

**DIAGNOSING JUDICIAL PERFORMANCE: TOWARD A TOOL TO HELP
GUIDE JUDICIAL REFORM PROGRAMS**

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This is a working draft, prepared for Transparency International. The contents reflect only the author's views and in no way should be equated with the official position of the World Bank.

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"These [checklists of indicators of judicial independence] are excellent heuristic devices, but they are not as useful for assessing whether a court is more or less independent than one would hope. . . . An index, which combines scores on diverse criteria to produce a single number, is the standard social science technique for reducing the data to a form that permits comparison; but information about the severity of violations and the relative importance of different measures is lost. . . . In the absence . . . of reliable indicators, the best method may be to allow those who have the most contact with the judicial system, the lawyers, to offer their own evaluation of trends in their countries." (Widner, p. 178)

"But why would you want to do that?" (Comment from a participant in several judicial reform programs in response to TI's checklist proposal)

Introduction

This paper responds to a request from the U.S Chapter of Transparency International's ad hoc working group on the judicial integrity. The author has been asked to develop a checklist for evaluating the transparency and related aspects of judicial performance, suggest how it might be applied, and discuss its use to promote judicial reform. The idea for the list clearly draws on Transparency's experience with its Corruption Index, but the working group just as evidently is expecting differences in methodology, as well as content. Nonetheless, there are important similarities. Like the Index, the list is not primarily a research tool, but is intended to promote reform programs. It is thus aimed at a diverse audience of national governments and judiciaries, their citizens, foreign and domestic investors, assistance agencies, and other potential reform constituents. Consequently, it must target common areas of interest and understanding. The list should also be suitable for global application. It is not to be written with any specific legal system or tradition in mind, but should capture certain universal factors that would help identify real or potential problems in judicial operations.

I have accepted the invitation with some trepidation, in as much as such checklists or judicial report cards have been an item on the agenda of judicial reformers for at least fifteen years.¹ Over that period I have collected some half dozen examples (see annexes),

¹ I am sure the efforts go back still further, but not in this universal form. More importantly, they appear to be enjoying a resurgence at present. Conversations with colleagues revealed several on-going projects (the tip of the ice-berg, I suspect), ranging from improved judicial inventories (see later sections for an

participated in a few efforts, and seen most float into oblivion. The present task is somewhat easier than what my predecessors attempted. Rather than encompassing all of judicial performance, it is to focus on those aspects related to efficacy, transparency, accountability, and independence. I have been told for example that the adequacy of the legal framework will be handled by someone else and that I may assume its existence. Given its purposes and target audiences the list should also be simpler and less exhaustive than the massive judicial inventories prepared prior to an actual reform program. This narrowing of the topic eases the burden but does not affect the overriding methodological challenge – our/my ability to identify a short list of characteristics that are good predictors of downstream behavior for the universe of judicial systems.

I will begin with my own list of explanations and caveats. First, I have accepted the invitation, not because I think can adequately fulfill the working group's expectations, but because they are targeting issues receiving far too little emphasis in current judicial reform efforts, and especially those sponsored by foreign assistance agencies. Whatever is implicitly or explicitly understood as the goal of judicial reform, it arguably transcends mere technological innovation or "modernization," but these have increasingly occupied the resources, plans, and indicators of progress incorporated in reform programs. For a variety of reasons, ranging from the difficulty of defining them and their highly political nature to our own ignorance as to how to proceed, internal and external reformers have tended to shy away from the more qualitative aspects of judicial performance. In doing so, they run the risk of producing superficially modern, but otherwise unsatisfactory organizations in their wake. As I have written elsewhere,² many reforms if implicitly acknowledging the importance of these imponderables, have resorted to providing judiciaries with the tools to produce improvements, trusting that they would be used to these ends.³ Experience suggests that at least over the short run, more direct action is required.

Second, at the present time, I doubt that anyone is in a position to produce the perfect checklist, first because our knowledge of the factors shaping judicial performance is too imperfect; second because on a global level, both judicial operations and the standards for evaluating them vary widely; and third because in the best of worlds, we are talking in terms of probabilities, not absolute laws. (There is also a fourth reason, addressed in the next point – that judicial performance depends on more than the judiciary). However, with the understanding that perfection is not a reasonable goal, we can advance some general rules of thumb, identify potentially problematic situations, and on this basis prioritize areas where reform is most needed. There will always be exceptions -- judiciaries which despite violating every rule, seem to function better than most, or those

explanation) to undertakings that look a good deal like what Transparency has in mind. Despite the obvious disincentives I've forged ahead, but the reminder that this is not a unique experience accounts for my emphasis on some methodological and operational issues the working group may not have anticipated.

² Hammergren, (1998).

³ This may give too much credit to the purveyors of infrastructure, equipment, and modern management techniques. Some of them clearly believe that the real cause of judicial inadequacies lies in the absence of these elements. Many, however, do justify their focus by arguing about the broader impact of technology (or better buildings) on behavior. Their argument may be valid, but it discounts the many countervailing forces working to diminish or distort that effect.

which despite an optimal organization still harbor an abundance of undesirable practices. Nonetheless, in the majority of cases, the rules of thumb should be a useful guide for would-be reformers – and probably more so than the special circumstances explaining the exceptions.

Third, assuming our ability to devise the checklist (which I do promise to advance in the bulk of this report), the judiciary is not an isolated organization, but rather operates within a surrounding institutional environment. That environment in turn puts limits on what even the most perfectly structured judiciary can accomplish and thus on our ability to resolve judicial problems by addressing only the judiciary or even its immediate links with society writ large. Two years ago, I was a member of a team asked to devise a rule of law reform program for a country recently emerged from a civil war and to our eyes (correctly, it turned out) on the brink of a second one. We were able to identify a series of necessary changes in judicial and police operations. However, our recommendation was to postpone any action until there was a government in place with sufficient interest in promoting an equitable, transparent, rule of law system and even then to proceed with utmost caution. This was an extreme case, but not a unique one.

Even in instances of less dramatic social breakdown, there are any number of environmental factors which will undermine the performance of the best structured system. Highly inequitable distributions of resources (not just wealth, but also status, information, education, and relationships); extreme regional, ethnic, and social cleavages; value systems and social expectations in conflict with formal norms; institutional breakdowns in other sectors; or government's inability to resolve a wide range of pressing critical problems will all interfere with the ability of the judiciary to perform its own work. The scarcity of financial and other resources can inhibit reform efforts in still more mundane fashions. Where monies do not exist to pay salaries or there is no pool of qualified candidates for the bench,⁴ reform designers will have to be innovative in adapting their rules of thumb.

Finally, it is well to recognize that both in the more developed nations and in many developing countries where reforms have been underway for some time, there is an emerging body of criticism directed at some of our most traditional beliefs about the judicial role and the way it is conventionally performed. I won't address this discussion here, but it has obvious relevance for the task at hand. My checklist, like its predecessors, is based on a conventional, minimalist understanding of judicial performance, one which posits that a well functioning judiciary will apply the law and underlying social norms in an equitable, predictable, and transparent fashion, will be protected from extraneous political and other pressures, and will be governed by some mechanisms to ensure both internal and external accountability. I will not delve into questions of the adequacy of judicial decision making for resolving different forms of conflict; debates about the public or private nature of the judicial good and the

⁴ As another example I was part of a second team asked to evaluate a judicial assistance program in Cambodia. Aside from the other problems faced in that country, the fact that it had only about 40 graduated lawyers (virtually none of whom were currently on the bench) suggests problems for some time to come in recreating even a minimally adequate judicial organization.

implications for what should be provided as a public service and how costs will be assigned; the desirability and possible limits of judicial independence; the recognition of alternative (indigenous) legal systems; or suggestions that certain traditional judicial functions be redistributed among a variety of judicial and nonjudicial bodies.⁵ Nonetheless, countries in the process of a radical redesign of their judiciaries should be aware of these arguments to avoid repeating some apparently ill-advised policies.⁶

Other Efforts and the Insights of Experience

Some additional inquiries revealed that my first estimate of the number of relevant prior efforts was far too conservative. Unfortunately, I didn't err as to their overall success. Collectively, they have significantly expanded our notions as to what to look at in reviewing judicial performance. They have yet to provide a single list of variables. One impediment has been their differing sponsors, themes, and intended applications. None it should be noted coincide perfectly with what the working group is proposing, although a few come close in their hidden if not overt agenda.

Roughly speaking, prior efforts include three kinds of activities. The first are the judicial or sector inventories typically conducted following a decision to undertake a reform project and thus as an input to project design. Their terms of reference (i.e. checklists) were usually developed to inform a single assessment and subsequently adopted or proposed as guidelines for others. Often running to dozens of pages, they are intended to ensure that the assessment team collects all information of potential relevance for program design. Early assessments sponsored by USAID in Central America⁷ produced several volumes of descriptive analysis and quantitative profiles for each country studied, and it has been said, amassed far more data than anyone ever used. Some subsequent efforts,⁸ sponsored by the World Bank have produced equally massive documents and in addition to the usual statistical and descriptive sections incorporated input from focus groups and surveys of users and judicial personnel.

Project design will always require detailed inventories, but most of the bits of information they contain have no significance in isolation. Planners need to know the number of judges, administrative, and support staff; prison population, condition of facilities, and budget; number and distribution of courts and how each is furnished and staffed; number of vehicles and other equipment, to whom they are assigned, and how used; person hours

⁵ For those interested in these topics, especially as they have been addressed in Latin America and Southern Europe, see Correa and Pena, Pastor, Garapon, Toharia, and articles in Tate and Vallinder.

⁶ Toharia argues for example that both Europe and Latin America have gone to questionable extremes in privileging judicial independence. A case in point might be Ecuador which lets the Supreme Court select its own members (*cooptacion*) as well as other judges, and at present, exempts them from impeachment. A more common error is the aspiration to provide all services to all comers, with no consideration for budgetary limitations.

⁷ These were designed and conducted by Florida International University's Center for the Administration of Justice (FIU/CAJ) and ILANUD (the United Nations Latin American Institute for Crime Prevention and Treatment of the Delinquent). Condensed versions were subsequently published privately by FIU/CAJ. A list is appended in the annexes.

⁸ See Chemonics. An example of the terms of reference developed by Waleed Malik (World Bank) is appended in the annexes.

per year devoted to judicial training, who is trained, and in what subjects; and total and average caseload in the aggregate and by different types of cases. They also require more descriptive analysis as regards the content of basic codes; rules and real practices for selecting judges and staff; or organization and activities of bar associations. Few of these items in and of themselves tell us much, even in the context of a single system and certainly not as a basis for cross-system comparison. Collectively, these and a mass of similar data help analysts develop a picture of how a national system operates, and where its weaknesses may lie. Apart from their utility for the programs already proposed, the resulting assessments did and continue to do a great service for countries where such overviews had never existed. They exposed unimagined problems and revealed the inaccuracy of some conventional wisdom about what was wrong and why.⁹ They substantially expanded our collective knowledge about justice operations and are still a source of ideas as to where reforms might focus.

The size of these first efforts has a second explanation. The absence of prior studies, reliable data bases, and even much understanding of what was wrong, made it difficult to predict what might be relevant. The only way to reach that determination was to collect all the information and analyze it en masse. Early studies and improved national statistics have eliminated part of this problem, although contemporary inventories still assume massive proportions, constrained only by tighter budgets or timeframes. A recognition that these fishing trips pulled in much that was not relevant thus generated a demand for a second approach, a shorter set of questions that could more quickly identify problem areas prior to intensive data collection. The exhaustive inventories could then be targeted to these areas, and the amassing of interesting but unnecessary information curtailed.

This second exercise comes closest to what the working group has envisioned. Its purpose, application, and intended audience are still somewhat different. The demand arose largely from assistance agencies' desire for a simple analytic tool that would allow them to determine the need for reform and the most productive areas for their work. The intended application is a series of individual countries, the audience the donors and their local counterparts in each, and the purpose is to guide joint determination of the outlines of a reform effort. There have been some suggestions that these quick assessments be provided to a larger national audience, but agency guidelines or country sensitivities often preclude that.¹⁰ More importantly, there has been little thought to using the results comparatively. Even with a common format, the studies don't lend themselves to easy comparison. While far briefer than the inventories, they remain highly descriptive and

⁹ In Latin American, these studies exposed, for example, the enormous percentage of pretrial detainees in the prison system, a previously unrecognized problem. They also raised questions about the assumed importance of an inadequate number of judges or an excessive workload in explaining court delays and large backlogs.

¹⁰ This has been a continuing problem with the inventories. Two early USAID assessments had their release delayed for years because of complaints from the country under evaluation (Guatemala) or USAID's concern about political repercussions (Panama). The Bolivian Supreme Court only released a World Bank funded study after leaks to the press made that preferable to allowing the rumors about its content to continue unchallenged.

qualitative, and their quantitative elements once again have little obvious significance outside the specific national context.¹¹

Moreover, even in single agencies, the formats have rarely been uniform. The priorities of different offices and country teams (whether for example this is seen as a democracy project or a market reform, whether the emphasis is on access to the poor, human rights, or efficiency) shape the thrust of each checklist, and in fact these are less checklists than sets of questions or topics to be explored. Those charged with applying them usually take their own liberties and occasionally attach their own analytic tools.¹² There has also been considerable debate as to whom should apply the tools. USAID's Democracy Center has for some time sought a checklist that a generalist could manage. Others have argued that most of the questions, even on the abbreviated list, require expert advice and that what a nonspecialist can count or identify as present will not tell us much.

As with the inventories, the results have fallen short of the goals, but the process has been useful. Despite agency and professional jealousies (and a consequent disinclination to use a checklist developed by anyone else¹³), there has been much cross fertilization of efforts, and a growing convergence on the general topics that ought to be featured. Researchers embarking on a quick judicial reconnaissance now have a variety of examples to inform their work and some helpful suggestions as to how to enter specific topics. Unfortunately, much of this is hard to access, and to be truthful, there are by now far too many examples to allow easy dissemination. A further grand obstacle to the overall goal is that the lists much like the inventories still contain too much information, and as a result can be used to justify a variety of follow-ups. The latter are usually negotiated, and often seem to avoid the high priority problems in favor of those that are less threatening. Sometimes that is the fault of the analysts who pulled their punches or came with their own pre-conceived recipes. More often, it is a consequence of stakeholder politics and a format which requires that problems be identified, but not ordered, prioritized, or weighted. If weaknesses are identified in salaries, budgets, equipment, court management, training, political intervention in appointments, external pressures on judges, and irregular contacts with clients, it is a sure bet that most

¹¹ Improvements in the quality and availability of basic judicial statistics in developing (and developed) nations have allowed some initial efforts to investigate the impact of a few potential quantitative indicators. However, the results, comparing obvious choices like the number of judges per 100,000 population, percentage of the national budget spent on the judiciary, or average caseload, against a more intuitive assessment of how the courts are doing, suggest that these are not what matters. A preliminary Bank Study (Buscaglia and Dakolias) finds some relationship between the percentage spent on infrastructure and use of computers, and delay reduction. However, of their six "good performers," three are widely regarded as having other serious performance problems (i.e. corruption), at the very least raising doubts that delay can serve as a proxy for overall quality.

¹² For example, one local contractor which has done a lot of work for USAID has introduced a stakeholders analysis (inventory of groups opposed to or supporting reform) which occasionally pays more attention to defining the political actors than the content of the reform they might support. Another, which has worked for both AID and the World Bank, is big on focus groups composed of users and judges, as a principal analytic tool, as well as a means of generating support for reform during the assessment.

¹³ When lists have been used repeatedly, it is usually because the same project manager or consultant directs the process.

judiciaries and governments will prefer a focus on the first half of the list and not on the second.

A third set of activities, now underway in all major donor agencies, aims at developing a list of indicators of reform progress. Now that we all plan for results, the idea is to set measurable goals for judicial performance and track and thus design projects to meet them. As suggested by USAID's eventual publication of some 75 indicators which it was forced to term "illustrative," the project is less easily realized than had been imagined. USAID's catalogue does attempt to cover a far wider range of performance than envisioned by Transparency, and initially faced some major battles as to how the major categories would be defined and conformed. It's arguable whether a category of "human and gender rights" makes sense, or whether impact on market oriented reforms should be separated from general efficiency and efficacy. However, once these compromises were reached, the most serious challenges were found within the individual categories -- here variations in where nations started, their legal traditions, and what the authors regarded as good performance or structural characteristics and practices likely to produce it were major impediments. Moreover, when USAID field tested the indicators in selected countries, it found many to be irrelevant and some to point in the wrong direction. Whereas signing of international conventions on human rights, anti-corruption or rights of the child might represent a major benchmark in some nations, others have been parties to these agreements for years with no noticeable decline in the related problems. Increases or decreases in reported abuses in any of these areas would have different significance depending on the country, or the point of time in its reform process. Much the same could be said of other hard indicators -- public opinion on judicial fairness, the percent of the national budget given to the courts, or case backlogs and average delay.¹⁴

Qualitative indicators fared no better. Once you know there is a bar association, judicial training program, or system for selecting judges, what else must you know to evaluate its performance? My favorite, the creation of separate commercial courts, added at the insistence of those working in the former Soviet Union, would put many Latin American nations, and as an informant noted, the state of Wisconsin, beyond the pale. The list of indicators had been intended to track advances in individual countries and to compare progress across them. One immediate conclusion was that it at best could be selectively used for the former purpose, but could not be recommended for the second. Hence, the initial dream of creating a short list of universal indicators of judicial performance and reform progress has devolved into a heuristic tool to assist reform planners in specifying their objectives and designing qualitative or quantitative benchmarks of change.

This catalogue of misadventures is not intended to dismiss either the real accomplishments or the possibility of now doing what has failed before. Certainly, past efforts to design and used diagnostic tools have advanced our knowledge of what counts in defining and shaping judicial performance, encouraged discussion over how to identify it, and improved the content of actual reforms. Even if we do not always apply it in real programs, we have an increasing understanding of relative priorities and how the various

¹⁴ As my colleague, Richard Messick, has noted, success in increasing confidence in the courts, should increase demand, and absent other changes, may well lead to more delay.

parts of the system interact with each other. And finally, the experience does illustrate the two major challenges faced by these efforts. One is purely technical, relating to the designers' ability to select and prioritize the key categories and to develop criteria for evaluating the status of each. The second is operational: how to ensure the tool will be used to its intended purpose, whether that be reaching an agreement on reform goals and components among stakeholders in one country or one agency, or mobilizing broader support for their doing the right thing. The two challenges cannot be neatly separated. The tool's design should be technically informed but must also be shaped by a knowledge of the eventual audience and their desired reactions. It has to play to their prejudices, understandings, and interests as well as to the broader cause. The design also requires its own internal politics. An instrument perceived as reflecting a broad consensus of acknowledged experts is likely to have more force than one produced by a single genius, especially as the excluded experts may form their own opposition. As discussed in the next section, this second set of considerations may have still more relevance for Transparency's proposal given that its expected uses are far more ambitious than anything yet attempted.¹⁵

General Principles, Assumptions, and Working Hypotheses

The task is more than the development of an analytic tool, but admittedly that's where I, and everyone I've consulted, first focused. Transparency's request only starts with the list. Its larger purpose is to have an instrument which will convince governments to undertake performance-enhancing reforms, either directly, because they acknowledge the list's validity and authority, or indirectly, through the actions of the rest of the target audience. As far as the list and its application are concerned this imposes certain further requirements:

- It must be technically sound, especially in its selection of the key variables affecting judicial performance and its criteria for assessing their content.
- In its normative or prescriptive elements, the values it reflects should be widely shared and it should recognize reasonable variations in the means for their realization as well as areas of emerging consensus and lingering disagreement.
- To allow comparison, the list must incorporate a grading or scoring system. This must be credibly and transparently applied, reducing so far as possible charges of subjectivity, cultural insensitivity and bias.
- It must be relevant and intelligible to all of its target audiences.
- While it should cover all the relevant categories, it should not be lengthy. Presentation and discussion should be brief and to the point and should lead readers to policy-relevant conclusions.

As the first two points suggest, the list will be based on theoretical assumptions linking three analytic categories: the behaviors (dependent variables) to which we are predicting;

¹⁵ The problem of encouraging the use of technically sound solutions is not unique to judicial reform. See Reimers and McGinn for a discussion in the context of education programs, where as with judicial reform, "...problems as they are faced by policy makers lack the precision to be found in a systematic study that can prespecify all relevant variables." (p. 27).

the independent variables or judicial characteristics which determine those behaviors, and the criteria used to evaluate those characteristics. The list itself will be composed of the independent variables or judicial characteristics, but its value hinges on their relationship to the other two levels. The selection of the dependent variables or desired behaviors is essentially normative, and thus should represent a broad consensus on what constitutes good performance. The elements of the other levels ideally arise in empirical theory. As that theory is far from complete, logical arguments and some normative preferences are likely to be as influential. By the time we get to evaluation criteria we are going to encounter increasing disagreements as to what really counts and how we will count it. At best the entire structure will derive from an emerging consensus as to the determinants of judicial performance. Where that consensus has not formed, there will be considerable room for disputing the particulars and even the overall objectives.

The likelihood that all these assumptions are not shared leads to the third point, the need for maximum transparency in the application of the checklist and for ensuring that those charged with this task are perceived, individually and collectively, as credible evaluators. I will discuss some means for meeting these criteria in a later section. The point for the moment is that the authority accorded to the list depends as much on how it is applied as on its own internal quality. Authority hinges in part on who the evaluators are; the other part depends on an adequate explanation of how they arrived at their determinations. This second requisite conflicts in some sense with the emphasis on a concise presentation, and my notion that the list's impact will vary inversely with its length and complexity. The solution is a compromise. First no matter how brief the basic presentation of an assessment, it will require some explanation of the grades or scores assigned. (While it has other weaknesses, the Blackton report card¹⁶ is a good example in this respect). Second, a far more extensive documentation should be readily available. This serves two purposes: the obvious one of justifying the conclusions and the less obvious but equally important provision of more details for those interested in heeding the implied recommendations.

The last two points, relevance and brevity, address the working group's concern that this list serve as a direct and indirect incentive for reform programs. Their desire that the list reach and influence a broader and fairly diverse public means that it must have significance for nonspecialists and for those whose interest in judicial performance is fairly narrowly focused. While the list can educate as well, there are practical limits. What entrepreneurs think they want from a judiciary and how they think it is achieved is likely to be different from the views of judges or advocates of social justice. All might be encouraged to take a broader viewpoint and recognize connections they had not understood. Still, if the list is to have a wide impact, it is going to have to sacrifice some detail and breadth in favor of a message that is readily and immediately understood.

This sacrifice will only be worthwhile if certain other working hypotheses hold. Most of these relate to the audience's intrinsic interest in having such a tool and the likelihood that it will inspire them to take actions supporting its explicit or implicit recommendations. The purpose will not be served if this becomes just another means of

¹⁶ Annex II.

bludgeoning the political opposition, punishing the judges, or a pretext for increasing the extra-judicial side of actors' operations. The operative assumption is thus not that the actions listed below will occur automatically. Instead, it posits that the methodology can be tailored to encourage these responses:

- Governments and judiciaries will grant sufficient authority to the product to attempt to follow its recommendations
- When they do not, other audiences will internalize the assessments and recommendations and mobilize their own resources to pressure for change
- Two potentially powerful constituencies, assistance agencies and investors, will find the list relevant to their concerns and use it to make decisions as to where they will start or expand operations.

As discussed above, even less ambitious efforts have fallen short in this area, and it is in fact the key to the value of the entire endeavor. Reformers already have enough checklists and related tools. What they need is one with an impact. I return to these issues in the last section.

A Methodological Detour: If the Goal is to Eliminate Inappropriate Behavior, Why Not Focus on it Directly?

Given the difficulties in developing structural predictors of behavior, this question needs to be taken seriously. If you want to know whether a judiciary is corrupt, unaccountable and vulnerable to politically and other pressures, why not just ask those questions? We have tools to do that, ranging from public opinion polls focusing on the overall judicial image, to surveys tapping real experiences with the judiciary (Did those interviewed pay bribes? Did they face any irregular obstacles in getting their case to court? Did the judge explain her decision and was it consistent with other similar cases? Were there indications of outside pressures being exercised?)¹⁷ to more anthropological observations of actual practices (which may extend to the deployment of simulated users).¹⁸ I remain convinced that such techniques are important and perhaps the most direct way of ascertaining the existence of certain kinds of problems. I surmise that the working group dismissed this option for two reasons: first they have their doubts about the utility and accuracy of these methods and second, their interest goes beyond identifying problematic behaviors.

Turning first to the doubts, these and other techniques to measure judicial corruption do have their limits. In some cases, judiciaries or political authorities will not permit this kind of investigation. That alone should be a signal that something is amiss, but it is hardly conclusive evidence.¹⁹ Beyond that, what the public perceives or informed

¹⁷ Although focused more on the executive bureaucracy, the World Bank Institute (WBI) is testing such instruments to develop a universally applicable tool.

¹⁸ This method is explained in some detail for the detection of administrative corruption in Lopez Presa et als. It was also used in the Greylord investigation in Cook County, Illinois. See Special Commission.

¹⁹ It is not just the retrogrades who object to these techniques. Many of the caveats raised here were also suggested in informal interviews with judges already engaged in reform work. Many are speaking from

observers are willing to admit may be inaccurate, incomplete, or outdated. Perceptions and even experiential reports are based on past events – if a judiciary has reformed or done some backsliding, the general public or the occasional user may be slow to recognize the change. Conversely, they may be extremely vulnerable to the vagaries of press coverage and whatever incident is currently attracting attention. Results of surveys in particular are difficult to compare across countries. They provide a valuable benchmark for tracking advances in resolving problems within a single nation, but may not be a good indication of whether such problems are unusually pervasive.²⁰

Moreover, problems may be systematically over or under reported. Losers in a legal case tend to perceive injustices even where they have not occurred; the tendency will be aggravated when legal counsel blames the judge rather than their own incompetence. Lawyers in some countries have been known to solicit and pocket “bribes” from clients; the judges never see the money. Unsophisticated clients may confuse legitimate court fees with pay-offs. Users may also be unaware of irregularities. In the famous Greylord investigation²¹ in Cook County, Illinois, some clients who paid bribes claimed not to realize that was the purpose of the monies solicited. Many other kinds of irregularities are virtually invisible – pressures on judges or other court personnel from upper ranges of the judicial hierarchy, concerns about vindictive disciplinary actions or denial of benefits,²² or calculations about the best career moves. Finally, while interviewers have developed techniques to encourage reports of systematic, petty irregularities (as things “others” commonly do), it is unlikely that parties to grand scale corruption will be as forthcoming or that simulated users or random observers will detect it.

For all their shortcomings, such efforts to identify the real incidence of corruption and other problematic behavior are an essential step in evaluating judicial performance. They may constitute input to the checklist²³ or be used to verify its findings and they can guide

experience and the observable fact that even “good” judiciaries often receive less than perfect scores on public confidence or impressions of bias.

²⁰ Survey responses may say as much about the expectations of the informants as they do about the behavior being reported. Differing norms on conflicts of interest or nepotism or about what constitute bribes (as opposed to normal social attentions) will obviously affect results and impede cross national comparisons. Outsiders (international entrepreneurs) may have a far different perception of the level of corruption, based on their different standards and possibly on a certain level of ignorance as to how local systems operate. Although lying outside the theme at hand, Jose Juan Toharia’s example of Venezuelans’ relatively low reporting of victimization by street crime is a case in point. It was only after repeated interviewing that the researchers discovered respondents were not including “minor” incidents like purse snatching or thefts of objects from cars. Cited in a lecture for the World Bank, July 14, 1999.

²¹ See Special Commission.

²² For example, in Ukraine and probably in other countries in the region, local authorities provide housing to judges and are said to use this, rather effectively, to influence judicial decisions. Ephraim Ugwuanye in private conversations and a paper written for the Bank recounts how such benefits (especially luxury vehicles) have been used to the same end in Africa. In El Salvador, until recently Court Presidents had their own slush fund, the use of which was not reported. The last president to enjoy that privilege used the fund as a campaign chest (providing meals, trips, vehicles and other equipment to lower ranking judges and private bar members) in his unsuccessful bid for reelection.

²³ The Messick checklist, Annex IV, in fact has two types of information – one focusing on problems, many of which derive from surveys, and the other focusing on structural and procedural traits. Unfortunately, this makes it extremely long and probably inappropriate for comparative use. It also may fall short on

the prioritization of eventual reform objectives. They may also be the most dramatic way of calling attention to the need for change. Judicial and political leaders can easily dismiss an expert panel's finding that the judicial selection system is flawed. They will have more trouble with a survey indicating that 90 percent of the citizenry have no faith in their courts. Presumably such quantitative measures also have more impact on potential investors or agencies interested in providing assistance, two additional sources of pressure for reform.

Nonetheless, I share the working group's apparent doubts about their utility as a stand alone tool – especially if the overall objective is to encourage countries and their judiciaries to take positive steps to correct problems. The quantitative nature of the data almost inevitably encourages their conversion into single scores, the creation of national rankings, and, as in the case of Transparency's Corruption Index, endless, often unproductive debates about objectivity, validity and reliability. Furthermore, while the numbers may speak for themselves, it takes a careful listener (or reader) to interpret their implications, which as suggested above may be more or less than their face value. Those who take the time to read through the methodological explanations or entire questionnaires may have a fairly good, if partial picture of what is happening on the ground; those who don't or who just rely on an aggregate score may form their own, possibly very distorted view of events.

More importantly, the focus on real or perceived outcomes is less helpful in identifying underlying causes or possible remedies and does little toward explaining the vulnerability of a judicial system or its potential for eventual abuses. Having indisputably attracted the judiciary's attention, along with that of elites and the public, figures on the real or perceived extent of corruption, backlogs, or "irrational" judgments frequently produce equally dramatic reactions which over the short and long run have only made things worse. Examples include the post-1992 judicial purges and executive interventions in Peru, justified by the judiciary's abysmal rating in opinion polls, and threatened attempts to imitate them in Venezuela, Guatemala, and Haiti.

The working group's desire for a judicial checklist incorporates a broader purpose – to call attention to a problem while simultaneously suggesting remedies and encouraging their adoption. This means that the list will focus on structures, characteristics, and practices which, while one step removed from the outputs or behaviors we want to influence, are key determinants of their content and which furthermore, lend themselves to modification through the normal reform inputs – resources, training, legal and procedural change, reorganizations, policy dialogue,²⁴ and so on. The list may not tell us what the real level of corruption, political intervention in decisions, delay, or arbitrariness is, but it ideally should identify points of vulnerability worthy of correction. It offers an invitation to a dialogue rather than a confrontation.

linking some of its extra-judicial problems to the judiciary -- violence, crime, and undesirable business practices certainly have causes other than judicial failings.

²⁴ The policy dialogue is important in those areas (e.g. higher budgets and salaries, some legal and constitutional change) where external actors cannot operate directly. Assistance agencies may lobby for higher judicial salaries, but they rarely if ever provide funds for implementing them.

This more complex strategy is far harder to mount and faces numerous obstacles of detail. One challenge is to identify characteristics that are sufficiently generic as to have a universal application. Many of the lists so far developed have fallen down on that point – developed from the authors’ experience with a few systems, they tend to suffer from a marked ethnocentrism, equating all the characteristics of a specific system which seems to work with what is necessary for any and all systems to operate well. Once applied beyond the author’s area of expertise, their flawed logic quickly becomes apparent. Latin Americans, for example, and many experts working in the region, have come to equate judicial independence with an earmarked 6 percent of the national budget and the elimination of any role for the executive (especially the Ministry of Justice) in appointments and administrative management. Many countries with judiciaries marked by fair to excellent performance would fail on one or both counts. The European Union’s current efforts to set judicial standards for aspiring members has been beset by similar arguments over how generic requirements can be separated from what specific countries commonly do.

A second challenge is the issue of objectivity. The list will inevitably require subjective judgment calls, both as regards its composition and any scoring system, and these will just as inevitably raise charges of bias or lack of cultural sensitivity. Means to lessen these problems are discussed below but there is no way to make them disappear. Its subjectivity and the kinds of details included may also make it a less effective rallying point for the reform coalition. A flawed selection system and lack of access to information on cases are not the kinds of issues that elicit street protests or a reduction in foreign investment whereas highly publicized opinion polls could conceivably do just that. Finally, a dialogue implies negotiation and raises the risk of bargaining away the key points or of entering into unacceptable agreements. It’s all well and good to suggest that economic subsidies may be decreased incrementally. The argument is hard to push for political interference in appointments (only in every other one this year?) or the incidence of bribe taking or human rights abuses. True reforms do require incremental change, but for obvious reasons often do not lend themselves to even tacit acknowledgment of this principle.

The Dependent Variables: What Are We Trying to Predict?

Although the central topic is corruption, the working group’s interest extends to other related aspects of judicial performance. I am calling these “dependent variables.” The quotation marks are important; the exercise is marked by considerable subjectivity and a substantial lack of rigor as regards the predictors, what we are predicting to, and the linkages between them. The group’s suggestions as to what they want predicted have left me considerable initial freedom in its further definition. I would include, in no particular order, the efficiency and efficacy of judicial operations, the courts’ equitable treatment of and accessibility to all citizens, the timeliness and predictability of decisions, their consistency with the formal law, common standards of interpretation, and certain broadly shared notions of justice, the absence of internal biases and susceptibility to external pressures, and a reasonable match between what the public expects and the

quantity and quality of what the courts are able to provide. To this we might also add a satisfactory legal framework for the judiciary to apply and mechanisms ensuring the enforcement of judicial decisions. I am taking the liberty of omitting the first of these additional dimensions, and slighting the second, but they obviously will affect performance.

As one of the key elements of the proposed strategy is the impact on foreign audiences (especially investors and donor agencies), it should be noted that some of the desired behaviors extend beyond their immediate interests. Investors in particular, will be interested in how commercial cases are handled and less concerned with access for the poor, equitable treatment, or broadly shared notions of justice. I am including these dimensions for two reasons. First, a well functioning justice system must address them, and that is our fundamental aim, not just good service for foreign clients. Second, if they do not do so already, investors (and donors whose main entry to the topic is economic growth) should be encouraged to look beyond the immediate impact on business disputes. In the end, these can be resolved by insisting on international arbitration, creating special courts, or just by striking deals with the government. However, in a country where the rest of the justice system does not operate well or at all, there are other, possibly more important negative consequences, ranging from uncontrolled crime and civil violence to business' difficulties in keeping permanent staff, who may face their own, unrelated legal problems. For this reason, the check list also should probably extend beyond the courts, to include prosecution, police, and the independent legal profession.

As regards the extended list of desired behaviors or dependent variables, several obvious comments are in order. First, the various components can be conceived as dimensions of a single construct – the quality of judicial performance. I have resisted ordering them because they are all usually regarded as essential. Advances in one or two dimensions without comparable advances in the others could well produce disastrous results -- efficiency without equitability, timely, but arbitrary results, internally consistent standards which remain unknown or unintelligible to users, and so on. Second, the standards against which any dimension is measured are relative and at their extremes, probably not only unattainable but also undesirable -- at least insofar as regards perfectly predictable, immediate decisions, machine-like efficiency, or excruciatingly detailed justifications of each and every one. This will clearly produce scoring problems -- can a judiciary be too independent or too efficient, and if so, how is that reflected in the score assigned? Finally, just as there is some overlap among the dimensions there are also internal contradictions. Efficiency may interfere with accessibility and conformity with legal norms, and all three may contradict public expectations. And although corruption was where we started, it is not the paramount objective. It is completely conceivable, in fact highly likely, that a system designed to eliminate all corruption would deliver no other results.

As a partial solution to these dilemmas, I am grouping the behavioral characteristics in three broader dimensions, suggesting that performance hinges on their dynamic interaction: the judiciary's creation of an internally consistent process (institutional integrity), its accountability to society writ large, and its maintenance of a certain level of

independence vis-a-vis its external environment. The first dimension relates to the judiciary's ability to set and enforce standards for its own operations, and the second and third on its cross boundary exchanges with other socio-political systems.²⁵ Like the more detailed list of desired behaviors, the three dimensions are essentially normative. This is probably most true of independence and accountability, both as regards their initial selection and the identification of the factors determining their achievement. Whereas in the case of institutional integrity, the factors derive from a more complex, if very basic model of requirements for organizational sustainability, those for the other two dimensions more closely resemble extended definitions. This is the difference between saying that a transparent organization requires a transparent selection system and noting that institutional integrity demands that an organization choose members on their ability to perform necessary functions. As the author of a checklist, I'm not happy with my taxonomic apples and oranges, but I see no way around the problem.

Elements of a Checklist

The extended definition of judicial performance is the basis for the checklist; the list itself is composed of the characteristics believed to be critical in producing the desired patterns of behavior. They are presented as general categories (e.g. selection of judges) and series of criteria or questions for evaluating them. So where did I get the characteristics and criteria? The short answer is that many were cribbed from pre-existing lists and from the working group's own suggestions as to what they thought might be important. The longer, more intellectually respectable answer is that they draw on an accumulated body of knowledge and understandings about how judicial systems operate, and that this in turn is based on academic studies, theoretical arguments, and the experience provided by real reform programs. As in all social science, the reach and sheer quantity of theory and hypotheses far exceed the support of empirical verification. Thus the relationships between judicial performance, the selected characteristics and the evaluation criteria are at best based on working hypotheses. We believe the ways judges are selected and subsequently treated by their institution have a strong effect on what they do; we believe irregular intervention by the other branches of government in these processes will have undesirable consequences (lesser predictability, equitability and consistency with the law, etc) on their behavior. The beliefs can be defended logically and are supported by some evidence, but the strength and precise details of the relationship by no means constitute self-evident truths.

There are two logical ways to represent the relationships figuring in the checklist – one is to take each desired behavior (e.g. efficiency, access, predictability,) and specify the structural characteristics most likely to produce it. The other is to select certain broad structural categories and leave the linkages for the subcriteria. I am taking the second tack, as have most other authors of such lists. This loses the one-to-one correspondence, but offers the advantage of focusing on systems as reformers will see them. It also

²⁵ Reddy and Periera summarize the required changes as “micro institutional reform, concerning the modification of the internal procedures,” “state-societal reform, involving the restructuring of links between public entities and civil society,” and “macro institutional reform, involving the inter-institutional relationships between different branches and agencies of the state.” (p. 27).

avoids much repetition or excessive detail, and finesses the very real gaps in our knowledge of the linkages. I will, however, present the major categories under the three overarching dimensions of institutional integrity (not just corruption but the ability of the judiciary as an institution to set and enforce internal standards of performance), transparency and independence. The first dimension is much broader than, and even in this simple format, imperfectly distinguished from the other two. (Are adequate salaries a part of institutional integrity or independence? Is public input into selections systems part of transparency, or institutional integrity?) I will discuss scoring and other details below. Whether or not an overall score is assigned, each of the three dimensions and each category within them should receive a score, based on the scores or answers for each of the evaluation criteria.

The checklist is, I would stress, only a first cut and hardly intended as the final product. It draws blatantly on others work, and might well have been replaced by one of the examples included in the annex. The purpose is to put something on the table for discussion, and the only possible advantage of my version is that it is more specifically tailored to the further requirements of the working group. For lack of time, I have not done two additional tasks that the working group undoubtedly expected.²⁶ The first is the lengthy explanation of each category, its intellectual provenance (especially as regards theoretical arguments, any empirical research, and more casual observation) and its impact on the dimension in question. Impact would be largely addressed in the second missing task, a discussion of the various criteria as they would be applied to concrete cases. As demonstrated by ABA/CEELI's checklist for judicial independence (included as Annex V) this latter discussion could be lengthy, incorporating a specification of the linkages (e.g. why are adequate salaries important?), a review of the range of known variations (from the irregularly paid \$15 or \$20 for Cambodian or Liberian judges to the amounts received by judges in Singapore, the US, or Europe) and a discussion of how they would be treated (how do real salaries compare with the external reference points and what should be regarded as adequate?). Technically, the checklist as presented publicly would not incorporate any of this detailed discussion. It should be available for those interested, would necessarily inform the work of application, and would be subject to constant modification on the basis of the results of the list's use.

In reviewing the list, some readers may be surprised by the absence of the usual quantitative indicators figuring in other examples. As I've discussed above, many of them (number of judges, judges per 100,000 population, average caseload, percent of budget spent on the judiciary) have little known independent significance. If there is a range of acceptable answers it is probably broad and has yet to be defined. Others (average time to resolution, backlog, percentage of users or of the general population expressing satisfaction with their courts) look more like downstream behavior, although they too have to be interpreted in context. Should time to resolution, for example, be weighed against user expectations, legally set limits, or some universal standard? It would be helpful, as an independent exercise, to establish a data base incorporating these statistics for a wide range of developed and developing countries. This would discourage

²⁶ However, Annex I does address some of these issues very briefly.

the misuse of individual statistics²⁷ and help identify those quantities with some broader significance as well as the acceptable range of variations. Obviously some of the criteria included below require that the scorers know these numbers, but they will only be part of the input in answering a single question.

²⁷ It is very common for a project justifications to incorporate country level data as indicators of massive problems. A little comparative work often reveals that the number represents an average or better than average rating. One example is the Latin American fixation on allocating 6 percent of the budget to the judiciary, a phenomenally high proportion on a universal basis.

TABLE I

A PROPOSED CHECKLIST FOR EVALUATING JUDICIAL PERFORMANCE

I. INSTITUTIONAL INTEGRITY

A. Selection of judges

Criteria for judicial selection are set, publicized and followed

Criteria are based on job-relevant²⁸ merit

Criteria incorporate exclusions (with background checks) for those with criminal records, outstanding cases or professional disciplinary actions pending against them

B. Management of the judicial “career”²⁹

Judges have permanent tenure or fixed, renewable appointments

Rules of conduct exist as does a process for monitoring compliance, disciplining violators, and appealing disciplinary decisions

Standards for performance (number of cases decided, average time limits, reversals on appeal, service to users, etc) exist and are monitored to help judges improve their work and where relevant, to affect decisions on tenure, promotions, transfers, and discipline

Promotions, transfers, dismissals, and/or renewal of appointments are based on publicized, transparent criteria

There is a transparent appeals process for judges in the case of denial of promotion, transfer, or renewal

Training programs are available and participation is encouraged and facilitated; some sort of entry level training or orientation is compulsory.

C. Internal administration

Administrative processes (at the systemic and court room level) follow set rules and procedures

Budgets, procurement and management of resources are monitored and audited

There is a management information system (manual or automated) to facilitate planning and budgetary oversight

Administrative staff are chosen, promoted and retained through transparent, merit-based procedures

²⁸ The kind of explanation offered here is doubtless needed for some other criteria. I say “job-relevant” because many merit-based lists, while properly objective, focus on traits of questionable importance to what a judge does – lists of publications, ability to recite laws or entire codes by memory, performance on psychometric tests supposed to reveal judicial vocation. Here, I would give credit for having objective criteria, but grade down for relevance.

²⁹ For countries without true career systems (e.g. where judges are elected or appointed “for life” to a single position) some of these categories will not apply and should not be scored.

Administrative staff have an ethics code, performance standards and their own career and disciplinary systems.

Adequate training is provided for administrative staff

D. Resources

Changes in the overall judicial budget are commensurate with the growth of the national budget and also reflect increases (or decreases) in demands for judicial services

Staffing, equipment, and offices provided to judges and administrators are adequate to allow performance of their duties

Staffing, equipment and offices provided to judges and administrators are no worse (no better?) than that for the rest of the public sector

Internal resource distribution is based on need and workload

E. Judicial Processes

Procedures for handling cases are standardized and mechanism exist for ensuring they are followed

Rules of evidence and standards for evaluating arguments exist and are applied in a predictable fashion

Assignment of cases follows standardized procedures and results in a reasonably equitable distribution of work

Procedures are reasonably efficient and designed and reformulated in the interests of eliminating unnecessary steps and bottlenecks.

Judges have the power to move cases ahead and to punish or deny efforts to create additional delays

Where judicial decisions are not complied with, courts have additional means to enforce them

There is a regularized process for appealing judicial decisions, and decision are not reversed in any other fashion

The pre-trial settlement of disputes is encouraged but not forced

There exist duly recognized alternative dispute resolution mechanisms, both court annexed and free standing, which provide a viable alternative to judicial processes

F. Legal Profession:

There is a transparent process for entrance into the profession, based on educational background and other relevant criteria

There exist laws and professional codes of ethics to govern the profession; they are widely known and enforced

Denial of entry or disbarment is subject to transparent rules, and has its own appeals process

Where there is a shortage of qualified professionals, there is a provision for lay representation or performance of some legal duties, but these individuals are also subject to rules of conduct

II. INDEPENDENCE³⁰

A. Selection of Judges

Any external input (by other branches of government or private individuals and organizations) to the appointment process is subject to transparent rules and occurs only in accordance with established procedures

Evaluation of candidates is done by a body or office separate from that making the final selections

Judicial appointments are made as vacancies occur, not to coincide with changes in national administration

B. Management of the Judicial Career

Judicial salaries meet living wage and some reasonable proportion of good wage in private sector

Additional privileges (housing, vehicles, trips, training) are allocated through a transparent process with no nonjudicial input

Where external actors have complaints about judicial performance these can only be entered through the normal disciplinary process

C. Internal Administration

The selection and further management of administrative staff is handled through transparent rules and regulations and is not subject to intervention by officials not legally authorized to provide specific inputs.

Whether handled by an external body (e.g. Ministry of Justice) or by the judiciary itself, oversight of internal administration responds to judicial needs, not to the administrators' agenda

D. Resources

Salaries and budgets cannot be reduced nor their distribution altered by other branches of government

When judicial workload reaches unmanageable limits, the judiciary is able to obtain more resources

E. Judicial Processes

Other branches of government do not override or ignore judicial decisions, and when they do, they are subject to legal action

Decisions and powers accorded to the judiciary are not usurped by other governmental actors

Judiciary is able to set its own rules for internal operations; where those rules are limited by enacted law, they have substantial input into shaping the latter

F. Legal Profession

Access to the professional status is managed only according to officials rules

³⁰ Independence refers both to that of individual judges and of the judiciary as a whole. The dual definition does pose problems, but it is important in that it distinguishes the judicial model from that of ordinary bureaucracies.

Whether the judiciary or the bar association is responsible for admittance and discipline, it does this without irregular outside intervention
Ability of lawyers to form professional associations is reasonably open.
Internal operations of bar associations are determined by the members themselves

III. TRANSPARENCY/ ACCOUNTABILITY

A. Selection of Judges

Public input is solicited as a part of the judicial selection process
Appointments are adequately publicized
Selection process is open and transparent

B. Management of the Judicial Career

Standards for judicial performance and ethical behavior are publicized
There is a process for registering complaints about judicial misconduct
Public input is solicited as part of the judicial evaluation process

C. Internal Administration

There is a process for registering complaints about administrative misconduct
Adequate information is publicly provided on the roles and responsibilities of administrative officials attending the public

D. Resources

Judicial budgets, salaries, and results of audits are publicly available
Judicial requests for additional resources are presented publicly
Proposals for major investments in infrastructure or equipment are presented publicly with opportunity for discussion

E. Judicial Processes

The rules for how cases will be processed are well publicized
Court users have access to information on the status of their case
Hearings are publicly announced and open to the public
Judicial decisions are publicized
Press and other nonjudicial groups may comment on decisions without fear of reprisals
Courts services are readily accessible to the entire population, and there are no unreasonable geographic, monetary, or legal barriers

F. Legal Profession

Information as to accredited bar members and any paralegal profession is easily available to public
Disciplinary actions and disbarments are publicized
There is an easily accessible process for providing complaints about attorney's actions

Methodology: How is the Checklist Developed?

My suggested checklist is intended as a tool for discussion. The first rule on the creation of a final product is that should not be developed by one person, but should be the product of extensive discussions among a representative group (or groups) of judges, lawyers, and others with experience in judicial reforms. Ideally, most if not all of the members should have familiarity with several legal systems. Given the variety of backgrounds and perspectives to be reflected in the product, it seems inconceivable that any single working group would suffice. Hence, the process would involve a series of subgroups, organized to reflect different legal traditions or geographic regions. An alternative organization might be structured around the three broad dimensions or six basic categories, with regional variations reflected in each of them. There would be an interactive exchange among the two levels – the principal working group designs a first version, which is sent to the subgroups for their comments which in turn are sent back to the principal group. As the USAID experience with its list of indicators demonstrates, field tests, and revision based on the results will also be required.

From my own experience with these exercises, I would add two cautions. First, while judges and lawyers may be the best sources of information on how a judicial system operates, the list could easily come to reflect only their perspectives and thus a series of unrealistic, skewed, or impossible requirements. Several other viewpoints need to be incorporated both for technical soundness and to ensure relevancy and buy-in. These include policy-makers (both from national governments and assistance agencies), reform practitioners (and especially those who have authored prior lists), court users, and groups, apart from these, which the list is intended to reach. Some may be included in the working groups. This is probably most important as regards the assistance agencies, as they are a major audience with their own views on the subject. (They also incorporate some of the other categories and constitute a far smaller group than government policy makers or court users) Others should have an opportunity to offer opinions at some point in the process. Obviously in the case of large constituencies like court users or national governments, one will have to rely on proxies. The subgroups, especially if they are geographically dispersed, may be able to contact associations or individuals who can speak authoritatively for these categories. Here, as in the other demands for representativeness, the concern is more than technical quality. The tool's authority and credibility will also hinge on who, besides its immediate authors, will buy into the process.

A second caution is that the process of setting up the working groups and their design of the product could easily take so long as to preclude its ever being used. If Transparency goes ahead with the exercise, it must set itself some temporal and substantive limits. It is entirely reasonable to allow a few weeks to define the participants, working methodology, and provide either a first working draft or a collection of examples and a general format for what is wanted. The rest of the process, and the various iterations should also have their time limits and specified products. In the end, a very few

individuals will do the actual writing – the others will have their chance to provide input, and if they object too much to the final version, to provide alternatives. And of course, one individual should be charged with monitoring the entire process and ensuring it occurs more or less on schedule. My further advice is that this individual not see him or herself as the major author – leaving this to the most eminent judge or legal expert is a virtual guarantee either that this person will dominate the entire procedure or that it will never get done at all.

Methodology: How is the Checklist Applied?

Leaving scoring for the next section, I will address the organizational issues here. The list will inevitably be dominated by questions with a highly subjective content and thus lend itself to application by expert panels. The times questions can be answered with a simple yes or no or a quantitative measure will be conspicuously few. To answer them adequately, panel members will need an in-depth knowledge of specific cases – unless of course one plans to increase the costs astronomically by having someone else do the field research for them. In the interests of comparability and consistency, we cannot have one panel of experts for each country, but ideally would have one panel do all ratings. Obviously that panel would either be too large to function or constitute the null category.

The solution, which also may resolve some of the complaints about cultural biases, appears to be a small number of panels, most probably specialized in specific regions, with care taken to ensure that the combined experience of the individual members provide a reasonable familiarity with all the countries covered. (Care would have to be taken that this familiarity not extend to marked biases, or that the affected expert recuse him or herself in the case of any country where that might be objected – calling in a substitute or relying on the knowledge of the remaining panel members.) I think in all cases, three to five members would be adequate – and where they are not, an extra member might be called in for any country they feel they cannot cover.

Staffing the panels and putting them into operation is the only easy part of the process. Members could be drawn from comparative legal experts (lawyers, political scientists, sociologists and other obvious disciplines; judges are less likely candidates, which further counters the likely judicial bias in the list itself) and especially those with reform or other field experience. It's a growing group, and I suspect most members would be willing to join – especially as most exchanges could take place by internet or in a brief series of real meetings. It would be useful to have an orientation session to discuss methodology, possibly uniting all the panels or at least each regional one. The orientation would use the results of the field tests (which I assume have already been done) and the problems encountered in them. I suspect an initial ranking of an entire region might require a months work or less from each member, but this could be spread out over a longer period – not too long or the advantage of immediacy is lost.

A central working group, composed of separate members or a representative from each of the regional groups would review the combined results, identify problems or inconsistencies (some groups will be harder graders), and find ways to resolve them. As

a precautionary measure, the first exercise might cover only a few countries in each region. That way the problems of cross-regional comparisons could be addressed while the sample is still manageable.

Methodology: Scoring

Comparability within and across regions requires a common unit of exchange. One hundred descriptive analyses will not serve this purpose and thus some kind of scores will have to be introduced. This is a transparent process and one not pretending more precision than it can deliver. Thus, I take heed of John Blackton's excellent device to conceive of these as grades, not scores, and perhaps to adopt his title of a "judicial report card." As he notes, the term grade already connotes a certain subjectivity and less than absolute precision, and in this case, that seems an appropriate aim. The grade for each criterion, category, dimension, and possibly the overall status could be given in terms of letters (A to F) or numbers (a 0 to four or five point scale).

There is a further problem of how to aggregate each country's scores, as one moves up from level to level. Even as I look at the categories I have suggested, I cannot pretend that they are all equally important. One could ignore that and work on the basis of the cumulative averages, reconfigure the evaluation criteria to make them more equivalent, or attempt some weighting system. While I might give equal weight to all the criteria under selection systems, I might give career systems for administrative staff twice the value of a management information system. Another solution (which I have adopted by accident in some cases – for example separating selection from career management) is the constructive use of redundancy. If something is very important, break it into parts or take several cuts at defining it. This I suspect is the best remedy. The larger point is that the checklist constructors should do a series of simulations before they go to press, or even to a field trial. As anyone who has attempted such a list can contest, some of the biggest errors develop from a failure to consider what the scores will look like. When those countries which we intuitively believe are good or bad performers have incompatible scores, or if all the scores cluster at one extreme or another, then the list has to go back to the drawing board.

Do you want to do an overall grade? It poses some of the same problems addressed above, and I have compounded them by my introduction of the three dimensions. Maybe that is sufficient reason for eliminating the dimensions, or perhaps they deserve different weightings. I think on the whole there is more to be said in favor of an overall grade than against one. If you don't devise one, the readers will. If you do, you have more control over how it is calculated and explained.

Which raises the final issue of explanations. The grades are inevitable, but the important message lies in the brief explanation that accompanies them. Once again I reference Blackton's report card as a good example of how this might be done. This is especially important for any overall score and at the level of dimensions and categories where countries with similar rankings will suffer from a variety of different problems and deserve to have those recognized. The explanations, like those on a conventional report

card, will also indicate what improvements are required. This information is important for those responsible for making them and also for the broader audience comprising the potential reform constituency.

Targets and Use

As the working group indicated from the start, their goal is not to rank judiciaries, but to give them an indication of where they stand in terms of performance and where their particular weaknesses lie. A second purpose is to provide publics, potential users, and international partners a basis on which they may select with whom they work and, it is hoped, to encourage them to mobilize their own resources to press for change. It is not entirely clear how Transparency envisions the release and further dissemination of the results. Individual countries, users and donors might request or be provided the scores on single judiciaries, but clearly the format requires a release in regional or global groups. It might be of some help to know that Colombia scored 3.0 overall, with lower grades in judicial processes and transparency and higher grades in independence, but both impact and utility hinge on knowing how that compares to everyone else, or at least its regional neighbors.

Judging from experience, to the extent I know it, with the Corruption Index, wider publication is guaranteed by ranking countries. Putting Colombia in category B might arouse some press interest; ranking it X of a total of 100 countries will guarantee far more. However, publicity is no guarantee of longer term impact, and the jury is still out as to how many concrete improvements the Corruption Index actually encouraged. For that reason I have opted against overall rankings, and thereby probably undermined the potential for automatic, free dissemination of the list.

The further question, however one does the initial presentation, is how to encourage the various audiences to react in the desired fashion. Street protests may serve some purpose, but the intent is the direct and indirect impact on reform efforts – how to get those responsible to read beyond the scores or grades to the explicit and implicit recommendations. The recommended format attempts to enhance those chances by including a transparent, disaggregated scoring system with brief explanations of how each score was derived. A lot depends on how Transparency explains the overall effort and even its further agenda. However, relying on readers' common sense and rationality is not fool proof. Thus, as I explain in the final section, still more depends on how the process is organized from the start, who is involved, and how their buy-in can be further guaranteed. The undertaking is valuable and worth supporting. In the real world that alone is rarely sufficient to make something work.

Some Caveats and Further Considerations

I began with a question raised by one of the people I consulted for further insights on the task: “Why would you want to do that?” Allowing for my possible misrepresentation of the goals, it is still a good question. Coming from a judge, albeit one involved in international reform programs, the response undoubtedly reflects normal professional

reservations about an effort, not only to evaluate individual judiciaries, but also to publicize those evaluations and compare them across countries. Even from outside the profession, it is not hard to recognize the potential dangers, some of which I've raised above.

Beyond this, there is the question of whether the exercise would really serve its intended purpose of pressing judicial and political elites to initiate fundamental reforms, which might undercut their immediate interests, or to rally wider support to force them to do so. One issue is whether this tool in any of its possible variations will really tell people things they don't already know, and whether that knowledge would affect their actions. Looking just at Latin America, the region I know best, it strikes me that the public, elites, and court members are hardly unaware of problems of corruption, inefficiency or just plain incompetence. They may not know who is responsible, why this occurs, or what could be done about it, and their present impressions may err on all those counts. Because 90 percent of the public believed the Peruvian judiciary was corrupt, does not mean that 90 percent of the judicial personnel participated in those practices – although on the basis of actions taken in 1992, that appeared to be the conclusion reached. Arguably, those actions did not resolve the problem, and better information as to its causes and incidence might have produced a different kind of reform. Hence, to the extent the tool can go beyond calling attention to problems to diagnosing them and presenting effective remedies, it could be a help.

However, this also assumes the audience will act on those recommendations. I've already discussed some reasons why that might not be the case for donor agencies or local reformers.³¹ There is a third category added by Transparency, entrepreneurs and especially foreign investors, which deserves further attention. With few exceptions, I don't believe this group suffers from extreme naivete about problematic judicial practices. The real problem, as another colleague volunteered, is that judicial performance is about twelfth on the list of things concerning individuals considering an investment in a foreign country, or in their own. Which is to say that by the time they have reached that factor, they have done a lot of other research, and if it affects them at all, it is likely to be in terms of how to avoid a problematic judiciary, not whether or not to invest in the country.³² We could be wrong, and maybe if such a judicial check list existed, entrepreneurs would consult it first, rather than last or not at all.

If we're right, this means that the main consumers of the list will be the usual suspects – political and judicial elites, assistance agencies, citizens of the surveyed countries, and various public interest and advocacy groups. It also means the main source of financing will come from the donor community, private foundations, and possibly private businesses, but as a public service, not something they intend to use extensively or would

³¹ For those who want more, Reimers and McGinn offer an excellent discussion.

³² Actually, risk management and other specialized services already provide potential investors with much of this information, and probably more specifically tailored to business interests. Interestingly, when the Bank invited some members of one such firm, Marsh and McLellan to a joint meeting, (June, 1999) we had some problems determining what each side knew that might be of interest to the other. One overwhelming impression was that a general evaluation of judicial operations was not high on the list of what concerned them or their clients.

buy on a pay-per-use basis. (This would be hard to do anyway without excluding the rest of the audience.) Excluding the business community as targeted users (or paying clients) does offer several advantages. It eliminates the need to focus on topics which might interest only them, as well as that of justifying the inclusion of some topics they might find less relevant. Now of course the question is how to justify to the usual suspects the financing and use of the ultimate check list or report card, when they have already paid for so many.

Past failure and unfulfilled need may appear to be sufficient justifications, but the real task is to convince the potential financiers and users (i.e. the assistance agencies) that it will work this time. The problem is not just funding. I'm sure Transparency can find some foundation willing to fund a year or two's worth of effort. However, that foundation is not a major consumer and its interest will not guarantee use. There may be other ways to bridge that gap, but a quicker solution is to enlist the donor community from the start, including them both as financiers and participants in the endeavor.

Participation is important for another reason. After all, why should Transparency with no track record in judicial reform, suddenly propose to provide the framework to guide future efforts? The answer is that Transparency will be the coordinator, not the author, of a joint effort, and that it will actively elicit contributions from interested parties at all stages of the process. Perhaps Transparency could run a competition for checklists, or ask parties to nominate participants to the various working groups. It might also want to exclude areas (court administration, delay reduction, infrastructure, legal framework) which are extremely technical and less directly related to the quality of judicial performance. My proposed checklist either ignores or downplays them, revealing my own biases. There are other less personal reasons for their exclusion – the most important of these is to focus the list on the forgotten variables, not those which already receive more than their share of attention. Among the neglected themes are those related to improving the quality of judicial personnel. I would argue that this (with a few internal nods to independence and accountability) is the most important element in combating corruption and thus most directly related to Transparency's own mandate.

The need for a universal judicial report card is a given. It could provide a way of uniting reform efforts and emphasizing themes currently receiving too little attention. Many of those involved in reform efforts would welcome a tool which supported an emphasis on the right rather than the politically feasible programs. As is well known by anyone who has ever confronted a roomful of politicians and bureaucrats dead set on buying computers and ignoring the appointment system, technical correctness is not a very valuable weapon. Having an external authority weighing in on those decisions could be the only way of turning the tide.

However, as is often the case, Transparency is only one of a long line of organizations to propose to fill an unmet need. Some of its most powerful detractors could be those who tried and failed. I've devoted a lot of time (because that was expected) to discussing how such a check list or report card might be developed and applied. The most important issues however are the last ones: how Transparency can build on past experience, turn

potential detractors into supporters, and ensure that the final product is both technically superior and used as intended. The short discussion of these last themes is not intended to discourage these efforts. It is rather, in the context of the group who will be reviewing this paper, advanced as a challenge. Many of the Durban participants have considerable familiarity with what has been tried. Some have been direct participants in prior efforts. The question is whether they can help Transparency build a better mousetrap and ensure that the world (at least of judicial reformers) beats a path to its door.

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ANNEXES

I am appending as Annex I a further description and explanation of my proposed checklist. The remaining annexes contain examples of others work. As should be abundantly evident from the prior discussion, the following is only a brief selection of what might be included. The first three examples constitute prior attempts at developing judicial checklists. Only one includes scores (most never got that far), and as indicated in the accompanying note, the scoring methodology is its weakest point. Nonetheless, I think it (the Blackton report card) is the best example of the genre. The fourth and fifth are draft checklists currently under development by a World Bank member and several external colleagues, and ABA/CEELI.

I have also included two judicial inventories and referenced the numerous works resulting from the FIU/ILANDU collaboration. USAID's list of indicators of judicial performance is too long to include. It is available through that agency's Global Center for Democracy and Governance. Neither the inventories nor USAID's indicators are intended as models for Transparency's proposal. However, they deserve reading if only as a reminder of the variety of topics that require coverage in a true assessment of performance.

ANNEX I: Further Explanation of Proposed Checklist Elements

Although I will not go into this in the detail that may have been expected, I am offering a slightly longer explanation and self critique of the proposed checklist offered in this paper. The obvious points for criticism are the following:

- It is still too long and too detailed
- It is not clear why the specific categories were chosen and what their linkages are to the desired results or behaviors
- The list of criteria seem somewhat arbitrarily chosen; it is not evident why these rather than others were included
- The standards against which the criteria will be evaluated are not obvious; some seem to imply a universal reference point, others a relative one, but words like “adequate” or “sufficient” leave a lot of room for subjectivity
- There remains the problem of how this list will be used for countries with very different legal traditions or at different stages of development. Given resource and other constraints, could Liberia’s score, even after a serious reform, ever be “good”?

I propose to address the criticisms and offer the further explanation simultaneously, starting with points two and three – the choice of categories and criteria. The entire list is based on one fundamental assumption, that a well performing judiciary has the same basic requirements as any organization – it needs to select the right human resources, manage them for performance, have adequate administrative systems and resources, and organize its fundamental business and operating procedures in a manner commensurate with achieving the outcome it desires. (I’ve added the legal profession as part of the human resource base, although giving it a separate category.) While one can take issue with each of the elements, either in general or as applied to the judiciary, or demand empirical verification, if they don’t hold a good deal of the underpinnings of Western civilization also is called into question. Hence, although we could organize research to determine whether a selection system is important to the composite “good performance” (efficacy, efficiency, etc), this seems less useful than trying to determine what kind of selection system is most appropriate for choosing judges or judicial administrators.

The application of these general categories to the two other dimensions (accountability/transparency and independence) is really, as noted, an extended definition. It also follows the logic that if these are the key components of a well functioning organization, then they are also the areas where transparency and independence are most critical.

If one accepts my first arguments, then the burden of the explanation falls on the evaluation criteria. These do have an empirical base, but it rests on collective observations, the product of my and others experience with a variety of real systems in both developing and developed countries. As my own experience skews the list, this is where others comments are most important. I have selected the criteria with a problem-orientation. This is inevitable, I believe, because we have a better understanding of

where a selection system or internal administrative processes may fail than what good ones should look like. This also accounts for the length, and that flaw will only be aggravated as more pens are put to the task. Possibly once a definitive working group has accumulated a much longer list, they can consolidate criteria or weed out some that seem less important. After doing so, they may want to add an “open” criterion within each major category, to allow consideration of unusual bad (or good) practices with a major influence on single systems. However, it is well to remember that the point is to provide comparable information on the most important influences on performance, not to cover every base.

This still begs the question of how the criteria will be applied – and what kinds of standards or points of reference will be used, and how differences in legal traditions and the developmental stages of individual countries will be considered. Obviously if both the United States and Senegal audit judicial budgets, the former is likely to do a more thorough job than the latter. Should the scores reflect that, or should each be evaluated against its own national standards and needs? Similarly, one would hardly want to hold Senegal to the standards of equipment and staffing for US or French courts, or to automatically give the latter two systems high grades because they can afford more, but possibly not “adequate” courtroom furnishings and personnel. Fortunately, not all the criteria pose this problem – the existence of a code of ethics and its enforcement or of set criteria for selection are probably less dependent on developmental variations. This may be still more true of those in the transparency and independence dimensions.

Blackton’s use of an external reference point – a system assumed to set the high performance mark for all others – doesn’t really resolve the issue. It might help on a regional basis. However, intra-regional differences can also be extreme. On at least some criteria, it would not be fair to judge Haiti or Honduras against the mark set by Costa Rica, Chile, or Uruguay. Still, the overall situation tends to support the wisdom of regionally-based grading. Not only is it fairer and less vulnerable to protests of cultural insensitivity; it also is more likely to produce useful results. Knowing how Haiti or Honduras or even Costa Rica stacks up against the United States isn’t going to tell me much I don’t already know. Measuring the first two against Costa Rica is likely to be more useful, as regards the less favored country and the problems still confronted by the regional standard bearer. This should not mean that the highest ranking country gets the highest possible score in all categories. There will still be a sort of ideal, if not universal standard; for each region it should take into account what is possible given the average level of development, resources, and other environmental constraints. This would of course have to be explained when the checklist is presented.

ANNEX II: JUDICIAL REPORT CARD (John Blackton, Amideast)

Judicial Reform Element	Grade: 4.0 Scale	Notes
JUDICIAL INDEPENDENCE	2.6	Judiciary justly proud of and jealous of its independence, but history of extra-judicial circumvention of the courts
a) appointments and evaluation of judges	3.8	Very independent
b)Disciplinary system for Judges	3.0	Independent, but erratic quality
c) Executive resort to extra-judicial solutions	1.0	A history of extra-judicial intervention in political cases – creation of special courts or use of military courts
JUDICIAL ADMINISTRATION	1.75	
a) Case Administration	1.5	Old procedures once adequate, now moribund and poorly implemented. Lack of leadership and motivation for those inclined to use the existing system effectively.
b) court Administration	1.5	Overstaffing, poor quality staff, Poor quality supervision, lack of professional court managers and court administrators. No Information Tech skills.
c) Court Facilities (Size and quantity)	3.0	More than enough capital plant capacity. Numerous and large courts often used only 15 hours per week. Better scheduling, longer working hours could double the court capacity with no new building
d) Court Facilities (quality and maintenance)	1.0	Most courts are large and expensively conceived, but very poorly maintained. Small but steady recurring cost investment and modern facilities management would pay large dividends at low cost

PROCEDURAL PROCESSES	2.0	
a)Access to case information	2.0	Information may be viewed in court files but the files are very disorganized.
b)Process is transparent	2.0	Surface process is knowable with effort. There seems to be a hidden process known to some.
c)Process is standardized	2.0	Practices vary among circuits and clerks based on unclear criteria
d)Process is free from inappropriate influence	1.5	Experts and service departments operate on extralegal payments for services
e)Process results in fair judgments	2.5	Judges seem to care about following the law, but don't seem able to use the law effectively to reach needed conclusions. To the extent that the result reflects the expert or service depts., the results are suspect
f)Judgements believed by the society to be fair	1.5	Society has little respect for the court as a fair and efficient organ of justice
g)Procedural devices aid the truth-finding process	2.0	The goal of many procedures is laudable. In practice the devotion to detail to the exclusion of overall fairness inhibits truth-finding
h)Process is efficient	2.0	Process deals with easier matters fairly well, with more complicated matters without regard for timely disposition

ACCESS TO JUSTICE	3.0	
a) Alternative Dispute Mechanisms	1.5	Eight years of American Advice and support, but no implementation. New approach needed.
b) court costs	4.0	Socially Structured and low fee schedule
c) Legal Aid or low cost legal services	3.0	No legal aid, but lawyers are plentiful and cheap, no evidence that this is a significant problem
d) small courts for small claims	3.5	A multi tiered court system with good access for small claims
e) Gender barriers to access	3.0	Biggest issue is no women judges, no large base of documented evidence of systemic bias in case outcomes, but needs research
LEGAL & JUDICIAL EDUCATION	1.75	
a) general quality of basic legal preparation	1.5	Low entrance standards for law school., making it choice of last resort: huge classes, little modern pedagogy or curriculum. Produces poorly trained and poorly motivated graduates in the main. Children of Judges a bright spot in a large sea of poor performers.
b) Judges' professional education	2.0	Would be adequate if basic legal education were better. Needs major improvement in light of actual legal education
c) Lawyers' continuing education	-	Not observed
PROFESSIONAL ASSOCIATIONS	2.75	
Judges Associations	3.0	Active, wide membership, professional
Lawyers Associations	2.5	Active, politicized
Over-arching Judicial-Legal Associations	-	None, associational links between judges and lawyers very much needed

Note: as this is the only example for which I have a recorded score, I asked the author, John Blackton (Blackton@AMIDEAST.ORG) for an explanation for how it was done. His answer merits citing in detail:

“You are, I believe, quite right in your observation that the categories are reasonably good, but the metrics are not transparent. Taxonomy is relatively easy. Rigorous and valid measurement within that taxonomy is hard work – both intellectually and in terms of field effort. My quantification would not stand up under examination by any serious ‘methodology maven.’ Since I couldn’t find any scales or indices from which to copy, I used an entirely intuitive process. I chose the ‘report card’ 1.0-4.0 model because academic grading is also more art than science and because I didn’t want to convey the idea that this instrument had any pretense of statistical validity. I then decided that I would take a few areas where I know something [about] the performance in a range of developing countries....I chose two performance categories where I was reasonably familiar with other countries’ performance (e.g. I used Singapore as my 4.0 standard in Judicial administration and then ranked... against this benchmark). This gave me two categories for which I had a grade with an external referent (subjective but still a referent). For the remainder of the categories I graded them against the two benchmarks since I didn’t have a [good idea].... where other countries stood.....”

ANNEX III: Elements for Evaluating and Identifying Problems in Judicial Systems

- a) the legal framework of the country and the role of judges within this framework
- b) positions of judges in society and the perception of the system of administration of justice by the community
- c) the integrity of the justice system
- d) the administration of the judicial system
- e) the economic cost of justice in the country
- f) access to justice
- g) the availability of legal information
- h) legal education and training
- i) the actual functioning of legal procedures
- j) physical facilities of courts
- k) the impact of court decision on society; and
- l) alternative dispute resolution mechanisms

Source: Ibrahim Shihata, "The World Bank" in Edmundo Jarquin and Fernando Carrillo, editors, *Justice Delayed: Judicial Reform in Latin America*. Inter-American Development Bank, 1998, p. 120.

ANNEX IV: Checklist for Institutional Evaluation of Judiciary

[This is a working draft supplied by Richard Messick of the World Bank. The initial note, directed to the co-authors, has been left in as a good illustration of how these exercises proceed. To my own mind, this is more of an inventory than a checklist, and while the authors intend it for general application, I'm not sure how one would compare the results. I am also not convinced they have successfully tied their initial problem identification to the judiciary, especially as regards nonsurvey data. There are many extra-judicial explanations for a low incidence of contract-intensive money -- no banks, lack of familiarity with banking practices, various disincentives to putting money there. For example, Ecuador's recent introduction of a 1 percent tax on all financial transactions led to an immediate decrease in bank deposits -- 25 percent or more -- with no change in the judicial system]

“I have reshuffled the indicators as we discussed, putting all those based on opinion, either the opinion of the public generally or the opinion of more select groups (lawyers, judges, business people, or whatever) in Part 1. As originally written, Part II had three main sections, ‘Courts,’ ‘Private Attorneys,’ and ‘Prosecutors,’ and ‘Courts’ had four subparts. Per Antoine’s suggestion, I have put the sections on lawyers and prosecutors under one of the subparts for Courts, “Competence of Personnel.” We should probably also move some of the material on prosecutors, particularly the portions on independence, to other subparts. Also, there are two quantitative indicators from Part 1, homicides per 100,000 and the prison measures that Santos is to supply, that do not fit under any of the four divisions in Part 2. Perhaps we should rename the third one, now called simply ‘Efficiency,’ ‘Efficiency and Effectiveness’?”

Assessing the Performance of the Judicial System Using Opinion and Quantitative Data

Opinions About the Performance of the Judicial System

A. Deter Wrongful Conduct

Public Opinion Measures --

- 1) Percent of population fearful of crime
- 2) Percent of population expressing confidence in state’s ability to protect them from crime
- 3) Percent of population willing to report crime to authorities

Opinions of Key Informants --

- 4) Degree to which crime and theft are obstacle to conducting business

II. Facilitate Voluntary Exchange

Opinions of Key Informants --

- 1) Predictability of judicial decisions
- 2) Bank/finance company use of secured credit

III. Resolve Private Disputes

Public Opinion Measures --

- 1) Percent of population that has submitted private dispute to court system in past 5 years
- 2) Percent of above expressing satisfaction with how dispute handled
- 3) Percent of above reporting dispute resolved timely
- 4) Percent of above reporting dispute resolved at reasonable cost
- 5) Citizen perception of courts' ability to resolve private dispute impartially
- 6) Citizen perception of courts' ability to resolve private dispute timely
- 7) Citizen perception of courts' ability to resolve private dispute at reasonable cost
- 8) Percent of population that has submitted dispute to some form of alternative dispute resolution mechanism within the past five years. [labor or family say?]
- 9) Percent of those expressing satisfaction with ADR

IV. Redress Abuses of Power

Public Opinion Measures --

- 1) Percent of population that has brought a case against a government entity (including police) in a court or tribunal [better definition needed?] in past 5 years
- 2) Percent of above expressing satisfaction with how case handled
- 3) Percent reporting case resolved timely
- 4) Percent reporting case resolved at reasonable cost

- 5) Citizen perception of courts' ability to resolve dispute with government impartially
- 6) Citizen perception of courts' ability to resolve dispute with government timely
- 7) Citizen perception of courts' ability to resolve dispute with government at reasonable cost
- 8) Parliamentarians' perceptions of courts effectiveness in redressing executive abuses of power [split between government and non-government party members]
- 9) Government administrators' perceptions of courts effectiveness in redressing executive abuses of power
- 10) Human rights activists' perceptions of courts effectiveness in redressing executive abuses of power

Quantitative Measures of the Performance of a Judicial System

I) Courts

Information would be gathered on four dimensions. While some of the quantitative data would call for significant collection effort, in many cases a close approximation can be had by asking either a sample of significant users of the system (banks, government agencies, etc.) or informed observers (lawyers, court personnel, media).

A.- Independence and Accountability:

- 1) Indicadores de independencia política (independence of other branches of government):
 - 1.1.- El gobierno de la Justicia: ¿a quien corresponde? (¿Ministerio de Justicia? ¿Consejo de la Magistratura o similar? Funciones respectivas).
 - 1.2.- Selección de jueces: ¿cómo se realiza? (Quien fija las pruebas, quien nombra al tribunal examinador).
 - 1.3.- El nombramiento y promoción de los jueces: [removal] ¿a quien corresponde?
 - 1.4.- El presupuesto de la Justicia: ¿quién lo determina? ¿quién lo administra?
 - 1.5.- Demandas contra la policía, el ejército o las fuerzas de seguridad:
 - 1.5 a.- ¿quién y cuando puede presentarlas?
 - 1.5 b.- ¿quién las examina y resuelve?
 - 1.5 c.- ¿con qué resultado?
 - 1.6.- ¿Qué imagen de independencia de la Justicia respecto del Gobierno prevalece entre...
 - 1.6 a: la ciudadanía

- 1.6 b: los profesionales jurídicos
- 1.6 c: [internal?]
- 1.7.- ¿Existen informaciones cualificadas y creíbles (reportajes de prensa, informaciones de expertos, etc...) acerca de quiebras de la independencia judicial por presiones políticas? ¿Qué casos, con qué frecuencia, con qué consecuencias?
- 1.8.- Los jueces y la política: ¿pueden militar en partidos políticos? ¿Pueden presentarse a elecciones políticas: en qué condiciones y con qué limitaciones?
- 1.9.- La configuración del Ministerio Público:
 - 1.9 a.- ¿Forma parte del sistema judicial o pertenece a la esfera gubernamental?
 - 1.9 b.- Selección, nombramiento y ascenso de sus componentes.

2) Indicadores de independencia respecto de grupos sociales y económicos:

- 2.1.- Estabilidad y amovilidad de los jueces:
 - 2.1 a.- ¿Todos los jueces son profesionales (ie., permanentes)?
 - 2.1 b.- ¿Cuál es la mecánica de los traslados y ascensos?
- 2.2.- Asociacionismo/sindicalismo judicial: ¿existe? ¿Con qué características? ¿Con qué grado de afiliación?
- 2.3.- Casos de corrupción (soborno/cohecho/prevaricación): número de casos oficialmente reconocidos en los últimos 5 años.
- 2.4.- Quien denuncia, investiga y sanciona casos de corrupción judicial
- 2.5.- Imagen predominante de los jueces, en cuanto a grado de corrupción/honestidad (actual, en comparación con cinco años antes) entre:
 - 2.5 a.- la población general
 - 2.5 b.- los usuarios de la justicia
 - 2.5 c.- informantes cualificados (profesionales jurídicos, periodistas)
- 2.6.- Jubilación de los jueces: edad de jubilación (¿es posible jubilación anticipada? ¿quién la decide? ¿en qué condiciones?; situación económica de la jubilación.
- 2.7.- El prestigio social de los jueces (“auctoritas”): [by level]
 - 2.7 a: en opinión de los propios jueces
 - 2.7 b: según la ciudadanía
 - 2.7 c: según informantes cualificados.
- 2.8.- Grado de confianza que, en conjunto, los jueces inspiran a la ciudadanía.

3) How does the compensation of judges and other court personnel compare with similarly situated individuals in the private sectors?

Sub-questions: What is the annual salary of a judge of a first instance court and how does this amount compare with either the minimum wage, the average wage, or the average salary for lawyers in the country? What is the annual salary of the lowest level clerk in a first instance court? How does this amount compare with the minimum wage or the average wage?

RICK's Note: Some of the questions in this section belong in Part I, opinion data.

3.- ¿Ante quién y como rinden cuentas los Jueces? (Accountability?)

- 3.1 ¿Ante quién rinde cuentas de su actuación el sistema judicial (“el poder judicial”) en su conjunto?
- 3.2 ¿Deben rendir cuentas de su gestión (asuntos recibidos, asuntos resueltos, etc..) los distintos tribunales? ¿Ante quien?
- 3.3 ¿Existen estadísticas públicas sobre la actividad de los tribunales? ¿Quién las publica? ¿con que grado de detalle y fiabilidad?
- 3.4 ¿Quién y como juzga los delitos cometidos por jueces?
- 3.5 ¿Quién y como juzga los casos civiles en que una de las partes es un juez?

B. Competence of Personnel

a) Court Personnel

1) How are judges selected, promoted and disciplined?

Sub-questions: What type of training is required of individuals before they become tenured judges? Is in-service training required before promotion? What methods are there for disciplining judges? How many judges have been penalized under these procedures in the past 5 years? How many have resigned to avoid disciplinary action in the past 5 years?

2) Is there a civil service-like system for hiring and promoting court personnel?

b) Private Attorneys/Notaries

1) Is the market for legal services competitive?

Sub-questions: How many lawyers in active private practice are there per 100,000? Notaries? Are there restrictions on entry into the legal or notarial profession? What are the criteria? Where an examination is required, what percentage of applicants pass the exam on the first try? Subsequent tries? Are legal fees regulated by law? By a professional association? Are lawyers and notaries permitted to advertise?

2) How are lawyers and notaries held accountable for their performance?

Sub-questions: Are there ethical rules governing the practice of law? Who sets these rules? Who enforces them? How many lawyer/notaries have been disciplined in the past 12 months for violating these rules? Do courts have the power to hold lawyers in

contempt for failure to appear or failing to file a pleading? Is this power regularly exercised?

c) Public Prosecutors

1) What is the number of individuals with power to charge per 100,000? Number of individuals responsible for prosecuting cases per 100,000?

2) What checks exist on decisions made by these individuals? [move to independence and accountability section?]

Sub-questions: Is the decision to charge recognized as discretionary? Where it is, are there guidelines for how this discretion is to be exercised? Are these guidelines public? Is there a system of hierarchical responsibility for those with the power to charge? Who supervises the department/agency that employs these individuals? How is this official appointed and to whom is this official accountable? Where prosecution and investigation separate, same questions for prosecutors.

3) Are those with the power to charge/prosecute able to exercise independent judgement? [move to independence and accountability section?]

Sub-questions: What is the annual salary of an entry level prosecutor/charger and how does this amount compare with either the minimum wage, the average wage, or the average salary for lawyers in the country? Are prosecutors/chargers tenured? For how long? What percent of prosecutors/chargers are serving under an exception to the normal tenure rules? Can prosecutors/chargers be transferred without their consent? Is their compensation, including pension, fixed while they are in office? How are prosecutors/chargers selected and promoted?

4) Do lawyers, judges, and executive branch personnel believe the decision to charge/prosecute is more or less influenced by politics than it was five years ago? [move to opinion part]

C. Efficiency [and Effectiveness?]

1) What percentage of court's time is spent on non-court matters?

2) *Number of Civil [define precisely] Cases Filed per year/Number of Cases Disposed per year [sometimes called the Cappelletti-Clark index]*

2) Reversal rates/Predictability: What percentage of cases are appealed from first to second instance courts? What percentage of those appealed are affirmed? What percentage of cases are attacked collaterally? What percentage of these are affirmed? Where the rules provide an abbreviated procedure for bringing certain types of claims (*amparo*, special writ, etc.), what percentage of such cases are rejected on procedural grounds? Where a final judgement has been entered invalidating the action of an

executive agency, what is the scope of the court's ruling? Does it invalidate the action in all instances? Or only with respect to the party bringing the action?

3) Who uses the courts and for what purposes?

Sub-questions: What are the five most common type of non-criminal cases heard by first instance courts? What percentage of the total docket are accounted for by these cases? Who are the most frequent users of the non-criminal first instance courts? For what kinds of cases? What is the most common outcome?

4) Are the private and social costs of litigation aligned?

Sub-questions: Do civil litigants have to pay a fee to bring suit? What impact do these fees have on the propensity to sue? How are these fees determined? What share of the civil courts' budget is paid for out of fees collected from litigants? Are there any provisions that require the losing party in a civil case to pay the prevailing party's legal fees? Are they enforced? When they are, what percentage of actual fees are reimbursed? Is there a fee required to appeal? Is there a fee required to lodge a collateral attack? Are fees of any kind assessed in such instances?

5) Are the courts able to enforce debt contracts at a reasonable cost?

Sub-questions: What is the average length of time it takes a large bank to recover a debt from a medium sized, solvent, enterprise that has no substantive defense? How many lawyer hours are required? Is interest available from the time the debt arose? From entry of judgement in the first instance court? At what rate?

6) Is the highest court/courts hearing appeals in civil matters able to set policy and rationalize the law?

Sub-questions: How many cases did the highest court hear last year? How many judges does it have? Does the court have any discretion in deciding what cases to accept?

7) Are the courts able to complement the work of the police and the prosecution?

Sub-questions: What is the average time from detention to judgement in a case involving a serious crime (homicide, rape, serious assault)? What percentage of the total prisoner population awaits trial? What percentage has not appeared before any court?

D. Access

1) How many judges sit for court outside the national capital per 100,000? For federal states, same question per state or provincial capitals.

2) Are citizens able to determine what their rights and duties are under the law?

Sub-questions: Are statute laws and secondary legislation/administrative norms regularly published? Are copies of these laws distributed to courts outside the capital? Have the criminal laws been codified? Those affecting the family (inheritance, child custody, divorce)? Have booklets, information brochures, or other material explaining the law in simplified terms available? Is there an information office/kiosk or other means for informing citizens about the law in first instance court houses in rural areas?

3) In those areas where large numbers of residents do not speak the national language, are court interpreters available?

4) Are methods of alternative dispute resolution available?

Sub-questions: Is there a law permitting disputes to be resolved using alternative dispute resolution methods? Is it considered adequate by lawyers and litigants? Are there informal means (*panchayats*, community councils, *jueces de paz*) for settling family matters, land disputes, and other cases involving the poor? Are they biased against identifiable groups (women, the landless, etc.)?

5) Does the state furnish indigent criminal defendants with a lawyer?

**ANNEX V: USAID Checklist for Eastern Europe and the Former Soviet Union
(Matt Mosner, USAID/ENI)**

[I do not know whether the list was ever applied; it comes closer to a checklist than the foregoing example, but the individual questions are extremely broad. There is no indication of whether a quantitative scoring system was intended]

- a. The Courts are independent and coequal with other branches of government
 - a. The judicial branch is independently funded, organized and administered, and has complete control over its own budget;
 - b. Judicial selection and promotion is based on merit;
 - c. judicial salaries are on a par with those in the private sector for practicing lawyers;
 - d. judges, lawyers and the general public have open, unimpeded access to all official, codified, written versions of the law, as they enter into force. As a corollary, the process of law and rule-making by either the court, the legislature, government or the executive is fair, open, transparent, and accessible to all, with opportunity for public access, comment and participation;
 - e. judges are regularly trained or given access to new judicial practices and procedures and new and/or evolving laws;
 - f. judges, court officers, lawyers, legislators, and other government officials are governed by written codes of ethics, which in practice govern their behavior, and which codes are enforced by active investigative and enforcement authorities.
2. A constitution and the relevant civil, commercial and criminal laws have the force of law, and support democratic processes and market reforms
 - a. A new constitution is in place that supports the separation of powers and democratic governance;
 - b. Democratically elected federal and regional legislatures have been elected that have the power to enact legislation that is responsive to democratic society. These legislatures are responsible to their electorate, conduct business openly, utilize public hearings, base decisions on a written record that is accessible to the general population, etc.;
 - c. the legislature is the sole authority to enact legislation (instead of the executive acting by decree) and has passed new laws supporting market economy in areas such as civil, commercial, and criminal law.
3. A viable legal profession exists that helps organize the training of law students, the ongoing training of practicing professionals, and that can regulate its own ethical and professional conduct.
 - a. Legal, educational establishments are in place, open to all, funded by a mixture of private and public money, which offer students training in all areas of the law relevant to supporting a market economy;

- b. The legal profession provides its members with ongoing training and access to information about evolving law and governs itself by a code of ethics and professional responsibility that works in practice to enforce those rules and keep the public trust in legal institutions;
 - c. Law enforcement officers, prosecutors, and investigators are governed by the same code of ethics, as the general bar, and are subject to the same disciplinary rules and regulations and sanctions as other legal professionals and general citizenry.
- 4. Laws are applied and enforced consistent with the written language of those laws and the expressed intent of the legislatures that drafted and passed them.
 - a. The legislative history of any law is based on an official written record that is accessible to the general public and kept as an official, enforceable government record;
 - b. Judges and other empowered government officials enforce the law as it is written, and are sanctioned under force of law, for their failure to do so;
 - c. Modernized court and trial procedures, including case management and court statistical and tracking systems are in place
 - d. Court decisions are based only on the written law accessible to the general public, and those decisions are themselves reflected in written decisions, after a written record of proceedings is taken that provides the basis for appeal, and public access to all aspects of the proceedings;
 - e. Criminal proceedings are prosecuted only in accordance with international standards of human rights, the relevant national constitution, and all other local laws;
 - f. Criminal trials are also governed by rules of evidence and rules of procedure governing prosecutorial behavior, requiring the state to provide defendants with notice of the charges against him, the right to counsel, access to the state's evidence, the right to bail and pre-trial release, etc;
- 5. The general population is aware of the laws, accepts their applicability, acts in accordance with them.
 - a. The legal system successfully operates to prevent/punish violations of the law by public officials, criminals, etc;
 - b. Citizens accept the importance and value of equal rights for all;
 - c. Citizens expect the timely and impartial application of all laws;
 - d. Citizens have a general understanding of their legal rights, know how to exercise them, and are familiar with the general elements;
 - e. To the extent that violations of the law and crimes take place, the public interest groups, specific groups NGO's and the media each have the right and the ability to voice and effect change concerning the legal system.

ANNEX VI: ABA/CEELI Checklist on Judicial Independence

[This is a work in progress, and along with Blackton's report card, comes closest to what the working group appears to want. It does include a scoring system, suggesting that countries will receive an overall ranking. Although the topic is judicial independence, the contents address a much wider range of issues]

**9/20/99
Draft**

A METHODOLOGY FOR MEASURING JUDICIAL INDEPENDENCE*

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INTRODUCTION

The following is a survey, developed by the American Bar Association's Central and East European Law Initiative (CEELI), designed to quantify the independence of the judiciary in any given country. An independent judiciary is widely perceived as an essential component of democracy, and in an era where the countries of Central Europe and the former Soviet Union are undergoing a difficult and lengthy transition to democracy, CEELI determined that it was appropriate to develop a methodology for measuring judicial independence in order to help CEELI, its funders, and the emerging democracies themselves better target judicial reform programs.

Defining Judicial Independence

CEELI developed this survey well aware of the obstacles to quantitatively measuring judicial independence. First, there is no simple, universally accepted definition of "judicial independence." "[J]udicial independence may be one of the least understood concepts in the fields of political science and law. . . . This is especially true in reference to judicial independence during the democratization process; its manifestations, limitations, and meaning, as well as fostering greater autonomy among a transitional country's judges, have not been thoroughly explored." Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," 44 Am. J. Comp. L. 605, 607 (1996); see also Tacha, "Independence of the Judiciary for the Third

* Prepared by Lisa Dickieson, Director, Judicial Reform Programs, the American Bar Association's Central and East European Law Initiative (CEELI), and Mark Dietrich, Member, New York State Bar and Advisor to CEELI. Research assistance by James McConkie, Student Intern, CEELI. CEELI would also like to thank the members of CEELI's Judicial Advisory Board, including Tony Fisser, Marcel Lemonde, Ernst Markel, Joseph Nadeau, Mary Noel Pepys, and Larry Stone, who reviewed earlier versions of this index. Additionally, CEELI expresses its appreciation to the contributors to its Concept Paper on Judicial Independence, James Apple, Dorothy Beasley, Nicholas Georgakopoulos, George Katrougalos, Giovanni Longo, Kenneth Lysyk, Roy Schotland, Terry Shupe, Patricia Wald, and Markus Zimmer.

Century,” 46 Mercer L. Rev. 645, 645 (1995) (“Although the general principle of judicial independence enjoys broad support, its definition is elusive.”).

Nevertheless, some definitions of judicial independence have been reached. Most American commentators note that judicial independence has both institutional and individual components. “In its institutional form, it is a corollary to the principle of separation of powers. That is, the judiciary is a vital branch of government with constitutionally delegated powers, and . . . must be free to act and interact with the other two branches. . . . In its individualized sense, judicial independence means simply that a life-tenured federal judge is free to decide cases in a wholly impartial manner.” Tacha, supra, at 645 – 46; see also Abrahamson, “Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence,” 12 St. John’s J. Legal Comment, 69, 70 (1996) (describing institutional and individual components of judicial independence); Fiss, “The Limits of Judicial Independence,” 25 U. Miami Inter-Am. L. Rev. 57, 58 – 59 (1993) (noting that judicial independence requires both independence from the parties in litigation, individual autonomy, and political insularity). Larkins builds on this concept to state that “[j]udicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact ‘neutral’ justice, and determine significant constitutional and legal values.” Larkins, supra, at 611; see also Cohen, “The Chinese Communist Party and ‘Judicial Independence:’ 1949 – 1959,” 82 Harv. L. Rev. 967, 973 (1969) (at a minimum, judicial independence means “that political organs will not interfere with the application of these legal sources (constitutions, statutes, regulations, rules of decisions, and other sources of authority) to the facts of particular cases. . . . [I]t should also mean that political organs will not inflict deprivation upon honest judges who make undesired decisions, nor reward those who make favored decisions.”); Plank, “The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia,” 5 Wm. & Mary Bill Rts. J. 1, 8 (1996) (the essential elements of judicial independence are “(1) guarantee of a fixed tenure, subject to a limited process of removal or discipline for misconduct or disability; (2) fixed and adequate compensation; (3) sufficiently high minimum qualifications in education and experience; and (4) limited judicial immunity.”).

Quantifying Judicial Independence

Second, the concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret “evidence of impartiality, insularity, and the scope of a judiciary’s authority as an institution.” Larkins, supra, at 611 et seq. Larkins cites the following faults in prior efforts to measure judicial independence: “(1) the reliance on formal indicators of judicial independence which do not match reality, (2) the dearth of appropriate information on the courts which is common to comparative judicial studies, (3) the difficulties inherent in interpreting the significance of judicial outcomes, or (4) the arbitrary nature of assigning a numerical

score to some attributes of judicial independence.” *Id.* at 615. Larkins goes on to specifically criticize a 1975 study by David S. Clark which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his “judicial effectiveness score,” Clark included such indicators as tenure guarantees, method of removal, method of appointment, and salary guarantees. Clark, “Judicial Protection of the Constitution in Latin America,” 2 *Hastings Const. L. Q.* 405 – 442 (1975). “The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including these factors, Clark overstated . . . the independence of some countries’ courts, placing such dependent courts as Brazil’s ahead of Costa Rica’s, the country which is almost universally seen as having the most independent judicial branch in Latin America.” Larkins, *supra*, at 615.

Third, reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: “[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy.” Larkins, *supra*, at 616.

CEELI’s Methodology

CEELI sought to address these criticisms by including both subjective and objective criteria, and by basing the criteria for an independent judiciary on some fundamental international norms such as those set out in the United Nations Basic Principles on the Independence of the Judiciary; Council of Europe Recommendation R(94)12 “On the Independence, Efficiency, and Role of Judges;” and Council of Europe, the European Charter on the Statute for Judges. Reference was also made to a Concept Paper on Judicial Independence prepared by CEELI and criteria used by the International Association of Judges in evaluating membership applications.

Following these norms, CEELI compiled a series of 33 statements setting forth the characteristics of an independent judiciary. Each statement or series of statements is followed by a brief commentary citing the basis for the statement and discussing the importance of those criteria and why it was included. A particular effort was made not to give higher regard to American as opposed to European concepts of judicial independence. The categories considered include selection and appointment procedures, education and training, budget and salary allocations, safeguards from improper outside influences, jurisdiction and judicial powers, transparency of process, ethics, work conditions, assignment of cases, and support for the judiciary by non-governmental organizations.

The methodology for scoring is as follows. Each statement is be allocated a value ranging from 5 to 1. Where the statement most corresponds to the reality in any given country, the country is given a score of 5 for that statement (thus, if all of the statements were true in the country being polled, that country would have a very independent judiciary). On the other hand, if the statement is not at all representative of the conditions in that country, it is given a 1. Conditions that fall between these extremes are to be given an appropriate intermediate “score.” Based upon its total numerical score, the country will then fall into one of four categories: “very independent” (highest numerical score, 134 – 165 range); “somewhat independent” (100 – 133 range); “somewhat controlled” (67 – 99 range); and “controlled judiciary” (lowest numerical score, 33 – 66 range). Cf. Cohen, *supra*, at 972 (suggesting that the degree of judicial independence exists on a continuum from “a completely unfettered judiciary to one that is completely subservient.”).

In the interest of simplicity and despite the potential for criticism, we have decided against giving different questions different values or weights; instead, all questions have been given equal weight. This problem has been partially addressed by including more statements in the more important categories; for example, there are eight statements relating to potential improper influences and only two statements relating to education and training.

Some of the subjective criteria would best be ascertained through public opinion polls or through extensive interviews of lawyers and court personnel. Aware of cost and time constraints, however, we decided to address these issues so that they could generally be answered by questioning some judges, journalists, and outside observers knowledgeable concerning the judicial system. Overall, the survey is intended to be implemented by one or more individuals who are generally familiar with the country and region and who would gather the objective information and conduct the interviews necessary to reach a scoring decision as to the more subjective criteria. The final scoring report would also briefly explain how the “scoring” decisions for each statement were reached.

One of the purposes of the survey is to help CEELI and its primary funder, the United States Agency for International Development (USAID), as well as other organizations working in this area, such as the World Bank, determine the efficacy of their judicial reform programs and help to target future assistance. Many of the issues raised (such as judicial salaries and improper outside influences), of course, cannot be directly and effectively addressed by outside providers of assistance. And we recognize as well that those areas of judicial independence that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an independent judiciary; and yet, an independent judiciary does need to be well trained. Moreover, the nexus between outside assistance and the country’s judiciary may be tenuous, at best: building a truly independent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, some sort of objective, quantifiable measurement is

necessary to better focus reform efforts, and to provide a means of comparison between different countries.

The real test of the utility of the system will be in its application. CEELI is currently planning to test the survey against four judiciaries: two in western democracies and two in countries in transition. The survey may be revised depending on the perceived accuracy of these “trial runs” or on any practical difficulties of implementation.

Finally, it should be noted that although this survey has been developed by ABA/CEELI, it has not been officially sanctioned by the Board of Governors of the American Bar Association, and the ABA does not intend, through this mechanism, to officially rank the judiciaries of the various states in the United States or of other countries. Rather, as discussed above, CEELI prepared this survey because the agencies that fund programs aimed at supporting judicial independence require some quantifiable measure of the impact of their programs and some tool for refining their implementation.

ABA/CEELI JUDICIAL REFORM SURVEY

Selection and Appointment

1. Judges are appointed based solely on objective criteria such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community.
2. Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.

COMMENTARY

UN Principle No. 10 provides, “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, color, sex, religion, political or other opinion, national or social origin, property, birth, or status”

The selection and appointment of judges is one of the most basic and important issues to be considered in measuring the independence of the judiciary. Unfortunately, whether or not a country’s selection/appointment procedures meet the UN aspirational principle set out above is extremely difficult to determine. There are several different methods of appointment.

Chief executive selection. *In a state ruled by a dictatorship, the chief executive is solely responsible for judicial appointments. Obviously, this opens the door to appointments based purely on cronyism or controllability. In such a situation, the judge*

simply becomes a tool of the state and the individual litigant cannot expect to receive fair treatment.

Judicial election. *In some jurisdictions (e.g., Texas and for some courts in New York), judges are elected by the voting public. At first blush, this selection method does not appear as threatening to judicial independence as the method described above. An elected judge, however, is less likely to be able to freely perform one of the key but most unpopular functions of a judge in a democratic society: Protecting minority and individual rights. This is not to say that elected judges never protect such rights; however, if they do so, they may well lose the next election. The situation can be mitigated, of course, if judges are elected for extended terms, of ten years or more, and if they are prohibited from standing for reelection. Even then, however, there are problems associated with the judge being overly beholden to the political party that backed his or her election (which, of course, may also be a problem with an appointed judge). A different sort of threat to judicial independence can arise from the pressures of fundraising that are inherent to a modern election campaign.*

Board Selection. *In other states, a panel of experts may either name the judges or recommend to the Chief Executive candidates qualified for appointment. This is the method recommended by European Charter Principle 1.3: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”*

Appointment from Law School. *In most civil law countries, law school students go on a judicial track quite early in their careers, and are appointed to the judiciary directly from law school. Plank, supra, at 36.*

Minority and gender representation. *European Charter Principle 2.1 prohibits any judicial “candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.” This consideration is important because, although judges are charged with resolving the disputes that society brings before them (and therefore, in a certain sense, must be “above” society), they must also fairly represent society. In addition, minority representation in the judiciary will be key to protecting minority rights and implementing the rule of law in many countries, such as the former Yugoslavia, where minority repression remains a cause of conflict and violence. Some statistics in this area can, however, be misleading. In the former Soviet bloc, for example, women often represented up to 70 % of the judiciary. This was not an indicia of the progressiveness of the region’s judiciary, but rather of the low level of esteem with which the judiciary was regarded: being a judge was considered almost a part time job which a woman could do and still have time to take care of her family. Few women, however, filled leadership positions, such as presidents of courts. In addition, men dominated the procuracy, again indicating where the real power in the legal system resided.*

Education and Training

3. Judges have formal university level training in the law and, in addition, before taking the bench are required (without cost to the judges) to take a series of courses concerning the substantive and procedural areas of the law that they will be working in, as well as concerning the role of the judge in society and cultural sensitivity.

4. Judges must undergo, on a regular basis and without cost to them, professionally prepared and judge-taught continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and development in the law.

COMMENTARY

A truly independent judiciary, in order to apply the law fairly, must know what the law is. As UN Principle No. 10 provides, “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in the law.” Judges must also be aware of how their colleagues are handling issues and cases that they frequently are addressing. This means that new judges must be educated concerning the law, and receive additional training concerning issues of specific relevance to judges after appointment or designation. European Charter Principle 2.3 mandates that judicial appointees receive “appropriate training at the expense of the state.” In addition, continuing legal education programs are vital if judges are to understand changes in laws, and if the laws are to be applied with any consistency. In many remote regions of Eastern Europe, for example, the judges do not receive copies of the laws and are relying on outdated materials. In order to be able to do their jobs properly, judges need to be systematically informed of changes to legislation. Finally, is important for judges to have control over what they are studying in such CLE courses; the government should not dictate what the judges are learning about. See Plank, supra, at 31 – 31 (noting that judges must possess “sufficient education and knowledge to discern the law and to articulate bases for a decision” and that “an educational requirement allows the judges to command the respect of litigants and society.”).

Budget

5. The following percentage of the country’s or state’s national budget is allocated to the judiciary (not including Ministry of Justice and police costs, for example, but including judicial and administrative staff salaries, court education and training, court maintenance, costs for jurors, lay assessors, etc.):

1. 0.04% or less
2. 0.05% - 0.19%
3. 0.20% - 0.34%
4. 0.35% - 0.49%

5. 0.50% or more

6. The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.

COMMENTARY

Adequate funding. *A judiciary that is well-educated and fairly appointed will serve little use if it is not provided with sufficient operating funds, and the discretion to use those funds as it sees fit. As UN Principle No. 7 provides, “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions;” see also European Charter Principle 1.6 (“The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.”). The UN Principles do not define what is meant by the term “adequate,” and obviously, the relative amounts dedicated to the judiciaries of various states will vary widely depending upon those states’ relative wealth. Accordingly, we have chosen to look at percentages of national budgets allocated to the judiciary. The percentages allocated in countries that are generally considered to have independent judiciaries are surprisingly small. In 1995, for example, costs for the judiciary consisted of less than a fifth of one percent of the total U.S. federal budget. Tacha, supra, at 649.*

Judicial involvement in budgeting/spending. *European Charter Principle 1.8 states that “[j]udges are associated . . . in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level.” Obviously, as in the United States, the judiciary will be beholden to a certain extent to the branch of government that controls the purse strings; the judiciary is unlikely to have a separate tax and spend authority. It is also important, therefore, that the judiciary have a means for lobbying Congress or Parliament. For the U.S. federal courts, this is done by the Chief Justice of the United States or associated justices through the Administrative Office of the Federal Courts. Lobbying may also be done through non-governmental associations of judges.*

Additionally, it is critical that the judiciary itself have control over - or at least substantial input into - how its budget is expended.

The role of the ministry of justice may be important here. In the United States, it is seen as key to judicial independence that the judiciary administers itself. But the Department of Justice in fact did administer the U.S. court system until 1939, when Congress passed the Administrative Office Act, which established the Administrative Office of United States Courts. Moreover, even today in many modern European countries such as Germany, and France, the courts are administered through the ministries of justice. Even in the United States, the judiciary is beholden to a certain extent to the executive branch, which nominates its members and enforces its decisions, and to the legislative branch, which confirms the appointments and provides the overall

funding. Accordingly, the issue is not whether the judiciary is funded through the ministry of justice, but rather whether the executive branch uses that funding methodology as a means of controlling or curtailing the activities of the judiciary. And transfer of budgetary control from the ministry to the judiciary itself is no guarantee of judicial independence: Russia recently made such a transfer, but that system is so beset by other problems that its independence is at least questionable.

Salary

7. The salary of a senior level judge is generally comparable to the salary of:

1. A government-employed bus driver or sanitation worker;
2. A government-employed clerk or police officer;
3. A public prosecutor;
4. A cabinet-level minister or member of parliament;
5. The president of the country.

8. Salary levels in the judiciary are formally linked to the salary levels of other government officials, so that, for example, Parliament may not vote a pay raise for itself or for executive officials without also raising the pay for the judiciary by the same rate.

9. Judicial salaries generally may not be decreased, unless as a part of government-wide budgetary cuts.

COMMENTARY

Adequacy of judicial salaries. *A country will not be able to attract capable lawyers to its judiciary unless it sufficiently compensates them. Salaries also need to be sufficient in order to counter the dangers of bribery. See European Charter Principle 6.1 (“[j]udges . . . are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions . . . ”). Obviously, in the United States and many other countries lawyers can make much more money in private practice than in government service. But judicial salaries must be such that they are at least comparable to the salaries of other high-level government employees. In other words, it would be inequitable, and the people would see it as such, if the nation’s Chief Justice were paid less than half of what the President is paid. Similarly, it sends the wrong message if prosecutors are paid more than judges. In many countries in Eastern Europe, judges have been paid less than policemen or bus drivers. This is unacceptable, even in a civil law country where judges may take the bench at a very young age, directly from university. Without examining the actual salaries paid (which could range broadly depending on the economies in each country), we decided that the best way to measure the relative worth of the judiciary is to compare the salaries of senior level judges (for example, members of the Supreme Court, Constitutional Court, or other high level appellate courts) with the salaries of other government employees.*

Salary guarantees. *UN Principle No. 11 states, “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.” Art. III, section 4 of the United States Constitution provides that compensation for judges cannot be diminished while in office. See also Plank, *supra*, at 29 – 31 (describing importance of fixed and adequate compensation and noting that “[a]ttracting able judges will help sustain a reasonably high respect for the judiciary.”).*

Safeguards from Improper Governmental and Non-Governmental Influences

10. Senior level judges are appointed for the following terms:

1. Senior level judges may be removed, without cause, at any time;
2. 1 - 5 years;
3. 5 - 10 years;
4. 10 - 20 years;
5. Life.

11. Judges may be removed from office or otherwise punished only for specified official misconduct, and through a transparent process, governed by objective criteria.

12. Judicial decisions are made without outside political pressure.

13. Judicial decisions are made without improper influences by litigants or other interested parties.

14. Judges have immunity for actions taken in their official capacity.

15. Judicial decisions may be reversed only through judicial appellate process.

16. Judges are free from threats such as assault and assassination.

17. Judges are advanced through the judicial system on the basis of objective criteria such as rate of reversal by higher court, numbers of cases handled, etc.

COMMENTARY

Improper influence. *These issues are difficult to address because attempts to improperly influence the judicial process, whether by the government or by individuals, are inherently secretive and almost always involve criminal activity. Judges in most countries, accordingly, are very unwilling to discuss the problem. The UN Basic Principles, however, recognize the importance of this issue. Principle No. 2 provides, “The judiciary shall decide matters before them [sic] impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences,*

inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” UN Principle No. 4 goes on to state, “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

Improper influence takes many forms. The prototype of governmental interference was the “telephone justice” prevalent during the communist era in Central and Eastern Europe, where government officials or prosecutors would call judges to instruct them on how to decide cases. The threat implicit in such calls was the loss of job or advancement, or a lowered salary or benefits (for example, the judge’s apartment). See Larkins, supra, at 608 (“judicial independence takes on critical significance when the government is one of the parties to a dispute . . . [I]t is important that judges not be subject to control by the regime, and that they be shielded from any threats, interference, or manipulation which may either force them to unjustly favor the state or subject themselves to punishment for not doing so. The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal.”).

As a general matter, improper influence by litigants or other interested parties most typically takes the form of bribery, about which one hears many stories in Eastern Europe today but which are difficult to confirm. A more extreme form of intimidating the judiciary is threatening its membership with violence; a memorable example is the campaign of terror waged against Italian judges by the Mafia in the early 1990s, the ongoing threat against Colombian judges by the drug cartel in that country, and assaults on Albanian judges in 1996.

A more subtle form of interference or intimidation is the political caterwauling that follows unpopular judicial decisions. In 1997, Judge Baer of the United States District Court for the Southern District of New York was threatened with impeachment because he had excluded evidence relating to the alleged sale of illegal narcotics, finding that the police did not have probable cause to search and seize simply because the suspects ran away from the arresting police officers. The subsequent public outcry led to a call for Judge Baer’s impeachment, but no action was ultimately taken. The Baer and other political controversies are described in more detail at Plank, supra, at 25, fn. 78; see also Cox, “The Independence of the Judiciary: History and Purposes,” 21 U. of Dayton L. Rev. 566, 574 – 75 (1996) (noting that judicial “bashing” in the United States has a long and distinguished tradition dating back to Thomas Jefferson).

We have selected a number of objectively identifiable steps that can be taken to protect, at least to some extent, the judiciary from improper influences. Specifically:

Lifetime or long-term appointment to office and irremovability. UN Principle No. 12 provides, “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office.” UN Principle

No.18 additionally states, “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.” In addition, UN Principle No. 17 provides that a “judge shall have a right to a fair hearing” in any disciplinary matters. UN Principle No. 20 adds, “Decisions in disciplinary, suspension, or removal proceedings should be subject to an independent review.” *See also* European Charter Principle 1.3 (“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”); Plank, *supra*, at 10 –14 (discussing importance of this aspect of judicial independence, and noting that federal judges in the United States have life tenure, while judges in a few American states, Canada, France, and Germany have permanent tenure; judges in Japan are appointed for 10 year terms, while members of Mexico’s Supreme Court of Justice have fifteen year terms). That a judge may face reappointment could raise questions concerning “the extent to which they can exercise their judgement [sic] free from inappropriate outside pressures.” *Id.* at 13. Of course, the tenure of a judge must be balanced by some method of accountability, but if a judge is to be removed or otherwise punished, it must be through a fair and transparent process. Clearly, any action taken against a judge must occur “for reasons other than her interpretation of the law in a particular case.” *Id.* at 14. Many countries generally considered to have independent judiciaries, such as France and Germany, discipline their judges through tribunals composed primarily or entirely of judges. *Id.* at 19 – 22 (also describing methods of discipline in the United States, Pakistan, Japan, and Argentina).

Immunity for official actions taken is another important indicia of judicial independence. UN Principle No. 16 provides that “judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial function.” Although not explicit in the UN Principles, and subject to the need for appropriate disciplinary procedures, it goes without saying that judges should have immunity from criminal prosecution for official actions taken. *See* Plank, *supra*, at 32 – 33 (discussing immunity generally, and concluding that judges should also have some form of protection from civil liability). And, as noted above, judicial decisions should only be reviewed through an appropriate appellate process.

Advancement based on objective criteria is also an important indicia of judicial independence. UN Principle No. 13 provides, “Promotion of judges . . . should be based on objective factors, in particular ability, integrity, and experience.”

We recognize that some of our questions -- such as “judicial decisions are made without outside political pressure” and “judicial decisions are made without improper influences by litigants or other interested parties” -- call for subjective judgments. There simply is no way for those questions to be answered in a fully objective fashion; rather, they will call for discussions with judges, lawyers, and journalists. Responses to such questions will require, however, concrete examples from the press concerning reports of improper judicial interference.

Jurisdiction and Judicial Powers

18. The judicial branch, or some part of it, has the power to determine the constitutionality of legislation and official acts, and such decisions are enforced.
19. The judiciary has exclusive jurisdiction over all cases concerning civil rights and liberties.
20. The judiciary works under uniform rules of evidence and procedure that facilitate the conduct of orderly trials and hearings.
21. Judges have meaningful subpoena, contempt, and enforcement powers.

COMMENTARY

Judicial jurisdiction. *The power of the judiciary would indeed be hollow if it did not have the power, ultimately, to say “what the law is.” See Marbury v. Madison, 5 U.S. 137, 177 (1803). UN Principle No. 3 provides: “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.” UN Principle No. 5 additionally states, “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”*

Similarly, the civil judiciary should have exclusive jurisdiction of cases involving the rights and liberties of civilians. In some countries, military courts have control over cases involving civilians. The appellate process for military courts, moreover, should culminate in a civilian court. In the United States, for example, the Supreme Court has the right and power to overturn decisions by military courts.

*In some countries, however, the judiciary does not have the power to determine the constitutionality of governmental actions, or to determine its own powers. Even in the United States, a subtle infringement on judicial independence may be seen in the mandatory sentencing guidelines that are currently in place in the U.S. federal court system. But see *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding constitutionality of the Federal Sentencing Guidelines).*

Rules of evidence and procedure. *In a country ruled “by laws, not men,” the individuals who serve as judges must also operate under an orderly set of rules. Such rules are necessary, moreover, in order to give substance to the ideal of equal protection under the law.*

Contempt/subpoena/enforcement. *The judiciary must also have the power to control its own courtrooms and to compel the appearance of witnesses. A complaint often voiced by judges and lawyers in Eastern Europe is that judges do not have, or are unwilling to exercise, such powers. A case can be stalled indefinitely simply by the failure of a lawyer, witness, or a party to appear. Again, a judiciary unable to control its own courtroom is unlikely to have the respect of the citizenry or to be able to enforce the rule of law throughout the country. It is also vital that the judiciary have some means, more generally, to enforce its orders and judgments.*

Judicial role in criminal justice. *Finally, the courts must be seen as being at the apex of the justice system. As such, the judiciary must be able to control (and declare unconstitutional) certain acts of the state. The prosecution and police must be controlled by a neutral judiciary, not the other way around.*

Transparency

- 22. Courtroom proceedings are open to, and can accommodate, the public and the media.
- 23. Judicial decisions are published and open to academic and public scrutiny.
- 24. A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.
- 25. Courthouses are centrally located and easy to find, and provide a respectable environment for the dispensation of justice.

COMMENTARY

The issue here relates largely to the public's perception of the judiciary. We sought to develop questions that would reflect the public trust and understanding of the judiciary, but that could be answered without engaging in the costly process of polling. We added the question concerning the location and accessibility of courthouses because too often, under the communist regimes of Eastern Europe, citizens did not know where the courthouse was until they were arrested. Even today, some trial courts, for example, are hard to find and not centrally located or easily identified. Again, this gives an impression that justice is not an open process. Similarly, we included the question concerning the appearance of the courtroom or the courthouse because of the impression that is conveyed to the public. In Romania, for example, the main courthouse in Bucharest is old, dilapidated, and in general disrepair. In contrast, the Office of the General Prosecutor is new, marble columned, and clean. It is clear where the State is allocating its resources and where the real power is.

Ethics

26. A code that governs the ethical conduct of judges (that generally covers issues such as conflicts of interest, ex parte communications, inappropriate political activity, etc.) is in place and enforced (through a process that respects due process).

27. Before taking office and throughout their tenure, judges are required to receive training concerning judicial ethics.

28. A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.

COMMENTARY

A truly independent judiciary must function within clear ethical guidelines. As UN Principle No 19 states, moreover, “All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.”

None of the items listed above ensure that a judiciary will always act in an ethical manner, but such at least serve as indicia of how the society regards the importance of judicial ethics.

Finally, while we recognize that the term “meaningful” when used to describe the judicial conduct process is subjective, the mere existence of a judicial conduct process, without regard to its quality, does not sufficiently respond to the question posed.

Caseloads and Work Conditions

29. The caseload of each judge is reasonable.

30. Each judge has the basic tools necessary to do his or her job, e.g., sufficient office space, adequate support staff, word processing equipment, a law library (whether physical or online), etc.

COMMENTARY

Caseload. *Many judges in both the United States and Eastern Europe complain that they cannot properly perform their jobs because of their heavy workloads. Indeed, the dispensation of justice should not take the form of an assembly line, where processing the cases becomes more important than ensuring fair results. Although, the issue of caseload is important, it is also difficult to measure. Rather than try to determine the number of cases that is appropriate for each judge to handle (which could vary widely in civil law and common law countries), we determined to simply apply a subjective test of reasonableness, and to rely on interviews with judges and lawyers to obtain a score.*

Working conditions. *The question of appropriate workspace is clearly subjective. Nevertheless, it is not appropriate to have three supreme court justices working in one small office, as was the case in Romania in 1994. The question of support staff is also somewhat subjective; American judges, for example, have (and, because of the burden of research and writing inherent to the common law system, require) much larger staffs than their European colleagues; such also may reflect more the litigiousness of Americans than anything else. On the other hand, some courts have absolutely no support staff (no clerks to assist with filing and no secretarial staff), and this clearly impedes their efforts to dispense justice. The lack of any word processing equipment would present a similar impediment. See Tacha, *supra*, at 648 (“In order for a judge to handle her caseload and maximize productivity, she implicitly must possess adequate staff, equipment, and physical facilities to carry out her responsibilities. Independent judicial action requires an appropriate level of support which allows a judge to carry out the judicial function without relying on other entities, depending on someone else’s assessment of the judge’s needs, or giving any thought in the case-deciding role to tangential factors that might influence the speed of deliberation or the outcome.”).*

Assignment of Cases

31. Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and this assignment process is administered by the judiciary, not the ministry of justice.

32. Once assigned to a case, a judge may be removed only for good cause, such as because of a conflict of interest or an unduly heavy workload.

COMMENTARY

Too often, cases are in essence pre-decided by assigning them to judges who are more “controllable” or “predictable.” Absent special reasons such as expertise or workload, judges should be assigned to cases according to a blind, random method. UN Principle No. 14 notes, “The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.”

Support by Non-Governmental Organizations

33. An association dedicated to protecting the interests of the judiciary exists and is active.

COMMENTARY

UN Principle No. 8 states that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly.” UN Principle No. 9 provides, “Judges shall be free to form and join associations of judges or other

organizations to represent their interests, to promote their professional training and to protect their judicial independence.” Similarly, European Charter Principle 1.7 states that “[p]rofessional organizations, set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.”

In many of the countries of Eastern Europe, the Ministries of Justice are directly responsible for administering the judiciary. Yet, many of those Ministries, either for financial or political reasons, have been unwilling to allocate appropriate resources (in terms of salaries, training, security, and many of the other issues discussed above) to the judiciary. Non-governmental associations of judges, accordingly, have sprung up throughout the region to lobby for improved conditions, help provide the training that the ministries are either unwilling or unable to provide, and/or improve judicial professionalism generally.

The existence of such an organization may be worth a point on the scale, but the real question is whether it is active and effective. Additional points should be provided where an association is engaged in lobbying, training, or other activities supportive of an independent and professional judiciary.

Annex VII: Outline of Issues and Ideas Relating to the Assessment and Establishment of a Functioning Judicial System in a Lesser Developed Country. (Robert Fiedler, International Legal Project Center)

[These terms of reference for a judicial assessment were developed by Mr. Fiedler for USG use in Haiti in the early 1990's. However, the author was clearly thinking beyond that case. The intended use does explain some details and references to USG agencies the participation of which in an eventual reform was already anticipated]

Introduction. The purpose of this paper is to outline some of the principal areas that might be considered when evaluating or attempting to reinvigorate a judicial system. It relates to circumstances that might be found in a lesser developed country, a war torn nation, or a jurisdiction where the judicial system is simply dysfunctional. The paper can serve as the framework for a needs assessment. It is generic and contains information and observations which have near universal applicability. Much of what is initially required is simply gathering information about available personnel, facilities, the substantive and procedural law, and the general justice/judicial system and structures that are in place. Following the assessment, a written analysis of the status of the system and plans for its reconstruction would be prepared. Implementation will vary dramatically based on the circumstances of the system, resources available, and the applicable legal and cultural history.

The paper assumes that the assistance team is performing its functions, at the request of the host nation and that cooperation with the host nation is expected.

- I. **Mission Approach/Methodology.** The assessment team must be formed and decide how to proceed. Items to consider should include:
 - A. Organization of the assessment team. The team must have a person designated as the project director. It must also be broad based, drawing its participants from areas such as court executives, clerks of court, information system specialists and other consultants and court managers as required, e.g., budget, personnel, or forms design specialists. Once the assessment team gains a substantial familiarity with the cultural setting in which it is working, much of the initial assessment will focus on the administrative structure and resources of the legal system. The inclusion of judicial officers may or may not be essential at this stage of the process, and should depend on their unique qualifications and the circumstances of the particular project. The inclusion of judicial officers will give the assessment effort a higher visibility and provide enhanced entree.
 - B. Site visits-when, how many, how long, by whom.

- C. Focus group--contact representative members of the bench, the bar, appropriate Ministries such as the Ministry of Justice (MOJ), and policy makers, police, penal, budget officials, human rights organizations, and other relevant entities.
- D. Interviews--schedule interviews with appropriate representatives from the focus groups, being sure to include judicial administrative personnel and other appropriate personnel involved in resource allocation issues.
- E. Presentations--inform those who need to know what you're doing and why, e.g., MOJ, U.S. Embassy (USE), U.S. Agency for International Development (USAID), U.S. military commanders (if applicable), appropriate nongovernment organizations or private volunteer organization is (NGO's/PVO's), and private groups.
- F. Surveys determine what information is sought and to whom the surveys should be sent. Evaluate whether surveys are suitable or reliable for your purpose.
- G. Background research--learn as much as you can about the country, its culture, and legal system before you hit the "field." Cultural sensitivity is a must.
- H. Support--who is supporting the assessment team? Special provisions may be necessary for security, housing, food, transportation, secretarial support, and an "entree" to the system. In many countries, translation support will be essential; regular translators are often adequate, but MOJ personnel may be required for more specific legal translation support.

II. Legal Framework. What are the historical and theoretical underpinnings for the legal system?

- A. History--generally, how did we get to where we are today? What law established the courts or the MOJ? Is it still in effect, or is some further effect or authorizing law needed? Is the judicial system unified, or do separate systems either overlap or perform separate functions?
- B. Basic substantive law.
 - 1. Constitution.
 - 2. Common law, Napoleonic civil law, or other tradition.
 - 3. written law.

- a. Statutory.
 - b. Codes--commercial, criminal, civil.
 - c. Case law.
 - d. Religious/cultural traditional law, e.g., the Sharia, in Moslem countries.
 - e. Special "personal" law that deals with family issues.
- 4. Availability of English translations.
- 5. Does the system have a counterpart to precedent, res judicata, or stare decisis?
- C. Procedural law/rules of court--do they exist separately? Uniformly?
Published?
- D. Martial law--does the host nation provide for it, and if so, how is it declared? What structure and law applies if it is implemented?
- E. Political/security crimes--does this category exist and if so, how is this aspect of the law handled? Does the central government retain political control over judges in these or other cases?
- F. Location of the law cases, statutes, regulations.
 - 1. Where located:
 - a. Courthouse.
 - b. Law libraries.
 - c. Personal legal materials of jurists.
 - d. Central facility, e.g., MOJ or branches of it or other ministries.
 - 2. Availability in:
 - a. English.
 - b. Language of host nation.
 - 3. Availability to:

- a. Lawyers.
- b. Litigants.
- c. Public generally.
- d. Government.

Note: Is a massive effort needed to reproduce the law so that attorneys, judges, and the populace have more ready access to it?

- 4. Depositories for case records and decisions.
- 5. Index system of cases.
- 6. Reporter system.
- 7. Citation system.

- G. Applicable law--the law of the host nation may be in the process of change and, if so, this will affect the implementation of the law. Determine what law is being applied--the old, present, or new law--and what--future expectations are.
- H. Conclusion/recommendations.

III. Judicial Officers and the Structure of Administration.

- A. Background. Ascertain the specific history of the role and relative position of judges in this legal system. Are they respected? Are they viewed as impartial or as tools of the political process?
- B. Organization.
 - 1. The judiciary may be dependent upon the Ministry of Justice or other ministry of the government for its routine support and/or policy guidance. If so, information about that ministry is required, such as:
 - a. Name of ministry and its function, its head, and status in government (cabinet officer?). What law authorized it?
 - b. Organizational structure of the MOJ.
 - i. Separate prosecutorial/judicial divisions.

- ii. Duties.
 - iii. Key personnel.
 - c. Relationship between ministry and courts, i.e., are the courts subordinate to the Ministry?
 - d. Jurisdiction of Ministry.
 - e. Selection and disciplinary authority of ministry over judges and its' own employees.
 - f. Location of the ministry and its various branches, regional and local.
 - g. Influence of the ministry over the courts' decision making.
 - h. Policy making authority such as administering a judicial council or controlling it.
2. The Judiciary may be independent and separate from any ministry. If the Judiciary is generally independent, or even if it is tied to the MOJ, it may have a distinct governance structure to administer its policy and administration.
- a. Ascertain the hierarchy for both judicial and administrative duties. There could be a chief justice, a chancellor, a chief administrative judge, chief judges, an administrative director, or similarly titled officials. Determine their selection process and duties.
 - b. There may also be a governing council, often called Judicial Council, for the court system and/or within each court. Determine who sits on it and their powers. (Or if judicial system is administered by MOJ, is there a Judicial Council within the Ministry and how is it organized?) To be most effective, a Judicial Council may require membership or participation at some level by non-judicial officers such as MOJ personnel, bar leaders, law school deans, or professors.

Note: Many countries may have a governance structure radically different from our concepts, for example, MOJ control of the judiciary. Be very cautious and sensitive to suggesting radical changes in governance.

- c. A court may have subordinate judicial officials, e.g., magistrates, or specialized judges.
 - d. Clerks of court may be the chief administrative officers of a court, handle modest judicial duties, and even direct and formulate the activities of the court.
 - e. A centralized administrative entity may exist upon which the courts rely for administrative support or training and research. It will be critical to understand its function, structure, and capability.
3. Many levels of courts probably exist: justice of the peace, small claims, traffic, religious, tribal administrative, misdemeanor, trial courts, appellate courts, a supreme court, a constitutional court, or a court of cassation. Very important to understand the relationship between the various levels and their relationship to the government generally, e.g. are there separate local national courts? Do the rural "hamlets" have courts or their equivalent? Determine the number of courts, judges, and administrative personnel at all levels and their location.
 4. Determine the jurisdiction of the various courts both in terms of geographic areas and type of case they handle.
 5. Can the judiciary declare an act of another branch of the government unconstitutional? Is this a process that is recognized and followed by the other branches?
 6. Ascertain exactly who provides and how the judiciary receives resources, e.g., budget, personnel, facilities, security.
 7. Determine the authority of the judiciary to impose restrictions on the bar, e.g., where and how lawyers may practice.
- C. Judicial selection, staffing, and removal patterns.
1. Selection process of judges--elected or appointed. When elected? How appointed? For what term?
 2. Criteria for quantity of judicial resources. Is there a workload formula or other standard-political, academic, or ethnic?

3. Will existing judicial and administrative officials remain in office and functioning while the review and restructuring is occurring? Determine the availability and suitability for future service.
 4. What is the removal disciplinary process for judges and other key judicial administrative officials?
- D. Operations. Review each level of court operations in areas such as:
1. Pre-trial/case management procedures.
 2. Trial settings.
 3. Calendaring.
 4. Sentencing/alternative sentencing/penalties
 5. Information system functions for the collection, indexing, and publication of decisions and rulings.
 6. Jury issues if applicable.
 7. Release and distribution procedures for court judgments and opinions.
 8. Alternative dispute resolution systems such as arbitration or mediation. To the degree that disputes can be settled easily, quickly and in an atmosphere of fairness, it should be encouraged. A "Neighborhood Justice Center" concept where simple disputes are resolved locally and informally by a respected figure without the need for a court process of extensive record keeping might be considered.
 9. Land records retention and security. (Critical that they be maintained and secured.)
- E. Training.
1. Determine if the judges are traditionally law school graduates or otherwise trained. Would further training be helpful or even essential?
 2. Determine what training programs are in place for the various levels of judicial and administrative officials and whether trainers are available.

- F. Relationships/needs-what is the operating procedure and relationship between the courts and the:
 - 1. Prosecutors.
 - 2. Defenders (public or private).
 - 3. Police.
 - 4. Court security officers.
 - 5. Prison officials.
 - 6. The bar.
 - 7. Humanitarian entities/NGO's/PVO's.
- G. Conclusions/Recommendations.

IV. Court Administration.

- A. Background.
- B. Organization.
 - 1. At each level of court, who are the administrative personnel and what are their structure and duties?
 - a. Personnel:
 - i. total personnel and their ratio to judges or cases.
 - ii. types of personnel/duties, e.g. clerk of court, lesser clerks, personnel or budget specialists, court reporters, interpreters.
 - iii. supervision--what's the chain? Do the judges direct court employees or is this a function controlled by the chiefs court administrators?
 - iv. Training—can the personnel perform their duties and what options are available to get them training?
 - 2. If a central administrative organization either for each level of court or for the system as a whole (such as the AOUSC in our

system) exists, understand the administrative apparatus in some detail. A national administrative entity, depending on the resources and sophistication of the legal system and country, may have a central entity with personnel to support functions such as:

- a. Automation and technology.
- b. Finance/budget.
- c. Human resources.
- d. Statistics.
- e. Special offices for identified areas such as:
 - i. Defenders.
 - ii. Rules support.
 - iii. Judicial needs.
 - iv. Administrative needs and policy.
- f. Facilities, security, and administrative services.
- g. Miscellaneous other support staff to assist the governance structures, develop policy, or conduct liaison with other ministries or the legislative body of the host nation government.

3. What role does the MOJ play?

C. Functions/services. How do the support personnel perform the following functions:

- 1. Operations—notices/summon/warrants. How are judgements or orders enforced? Who is notified?
- 2. Records such as:
 - a. papers, filing system
 - b. registers
 - c. accounts

- d. calendar for cases and events
- e. process and schedule for the retention/forwarding/or destruction of documents

OBSERVATION: Keep it simple, but definitely keep records, especially at the lowest levels--it is the basis for everything.

- D. Public relations. Determines who handles the public relations function on behalf of the judicial system. Very important to have a thoughtful, possibly multi-lingual spokesperson(s) familiar with courts and media needs. This becomes essential if the Western press are interested in the country's judicial system and giving great attention to human rights issues.
- E. Conclusions/recommendations.

V. **Judicial System Resources Inventory.**

- A. Research capabilities. Are there libraries or other research resources? Are they available in chambers or for the bar and public use? Are there law schools?
- B. Forms/files/paper. Keep it simple. Design forms for multiple purposes. Have important files and files relating to land ownership in a secure place or at least in fire proof filing cabinets.
- C. Equipment-types and use. Is rudimentary systems the most important piece of equipment may well be a basic copier or a manual typewriter. Something that is low maintenance and dependable. Computers may only be necessary at a Central administration point. Key factors when considering the suitable level of equipment and automation are: expected volume or complexity of cases, technical support capability for the system, and software issues relative to language compatibility.
- D. Judicial Facilities. What exists and what will it take to make the facilities functional?
 - 1. Location.
 - 2. Type--Concrete block? Wood? Stand alone or part of a larger facility?
 - 3. Suitability for use.
 - 4. Cost of repair/availability of labor and material.

5. Prioritize needs for facilities.
 6. Be in contact with engineers/architects regarding restoration of facilities. If the U.S. Corps of Engineers has personnel in the country, they may be particularly helpful.
 7. Availability of facilities to rent.
- E. Judicial information systems/criminal justice information system. Statistical information on what is happening in the courts should be gathered so that future planning and adjustments can be made with a knowledge about what is occurring.
- F. Conclusions/recommendations.
- VI. Miscellaneous Justice Issues. Depending on the circumstances, it might be helpful in assessing the judicial system to have a complete understanding of the justice system apparatus such as the Ministry of Justice, Ministry of the Interior, Ministry of Security, Ministry of Defense, police, penal system, prosecutor and the bar. For example:
- A. Police/prosecutors.
1. Number.
 2. Location.
 3. Status.
 - a. Function.
 - b. Training level.
 - c. Equipped.
 - d. Professionalism.
 - e. Selection/removal process.
 4. Determine their priorities and whether they make many arrests that lead to court activity. Are they a mere presence in community? Do they influence policy or control certain groups in the community?

5. Determine whether the arrests that are made are on simple issues or complex cases.
 6. What control do the courts have over the police and prosecutors?
 7. Need to monitor for human rights abuse?
- B. Prisons.
1. Number.
 2. Location.
 3. Status, i.e. capacity, security level, accessibility.
 4. Need to monitor for human rights abuse. ICRC representatives may play a special role here.
- C. The bar.
1. What is the size and organization of the bar?
 2. Are the lawyers graduates of law schools? Is a bar exam or other prerequisite required for a lawyer to practice?
 3. Is the bar loyal to one political faction or another? Do they have a traditional role or position on major issues relating to the legal system? Are they community leaders?
 4. Are there bar associations? What function do or can they play?
 5. Is there any form of legal aid? Who appoints defense counsel if they are provided in certain criminal matters-judge or MOJ?

VII. Further Observations.

- A. Make the working judicial system highly visible. It will be a symbol of government stability and give a sense of justice and hope. Display flags and other trappings of authority and dignity.
- B. Make the assessment as broad as possible. Identify what's there and working. Make a complete inventory of what you have and what you need.
- C. It all starts at the local courts--this is where records are created and most "justice" occurs. Concentrate on the lowest levels of justice and work your way up.

- D. Re records--keep them! Necessary to at least have summary records of criminal cases which can be kept or sent to a central depository. Land and other property rights records are critical-keep them secure.
- E. Security needs are probably not high in courts handling petty offenses and traffic matters. Security needs grow as courts become those of general jurisdiction handling criminal matters. Holding cells may be a necessity for defendants:
- F. Equipment should be kept simple:
- manual typewriters
 - basic copier essential
 - fireproof, locking file cabinets
 - fill-in-the-blank forms/files
 - registry books
 - basic office supplies
 - More sophisticated automation systems are probably only justified by high volume and if a technical support system exists to support them.
- G. Create some form of governing Judicial Council at one or more levels. Judges usually will take charge and make things work. They generally have a strong allegiance to a legal system and its concepts. They will understand their charge, create an agenda, and make it work.
- H. Advisors/consultants:
- Advise—don't make decisions for your hosts.
 - Precise agreement needed on scope of work and support. Look around--see if what is in place works. Maybe you don't have to create new wheels.
- J. Any system starting up will need the services of on-the-spot consultants for at least six months. It is prudent to plan to have 3-4 people with differing court administration specialties under contract working as a team.
- K. If U.S. model court system were to be looked upon as the model, it might be best to look at local and state systems in the U.S. that have size, case, and resource capabilities similar to that of the host nation. The judges, officials and employees of the federal system can be of great help, but they are working within a huge, complicated system that may have de minimus application to the needs of a third world country. Always keep in mind that the Anglo-American legal model is probably foreign to the host nation unless the British Empire touched their past. Don't force feed our system, but rather, expose them to how we might perform a function--it might fit!

- L. Much depends on the political/legal tradition of the country. Get a feel for people's expectations and reactions to the justice system and courts. For example, do people seek recourse to justice in the courts or elsewhere? Do litigants abide by decisions of the court? Do the judges receive sufficient pay to give them status and insulate them from undue influence by monied parties or the government? Are human rights generally respected by courts, prosecutors, police, military? Are there protections against arbitrary actions by courts, prosecutors, police or military?
- M. From the data gathered in the assessment, there are at least four areas that will need to be addressed by specific plans:
- law and procedure
 - governance/court structure
 - operation
 - automation/technology/information systems

Conclusion: The establishment of a fair and functioning justice system may well be the central underpinning for an emerging democratic country. A system in which legal differences can be fairly and efficiently administered will gain the support of the people and redound to the benefit of all governing officials. The justice system has many components. This paper has focused on the judicial portion of the broader justice system but has touched on the role and organization of the prosecutorial, police, and penal aspects, as well. In the final analysis, all the components must work and blend together, but the judiciary, given sufficient independence and resources, can act as the force that gives the system integrity and guides and holds the entire system together.

ANNEX VIII: Guidelines for Judicial Sector Assessment (Waleed Malik, World Bank)

[This is one of several such guidelines prepared by Mr. Malik for assessments in Pakistan, Egypt, Venezuela, El Salvador and Guatemala. The results of the assessments that were conducted did fill several volumes. However, as an inventory, not a performance checklist, they are good examples of what is needed]

PAKISTAN - COMMERCIAL JUDICIAL SYSTEM³³

I. OVERVIEW

JUDICIAL REFORM AND DEVELOPMENT

→What are the priorities for economic and social development in Pakistan?

(description of the economic context—GATT, other agreements—with focus on the major economic development issues and planned strategies of economic reform.)

→What is the importance and role of judicial reform in the development strategy for Pakistan?

→What are some of the links between judicial reform and private and social sector development?

(description of the main links between the establishment and guarantee of property rights and economic development. Anecdotal evidence based on survey results or opinion polls, media reviews, interviews, observation etc.)

→How does the private sector access the judicial system?

(Based on survey results, media reviews, interviews, discussion during the seminar etc.)

→What is the likely result of judicial reform in Pakistan?

(description of possible sector specific performance indicators to monitor progress and evaluate the impact of reform.)

→Who supports or opposes judicial reform?

(description of interest groups and potential risks)

Governance framework

→What are the different organs of the government?

(description of the constitutional basis, role, size, and functional responsibilities of the three branches of government—executive, legislative, and judicial)

Independence framework.

→What are the constitutional and other legal safeguards guaranteeing the independence of the judicial branch?

(description of laws, decrees, and other safeguards, such as the budget process ensuring financial autonomy, and past and recent efforts to strengthen the independence of judges)

Organizational framework.

→What is the organization of the judicial sector (public and private)?

(description of institutional characteristics of the different components of the sector with focus on:

the constitutional basis;

the jurisdiction and functions; and

the quantitative profile including:

³³.

Attach copies of reference documents and list of people met complete with contact info.

classification and number of staff (such as judges, attorneys, specialists or experts, support staff, other employees) including gender classification);
budget information (such as total expenditures, expenditure on payroll, capital investments, and other categories);
workloads (for the court system data such as number of cases—received, decided, or pending by type of case (e.g. civil, commercial, penal, labor), for the ADR center data such as cases adjudicated, types of cases and their values, fees charged etc., for the legal aid programs data such as annual expenditures, number of persons receiving the aid etc., for the prosecution number of cases received, processed, and pending; for the prison system number under detention, sentenced, pending trial etc., for the law school number of law students, gender classification etc.)

Public Sector Elements:

- Ministry of Law and Parliamentary Affairs
- Supreme Court of Pakistan
- High Court of Punjab (and other provinces)
 - Session Courts
 - Civil Courts
- Magistrate system
- Attorney General's Office (public prosecutor's at federal and provincial levels)
- Specialized courts such as Banking court, etc.

Public/Private Sector Elements:

- Bar associations
- Law Schools
- Law firms
- Non-governmental organizations (NGOs)—such as legal aid agencies and agencies that provide assistance programs for the general public (in particular the poor);
- Other commissions/associations—such as American-Pakistan Chamber of Commerce, law commissions, human rights commissions, judges' commissions, industrial dispute commissions, judicial staff associations, small business associations, and associations of traders

Inventory of Past Judicial Reform Efforts.

→What has been the experience of judicial reform activities in the past?

→Have these activities been supported by IFIs?

(Description and time-line of previous or ongoing efforts and their impact)

II. WHO USES THE COURTS? QUANTITATIVE AND QUALITATIVE ANALYSIS

Time series (demand and supply analysis) (statistical annex)

User surveys and focus groups (statistical annex)

Enforcement of court decisions

II. JUDICIAL REFORM ELEMENTS

A. PROCEDURAL/LEGAL REFORM

Context—definition, problems, experience

→What constitutes legal reforms?

(brief description of the following areas of the legal system [with focus on commercial reform]:

- Constitutional law - Constitutional reform that may have an impact on the administration of justice?
- Civil code and procedure/commercial procedure
- Criminal code and procedure
- Organic law of the judiciary
- Administrative law
- Company law
- Bankruptcy code
- Notaries law
- Commercial registries law
- Environmental law
- Labor law
- Foreign investment law
- Intellectual property law
- Tax law
- Other laws codes etc.)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

B. ADMINISTRATION OF JUSTICE

→What aspects constitute the administration of justice?

Judicial Administration

Context—definition, problems, experience

→What are the arrangements for judicial administration?

(description of the administrative structure of the supreme court—or other entity responsible for administering the court system—the level of decentralization; inter and intra institution coordination; oversight responsibility and capacity.)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

Court Administration

Context—definition, problems, experiences.

→How are the courts organized at the micro level?

(description of: organization, configuration, and staffing; judicial and administrative procedures; case flow management—case loads, case assignment, docketing and registration, archives, controls, and case information release; notification; accounting—voucher and invoice payment—system; media coordination; support systems; and public access)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

Judiciary Finance and Budgeting

Context—definition, problems, experiences.

Macroeconomic Context

→Which agencies are responsible for making assessments and forecasts on both the national and entity levels of the judiciary?

→What are the major problems with these agencies?

→What is the link—formally and in practice—between these assessments and the preparation of budgets and other programs?

→What percentage (amount) of the national budget is spent on the judiciary (that is, the Supreme Court)?

→How has the allocation to the judiciary changed over the past years?

→Who awards the annual budget?

→How can independence of the judiciary be ensured in the budgetary process?

Budget Planning and Evaluation

Evaluation of Planning

→Who within the Supreme Court is responsible for budget preparation? (Is there an office concerned with analyzing court operations in terms of their fiscal objectives?)

→What is the budgetary cycle? (Is the time available for completing the budget document sufficient for the complex requirements of negotiating and incorporating plans?)

→What is the degree of participation between the different court levels (for example, between the first instance courts and the superior courts) in the annual budget preparation process?

→What kind of budgetary system is in operation now (none, line-item, programs, and so on)? How amenable would it be to introduce new procedures?

Evaluation of Budgeting

→Is there a rolling annual budget linked to a multi-year program? (Why or why not?)

→Are budget variances (actual minus estimated) considered in projecting future budgetary needs?

→Are current budget levels adequate to support modernization plans? (if not, what additional recurrent expenditures—for example, for courtroom supplies and building maintenance—would be needed to support modernization plans and institutional building?)

→Who within the Supreme Court is responsible for budget preparation? (Is there an office concerned with analyzing court operations in terms of their fiscal objectives?)

→How are expenditures prepared? (Is the process essentially incremental? What is the process by which new courts are actually established and budgeted?)

→What information is available to the budget office—or other office with budget preparation responsibility—on the number of judges and judicial staff needed for each court, on the activities of judges and judicial staff, and on the price/wage relationship for wage expenditures?

Classification Of Budget Items

→How useful is the current classification? (What is the definition of individual budget accounts—for example, courtroom supplies, building maintenance, rent, utilities, judges travel, special courts? What can be done to improve estimation, monitoring and control?)

→What is the definition of capital expenditures (if any)? What new budget accounts would be needed to monitor and control computerization and automated expenditure programs?

Budget Implementation and Control of Expenditures

→What is the administrative capacity of individual courts for budget execution and control of expenditures?

→What are the procedures for ordering and controlling actual payments? (What degree of autonomy do individual and regional courts have in the expenditure of courtroom supplies and facilities maintenance?)

→To what extent are existing rules and procedures, even if adequate in theory, by-passed in practice? (Why is this done? What can be done to improve adherence to good practice?)

→Does the central budget office of the Supreme Court have necessary information to control the composition and total level of spending? (What institutional, procedural, and manpower changes are required to make such controls effective?)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

Strategy Planning and Statistics

Context—definition, problems, experiences.

→Is there a planning function within the Supreme Court? (Is it adequately coordinated or fragmented? What is the capacity of the Supreme court to prepare short-term, medium-term, and long-term investment plans?)

Quantitative Indicators

→Are judicial statistics available? (What is the quality of these statistics?)

Storage and Destruction of Documents

→What is the policy and arrangement for the storage and destruction of case files? (Are case files and documents being retained indefinitely?)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

- What are the recommended reforms to alleviate the above mentioned problems?
- What is the recommended implementation strategy?
- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

Human Resources

Context—definition, problems, experiences.

- Who is responsible for human resource management in the judiciary?
- How is the information collected on pay and employment aspects of the judiciary? (What information is available on the levels of employment, ratios of salary compression, ratios of support staff to total employees, turnover in the judicial and managerial ranks, and ratios of personnel expenditures to total expenditure.
- How is recruitment, promotion, evaluation conducted in the judiciary?
- What is the system of performance evaluation? (Are there developed systems for rewarding and disciplining staff?)
- Are judicial career employment policies and procedures similar to those of the executive branch?
- What types of systems are in place to facilitate human resource planning and control?
- What is the system of personnel records?

- What are the main problems in each of the above areas?
- What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

- What are the recommended reforms to alleviate the above mentioned problems?
- What is the recommended implementation strategy?
- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

Staff Training

Context—definition, problems, experiences.

- What are the arrangements for training staff?
- What is the capacity of training institutions in the country?
- What is the possible role of the judicial school?
- What are the main problems in each of the above areas?
- What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

- What are the recommended reforms to alleviate the above mentioned problems?
- What is the recommended implementation strategy?
- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

Information Management

Context—definition, problems, experiences.

- Who is responsible for generating management and other information?

→Has there been any studies on the use of information technology in administrative procedures or case management?

→Are databases of laws available in the judicial sector? (Are such databases available in the private sector? What is the likely benefit of providing such a database?)

→What is the present condition of law libraries within the judiciary and the private sector? (Are reference materials available in courts?)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

Physical Facilities

Context—definition, problems, experiences.

→Who is responsible for the provision of physical facilities—new courtrooms, space planning, maintenance, remodeling? (What specific role do national, regional, and municipal governments perform in this matter?)

→Is there an inventory of court buildings (total space in use for different types of courts and judicial offices, condition of buildings, maintenance plans, space rented from private owners, space rented from government agencies, and the like)?

→Are there any guidelines for the use of space and standard design in different types of courts?

→What are the safety and security systems installed in judicial buildings?

→Is there a new construction plan for courts and other judicial offices?

→What is the administrative capacity of individual courts to upkeep court facilities?

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

C. JUDGES

Context—definition, problems, experiences.

→How many judges are serving the court system? What is their distribution by type and level of court?

→What is the quality of judges? (What are some of the characteristics of good judges? What are the measurement criteria for assessing the quality of judges? Are many judges perceived to be corrupt?)

→How are judges appointed? (Does this promote competition and ensure transparency? What are their tenures of office?)

→Are salaries of judges adequate? (How do they compare with salaries of the private sector and lawyers in private practice? What are the other incentives for performance?)

→What are the disciplining procedures for judges? (Can judges be removed from office? How many judges have been removed in the last ten years?)

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

D. ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Context—definition, problems, experiences.

→What constitutes alternative dispute resolution?

(description of mechanisms in court-annexed and private procedures)

-What centers are providing ADR services? Is their institutional capacity adequate? If not what can be done to improve these centers?

-Are there formal mechanisms within the judicial system to refer legal conflicts for alternative resolution?

-If mechanisms exist, how are they referred?

-If mechanisms exist, who pays for it?

-Are the decisions arrived at through the following means binding: arbitration? mediation? conciliation?

-For what matters is alternative resolution allowed?

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

→What international experiences can facilitate design and implementation of reforms?

→What is the estimated cost of reform?

E. ACCESS TO JUSTICE

Context—definition, problems, experiences.

→What constitutes access to justice?

(description of access to justice in connection with time, cost, and availability)

→What are the different types of legal aid programs?

(description of programs with focus on quality and service capacity)

→Are any NGOs performing legal aid functions—in addition to those provided by the government?

→What are the main problems in each of the above areas?

→What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

→What are the recommended reforms to alleviate the above mentioned problems?

→What is the recommended implementation strategy?

- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

F. **LEGAL PROFESSION**

Context—definition, problems, experiences.

- What are the characteristics of a legal profession?
- What is the role of bar associations in reform?
- How many lawyers are there in the whole Republic?
- How many lawyers are there for every 100,000 inhabitants?
- How many lawyers are there in each region (or province)?
- How many female lawyers are there--and what is the percentage of female lawyers in the nation?
- How many unions are there?
- How many federations of unions are there?
- Where are unions and federations located, by city and street address?
- What is the number and percentage of lawyers that belong to unions?
- Are the lawyers required to be members of the unions or of any other associations?
- Can the unions or federations sanction the lawyers?
- What type of sanctions can the unions, associations and/or federations impose?
- What are the services that the unions provide to their member?
- What requirements do unions have in order for lawyers to continue to be members?
- What type, duration, periods and quality of do the unions give to their members? Are members required to take any courses? If yes, what is the minimum that the lawyers/members have to attend the following: courses, seminars, conferences, and other mediums of the lawyer unions or federations?
- What are the main problems in each of the above areas?

Recommendations—measures, implementation strategy, cost.

- What are the recommended reforms to alleviate the above mentioned problems?
- What is the recommended implementation strategy?
- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

G. **JUDICIAL TRAINING**

Context—definition, problems, experiences.

- Who is responsible for providing training to judges and staff?
- What are the elements of judicial training?
- What are the main problems in each of the above areas?
- What measures have been taken in the past to improve each of the above areas?

Recommendations—measures, implementation strategy, cost.

- What are the recommended reforms to alleviate the above mentioned problems?
- What is the recommended implementation strategy?
- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

H. **LEGAL EDUCATION**

Context—definition, problems, experiences.

- What constitutes legal education?
- What are some of the famous law schools?
- How many years of law school is required to receive a law degree?
- Who confers the degree?
- Are there post-graduate law studies?
- How many years of post-graduate law school is required to receive a doctoral degree?
- Who confers the doctoral degree?
- What is the minimum degree required to be named a judge in the different courts? (such as administrative court, appeal court, ordinary court, other courts)
- What is required to be a notary public?
- What entities are responsible for establishing the law school curriculum?
- How many students enroll in law school each year? In 1993-94?
- What percentage of enrolling law students are female?
- What percentage of law students who enroll eventually graduate?

Recommendations—measures, implementation strategy, cost.

- What are the recommended reforms to alleviate the above mentioned problems?
- What is the recommended implementation strategy?
- What international experiences can facilitate design and implementation of reforms?
- What is the estimated cost of reform?

IV. ACTION PLAN FOR JUDICIAL REFORM - PROPOSED NEXT STEPS

(recommendations and sequencing organized as follows:

Matrix 1 columns: overall objective, recommendation, priority assignment and timing, responsibility;

Matrix 2 columns: overall objective, specific objective, quantitative indicators, expected impact, beneficiary or affected party; and

Matrix 3 columns: specific objective, activity detail, resource required, estimated cost, implementation responsibility.

ANNEX IX: A Note on the Florida International University (FIU)/ ILANUD Inventories

To avoid filling my list of references with these publications, I am giving them an annex. The principal assessments (in Costa Rica, Honduras, El Salvador, Guatemala, and Panama) were contracted by USAID and done in the late 1980's. The format was later applied by members of the original team to shorter assessments, usually with USAID sponsorship, in Nicaragua, Ecuador, and Bolivia.

Work under most of these assessments was directed by the FIU/CAJ staff, headed by Professor Luis Salas. ILANUD was a party to many of the assessments, but it had no permanent staff assigned to them, and most of the direct participants have since left the institute.

The studies were true inventories and far exceed in both quantity and breadth of information what the working group wants in a checklist. However, they are an invaluable reference for anyone attempting this kind of global assessment, and I have often recommended that those writing terms of reference for this kind of work review the table of contents of any of the works.

The initial studies, executive summaries and some spin off work are most easily available through FIU/CAJ and Professor Salas. USAID may have copies in its central information office, CDIE or in the country mission where each study was conducted. As noted, a series of short publications, based on this work, was subsequently published privately. I am listing them below.

Chinchilla, Laura and David Schodt, *The Administration of Justice in Ecuador*. Miami: Florida International University, Center for the Administration of Justice, 1993.

Gamara, Eduardo, *The System of Justice in Bolivia; an Institutional Analysis*. Miami: Florida International University, Center for the Administration of Justice, 1991.

Rico, José María, *Los consejos de la magistratura: análisis crítico y perspectivas para América Latina*. Miami: Florida International University Center for the Administration of Justice, 1993.

Rico, José Me., et al., *La justicia penal en Costa Rica*. San Jose, Costa Rica: EDUCA, 1993.

Salas, Luis and José María Rico, *La justicia penal en Guatemala*. San Jose, Costa Rica: EDUCA, 1989.

Salas, Luis and Jose Maria Rico, *Carrera judicial en America Latina*. Florida International University, Center for the Administration of Justice, 1993.

Salas, Luis and Jose Maria Rico,, *La justicia penal en Honduras*. San Jose, Costa Rica: EDUCA, 1989

Solis, Luis G., and Richard J. Wilson, *Political Transition and the Administration of Justice in Nicaragua*. Miami: Florida International University, Center for the Administration of Justice, 1991.

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