding particular cases, the judiciary has much greater autonomy. However, those who heard about the recent establishment of an inter-agency commission, headed by a vice-secretary of a local party organization and composed of representatives of several party departments and the Chief Judge of the Ho Chi Minh City Court, to "coordinate with other concerned agencies in steering the trial of the Nam Cam case,"<sup>(115)</sup> may have raised concerns about the intervention of the party in outcomes of specific cases. However, since the leadership operation of the party organizations is carried out within the framework of the Constitution and laws,<sup>(116)</sup> whereby the independence of judges in deciding cases is a constitutional guarantee, the steering role should be understood as providing the judiciary with general policy guidance to make sure that adjudication is carried out according to



the law, and not as instructing judges on what the sentence should be.

There is a strong bureaucracy within the judiciary. The relationship between judges and their bosses is sensitive since the bosses have a big say in evaluation of judges' performance every year, promotion, and appointment every five years. In addition, cases are assigned deliberately by court leaders. Does this affect internal independence?

### *Supremacy of the Parliament*

Article 6 of the Constitution provides that the people make use of state power through the agency of the National Assembly and the People's Councils, which represent the will and aspiration of the people at nationwide level and in localities respectively. Both executive and judicial branches are accountable before the people-elected bodies: the National Assembly at the central level and the People's Councils at the provincial and district levels.<sup>(117)</sup> The Chief Justice of the Supreme People's Court as the Head of the Judiciary is responsible and accountable to the National Assembly and, when the latter is not in session, to its Standing Committee and to the State President. The Chief Judge of the local court is responsible and accountable to the local People's Council in the place where the court is located.<sup>(118)</sup> Twice a year the Chief Justice presents his reports on judicial tasks recently carried out by the judiciary before the National Assembly, and answers questions raised by members of parliament concerning general judicial matters or particular cases. The Chief Judges of local courts do the same before the local People's Councils. The rationale for this is that the judiciary should be accountable to the people via its representative bodies. This kind of accountability does *not* mean that the courts seek instruction from Parliament on how they should deal with particular cases.

### *The executive vs. the judiciary*

The judiciary is also becoming more independent of the executive. The recent judicial reform transferring the administration of the local courts from the Ministry of Justice to the Supreme Court is a step towards the enhancement of judicial autonomy.<sup>(119)</sup> Currently the Supreme Court has a higher degree of influence in the budget preparation for the whole judicial sector,<sup>(120)</sup> in recruitment of court officials, in appointment of judgeships and provision of training for court staff. It seems that the judiciary has gained more external independence from the executive.

(117) Viet Nam has 61 provinces and cities that have the same status of 'province'. Within each province, there are a number of districts.

(118) The Constitution 1992 (revised), section 135

(119) Art. 17 of the Law on Organization of People's Courts 2002

(120) Proposals for the operating budget of the Supreme People's Court, of the local People's Courts shall be made by the Supreme People's Court, and be proposed to the Government for submission to the National Assembly for approval. See Art. 46 of the Law on Organization of People's Courts 2002

### *Judges and court leaders or internal independence*

There is another type of relationship that judges encounter during the exercise of their judicial tasks: the relationship between a judge and his/her 'supervisors', the Chief Judge and Deputy Chief Judges of the court where he or she is working, or of the higher courts, hereafter called 'judicial bosses.' According to the Constitution and laws, there is no requirement that a judge has to refer a difficult, complicated or important case to the committee of the court leaders to discuss and make a decision. In China, in the past, the Chief Judges had the power to take such cases out of the hands of the collegial panel that was actually hearing the case and submit them to the committee of the court leadership for discussion and decision-making, which was binding to the panel. According to the new criminal procedure law of China, it is now up to the panel to decide whether they need help from the leadership.<sup>(121)</sup>

(121) Xiong Qiuong, *The Reform of The Chinese Criminal Procedure Law in A Human Rights Perspective*, at 10. A draft working paper of the China Programme, the Norwegian Institute of Human Rights. The draft is available in the author's file.

Chief Judges and Deputy Chief Judges in Viet Nam have a high degree of influence when evaluating the judges' performance, promotion and appointment as well as discipline. Therefore the relationship between judges and their judicial bosses is very sensitive. Even though there is no procedural connection between them in deciding cases, internal working rules may influence the independence of judges. If a judicial boss sets a rule requiring the clearance of possible outcomes of certain categories of cases, judges must follow that rule within a framework of judicial bureaucracy. I do not favour this practice. If it exists, there should be clear working rules indicating that such internal discussions or consultations must be seen as optional and not binding for judges.

Another issue relating to the relationship between judges and court leaders is the assignment of cases. There is no rule on case assignment. Cases are usually assigned deliberately (as opposed to random assignment) by the Chief Judge or the court leaders. This may leave room for corruption,<sup>(122)</sup> or for intervention, by insisting that judicial bosses assign a case to a particular judge who could be influenced.

(122) In Indonesia, practice has shown that 'good' cases, where court leaders foresee the possibility of taking bribes, are usually left in the hands of the court leaders or assigned to their friendly colleagues. See Indonesia Corruption Watch, *supra* note 29

Similar situations have occurred in Russia and raised concerns about internal independence because Russia also has a strong judicial bureaucracy, in which, according to Solomon, pursuit of careers calls for conformity to the norms of the judicial corps, especially among young and inexperienced judges.<sup>(123)</sup> The influence of judicial administrators, such as Chief Judges and Deputy Chief Judges over their subordinate judges still exists,<sup>(124)</sup> which has led to a proposed reform to make court leaders less influential.

(123) Peter H. Solomon, Jr., *supra* note 25, at 8

(124) In 2000 a number of Chief Judges were removed for interfering in the hearing of cases by subordinate judges and "turning the court into a legal office of the judge's spouse." *Ibid*, at 12

It is therefore inevitable that judges may in certain instances be dependent on their judicial leaders, so long as this kind of judicial bureaucracy remains strong. There should be a strictly limited number of 'judicial bosses'. A transparent working rule regarding the relationship between judges and court leaders with respect to internal independence must be in place. A method of random assignment of cases should also be applied.

### 3.2. Security of office

Judges are appointed for five-year terms and shall be automatically removed if convicted, or could be removed if they have (i) committed a wrongful act during the exercise of their judicial duties; (ii) behaved immorally ; (iii) been involved in business forbidden for judges, (iv) given legal advice to litigants, (v) illegally intervened in adjudication of cases, (vi) taken case files or part of case files from the office without authorization, (vii) met with litigants outside the appointed places; or (viii) conducted any another law violation act.

#### *Term of office*

The term of office of judges at all levels, including Deputy Chief Justices and Justices of the Supreme People's Court, Chief Judges, Deputy Chief Judges and judges of the local courts, is five years. Tenure of the Chief Justice of the Supreme People's Court accords with the term of the National Assembly.<sup>(125)</sup> There was an attempt to extend the judicial tenure for a longer term during the process of revision of the Law on Organization of the Courts in 2001, but it was dismissed by those who argued that instituting a short term was an effective tool for making judges accountable. Once the term has expired, the reappointment procedure is almost the same as that applicable for a first appointment, and judges are not allowed to hear cases if the re-appointment is not made on time, even for valid reasons.

Many still think that a five-year term is relatively short and the possibility of changing the current five-year term appointment of judges to a longer term, for instance a 10 or 15-year term, or even tenure for life, should be considered<sup>(126)</sup> as a guarantee of judicial independence. While long-term tenure is not applicable, it may be wise to make sure that a five-year term is automatically extended without a reappointment process unless a particular judge has behaved in such a way as to justify the scrutiny involved in the reappointment process.

(125) The Constitution 1992 (revised), section 128

(126) Legal Needs Assessment Team 2 Report, at 62. A copy of the report is available in the author's file.

There are two points that would need to be carefully considered. First, the grounds for removal seem vague to some extent. For example, how is “a wrongful act” defined? Furthermore, the list of grounds is never-ending. What are “law violation acts”? Secondly, there is no clause allowing a removed judge to appeal. And thirdly, there is no transparent procedure to determine grounds for removal within the judiciary before the matter is sent to the judge selection committee for decision.

I would suggest that for longer terms, a code of conduct with detailed grounds for removal and discipline be promulgated to reduce or eliminate the discretion of the court leaders in application of discipline and removal sanctions. In addition, a transparent procedure of investigation of misconduct and determinations of the nature of the misconduct should also be formulated to make sure that judges are also subject to fair treatment and hearing.

### **3.3. Adequate remuneration**

Judges enjoy higher salaries than other public servants, although this does not necessarily mean that judges are adequately paid. In fact, judges are still underpaid. The judicial salaries range from US\$40 for a district judge to US\$100 for a Supreme Court Justice. Judges are no longer entitled to public housing or apartments or any other substantial subsidies. It is very hard to maintain a comfortable life on such a modest income. Judges have to rely upon the incomes of other family members, such as that of a spouse, or they have to find other sources of income. No one doubts that corruption exists within the judiciary and a number of corruption cases have been exposed with some judges being sentenced to jail for taking bribes. With the image of the judiciary thus undermined, public confidence in it is still low.

Many have suggested that increasing judicial salaries would make for a better functioning and less corrupt judiciary. However, judges are still public servants and do not enjoy any special status; thus increasing judicial salaries could lead to an expectation of a general increase in the salaries of a large number of public servants.

However, I suggest that increasing judicial salaries is one of the cornerstone elements of judicial reform. Greater awareness of the importance of having an incorrupt and properly functioning judiciary, as well as a strong political commitment to this end, are both needed to overcome this problem.

### 3.4. Judicial nomination and appointment

At the recommendation of judicial selection committees, the State President appoints Supreme Court Justices, and the Chief Justice of the Supreme Court appoints the local court judges. A career path approach is practised. There is no advertising of vacancies. The nomination process takes place internally within the judiciary. There is no system of a number of candidates for one vacant judgeship. Therefore, the committees expect to vote yes or no for the 'pre-cooked' candidates without any alternatives.

#### Criteria

The criteria of judicial candidates are: (i) to be a holder of Vietnamese citizenship; (ii) to be loyal to the Fatherland and the Constitution; (iii) to have good qualifications and ethics, integrity and faithfulness, a strong sense of protection of the socialist rule of law; (iv) to have a Bachelor of Law degree and Certificate of Training in Professional Adjudication, and practical experience in accordance with provisions of laws and capacity to perform judicial works; and (v) excellent health to ensure that they can accomplish their assigned tasks.<sup>(127)</sup> This is the first time the law includes the requirements of having the Bachelor of Law and a certificate in pre-appointment professional training.<sup>(128)</sup> The judiciary of Viet Nam has recently adopted the judicial path approach. Except in special circumstances, judges now have to move up from the district to the provincial and then to the top level, with most judges being appointed after having been judicial clerks.

#### Procedure

The Ordinance of Judges and Assessors of the Courts provides that judges of the Supreme Court<sup>(129)</sup> are appointed by the State President<sup>(130)</sup> from among a list originally prepared by the President of the Supreme Court and then cleared by the Judge Selection Committee, headed by the President of the Supreme Court with representations from the Ministry of Home Affairs,<sup>(131)</sup> the Viet Nam Central Father Front,<sup>(132)</sup> and the Viet Nam Lawyers Association.<sup>(133)</sup> There are no other regulations specifying how the Chief Justice comes up with the list of candidates. There is no advertising of judicial vacancies. The procedure for nomination of judicial candidates which has been practised to date, is the promotion procedure applicable for public servants, since judges are considered public servants. First, the credibility of a possible candidate must be voted on by his or her colleagues in the unit

(127) Art. 37 of the Law on Organization of People's Court 2002

(128) In the past, the law required a candidate to have a university law degree or *equivalent qualifications*.

(129) As of July, 2001 there are 97 Supreme Court judges. Overall Legal Needs Assessment Report, hereafter called LNA Report, at page 12. A copy of the report is available in the author's file.

(130) Art. 40 of the Law on Organization of People's Court of Viet Nam promulgated on April 2, 2002

(131) Ministry of Home Affairs and its subordinate agencies in localities are the agencies that take care of, *inter alia*, policies on personnel matters such as recruitment, promotions, salaries, etc.

(132) Viet Nam Father Front is the social-political organization with a duty to take care of the social organizations in Viet Nam.

(133) Art. 26 of the Ordinance on Judges and Assessors of the People's Courts 2002

(134) Usually a local authority calls for a meeting of the candidate's neighbours with participation of the court representative to discuss how the candidate behaves and obeys laws and local rules in the area where he or she is a resident.

(135) The Constitution 1992 (revised), sections 84 and 103

(136) As of July 2001, there were 3235 local judges. LNA Report, *supra* note 129, at 12

(137) Art. 40 of the Law on Organization of People's Court of Viet Nam promulgated on April 2, 2002

(138) The people's councils in localities are the people's elected bodies.

(139) Art. 27 of the Ordinance on Judges and Assessors of the People's Courts.

where he or she is working. Then the undisclosed outcome of the votes is transferred to the leadership of the court for a decision as to whether or not to put him or her on the list of candidates. A candidate also needs to be cleared by his or her neighbours.<sup>(134)</sup> The comments and inputs made by the neighbours are collected and added to the candidate's file, which is then submitted to members of the Judge Selection Committee for further research if the Chief Justice has approved the candidate. The Chief Justice then calls a meeting of the Committee, of which he is the Chair. The Committee discusses the profiles of the candidates nominated by the Chief Justice and votes. They do not have the power to add anyone else to the list of candidates. The outcomes of the votes are then sent to the Office of the President for the final decision.

The Chief Justice of the Supreme People's Court is elected by the National Assembly from among its members at the recommendation made by the State President.<sup>(135)</sup> His or her membership of parliament suffices and he or she does not have to hold a judgeship before becoming a Chief Justice.

Local judges<sup>(136)</sup> are appointed by the Chief Justice of the Supreme Court<sup>(137)</sup> from a list of vacancies originally prepared by a Chief Judge of the Court of the Province and then cleared by the local judicial selection committee, headed by the Chairman/Vice Chairman of the Provincial People's Council<sup>(138)</sup> with the participation of the Chief Judge of the Provincial Court and representatives from a local Lawyers Association and Father Front at the provincial level.<sup>(139)</sup> Internal nomination of candidates for local court judgeships seems to be similar to that described above for Supreme Court judgeships. The Chief Judge is also very powerful and the selection committee mandate is limited.

This system of nomination seems to be political rather than merit-based. Much depends on the will of the court leadership and possibly on personal connections and relationships between judges, clerks and their leaders.

It is suggested that the judiciary should be open for any qualified lawyers working in other legal professions. There is also a need for a sound, transparent and merit-based nomination process to ensure that the best qualified lawyers can be chosen for judgeships. Some sort of competition through examination or other transparent means should be considered for the nomination and selection process.

### 3.5. Judicial accountability

To hold the judiciary and judges more accountable for the legality and quality of their decisions, a court now has to recompense a litigant for damage caused by a wrongful decision made by its judge. Then the judge may have to reimburse the court what the former has paid to the litigant.

(140) See briefing on reports of the Chief Justice and General Procuratorate at a National Assembly section, held in November, 2002, at [http://www.laodong.com.vn/pls/bld/display\\$.htnoidung\(185,50610\)](http://www.laodong.com.vn/pls/bld/display$.htnoidung(185,50610)). These two highest judicial officials noted that the main reasons are corruption and the poor qualifications of some judicial officials.

(141) Art. 37 of the Law on Court Organization and Art. 8 of the Ordinance on Judges and Assessors.

(142) Art. 6 of the Ordinance on Judges and Assessors. According to the Chief Justice, there have been 29 judges who have been sanctioned for making illegal or wrongful decisions. The disciplinary measures range from a warning to a criminal charge. See Chief Justice of the Supreme Court Nguyen Van Hien, *Illegal and wrongful judgments are not many but deeply concerning*, a statement of the Chief Justice to the Chief Justice at the recent National Assembly section, held in November 2002, at [http://laodong.com.vn/pls/bld/display\\$.htnoidung\(185,51852\)](http://laodong.com.vn/pls/bld/display$.htnoidung(185,51852))

As mentioned earlier in the section on judicial accountability in transitional countries, there is increased demand for judicial accountability in many jurisdictions. The more powers are given to the judiciary, the more accountability is demanded from the judiciary. Viet Nam is also concerned with judicial corruption and the relatively low quality of the judicial service. During recent years, a number of wrongful judgments have put innocent people in jail or sentenced the accused more severely than was justified, and this has raised the concern of the public and the authorities.<sup>(140)</sup> Article 72 of the Constitution guarantees the principle of presumption of innocence and accountability of justice institutions. It reads as follows: *“No one shall be regarded as guilty and be subject to punishment before the sentence of the Court has acquired full legal effect. Any person who has been arrested, held in custody, prosecuted or sentenced in violation of the law shall be entitled to damages for any material harm suffered and his reputation shall be rehabilitated. Anybody who contravenes the law in arresting, holding in custody, prosecuting, sentencing another person thereby causing him damage shall be dealt with severely.”* This is recognized as a constitutional fundamental right of the citizen. The recent violation of this right has led to a demand that justice institutions, including courts, should be responsible for the damages caused to litigants by illegal or wrongful judgments and decisions. As a result, this principle has been elaborated in recent legislation regarding the courts and judges, promulgated in 2002. Now if a judge or an assessor causes damage in the course of performing their tasks or exercising their powers,, the court where the judge or the assessor is performing the judicial tasks shall be liable for economic compensation and the judge or the assessor who causes damage will be responsible for reimbursing the court in accordance with the law.<sup>(141)</sup> In addition to this, judges are also subject to disciplinary or criminal liabilities, depending on the seriousness of the wrongful judgments or decisions.<sup>(142)</sup>

This may represent a promising development from the perspective of judicial accountability and responsibility. It guarantees that the fundamental rights of the citizen are not violated by the institution,

the essential duty of which is to protect human rights. It may also help to make judges more careful in deciding cases and improve their quality of service. However, this accountability should be put in the context of judicial independence as described in earlier sections. Too much pressure on judges undermines their independence. It is also important to take into account possible consequences of this responsibility. For example, a judge is more likely to refer a difficult or important case to a committee of court leaders for ‘advice’ or ‘instruction’, or even ‘decisions’ in order to avoid possible liability in the future. Another possibility is that the courts of appeal may hesitate to reverse the judgment or reduce the sentence of the lower courts so that the latter may not face liability for compensation. In these possible scenarios, the original rationale of this accountability is lost.

The issue here is that the recent legislation is not yet clear about the circumstances in which judges should be held liable. Further clarification may be found in future situations concerning the liability of civil servants but I would suggest that judges should have different status because their spheres of influence are different from those of other civil servants. I strongly recommend that judges should not be subject to such suits and financial responsibility. For the time being, when the current law on the matter is unclear, its clause on the responsibility of judges should be interpreted in the light of a judge having to pay damages in only two specific situations: when judges have deliberately delivered an illegal decision or are guilty of gross negligence.

(143) At that time international assistance in the legal sector was considered by the Government of Viet Nam as sensitive. The neutral status of the UNDP was a key reason why the Government had approached the UNDP for this assistance.

(144) Many market-friendly laws were drafted with technical assistance from UNDP, of which the Enterprise Law is recognized as a key factor in boosting private business. This law has replaced the old mechanism of applying for a grant and license for the establishment of a business with a much easier and simpler registration procedure. As a result, the private economy has witnessed a real boom since the enactment of the law in 2000, with the creation of some 53,000 businesses with a total investment of about USD 5.3 billion. Central Institute of Economic Management (CIEM), *“The Enterprise Law: A Key for Future Job Creation.”* A Newsletter of the UNDP Project VIE 01/025. The hard copy of the newsletter is available in the author’s file.

### 3.6. Donor assistance vs. Current Justice Reform

“The two phase UNDP Project supporting strengthening legal capacity in Viet Nam has been recognized as one of the most successful projects funded by international donors in the legal sector”- the Minister of Justice expressed to Mr. Jordan Ryan, UNDP Resident Representative, at the final Tripartite Project Meeting held in Ha Noi on 4<sup>th</sup> Dec. 2002.

Overview of past and ongoing assistance: At the beginning of the 1990s, the United Nation Development Programme was among the very few international donors<sup>(143)</sup> who were asked by the Government of Viet Nam to help them create a new legal framework for the newly introduced market economy<sup>(144)</sup> and to assist the judiciary in improving its performance in handling a significantly increased number of cases of a new nature. The first objective of UNDP



(145) Before that time, because of the lack of the relevant substantive laws, the court had to use reports of the Supreme Court on particular subject of law, such as Report No 58 on some issues related to dealing with housing disputes, or event drafts of circulars, such as Draft 173 of the Supreme Court on compensation for non-contractual damages.

(146) LNA Report, *supra* note 129, at 10

(147) Vietnam has concluded more than 1000 bilateral treaties and is a party to more than 180 multilateral treaties. *Ibid*, at 11

(148) In the past law drafts were considered as classified and even legal normative documents were rarely published. Now, the Law on Drafting and Promulgating Legal Normative Document (hereafter called LND) 2002, the drafting of which was partially supported by UNDP, clearly requires that a LND draft must be at least shared with the people who have interests at stake in the draft, and that LND, promulgated by the government agencies, has to be published in the Official Gazette in order to have legal force.

(149) Recently, at the Annual Conference of the Justice sector, held in Ha Noi on January 7-8, 2003, State President Tran Duc Luong reaffirmed the importance of this exercise for the rule of law and called for future attention. See full text of the President's speech at Nhan Dan on line dated January 7, 2004 <http://www.nhandan.org.vn/vietnamese/20030107/index.html>. UNDP has also been asked to continue its support in this area during the next cooperation framework.

(150) As a result thousands of legal normative documents were reviewed and many of them were found to be outdated and were put forward for nullification or abolition. The information is available on the author's file.

(151) See "Mot cach lam hay" [A good practice], Ha Noi Moi [New Ha Noi] newspaper, January 7, 2003

assistance focused on law drafting. The Civil Code, promulgated in 1996, has been considered a 'key tool' for the courts since Viet Nam, a civil law country, has lacked laws for a long period of time.<sup>(145)</sup> Within 15 years, the number of laws and ordinances promulgated were double the number of such legal documents promulgated during the preceding 40 years (1945-1985),<sup>(146)</sup> and the number of international treaties concluded by Viet Nam was equal to the total number of international treaties concluded in the preceding 50-year period.<sup>(147)</sup> Within the project framework, the Guidance Manual on Law Drafting and the Review of Drafts was made available for law drafting officials. The participatory and transparent principles in law making were also introduced.<sup>(148)</sup>

The second aim of the UNDP intervention focused on ensuring the consistency and the legality of laws and other legal normative acts.<sup>(149)</sup> With a significantly increased number of new laws and other legal normative documents, it has been necessary to systemize, codify and review the existing legal acts to see which are outdated and inconsistent or illegal, so that the people and the judges could find out what were the correct laws. A Guidance Manual on reviewing and systemizing the legality of legal normative acts was made available and widely shared with hundreds of law officials working in the field.<sup>(150)</sup>

Better access to laws for judges and for the public in general was also a target of the UNDP assistance. A law database CD-ROM containing the laws and the most important legal normative documents has been made available. An information network that links the Supreme Court with all 61 provincial courts was established to share judicial information. A CD-ROM "Your Lawyer" containing most frequently asked questions and answers has been widely distributed to the public. A set of radio cassettes on most popular legal topics, designed to be attractive, simple and easy-to-understand, has been distributed to all local radio stations for law dissemination purposes and has received good feedback.<sup>(151)</sup>

Within the framework of a UNDP assistance project, hundreds of justices, judges and court officials had the chance to attend training courses abroad or locally on substantive and procedural laws as well as professional skills. Recovery of such investment is impossible to quantify, but no one doubts that that assistance was very important and added value.

(152) The project was co-funded by the Danish Government.

Training for judges and court officials was among the key activities of a UNDP project to support the strengthening of judicial capacity, the first donor assistance for the court sector.<sup>(152)</sup> New thinking and new levels of awareness by those judicial officials on the issues of judicial independence mean that the new role of the judiciary has been significantly enhanced.

(153) The Ministry of Justice has been the coordinator for government agencies.

(154) UNDP has been seen as the leading coordinator among the donor community in this exercise.

(155) The LNA Report suggests that in the long run, judges should enjoy longer term of office or life tenure, and much higher remuneration. The Report also suggests the application of an adversary approach in litigation and more compliance with principles of fair trial and so forth. See LNA Team 2 Report, *supra* note 126, at 62.

(156) One year after the LNA was launched the Politburo issued the Resolution 8 dated January 2, 2002, on judicial reform.

(157) The State President recently emphasized that the expansion of the jurisdiction of the administrative courts is to make sure that "all people realize that their peaceful lives, their fates and properties, moral and human dignity and values are put under the credible security of the law." See Tran Duc Luong, *Judicial Reforms for the Rule of Law*, Nhan Dan Newspaper on line, at <http://nhandan.org.vn/vietnamese/20020326/bai-tsluat.html>

In addition to this assistance, the recently conducted Comprehensive Legal Needs Assessment (hereafter called LNA), which commenced in March 2001, encompassed the whole legal sector, ranging from law-making, law implementation, legal education and judicial training to legal dissemination, has had a positive impact upon the current reforms of the justice sector. The implications are reflected in three main areas. It was the first time the key legal institutions, such as the Supreme Court, the Ministry of Justice,<sup>(153)</sup> the Supreme Procuratorate and the Office of National Assembly, worked together with donors<sup>(154)</sup> and international experts to find out the shortcomings of the current legal system. These shortcomings included the issues related to judicial independence and performance and there were discussions concerning the ways forward to future development by formulating a 10-year strategy with a detailed action plan for implementation. Second, the process in itself is a great step forward. Through several discussions and consultations among themselves and with international experts during the exercise, the key legal agencies and officials have reached a common awareness and understanding on the definition of, and how to deal with, legal and judicial reform. Many suggestions and recommendations of the LNA exercise on the enhancement of judicial independence and performance<sup>(155)</sup> can be found in current judicial reforms, which the Party and the Government are very committed to.<sup>(156)</sup> Third, the LNA has brought donors in town to work together to discuss the best ways to support the legal and judicial reforms in Viet Nam in a more coherent, effective and efficient manner in order to avoid duplication and overlapping.

### **The Current Judicial Reform: promising future perspectives.**

The reform requires that when deciding cases, the courts have to ensure the equality of all before the law, democracy, impartiality and independence of the judges and assessors. The reform also urges for the expansion of the scope of judicial review.<sup>(157)</sup> The judiciary has to pay much more attention to the principles of fair trial. Rights of the parties to be heard must be ensured. The case outcome must be mainly based on the findings of the adversary litigation during the trial, not on the case files as practised in the past. Judicial funds and salaries will be increased. An examination-based method of judicial appointment will be considered and the role of defence lawyers

(158) The Resolution 08 of the Politburo on some important tasks of the justice sector.

enhanced in the areas of fact finding and reasoning.<sup>(158)</sup> This political will has been widely welcomed by both the judiciary and the public.

Resolution 08 dated 2 January, 2002 of the Party Politburo has set the political will for the judicial reform towards the enhancement of judicial independence and performance. The role of the judiciary in the rule of law and human rights protection and economic reforms is increasingly recognized. This new momentum for the promising future of the judiciary would open a new chapter of the donor intervention in this very important area.

(159) UNDP Viet Nam has supported the key legal agencies in drafting the comprehensive Legal System Development Strategy until 2010, which intends to cover law making, law implementation, legal education and judicial training and law dissemination.

It will take time to have the desired properly functioning and independent judiciary. It depends on a number of factors, including a need for greater political will in support of judicial independence. Therefore the legal reforms<sup>(159)</sup> in a broader sense would greatly help better access to justice. Efforts of donors to support Viet Nam in drafting sound criminal and civil court procedures, which would make courts more easily accessible, especially to the poor and vulnerable, are needed. Immediate support of the expansion of the scope of judicial review and the application of the adversary litigation system is needed. Support to the establishment of a sound legal aid system and alternative resolutions to disputes should also be considered as one of the key targets. This seems to be particularly important since there are only about 2000 attorneys-at-law eligible to represent clients before the courts. The lack of lawyers and a sound legal aid system are among the key obstacles to access to justice, especially for the poor. Public defence is provided only for those accused who possibly face the death penalty, for juvenile defendants or for those who are mentally ill. Eligibility for public defence should be extended. There is great need to lessen the degree of judicial bureaucracy and to strengthen the capacity and independence of the next generation of judges.

## Conclusion

**The judicial reforms of the 1990s have provided the judiciary in many transitional countries with institutional guarantees for the autonomy of the judiciary as an institution and personal guarantees for judges as individuals. The adoption of separation of powers and the introduction of life tenure or long terms of office for judges have been recognized as being among the most essential factors to ensure judicial independence.**

However a lack of respect and support from other branches in some countries in transition continues to make it almost impossible for the judiciary to perform their tasks properly. Greater political will is needed for further enhancement of judicial independence. The inadequate quality of judicial performance and widespread judicial corruption have reduced the public confidence in the judiciary and as a result created obstacles for access to justice, especially for the poor and vulnerable. This has called for a greater degree of judicial accountability and more effort from the judiciary itself.

There must be greater awareness among the political and judicial leaders as well as the public of the significance of an independent judiciary. Both the governors and the governed must understand why they need an independent judiciary to uphold the rule of law and protect human rights and the degree to which it is mutually beneficial. Only then will there be greater political will and effort from political and judicial leaders, enhanced by the support of the public to build up an independent, well-functioning and accountable judiciary, which will, in turn, play an increasingly important role in the achievement of the Millennium Development Goals. More specifically, the political efforts should focus on the key areas as follows:

- A comprehensive legal framework should be designed to ensure judicial independence, with the adoption of the UN basic principles of the independence of the judiciary
- More funds should be provided to the judiciary to ensure its proper performance and adequate payment for judges
- More respect from other institutions and the public should be given to the judiciary
- Life tenure or long-term office for judges should be instituted
- A merit-based and more transparent and participatory approach of the judicial selection should be considered
- A code of judicial conduct with detailed provisions on, *inter alia*, grounds for and process of removal and discipline to ensure the independence of judges and to enhance the accountability of judges, should be adopted with the incorporation of the Bangalore Principles of Judicial Conduct