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## THE VIETNAMESE JUDICIARY: THE POLITICS OF APPOINTMENT AND PROMOTION

Penelope (Pip) Nicholson and Nguyen Hung Quang<sup>†</sup>

*Abstract:* This Article contends that while the Vietnamese judiciary and court system have been the subject of not insignificant reforms over the last two years, they remain political institutions. More particularly, our analysis of the manner and criteria for the appointment and dismissal of judicial officers characterizes these officers as having to act within the auspices of the Communist Party of Vietnam, despite reforms having been introduced that cast the courts as more independent.

### I. INTRODUCTION

In 2002 the Vietnamese government amended the Law on the Organization of People's Courts<sup>1</sup> ("2002 Law") and the Ordinance on Judges and Jurors of People's Courts ("2002 Ordinance").<sup>2</sup> The changes have been heralded as evidence of the government's commitment to an "independent court system."<sup>3</sup> This Article argues that, upon closer analysis, these reforms will not culminate in an "independent" court system as that term is understood in the West. Rather, the reforms produce a system of

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<sup>1</sup> Order 13 on Court Organization and Judges was introduced on January 24, 1946. However, there were substantial challenges to its implementation (in particular, the war) and therefore the court system was not effectively introduced until the Law on the Organization of People's Courts of July 26, 1960. The Law on the Organization of People's Courts has been amended several times since that date. Ordinarily, the amendments follow constitutional amendments. See LAW ON THE ORGANIZATION OF PEOPLE'S COURTS, (July 13, 1981); LAW TO AMEND THE 1981 LAW ON THE ORGANIZATION OF PEOPLE'S COURTS, (Jan. 4, 1989); LAW ON THE ORGANIZATION OF PEOPLE'S COURTS (Oct. 6, 1992); LAW TO AMEND THE LAW ON THE ORGANIZATION OF PEOPLE'S COURTS (Jan. 10, 1994); LAW ON THE ORGANIZATION OF PEOPLE'S COURTS (Apr. 2, 2002). Most Vietnamese laws are published in Cong Bao (Official Gazette), although it was not available via subscription the last decade. Two excellent on-line searchable databases are the National Assembly database located at <http://www.vietlaw.gov.vn/> (last visited Oct. 27, 2004) (in Vietnamese) and a database introduced by the law firm Phillips Fox at <http://www.vietnamlaws.com/> (last visited Oct. 27, 2004) (in English). These are subscription databases. Copies of older laws (pre-1994) informing this paper were obtained before the existence of databases and before Cong Bao was widely available. Copies of these older laws were sourced from friends with access to copies of Cong Bao. Copies on file with the authors.

<sup>2</sup> See *infra* Part II for details concerning the introduction of these laws.

<sup>3</sup> See, e.g., *Politics & Law: Supreme Court Takes Over Judiciary*, SAIGON TIMES DAILY, Oct. 1, 2002, at 1.

courts increasingly managed by the Supreme People's Court, with the historically strong role of the National Assembly and the Ministry of Justice radically constrained. However, the reformed courts will continue to operate within the auspices of and subject to the influence of the Communist Party of Vietnam ("CPV"). In short, reforms to the appointment of judges have done little to change the status quo in the short term. The effects of the changes over the medium- to long-term remain largely speculative.

After a brief exploration of Vietnamese legal history and the place of law and courts in contemporary Vietnam (Part II), the criteria and procedures for the appointment of Vietnamese judges are discussed in Parts III and IV.<sup>4</sup> The paper also considers judicial term and tenure (Part V), promotion (Part VI) and judicial discipline and dismissals (Part VII). This Article argues that the latter aspects of the court system discussed in Parts V-VII are integral to appointments generally and are central to understanding the ongoing significance of the CPV to court management and jurisprudence. In conclusion, it is contended that in large part CPV influence remains very strong in the Vietnamese courts.

The authors do not causally link independent court systems and methods of judicial appointment. For example, Australia arguably has an independent court system in the Western liberal legal tradition.<sup>5</sup> However, in Australia the government of the day appoints the judges in a non-transparent manner.<sup>6</sup> However, in the Vietnamese context, the ongoing significance of the CPV in judicial appointments (and dismissals) precludes the Vietnamese court system from being free from political influence in the short term.

Before turning to analyze the provisions regulating the appointment and dismissal of Vietnamese judges, we wish to make some general observations about the Vietnamese legal system. This will assist to place the subsequent discussion in context.

## II. CONTEMPORARY CONCEPTIONS OF VIETNAMESE LAW

The Communist Party of Vietnam is a political party which gained society's almost absolute confidence and is able to call

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<sup>4</sup> It is artificial to discuss the appointment and removal of judges in terms of criteria and then procedures. Each of these aspects of the appointment and removal of judges affects how the other is given effect. However, for the sake of clarity this divide will be maintained. See Pip Nicholson, *Appointing High Court Judges: Need for Reform?*, 68 AUSTL. Q. 69 (1996).

<sup>5</sup> Or as Ugo Mattei puts it, a "professional" legal system as opposed to one predicated on political influences or traditional values. See Ugo Mattei, *Three Patterns of Law*, 45 AM. J. COMP. L. 5 (1997).

<sup>6</sup> Nicholson, *supra* note 4, 69-70.

on the support of all the people. Moreover, in the first years of the people's democratic system, the distinction between the leadership of the Party and the administration of the State was out of the question because the State could not be present everywhere in the country and the secret Party cells had to play the role of the State. Such practice became a social rule which was hard to challenge.<sup>7</sup>

*Nguyen Nhu Phat*

#### A. *Contemporary Debates*

The role of law in Vietnam today is unclear: it is perhaps best described as in flux, with various contending views as to the role law ought to have.<sup>8</sup> The majority of commentators correctly point out that the Vietnamese legal system, like its economy, is in transition and uncertainties about its new form and orientation remain.<sup>9</sup>

The State and Party have committed to the establishment of *nha nuoc phap quyen*, perhaps best translated as law-based state.<sup>10</sup> The commitment to a law-based state was formally launched in 1991, at the Seventh Party Congress. This policy choice was reflected most clearly in changes to Article 4 of the 1992 Vietnamese Constitution, which was amended to read "all Party organizations operate within the framework of the Constitution and the law."<sup>11</sup> The Party had not previously been exhorted to act within the

<sup>7</sup> Nguyen Nhu Phat, *The Role of Law During the Formation of a Market Driven Mechanism*, in COMMERCIAL LEGAL DEVELOPMENT IN VIETNAM: VIETNAMESE AND FOREIGN COMMENTARIES 398 (Gillespie ed., 1997).

<sup>8</sup> Bibliographies on Vietnamese law include: Barbara James, *Vietnamese Law in English: A Selected Annotated Bibliography*, 84 SUMMER L. LIBR. J. 461 (1992); Phuong Khanh Nguyen, *How to Conduct Research in Vietnamese Law*, 27(3) INT'L J. LEGAL INFO. 307 (1999); Penelope (Pip) Nicholson, *Vietnamese Law: A Bibliography*, 22 (2/3) LEGAL REFERENCE SERVICES Q. 139 (2003).

<sup>9</sup> Russell Heng Hiang Khng, *Leadership in Vietnam: Pressure for Reform and Their Limit*, 15(1) CONTEMP. SE. ASIA 98 (1993); Penelope Nicholson, *Judicial Independence and the Rule of Law: The Vietnam Court Experience*, 3(1) AUSTL. J. ASIAN L. 37 (2001); INTER-AGENCY STEERING COMMITTEE, REPORT ON COMPREHENSIVE NEEDS ASSESSMENT FOR THE DEVELOPMENT OF VIETNAM'S LEGAL SECTOR FOR THE PERIOD 2001 – 2010, 11, 12 (2002); John Gillespie, *Concepts of Law in Vietnam: Transforming Statist Socialism*, in ASIAN DISCOURSES OF RULE OF L. 146 (Randall Peerenboom ed., 2004).

<sup>10</sup> John Gillespie, *The Political-Legal Culture of Anti-Corruption Reforms in Vietnam*, in CORRUPTION IN ASIA: RETHINKING THE GOVERNANCE PARADIGM 180 (Tim Lindsey & Howard Dick eds., 2002); see also Gillespie, *supra* note 9, at 151-53. Compare with Vietnamese scholarship which translates "Nha nuoc" as "state" and "phap quyen" as "rule of law." See, e.g., "nha nuoc phap quyen" as "rule of law state" (5 NGHIEN CUU LAP PHAP (LEGISLATIVE STUDIES MAGAZINE) 2 (2002)) or "state under rule of law" (1 NGHIEN CUU LAP PHAP (LEGISLATIVE STUDIES MAGAZINE) 2 (2002)).

<sup>11</sup> VIETNAM CONST. OF 1992, art. IV. An unofficial English translation of the 1992 Vietnam Constitution is available from the website of the Embassy of the Socialist Republic of Vietnam in the

framework of the law.<sup>12</sup> In the ensuing decade the State has implemented a range of measures to give effect to a socialist law-based state.<sup>13</sup>

The transition from socialist-planned economy to a socialist-oriented market economy with a law-based state is qualitatively different from a transition to a market economy under the rule of law.<sup>14</sup> In particular, the State continues to adjust to a prior conception of the law as a tool of the revolution, where law was conceived and used instrumentally.<sup>15</sup> In other words, the Party-State commits to an evolving conception of law as a regulatory force binding the Party-State. In this transition an uncertain role emerges for other pre-existing regulatory influences/mechanisms (such as policy), to augment and supplement the society's evolving legal base. So while the Party-State avows the central role of law, its institutions and agents continue to lead by relying on an amalgam of law and policy. This is different from Western conceptions of the rule of law, which are complete with assumptions about the independence of the judiciary and the separation of law and politics.<sup>16</sup>

In this conception of a law-based state, Party policy continues to be as influential as law. In the Vietnamese context political-legal relations are summarized in the phrase "the party leads and the State manages."<sup>17</sup> Party leadership is not exclusively located within political institutions (usually referred to as administrative institutions such as the National Assembly, courts and ministries), but also in the Party apparatus itself.<sup>18</sup> This Party machine generates policy and leads the State. This means that although the legal and political institutions and functions in Vietnam are increasingly separated, this separation does not necessarily curtail the separately founded Party leadership. The Party's leadership is manifested in Party policy documents and via the extensive hold the Party has over senior government and legal offices.<sup>19</sup> In effect, law remains intrinsically political. This

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United States of America at <http://www.vietnamembassy-usa.org/learn/gov-constitution1.php3> (last visited Nov. 15, 2004).

<sup>12</sup> Vietnamese constitutions, like those of other socialist states, are hortative rather than prescriptive. Christopher Osakwe, *The Common Law of Constitutions of the Communist-Party States*, 3 REV. OF SOCIALIST L. 155, 206-209 (1977).

<sup>13</sup> For example, the State has introduced a raft of legislation on matters as diverse as investment, legal institutions and complaints procedures. See Nicholson, *supra* note 8, at 139-200.

<sup>14</sup> Gillespie, *supra* note 9, at 146-82.

<sup>15</sup> *Id.*

<sup>16</sup> David S. Clark, *The Many Meanings of the Rule of Law*, in LAW, CAPITALISM AND POWER IN ASIA 28 (Kanishka Jayasuriya ed., 1999).

<sup>17</sup> See Gillespie, *supra* note 10, at 167-200.

<sup>18</sup> Phat, *supra* note 7, at 398.

<sup>19</sup> John Gillespie writes of this phenomenon as the *nomenklatura* system of the Communist Party of Vietnam. See, e.g., Gillespie, *supra* note 10, at 180-81.

formulation of the role of law enables law and the courts to remain at least responsive to, and at most a tool of, the political leadership.

In contrast, rule of law assumes the importance of separating political and legal institutions, with the latter settling legal issues.<sup>20</sup> In particular, rule of law conceives of the state as bound by law and liable for any breaches. Rule of law also assumes that political power is located in political institutions: for example, separations between courts and parliaments are meaningful.<sup>21</sup>

### B. *History and the Vietnamese Legal System*

Contemporary Vietnamese law also reflects complex historical influences. Most commentators agree that northern Vietnam's legal system is an amalgam of Imperial Chinese, colonial French, and Soviet influences.<sup>22</sup> More recently, donors and entrepreneurs have advocated reforms to support the marketization of the economy, producing a diverse set of civil and common law influences from various sources including Sweden, United States of America, Canada, Japan and Australia to name a few.<sup>23</sup>

It is also simplistic to debate influences on the Vietnamese legal system in terms of transplanted laws and legal norms. Again, most commentators are in agreement that philosophical and moral influences resonate in Vietnam, variously affecting the role and place of law. For example, Confucianism (whether Chinese or Indian) and Marxist moral influences affect the place of law in contemporary Vietnam.<sup>24</sup>

<sup>20</sup> To assume a settled meaning for the rule of law is misleading. For a discussion of the range of interpretations of rule of law, see Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of US-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, CID Working Paper No. 47, at 9-10 (May 2000). See also Clark, *supra* note 16.

<sup>21</sup> See Clark *supra* note 16.

<sup>22</sup> See M. B. HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA (1978); M. B. HOOKER, LAWS OF SOUTH-EAST ASIA, ch. 10 (1986); Phan Huu Chi, *The People's Prosecutor's Office*, in INSTITUTIONS OF THE DEMOCRATIC REPUBLIC OF VIETNAM 82 (1973); Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, UCLA PAC. BASIN L. J. 221 (1993); Mark Sidel, *Vietnam*, in ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA 356, 360-362 (Poh-Ling Tan ed., 1997) [hereinafter Sidel, *Vietnam*].

<sup>23</sup> For a useful list of current legal reform projects see UNITED NATIONS DEVELOPMENT PROGRAMME, LEGAL SYSTEM DEVELOPMENT PAST, ONGOING AND PLANNED DONOR PROGRAMMES, at <http://www.undp.org.vn/themes/governance/matrix.htm> (last visited Oct. 27, 2004).

<sup>24</sup> See Shaun Kingsley Malarney, *Culture, Virtue and Political Transformation in Contemporary Northern Viet Nam*, 56(4) J. ASIAN STUD. 899 (1997). Malarney convincingly argues the continuity between Confucian morality and socialist morality. This has also been asserted by Mark Sidel. See, Sidel, *Vietnam*, *supra* note 22, at 360-362. Sidel cites Harvard University Prof. Hue Tam Ho Tai as lecturing on these connections. *Id.* at 361. See also Penelope Nicholson, *Borrowing Court Systems: The Experience of the DRVN 1945 - 1976*, ch. 10, (2000) (unpublished Ph.D. dissertation, University of Melbourne) (on file with the University of Melbourne library); Christoph Giebel, *Museum-Shrine: Revolution and its Tutelary*

Vietnamese legal history and legal culture merit a more profound discussion than this Article on the appointment and dismissal of judges can provide. However, in the context of this Article, certain features of the Vietnamese legal system need to be noted. The Vietnamese legal system, in particular its courts, remains largely a tool of the State.<sup>25</sup> It is also a system whose normative force is moderated by the very strong moral precepts affecting daily life and state administration.<sup>26</sup> Moreover, the courts' socialist history resonates today and socialist ethics remain significant in decision-making.<sup>27</sup>

### C. *Continuity and Change in Vietnamese Court History*

Very shortly after Ho Chi Minh's declaration of independence in 1945, the Vietnamese Revolutionary Government established a civil judicial system parallel with the newly established military system.<sup>28</sup> From 1946 onwards the Vietnamese court system was hierarchical, comprising three levels: district, provincial and supreme courts.<sup>29</sup> Set up as accountable to the National Assembly under the 1946 Vietnamese Constitution, the court system remains accountable to the National Assembly today. Then as now, judges and people's assessors (sometimes translated as jurors) appear at all levels of the court system and in both the civil and military court systems.<sup>30</sup> Other legal professionals, such as court clerks and evaluators (whose work it is to assess judgments of inferior courts and to assist judges) have also existed since 1946. Similarly, since inception, at least in theory, parties have been able to seek review of judgments as well as to appeal them. In effect,

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*Spirit in the Village of My Hoa Hung*, in *THE COUNTRY OF MEMORY* 92-95 (Hue-Tam Ho Tai ed., 2001) (arguing that concepts of 'proper rule' that pre-dated Confucianism are being revived in contemporary Vietnam).

<sup>25</sup> See generally Nicholson, *supra* note 9; Penelope Nicholson, *The Vietnamese Courts and Corruption*, in *CORRUPTION IN ASIA*, *supra* note 10, at 201; Brian J. M. Quinn, *Vietnam's Continuing Legal Reform: Gaining Control Over the Courts*, 4 *ASIAN-PAC. L. & POL'Y J.* 12, 431 (2003).

<sup>26</sup> Malarney, *supra* note 24; Pham Duy Nghia, *VIETNAMESE BUSINESS LAW IN TRANSITION* 1-27 (2002).

<sup>27</sup> For example, the experience of the land and military courts continues in Vietnamese memory today. For analysis of these, see BERNARD FALL, *THE VIET MINH REGIME GOVERNMENT ADMINISTRATION IN THE DEMOCRATIC REPUBLIC OF VIETNAM* (1956); Nicholson, *supra* note 24, ch. 3.

<sup>28</sup> Nicholson, *supra* note 24, ch. 3.; Dang Quang Phuong, *Vai net ve qua trinh hinh thanh va phat trien cua Toa an Nhan dan* [Some sketches of the Establishment and Development of the People's Court], in *TONG THUAT KET QUA NGHIEN CUU DE TAI CHINH* [FINAL ABSTRACT ABOUT PRINCIPAL RESEARCH] (unpublished work on file with author).

<sup>29</sup> For a short discussion about the development of the Vietnamese court system see Nicholson, *supra* note 9, and Quinn, *supra* note 25, at 432-68. See also Nicholson, *supra* note 24.

<sup>30</sup> VIETNAM CONST. OF 1946, art. 64, 65. The exception to this general proposition is that jurors are no longer used in the Supreme People's Court. LAW ON THE ORGANIZATION OF PEOPLE'S COURTS, art. 18 (2002).

many of the central features of the court system—its personnel, structure, and review of its decisions and processes for accountability—have officially remained constant.<sup>31</sup> In contrast, how judges come to hold office and how they are removed has been the subject of considerable debate and some reform.<sup>32</sup>

### III. JUDICIAL SELECTION CRITERIA

There are currently 9117 employees working for the court system in Vietnam, of whom 3466 are judges.<sup>33</sup> These judges are appointed to a court and not to a particular jurisdiction for a period of five years. At present, the court system lacks 1287 judges.<sup>34</sup> In particular, the courts lack 193 provincial court judges and 1067 district court judges.<sup>35</sup> Further, many district courts in remote areas have only one or two judges.<sup>36</sup>

At the end of 2001, Vietnam amended its fourth Constitution.<sup>37</sup> Like its 1992 predecessor, this Constitution provides that the rights and duties, remuneration and procedures for appointment, removal and dismissal of judges will be provided for by law.<sup>38</sup> On January 2, 2002, the Communist

<sup>31</sup> Nicholson, *supra* note 9; Brian J. M. Quinn, *Legal Reform and Its Context in Vietnam*, 15 COLUM. J. ASIAN L. 219 (2002). In a forthcoming paper Nicholson argues that court practices have indeed changed over the last decade, while the responsibilities of the courts have remained constant. See Nicholson, *Vietnamese Court Reform: Constancy and Change in the Contemporary Period*, Paper presented at Victoria University, Victoria, Canada (May 28, 2003) (on file with author).

<sup>32</sup> Sac lehn so 13/SL [Presidential Order No. 13 on Court Organization and Judges] (Jan. 24, 1946) provided five criteria for judicial appointment, compared with the Ordinance on Judges and Jurors of People's Courts (May 14, 1993), which had seven criteria and the Ordinance on Judges and Jurors of People's Courts (Oct. 11, 2002), which also has seven criteria. Under the applicable legislation in 1959, judges at the local level were elected by the local People's Councils. The Standing Committee of the National Assembly elected Supreme Court Justices and the Chief Justice was appointed by the President.

<sup>33</sup> Resolution No. 353/2003/NQ-UBTVQH11, On the Personnel and the Quantity of Judges in the Supreme People's Court (Feb. 25, 2003). Article 1 stipulates the need for 523 personnel for the Supreme People's Court, of which 120 ought to be judges. Resolution No. 355/2003/NQ-UBTVQH11, On the Personnel and the Quantity of Judges for Local People's Court (Feb. 25, 2003). It also stipulates the need for 3064 personnel to work in Provincial People's Courts, of which 1118 ought to be judges. Article 2 stipulates the need for 5936 personnel, of which 3515 ought to be judges. Tran Van Tu, Head of the Personnel Dept. of the Supreme People's Court, *Doi moi to chuc va hoat dong cua toa an nhan da* [Reforming the Organization and Operation of People's Courts], 1 TAP CHI NGHIEN CUU LAP PHAP [LEGISLATIVE STUDIES MAGAZINE] 34-39 (2003).

<sup>34</sup> Tran Van Tu, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Vietnam's 1992 Constitution was amended by National Assembly Resolution No. 51/2001/QH10 dated Dec. 25, 2001.

<sup>38</sup> VIETNAM CONST. OF 1992, art. 128. See generally Penelope Nicholson, *Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 300 (Kanishka Jayasuriya ed., 1999).



Party of Vietnam Politburo passed Resolution No. 08/NQ-TW on Justice Reform.<sup>39</sup> The central feature of this resolution was to reform the justice system with a view to strengthening the investigation organizations, prosecution systems and, most importantly, the judicial system. The reforms were introduced to create a law-based state with a socialist orientation. Accordingly, the National Assembly revised the Law on the Organization of the People's Court, passing new legislation on April 2, 2002.<sup>40</sup> This law claims twin over-arching objectives: to improve the effectiveness of the courts and to ensure judicial independence.<sup>41</sup> In October 2002, the Ordinance on Judges and Jurors of People's Courts was introduced to complete the legislative reforms.<sup>42</sup>

#### A. *Legal Knowledge*

According to the 2002 Law on Organization of the People's Court and the 2002 Ordinance on Judges and Jurors of People's Courts, a person who wants to become a judge in Vietnam has to be a Vietnamese citizen and satisfy the following criteria:<sup>43</sup>

- Demonstrate loyalty to the motherland and the Constitution of the Socialist Republic of Vietnam;
- Have good morality, not be corrupt and be truthful;
- Firmly defend socialist legality;
- Have a bachelor of law degree and be trained professionally in trial work;
- Have judicial capacity;
- Have good health for the exercise of the assigned tasks;
- Have a number of years of legal work experience: (i) A supreme court appointment must have five years of trial experience in provincial courts or ten years relevant experience; (ii) a provincial court judge must have five years of trial experience in district

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<sup>39</sup> Politburo Resolution No. 8-NQ/TW, On Justice Reform (Jan. 2, 2002).

<sup>40</sup> LAW ON ORGANIZATION OF PEOPLE'S COURT (2002).

<sup>41</sup> *Id.*

<sup>42</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS, No. 02/2002/PL-UBTVQH11 (Oct. 11, 2002) [hereinafter ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002].

<sup>43</sup> LAW ON ORGANIZATION OF PEOPLE'S COURT, art. 37 (2002); ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 5. All analysis of these instruments is based on official English language translation of laws published by Cong Bao (Official Gazette) in volumes No. 25 and No. 60, published in 2002, respectively.

courts or ten years of relevant experience and (iii) a district court judge four years experience.<sup>44</sup>

The criteria for judicial appointment seem all too rarely applied. In particular, the 1993 criterion of legal knowledge and its 2002 variant requiring a law degree have not been enforced because the limited number of judicial candidates has forced the State to relax its requirements. Following the passage of the 1993 Ordinance on Judges and Jurors of People's Courts, the Standing Committee of National Assembly adopted Resolution No. 37/NQ-TVQH9 on May 14 1993, allowing judicial appointments where not all criteria had been met. According to this Resolution, those possessing good morals, judicial capacity and good health, but having neither the required work experience nor the legal qualifications could still be appointed judges.<sup>45</sup>

Following the passage of the 2002 Ordinance on Judges and Jurors of People's Courts, the State again officially recognized the need to relax the professional qualifications of judges by passing Resolution No. 131,<sup>46</sup> which continues the application of Resolution No. 37. Thus, as a senior officer of the Supreme People's Court explained, Bachelor of Law degrees should be mandatory under the new Ordinance,<sup>47</sup> but the State officially recognizes that it will be some time before this ideal can be met.

Both Resolution 37, and its successor Resolution 131, create a new class of judicial appointment where the appointee is classified as owing a "legal knowledge debt" (*no kien thuc phap ly*) to his or her employer, and undertakes to obtain a law degree after appointment.<sup>48</sup> The Chief Judge must cooperate with the relevant agencies to create advantageous conditions

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<sup>44</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 5(1), ch. III, arts. 20-22.

<sup>45</sup> Nghi Quyet Cua Uy Ban Thuong Vu Quoc Hoi So 37 NQ/USTVQH9 Ngay 14/5/1993 Quy Dinh Mot So Diem Ve Vieo Thi Hanh Phap Lenh Ve Tham Phan Va Hoi Tham Toa An Nhan Dan [National Assembly Standing Committee Resolution No. 37/NQ-USTVQH9, Providing Some Points Relating to the Implementation of the Ordinance on Judges and Jurors of People's Courts] (May 14, 1993).

<sup>46</sup> National Assembly Standing Committee Resolution No. 131/2002/NQ-UBTVQH11, Providing Some Points Relating to the Implementation of the Ordinance on Judges and Jurors of People's Courts 2002 (Oct. 4, 2002).

<sup>47</sup> See Hoai Linh, *Tham phan phai giu minh*, PHAP LUAT NEWSPAPER, No. 78/2002, Nov. 14, 2002, at 7. Mai Ngoc Trinh, the Deputy Chief Justice of the Supreme People's Court, commented on the new Ordinance on Judges and Jurors of People's Courts, stating that "Phap lenh moi yeu cau bat buoc doi voi njuoi duoc bo nhiem phai co trinh do cu nhan luat va da duoc dao tao ve nghiep vu xet xu (dut khoat khong cho "no" bang nhu truoc) [the candidates for judicial positions must have university law degrees and be trained in judging skills (definitely not accept education certificate debt as in previous times)."

<sup>48</sup> Nghi Quyet Cua Uy Ban Thuong Vu Quoc Hoi So 37 NQ/USTVQH9 Ngay 14/5/1993 Quy Dinh Mot So Diem Ve Vieo Thi Hanh Phap Lenh Ve Tham Phan Va Hoi Tham Toa An Nhan Dan [National Assembly Standing Committee Resolution No. 37/NQ-USTVQH9, Providing Some Points Relating to the Implementation of the Ordinance on Judges and Jurors of People's Courts] (May 14, 1993).

for these judges to study law.<sup>49</sup> One of Vietnam's Vice Justice Ministers, Le Thi Thu Ba, alleged "more than 1000 present judges have repaid the 'legal knowledge debt' by obtaining a law degree as requested by law."<sup>50</sup> However, this claim must be balanced against the fact that eighty-five percent of judges and seventy percent of court officers have obtained law qualifications, but not Bachelor degrees.<sup>51</sup>

As a result of the most recent amendments, a judge needs to hold a bachelor degree in law. Judges need not, as previously set out, hold the more general qualification of a "law degree certificate." For example, procurators and investigators graduating from the Police College, the Security College or the Procuracy College are described as holding a "law degree," while in fact their qualifications are certificates in law from specialist training institutions. Yet these lesser qualifications are classified as "law degrees" in analyses of judicial qualifications. So the seventy percent of judges who hold "law degrees" include an unidentified number holding the lesser law certificate qualification.<sup>52</sup> Dr. Nguyen Van Hien, Chief Justice of Supreme People's Court, has claimed that these qualifications should not be classified as sufficient for judicial selection.<sup>53</sup> It remains to be seen whether the earlier practice of accepting these qualifications will change.

In effect, the legal qualifications requirement is undermined by current practice. Judges may become increasingly competent over the medium- to long-term, but it is not currently possible for the State to recruit university-trained lawyers. This paper does not take up the larger issue of legal training in Vietnam, but it is not contentious to suggest that Vietnam's law universities offer a much broader curriculum than specialist training colleges, and therefore better prepare judges for judicial office.<sup>54</sup>

<sup>49</sup> Thông Tư Liên Ngành Tòa Án Nhân Dân Tối Cao Bộ Tư Pháp Số 05/TTLN Ngày 15 Tháng 10 Năm 1993 Hướng Dẫn Thực Hiện Một Số Quy Định Của Pháp Lệnh Về Tham Phan Và Hối Tham Tòa Án Nhân Dân [Ministry of Justice and Special People's Court Inter-Circular No. 05/TTLN, Guide on the Ordinance on People's Judges and Jurors], pt. I, 1(b) (Oct. 15, 1993).

<sup>50</sup> Le Thi Thu Ba, *Cong tac quan ly toa an nhan dan dia phuong va van de nang cao trinh do van hoa xet cu cua cac toa an* [Local People's Court Management and Judging Cultural Enhance of People's Courts], 7 TAP CHI THÔNG TIN NGHIÊN CỨU KHOA HỌC PHÁP LÝ [JUDICIAL SCIENCE INFORMATION REVIEW] 149 (2001).

<sup>51</sup> Tran Van Tu, *supra* note 33. The types of qualifications this encompasses include certificates from specialist training institutions such as the Procuracy Training School.

<sup>52</sup> *Id.*

<sup>53</sup> Nguyen Van Hien, *Tieu chuan tham phan-thuc trang va nhung yeu cau dat ra trong thoi ky moi* [Judicial Criteria - Current Situation and Requirements for New Era], 4 TAP CHI TOA AN NHÂN DÂN [PEOPLE'S COURT JOURNAL] 5 (2001).

<sup>54</sup> Bui Bich Thi Lien, *Legal Education in Transitional Vietnam*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM (Penelope Nicholson and John Gillespie eds., forthcoming 2005) (on file with authors).

### *B. Morals and Loyalty*

Article 2 of Circular 01 and the 2002 Law require the following qualities of candidates for judicial office: loyalty to the Fatherland and to the socialist Constitution, good ethical qualities (seemingly cast as “incorrupt and honest”), and capacity to protect socialist legislation.<sup>55</sup> To pass the good morals and loyalty threshold an applicant must:

- Not commit any act detrimental to the independence, sovereignty and territorial integrity of the Fatherland, the entire-people’s defense, the socialist regime and the State of the Socialist Republic of Vietnam;
- Strictly abide by the Constitution and laws, undertakings of the Party and policies of the State, lead a sound and healthy life, and respect public rules;
- Resolutely struggle against persons and acts harmful to the Party, the Fatherland and people;
- Respect the people, devotedly serve the people, have close links with the people, attentively listen to their opinions and place themselves under the people’s supervision; resolutely fight corruption, wastefulness and all signs of red-tape, imperiousness and authoritarianism;<sup>56</sup>
- Have the spirit of self-criticism and criticism to protect justice;
- Be free of criminal liability and not currently undergoing disciplinary procedures.<sup>57</sup>

Finally, candidates must complete a property declaration form and include it in the Application Dossier.<sup>58</sup>

Other concepts integral to the criteria for judicial appointment set out in 2002 have yet to be defined clearly. For example, it is not clear how to interpret the requirement of “defending socialist legality.” It would appear

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<sup>55</sup> LAW ON ORGANIZATION OF PEOPLE’S COURT, art. 37 (2002); ORDINANCE ON JUDGES AND JURORS OF PEOPLE’S COURTS 2002, art. 5(1); Inter-Circular No. 01/2003/TTLT/TANDTC-BQP- BNV-UBTWMTTQVN, Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People’s Courts, art. 2 (Apr. 1, 2003).

<sup>56</sup> This is consistent with the Ordinance Against Corruption (Feb. 26, 1998).

<sup>57</sup> Inter-Circular No. 01/2003/TTLT/TANDTC-BQP- BNV-UBTWMTTQVN, Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People’s Courts, art. 2 (Apr. 1, 2003).

<sup>58</sup> *Id.*

that Circular 01 (as well as the prior Circular 05) provides that the judicial application dossier must contain a "Political Theory Diploma" (*chung chi trinh do ly luan chinh tri*), and that this requirement goes some way towards detailing how loyalty to the motherland and commitment to socialist legality can be demonstrated.<sup>59</sup>

These criteria remain flexible and capable of diverse interpretation. In turn, this gives selecting judges broad discretion. It is not possible to comment with any certainty how that discretion is used, but to date no private lawyer has been appointed and, by implication, those with appointment power have a predisposition toward the status quo. This can be legitimated by invoking flexible and ill-defined qualitative criteria.

### C. *Adjudicative Capacity and Good Health*

It is not clear what "adjudicating professional capacity" to resolve cases entails.<sup>60</sup> This term had not been defined prior to Circular 01.<sup>61</sup> Although Circular 01 attempts an explanation in Article 6, its meaning remains vague.<sup>62</sup> This leaves the "assessment" of the professionalism criteria for judges unclear.<sup>63</sup> Pham Quy Ty, Chief Judge of Hanoi People's Court, has suggested that professional capacity will be demonstrated via the time worked in the court system in combination with a judicial training certificate from the Legal Professional Training School.<sup>64</sup>

<sup>59</sup> Ministry of Justice and Special People's Court Inter-Circular No. 05/TTLN, Providing Guidelines for the Ordinance on People's Judges and Jurors, pt. III, item 1 (Oct. 15, 1993); Inter-Circular No. 01/2003/TTLT/TANDTC-BQP-BNV-UBTWMTTQVN, Providing Guidelines for the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People's Courts, pt. III, item 5.d. (Apr. 1, 2003); ORDINANCE AGAINST CORRUPTION (Feb. 26, 1998).

<sup>60</sup> Mai Bo, *Can sua doi Phap lenh tham phan va hoi tham nhan dan* [Ordinance on People's Judges and Jurors Should Be Amended], 2 TAP CHI TOA AN NHAN DAN [PEOPLE'S COURT JOURNAL] 1 (2000).

<sup>61</sup> Bui Ngoc Son, *Tu tuong Ho Chi Minh ve to chuc toa an va y nghia hien nay* [Ho Chi Minh's Ideology on Court Organization and its Significance Today], 2 TAP CHI NGHIEN CUU LAP PHAP [LEGISLATIVE STUDIES MAGAZINE] 26 (2002).

<sup>62</sup> Article 6 provides "[h]aving the capability to perform the adjudicating work" means having the ability to well fulfill the adjudication of cases and settle other work falling under the jurisdiction of the courts of the corresponding levels . . . having valuable legal writings and/or in-depth legal researches [sic] which have been publicised or applied to reality." Inter-Circular No. 01/2003/TTLT/TANDTC-BQP-BNV-UBTWMTTQVN, Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People's Courts, art. 6 (Apr. 1, 2003), translated in 31 CONG BAO [OFFICIAL GAZETTE] (2003).

<sup>63</sup> *Id.*

<sup>64</sup> Pham Quy Ty, *Cac yeu to ve to chuc lao dong, phuong tien va dieu kien lam viec cua can bo toa an anh huong den van hoa xet xu* [The Influence of Labor, the Means and Working Conditions of Court Officers (Judges, Clerks and People's Assessors), on Judicial Culture], 7 TAP CHI THONG TIN NGHIEN CUU KHOA HOC PHAP LY [JUDICIAL SCIENCE INFORMATION REVIEW] 134, 148 (2001) (written while Dr. Pham Quy Ty was Head of the Local Court Management Division, Ministry of Justice).

The current practice is for judicial appointments to come from the ranks of court officers, clerks, military officers, arbitrators (including arbitrators from defunct arbitral organizations), investigators, procurators (with “judging experience”) and legal experts of governmental bodies. In addition, employees of communist and politico-social organizations who have passed a judicial training course at the Legal Professional Training School are also said to possess the requisite judicial capacity.<sup>65</sup> The most common work history leading to judicial appointment is experience as a court clerk, evaluator or other court officer.<sup>66</sup> This means that although the criterion of “judicial capacity” remains vague, work history in a state legal organization opens up the possibility of judicial appointment.

In giving effect to the requirement of judicial capacity, it appears that judicial appointments value older personnel. In particular, “*song lau len lao lang*” (“glory with age”) is a maxim used to describe the type of person valued by the courts.<sup>67</sup> The Chief Justice of the Supreme People’s Court writes that judicial capacity, as a criterion for appointment, explicitly calls for persons of mature years.<sup>68</sup>

The health criterion set out in Circular 01 requires “good physical strength and appearance.”<sup>69</sup> In addition to the physical appearance of judges, the Circular states that judges must be “without malformation and strange shape” (*khong di tat, di hinh*). The Circular alleges that these may “affect the posture and performance” of a judge (*anh huong toi tu the va viec thuc hien nhien vu*).<sup>70</sup> In effect, the provisions provide that there can be no physically-challenged judges.

Party influence is then implicitly maintained through the “adjudicative capacity” criterion by enabling the Party-State to primarily select judges from the pool of staff already employed by the courts. Those selecting judges chose from a known pool of candidates whose work performance can be monitored and judged against consistently vague criteria.

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<sup>65</sup> Nguyen Van Hien, *supra* note 53 (written while Dr. Hien was the Chief Justice of the Supreme People’s Court).

<sup>66</sup> *Id.* See also Pham Quy Ty, *supra* note 64, at 140.

<sup>67</sup> Pham Quy Ty, *supra* note 64, at 140.

<sup>68</sup> *Id.* See also Nguyen Van Hien, *supra* note 53.

<sup>69</sup> Inter-Circular No. 01/2003/TTLT/TANDTC-BQP-BNV-UBTWMTTQVN, Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People’s Courts, pt. I, item 7 (Apr. 1, 2003).

<sup>70</sup> *Id.*

#### D. Party Endorsement

In addition to the above-mentioned criteria, the Party endorses candidates. Under the now-outdated Circular 05, a candidate's application dossier had to include an "opinion letter from the Communist Party cell" (*y kien cua cap uy*).<sup>71</sup> This letter had to come from the level of the court to which a person applied.<sup>72</sup> In effect, a candidate applying to be a provincial court judge needed a letter of support from a provincial court cell of the Communist Party. Candidates had either to be members of the Vietnam Communist Party or be capable of endorsement by the Party. If this was not the case, it would not be possible to obtain the letter.

While Circular 01 does not explicitly reiterate the need for the "opinion letter from the Communist Party cell," it seeks an "assurance of the principle of Party leadership over personnel works [sic]" (*bao dam nguyen tac Dang lanh dao doi voi cong tac can bo*).<sup>73</sup> Therefore, some scholars maintain that the courts will continue to seek opinion letters in order to ensure that Party oversight over judicial appointments remains intact.<sup>74</sup> The combined effect of an assurance of Party Leadership over nominated candidates and a Political Theory Diploma is that non-Party members will very rarely become judges. As one of the Vice-Ministers of Justice notes, the "opinion of communist cells (*cap uy*) on the lists of judicial applicants will be considered as moral and political guarantees."<sup>75</sup> More significantly, "when the communist cell does not agree to introduce a person then the governing body shall give up him/her even if s/he satisfies most of the criteria and conditions for judicial appointment."<sup>76</sup>

In practice, the local Party officials retain significant influence on the work of courts by vetting appointments to the Committee of Judges of any one provincial court. For example, three months after the introduction of

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<sup>71</sup> Ministry of Justice and Special People's Court Inter-Circular No. 05/TTLN, Guiding the Ordinance on People's Judges and Jurors, pt. III, item 2 (Oct. 15, 1993).

<sup>72</sup> *Id.*

<sup>73</sup> Inter-Circular No. 01/2003/TTLT/TANDTC-BQP-BNV-UBTWMTTQVN, Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People's Courts, pt. V (Apr. 1, 2003). The term "personnel works" is used in the translation offered by Cong Bao (Official Gazette). It might be better translated as "matters relating to personnel."

<sup>74</sup> Pham Hong Hai, *MO HINH LY LUAN BO LUAT TO TUNG HINH SU VIETNAM [THEORETICAL MODEL OF CRIMINAL PROCEDURE CODE OF VIETNAM]* 60 (2003). Tran Van Tu, *Doi moi to chuc va hoat dong cua toa an nhan dan [Reforming the Organization and Operation of People's Courts]*, 11 *NHA NUOC VA PHAP LUAT [STATE AND LAW MAGAZINE]* 16 (2003).

<sup>75</sup> Le Thi Thu Ba, *supra* note 50, at 155-56.

<sup>76</sup> Nguyen Thi Hong Tuoi, *Bo nhien, Nhan chuc, Thuyen chuyen, Mien Nhien va Cach chuc Tham phan theo phap luat hien hanh [Judicial Appointment, Tenure, Secondment, Disappointment and Removal according to current laws]*, 5 *TAP CHI LUAT HOC [JURISPRUDENTIAL REVIEW]* 76 (2000).

Article 29(1) of the 2002 Law on the Organization of People's Court, which provides that the Committee of Judges at a provincial court will include judges appointed by the Chief Justice of the Supreme People's Court upon nomination of the Provincial Court's Chief Justice, one province had failed to establish a Provincial Judge's Committee. In this case the relevant court Communist Party Cell did not approve the nominees identified by the Chief Justice.<sup>77</sup> The Chief Justice had successfully appointed justice committees for another sixty provincial courts.<sup>78</sup>

In addition, when an applicant seeks a Political Theory Diploma from the National Political Academy (which is managed by the Communist Party) he or she needs to be a communist party member or a candidate member. Dr. Hien, Chief Justice of Supreme People's Court, defends the requirement of the Political Theory Diploma, writing that "the judges at all court levels should be trained in politics effectively and strongly to implement judicial responsibility and to protect against the phenomenon of 'mechanical and simple legalism, non politics'" (*may moc, phap ly don thuan, vo chinh tri*).<sup>79</sup>

As a result, some ninety percent of appointed judges are Communist Party members<sup>80</sup> and, in effect, owe responsibilities to the Party over and above any duty to the development of the law. Ordinarily, judicial officers strive to develop the law in line with party leadership. Thus, little conflict emerges for judges in practice. Nevertheless, this obligation to Party leadership distinguishes judges in Western systems from those in Vietnam's Communist-led Party-State.

### E. Judges as Civil Servants

In addition to the specific provisions relating to judicial appointments, the laws relating to civil servants also apply to judges.<sup>81</sup> As a result, judges have to satisfy the criteria for the recruitment of civil servants.<sup>82</sup> This raises the question whether before becoming a judge, a candidate must be a civil

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<sup>77</sup> BAO CAO TONG KET CONG TAC NGANH TOA AN NHAN DAN NAM 2002 VA PHUONG HUONG NHIEM VU CONG TAC NGHANH TOA AN NHAN DAN NAM 2003 [SUPREME PEOPLE'S COURT REPORT ON THE OPERATION OF THE COURTS IN THE YEAR 2002 AND TASK ORIENTATION FOR THE YEAR 2003] 14 (Jan. 8, 2003).

<sup>78</sup> *Id.*

<sup>79</sup> Nguyen Van Hien, *supra* note 53.

<sup>80</sup> Le Thi Thu Ba, *supra* note 50, at 156.

<sup>81</sup> ORDINANCE ON PUBLIC EMPLOYEES, art. 1(4) (1998) (*translated in* 10 CONG BAO [OFFICIAL GAZETTE] 3 (Apr. 10, 1998).

<sup>82</sup> ORDINANCE ON PUBLIC EMPLOYEES, art. 1(4) (1998) (*translated in* 10 CONG BAO [OFFICIAL GAZETTE] 3 (Apr. 10, 1998); Government Decree No. 95/1998/ND-CP, On Recruitment, Use and Management of Civil Servants, art. 6. (Dec. 2, 1998).



servant. There is no document that resolves this issue. The legal documents relating to the appointment of judges state that “a Vietnamese citizen” may be appointed as a judge.<sup>83</sup> Yet not just any citizen can receive a Political Theory Diploma: the National Political Academies select their trainees and they are required to be civil servants, communist members or military officers.<sup>84</sup>

#### F. *Contemporary Criteria for Appointment in Context*

The above criteria appear to focus on documentary formalism (*chu nghĩa giấy tờ*) rather than demonstrated capacity.<sup>85</sup> That is to say that if a candidate can produce all the correct documents and letters of support, the candidate may be appointed irrespective of skills or qualifications. The Party recognizes that the lack of expertise may explain some of the weaknesses of the current court system.<sup>86</sup> This was specifically noted in the Communist Party’s Resolution No. 8, dated January 2, 2002, which identified a lack of judges and suggested that those appointed often have insufficient knowledge and professional capacity.<sup>87</sup> Examples of judicial failings referred to in Resolution No. 8 included “failing to convict criminals” (*bo lọt tội phạm*), “unjust decisions affecting innocent persons” (*lạm oan người vô tội*), and “violating the freedom and democracy of citizens” (*vi phạm quyền tự do dân chủ của công dân*).<sup>88</sup>

Numerous challenges remain for Vietnam in its appointment of judges. In particular, the political vetting of candidates via the requirements of a Political Theory Diploma, the assurance that candidates follow Party leadership, and the ambiguous public servant criterion, militate against the selection of non-party political appointments. Further, the lack of clear instruction about the level of legal knowledge required of judges results in appointments which the State itself deems insufficiently qualified for the judicial office. Perhaps the fact that no practicing lawyer has been appointed as a judge despite the fact that this professional group offers many candidates that meet the legal (if not the political) criteria, best illustrates the

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<sup>83</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE’S COURTS 2002, art. 5; Inter-Circular No. 01/2003/TTLT\_TANDTC-BQP-BNV-UBMTTQVN, Providing Guidelines for the Ordinance on Judges and Jurors of People’s Courts, art. 2 (Apr. 1, 2003).

<sup>84</sup> Ministers Council (now called Government) Decision No. 91/HDBT, On Organization and Tasks of Central Administrative College (Sept. 26, 1981).

<sup>85</sup> Bui Ngoc Son, *supra* note 61, at 26.

<sup>86</sup> Interviews by Penelope Nicholson with two judges of the Supreme People’s Court and the Hanoi Provincial Court (Jan. 2004) (granted on the basis of anonymity).

<sup>87</sup> Politburo Resolution No. 8-NQ/TW, On Justice Reform, 1 (Jan. 2, 2002).

<sup>88</sup> *Id.*

limited nature of the reforms and the constraints under which existing reforms are being implemented.<sup>89</sup>

#### IV. JUDICIAL APPOINTMENT PROCEDURE

Thus far we have seen that the criteria for judicial selection are likely to produce candidates loyal to the Party and its policies. Similarly, the process by which a person applies for judicial office precludes, as a matter of practice, an independent person (non-State functionary) from becoming a judge. The nature of the appointment panel and the requirements of the application dossier, both explained below, essentially require that judges be Party members with established track records of politically-sensitive decision making.

##### A. *The Dossier Requirement*

As discussed *supra*, the procedures for the appointment of judges are set out in general terms in the 2002 Law on Organization of People's Courts and the Ordinance on Judges and Jurors of People's Courts.<sup>90</sup> Circular 01, Chapter III provides additional details. It requires that an application dossier include:

- A completed Supreme Peoples' Court application to work as a judge;
- A resume and photo together with certification from the Party Central Committee's Organization Commission;
- The property declaration in the form required by the Decree on Anti-corruption;<sup>91</sup>
- Notarized copies of the law degree, legal professional qualifications, Political Theory Diploma, and other certificates (if any) which may be relevant to the selection and appointment of judges;
- The candidate's self-criticism statement;<sup>92</sup>
- Recommendation from the head of agency where the candidate currently works;

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<sup>89</sup> Author Nguyen Hung Quang is not aware of any private practitioner having been appointed as a judge since 1945 in the north of the country and since 1976 in the reunified Vietnam.

<sup>90</sup> LAW ON ORGANIZATION OF PEOPLE'S COURT, art. 37(5) (2002).

<sup>91</sup> Government Decree No. 13/2002/ND-CP, On Amendment of and Supplement to Government Decree No. 64/1998/ND-CP dated Aug. 17, 1998 Providing Details of the Ordinance Against Corruption (Jan. 30, 2002).

<sup>92</sup> Ministry of Justice, Ministry of Defense and SPC Inter-circular No. 01/TTLN (Apr. 1, 2004).

- The record of the vote as to the candidate's suitability for the position taken within the agency, unit, or organization where the candidate currently works;
- The verification of the number of persons who voted and the result;
- The written proposal of the Chief Judge of the provincial-level People's Court or the Central Military Court to select and appoint a candidate to judicial office.<sup>93</sup>

Once the dossier is finalized, it is delivered to the Judicial Selection Council for consideration. The Judicial Selection Council at each level considers the dossiers for that level and then submits a list of preferred appointees to the Chief Justice of Supreme People's Court.<sup>94</sup>

### *B. Who Appoints Judges?*

According to the 1992 Constitution of the Socialist Republic of Vietnam, the President of Vietnam will nominate the Chief Justice of the Supreme People's Court for appointment by the National Assembly.<sup>95</sup> The National Assembly will then "elect" the Chief Justice or, in effect, confirm the President's candidate.<sup>96</sup> Previously, the detailed provisions relating to the appointment of judges gave the President the power to appoint all judges, irrespective of court level.<sup>97</sup>

More recently, the 2001 Constitutional amendments and consequent 2002 amendments to the Law on Organization of People's Court,<sup>98</sup> have reduced the appointment powers of the President and increased the Chief Justice's power to appoint. As a result, the President now only appoints judges to the Supreme People's Court. Other judges are appointed by the Chief Justice of the Supreme People's Court.<sup>99</sup> The Chief Justice exercises this power to appoint lower level judges based on lists of preferred appointments received from the Judicial Selection Council at the relevant levels.<sup>100</sup> Chief justices or deputy chief justices at the local level are

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<sup>93</sup> *Id.*

<sup>94</sup> LAW ON ORGANIZATION OF PEOPLE'S COURT, art. 40(3) (2002).

<sup>95</sup> VIETNAM CONST. OF 1992, arts. 84 & 103.

<sup>96</sup> *Id.*

<sup>97</sup> LAW ON ORGANIZATION OF PEOPLE'S COURT, art. 38 (2002).

<sup>98</sup> VIETNAM CONST. OF 1992, arts. 84, 103 (including amendments in 2001); LAW ON ORGANIZATION OF PEOPLE'S COURT (2002).

<sup>99</sup> Politburo Resolution No. 8-NQ/TW, On Justice Reform, pt. II, sec. B, art. 2.c. (Jan. 2, 2002).

<sup>100</sup> *Id.*; LAW ON ORGANIZATION OF PEOPLE'S COURT, art. 40(3) (2002); ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, arts. 27 and 28.

appointed by the Chief Justice upon approval of the relevant local People's Council.<sup>101</sup>

*C. The Role of the Judicial Selection Councils*

The 2002 Law on Organization of People's Courts provides that the National Assembly Standing Committee issue new regulations concerning the work and function of the Judicial Selection Councils.<sup>102</sup> As a result, on October 11, 2002, the Standing Committee of the National Assembly issued the Ordinance on Judges and Jurors of People's Court.<sup>103</sup> Under this Ordinance the new Supreme People's Court Judicial Selection Council and Central Military Court Judicial Selection Council are both chaired by the Chief Justice of the Supreme People's Court.<sup>104</sup> In addition, each Judicial Selection Council comprises representatives of the Ministry of Defence, the Ministry of Justice, the Ministry of Interior (sometimes translated as Ministry of Home Affairs),<sup>105</sup> the Vietnam Fatherland Front Central Committee,<sup>106</sup> and the Vietnam Lawyers Association.<sup>107</sup>

The provincial and district Judicial Selection Councils are chaired by the Chairman or Vice-Chairman of the relevant Provincial People's Council, and include the Chief Judge of the Provincial People's Court, representatives of the Provincial Department of Governmental Personnel, the Provincial Vietnam Fatherland Front, and Vietnam Lawyers' Association as members.<sup>108</sup> Military Zonal and Regional Judicial Selection Councils are chaired by the Chief Judge of the Military Central Court and have representatives from the Ministry of Defence, the Vietnam Fatherland Front Central Committee and Vietnam Lawyers' Association as members.<sup>109</sup>

Judicial Selection Councils are ad-hoc committees operating on the basis of "collective decision-making and majority vote" (*lam viec tap the,*

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<sup>101</sup> LAW ON ORGANIZATION OF PEOPLE'S COURT, arts. 25(7), 40 (2002).

<sup>102</sup> *Id.* art. 37(5).

<sup>103</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002.

<sup>104</sup> *Id.* art. 26.

<sup>105</sup> The Dept. of Governmental Personnel was renamed the Ministry of Interior in 2002 under Nghi Quyet Cua Quoc Hoi So 02/2002/QH11 Ngay 5 Thang 8 Nam 2002 Ve Viec Quy Dinh Danh Sach Cac Bo Va Co Quan Ngang Bo Cua Chinh Phu [National Assembly Resolution No. 02/2002/QH11, Regarding the Enumeration of Committees and Ministries] (Aug. 5, 2002).

<sup>106</sup> The Vietnam Fatherland Front is a popular organization with social and political responsibility to represent the people.

<sup>107</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 26.

<sup>108</sup> *Id.* art. 27.

<sup>109</sup> *Id.* art. 28.

*quyet dinh theo da so*).<sup>110</sup> During meetings the Judicial Selection Councils closely evaluate each candidate on the list. First, a member of the Judicial Selection Council presents all of the documents in the application dossier. Second, the remaining committee members express their opinion on the suitability of the candidate, prior to a show of hands from those in favour of the appointment.<sup>111</sup> Decisions of Judicial Selection Councils are made by a majority vote and any dissent is noted in the minutes of the meeting.<sup>112</sup>

One weakness in the current judicial appointment procedures is that there are no time limits for either the preparation of application dossiers, or for the provision of information from relevant agencies for the application dossiers. For example, the current workplace of the applicant or the Communist party cell of the court to which the applicant seeks appointment can take as long as it wishes to provide the documents sought. Further, there is no regulation of the time-frame in which Judicial Selection Council decisions must be made. The authors have been advised that as a matter of practice, the period for completing an application dossier for judicial office is normally one year and sometimes even longer.<sup>113</sup>

A further weakness is that existing judges who have satisfactorily performed their duties cannot renew terms automatically or even with an abridged procedure. Upon the expiry of a judge's term, those judges wishing to serve further must present a new application dossier.<sup>114</sup> This dossier must then be considered afresh by the relevant Judicial Selection Council.<sup>115</sup> This process is cumbersome and requires unnecessary work by both the judges seeking re-appointment and the Judicial Selection Councils.

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<sup>110</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 25.2; *Quyết Định Của Chánh án Tòa án Nhân Dân Tối Cao Số 46/2003/QĐ-TCCB Ngày 02 Tháng 4 Năm 2003 Về Việc Ban Hành Quy Chế Lam Việc Của Hội Đồng Tuyển Chọn Tham Phan Tòa án Nhân Dân Cấp Tỉnh Tham Phan Tòa án Nhân Dân Cấp Huyện Và Hội Đồng Tuyển Chọn Tham Phan Tòa án Quan Su Cấp Quan Khu Tham Phan Tòa án Quan Su Khu Vực* [Decision No. 46/QĐ-TCCB, Promulgating the Working Regulation of the Judicial Selection Councils of the Provincial Level People's Courts, District Level People's Courts and Military Zone Level Military Courts], art.2 (Apr. 2, 2003).

<sup>111</sup> *Quyết Định Của Chánh án Tòa án Nhân Dân Tối Cao Số 46/2003/QĐ-TCCB Ngày 02 Tháng 4 Năm 2003 Về Việc Ban Hành Quy Chế Lam Việc Của Hội Đồng Tuyển Chọn Tham Phan Tòa án Nhân Dân Cấp Tỉnh Tham Phan Tòa án Nhân Dân Cấp Huyện Và Hội Đồng Tuyển Chọn Tham Phan Tòa án Quan Su Cấp Quan Khu Tham Phan Tòa án Quan Su Khu Vực* [Decision No. 46/2003/QĐ-TCCB, Promulgating the Working Regulation of the Judicial Selection Councils of the Provincial Level People's Courts], art. 7 (Apr. 2, 2003).

<sup>112</sup> *Id.*

<sup>113</sup> Interviews by Nguyen Hung Quang with two judges of the Hanoi People's Court, one judge from the Supreme Court and one officer of Central Committee of Vietnam Fatherland Front (2002) (granted on the basis of anonymity).

<sup>114</sup> Mai Bo, *supra* note 60, at 3.

<sup>115</sup> *Id.*

Commentators believe that the lack of an abridged procedure for existing judges is one of the reasons there is a lack of judges at the local level.<sup>116</sup>

There is no evidence on hand that applicants rely on favorable sentiment or treatment (*yeu to tinh cam*) to obtain appointment to the bench quickly (*nhanh*). Nor is there public evidence of individuals or agencies forcing (*ep*) or suggesting (*goi y*) the need for applicants to pay bribes to obtain the necessary documentation for the application dossier. However, without time limits on the provision of information, there is ample opportunity for dubious actions (*khuat tat*) both by the applicant and by those assisting with the preparation of necessary materials. Finally, there is also no publicly available evidence that corruption affects the actual decision to appoint a judge. It is possible that the show of hands required at the council meeting protects against corruption.

However, the dossier requirement, in combination with the selection process and the composition of the selecting bodies, ensures that the Party-State has not relinquished any control of this phase of judicial selection. While the process is arguably more democratic and allows both the Supreme People's Court and local input into appointments, Party-State control has not been unsettled.

## V. JUDICIAL TENURE AND TERM

Unlike most civil servants in Vietnam who enjoy lifelong appointments, judges are appointed to five-year terms.<sup>117</sup> As discussed above, at the end of each term a judge must resubmit an application for a new term. Thus, judicial office does not offer judges job security. More significantly, any claim of judicial independence is fundamentally undermined by the lack of tenure. Not only can judges be arbitrarily removed,<sup>118</sup> but a Judicial Selection Committee can determine not to re-appoint judges giving no reasons for this decision. This also allows the State to tightly control who will remain judges.

Under the 1992 Constitution, the term of the Chief Justice of the Supreme People's Court is set to coincide with the election of the National Assembly and National President (also on five-year terms).<sup>119</sup> The terms of office of the Vice-Chief Judges of the Supreme People's Court and the Chief

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<sup>116</sup> Pham Quy Ty, *supra* note 64, at 142; Le Thi Thu Ba, *supra* note 50, at 159; Tran Van Tu, *supra* note 51.

<sup>117</sup> LAW ON THE ORGANIZATION OF THE PEOPLE'S COURTS, art. 40 (2002); ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 24.

<sup>118</sup> See *infra* Part VII.

<sup>119</sup> VIETNAM CONST. OF 1992, art. 128.

Judges and Vice-Chief Judges of local courts or military courts are also five years from the date of appointment.<sup>120</sup> As civil servants, female judges must retire at fifty-five and male judges at sixty.<sup>121</sup>

Vietnamese judges themselves argue that a five-year term is too short to provide the requisite security of tenure.<sup>122</sup> Judges feel constrained during their short term of office not to offend those who can influence their reappointment.<sup>123</sup> It may be that the State needs to move gradually to life-long tenure for judges. It could initiate reform in the first instance by lengthening the terms of office from five to ten years. Reforming re-appointment so that it becomes automatic unless there has been misconduct would also diminish the current vulnerability of judges to regular political vetting.

## VI. JUDICIAL PROMOTION

There are two kinds of judicial promotion. First, in accordance with civil servant regulations, judges can expect salary increases to reflect their level of experience. Secondly, it is possible for judges to move between courts and obtain the benefits of higher remuneration and status from becoming a member of a more senior court.

### A. *Salary Increases*

As noted earlier, judges are also civil servants broadly equivalent to those working in other governmental agencies. As a result, most of the criteria and procedures pertaining to the salaries of judges are the same as those that apply to other civil servants, as set out in the relevant regulations on civil servants.<sup>124</sup>

Civil servants are classified into four educational categories (A, B, C and D) based on their level of education.<sup>125</sup> The regulation provides that

<sup>120</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 31 (5).

<sup>121</sup> ORDINANCE ON PUBLIC EMPLOYEES, art. 30 (1998) (*translated in* 10 CONG BAO [OFFICIAL GAZETTE] 3 (Apr. 10, 1998)); LABOR CODE, art. 145 (1994).

<sup>122</sup> Former Chief Justice Pham Hung, *Tiep tuc doi moi to chuc va hoat dong cua nganh toa an nhan dan* [Continuously Reforming the Organization and Operation of People's Court], 10 TAP CHI TOA AN NHAN DAN [PEOPLE'S COURT JOURNAL] 1-6 (1997).

<sup>123</sup> Nicholson, *supra* note 38, at 320.

<sup>124</sup> Government Decree 95/1998/ND-CP, On Recruitment, Use and Management of Civil Servants (Dec. 2, 1998).

<sup>125</sup> "Civil servants shall be classified into following categories:

1 - Educational categories will consist of:

a. Civil servant in A class will have a university degree;  
b. Civil servant in B class will have a college degree;

judges be classified as “A” category civil servants, which assumes that they hold professional qualifications from a university.<sup>126</sup>

Within each civil servant category, there are three classes: high level expert, principal expert and ordinary expert.<sup>127</sup> However, judges are not classified according to these three divisions of expertise, but distinguished by salary level, in turn reflecting time spent in office. Legislation sets out the various divisions with district judges having ten salary levels, provincial judges having nine levels and supreme court judges having seven levels (see Table 1 below).<sup>128</sup> Every three years, a judge will receive a salary raise, providing all the criteria for increasing the salary have been met. In general terms the criteria are:

- Fulfilling all assignments and meeting both quality and timing requirements of assignments;
- Remaining without any conviction or charge for violations of labour rules, internal office regulations and laws relating to the jobs and ethics required of civil servants;
- Having spent enough time in office (either 24 or 36 months).<sup>129</sup>

The Ministry of Internal Affairs<sup>130</sup> has issued more detailed regulations on assessing a civil servant’s salary. The eight factors used to determine whether to increase a civil servant’s salary are:

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- c. Civil servant in C class will be a high school graduate;
  - d. Civil servant in D class will be a high school graduate.
  - 2- Positional categories will consist of:
    - a. Leading officers (monitors and managers)
    - b. Experts.” *Id.* art. 3.

<sup>126</sup> *Id.*

<sup>127</sup> Quyet Dinh Cua Bo Truong Trung Ban To Chuc Can Bo Chinh Phu So 150/1999/QD-TCCP Ngay 12 Thang 02 Nam 1999 Ve Viac Ban Hanh Quy Che Thi Nang Ngach Cong Chuc [Minister of Governmental Personnel Decision 150/1999/QD-TCCP, On Providing Regulations on the Civil Servant Class Upgrading Examination] (Feb. 12, 1999); Quy Che Ve Viac To Chuc Thi Nang Ngach Cong Chuc [Minister of Governmental Personnel Working Regulation 150/1999/QD-TCCP] (Feb. 12, 1999).

<sup>128</sup> Nghi Quyet Cua Uy ban thuong vu Quoc hoi khoa 9 so 35/NQ/UBTVQH9 ngay 17 thang 5 nam 1993 Phe chuan bang luong chuc vu dan cu beng luong chuyen mon nghiep vu nganh Toa an Kiem sat [National Assembly Standing Committee Decision No. 35/NQ/UBTVQH9, On Providing the Special Brackets of Salary Levels for Judges] (May 12, 1993).

<sup>129</sup> Thong Tu Cua Ban To Chuc Can Bo Chinh Phu So 45/TCCP-BCTL Ngay 11 Thang 3 Nam 1996 Huong Dan Che Do Nang Bac Luong Thuong Xuyen Hang Nam Doi Voi Can Bo Cong Chuc Khu Vuc Hanh Chinh Su Nghiep Dang Doan The [Ministry of Governmental Personnel Circular No. 45/TCCP-BCTL, On Providing Guidelines on the Raising of Annual Salaries for Civil Servants in the Administrative System, Party Organizations and Other Political-Social Organizations], pt. II, III (Mar. 11, 1996).

<sup>130</sup> National Assembly Resolution No.02/2002/QH1, On the List of Ministries and Ministerial Line Agencies of the Government (Aug. 5, 2002); Statement of the Government No. 38/CP-TCCB, On the



- i) Compliance with laws and policy of State;
- ii) Assignment completion (quantity of completed assignments in a year);
- iii) Disciplined spirit (*tinhh than ky luat*) (disciplinary and organizational consciousness in working and implementing office internal regulations);
- iv) Team spirit (cooperation with relevant agencies and colleagues);
- v) Truthfulness in work (truthfulness in reporting to supervisors and accuracy of such reports);
- vi) Life style and ethics;
- vii) Attitude towards enhancing knowledge;
- viii) Spirit and positive attitude to serve people.<sup>131</sup>

In addition to these eight factors, managing judges are also assessed on the results of their court's operations, managerial capacity, cooperation with other agencies and trustworthiness as assessed by colleagues.<sup>132</sup>

**Table 1: Salary Coefficients of Judges**

| No. | JUDICIAL SCALE             | SALARY LEVEL |      |      |      |      |      |      |      |      |      |
|-----|----------------------------|--------------|------|------|------|------|------|------|------|------|------|
|     |                            | 1            | 2    | 3    | 4    | 5    | 6    | 7    | 8    | 9    | 10   |
| 1.  | Supreme People's Court     | 5.02         | 5.36 | 5.70 | 6.05 | 6.40 | 6.75 | 7.10 |      |      |      |
| 2.  | Provincial People's Court. | 3.62         | 3.88 | 4.14 | 4.40 | 4.66 | 4.92 | 5.18 | 5.44 | 5.70 |      |
| 3.  | District People's Court.   | 2.16         | 2.39 | 2.62 | 2.85 | 3.08 | 3.31 | 3.54 | 3.77 | 4.01 | 4.25 |

(Note: The current basic monthly salary is 210,000 VND)<sup>133</sup>

Request of National Assembly Deciding the Governmental Structural Organization of the Government (July 26, 2002).

<sup>131</sup> Minister of Governmental Personnel Decision No. 11/1998/QD-TCCP-CCVC, On Annual Assessment of Civil Servants, art. 6 (Dec. 5, 1998).

<sup>132</sup> *Id.*

<sup>133</sup> Nghị Định Của Chính Phủ Số 77/2000/ND-CP Ngày 15 Tháng 12 Năm 2000 Về Việc Điều chỉnh Mức Tiền Lương Tối Thiểu Mức Trọ Cap Và Sinh Hoat Phi Đối Với Các Đối Tượng Hương Lương Phụ Cap Trọ Cap Và Sinh Hoat Phi [Government Decree No. 77/2000/ND-CP, On Adjustment of Basic Salary, Subsidiary and Living Expenses for Persons Who Receive the Salary, Subsidiary and Living Expenses], art. 1 (Dec 15, 2000).

The very low salary level of judges, in combination with the very limited opportunities for promotion, must at least partly explain both the lack of expertise and judicial corruption.<sup>134</sup> For example, a newly appointed district judge receives a salary of only VND 453,600 per month (VND 210,000 x 2.16 or approximately US\$30.25 per month).<sup>135</sup> Such a low salary base severely compromises Vietnamese judicial independence. Furthermore, the strictly time-based nature of the promotions means that judges within existing courts are automatically promoted to salary levels irrespective of their performance, at least for a period of five years.

### *B. Promoting Judges Between Courts*

The 2002 Ordinance provides for judicial promotion between different levels of courts. However, a judge seeking promotion to a higher court must apply for the position anew using Circular 01 procedures.

Prior to the new judicial promotion policies, promotion between the levels of courts was rare and judges were locked into local communities and local politics. They worked in a parochial environment with no opportunity to leave that circuit via promotion to a higher court, or even move to a different court at the same level. Further, the lack of promotional opportunities meant that there was little to motivate judges to increase skills or improve work practices. Complacency was potentially endemic, particularly at the lowest levels of the court system where problems with poor judging have been identified.<sup>136</sup>

While it remains too early to judge the impact of the new promotion policies, ostensibly judges are being encouraged to seek promotion into higher courts. This may potentially require them to move to work out of their districts and into provincial cities. The possibility of moving to similarly ranked courts but in new localities opens up the real possibility of travel for judges seeking new jobs and opportunities. Whether the selection panels will be open to candidates outside their locality is not clear.

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<sup>134</sup> For a general discussion of the incidence and nature of Vietnamese judicial corruption see Nicholson, *supra* note 25, at 201-18.

<sup>135</sup> One U.S. Dollar equals approximately 15,000 Vietnamese Dollars.

<sup>136</sup> In June 2001, the National Assembly rejected a proposal to expand the jurisdiction of District People's Courts in criminal matters. The proposal would enable District Court judges to deal with offences where the maximum penalty was fifteen years, as opposed to the seven-year penalty, which is currently the District Courts' jurisdictional limit. See Posting to Vietnam New Listserve, vnnews-l@coombs.anu.edu.au, Vietnam MPs Vote Down Bill Boosting Powers of District Courts, June 14, 2001. See also Politburo Resolution No. 8-NQ/TW, On Justice Reform (Jan. 2, 2002).

## VII. DISCIPLINE AND REMOVAL OF ERRANT JUDGES

The power to discipline and remove judges is integral to public confidence in any court system. Unless the State or the courts can effectively remove those who breach agreed ethical and substantive practices, there is no means by which the behavior of judges can be sanctioned. At present, however, the discretionary nature of the current regulations on the discipline and removal of judges is not transparent. As a result, there is little to foster public trust in the existing court system.

Currently, disciplinary proceedings can be brought for political reasons, or to punish judges whose decisions are contrary to the views of their supervisors. The Chief Justice of the Supreme People's Court can be disciplined or removed by the National Assembly, on the advice of the President.<sup>137</sup> Deputy Chief Justices and judges of the Supreme People's Court can be disciplined or removed by the President at the request of the Chief Justice.<sup>138</sup> The Chief Justices and Deputy Chief Justices of the local courts (at both provincial and district levels) can be disciplined or removed by the Chief Justice of the Supreme People's Court based on the advice of the Standing Committees of the appropriate local People's Councils.<sup>139</sup> The judges of local courts can be disciplined or removed by the Chief Justice on a proposal of the Judicial Selection Council at the appropriate level.<sup>140</sup> To dismiss a Deputy Chief Justice of the Supreme Court or a Chief Justice or Deputy Chief Justice of a local court, it is necessary for the relevant Judicial Selection Council to recommend removal, and for the Chief Justice to endorse that recommendation.<sup>141</sup>

The bases of dismissing or removing judges are set out in the Ordinance on Judges and Jurors of People's Court 2002. Under this Ordinance, the judge is prohibited from:

- Doing anything that officials and public employees are prohibited from doing by law;

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<sup>137</sup> LAW ON THE ORGANIZATION OF THE PEOPLE'S COURTS, art. 40; ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 31(1).

<sup>138</sup> LAW ON THE ORGANIZATION OF THE PEOPLE'S COURTS, art. 40; ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 27(2)(c).

<sup>139</sup> LAW ON THE ORGANIZATION OF THE PEOPLE'S COURTS, art. 40; ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 31(2).

<sup>140</sup> LAW ON THE ORGANIZATION OF THE PEOPLE'S COURTS, art. 40; ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, arts. 26-28.

<sup>141</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 31(4).

- Providing advice to defendants, the accused, involved parties or other persons involved in legal proceedings, thus making the settlement of cases or other matters contrary to law;
- Illegally intervening in the settlement of cases or abusing his or her influence to pressure persons with responsibility to settle cases;
- Taking case dossiers or documents in case dossiers out of the office for purpose other than performing the assigned tasks or without the consent of competent persons;
- Receiving defendants, the accused or persons involved in legal proceedings outside the prescribed places.<sup>142</sup>

Because judges are considered civil servants, the discipline and removal of judges is not only subject to the specific rules applicable to judges, but also to the other rules applicable to civil servants. Under the 1998 Ordinance on Civil Servants, a civil servant must not:

- Be lazy, shirk responsibilities or refuse to discharge tasks or public duties, demonstrate factionalism, discord or departmentalism or quit work without permission (Article 15);
- Be authoritarian, overbearing, or solicit bribes, or cause any difficulties and troubles to organizations, agencies or individuals in the course of his or her work (Article 16);
- Establish, take part in establishing, manage or run private enterprises, limited liability companies, stock companies, cooperatives, private hospitals and private scientific research institutions (Article 17);
- Work as consultants for enterprises, businesses, or service organizations and other organizations or individuals inside or outside the country where their work would involve State secrets, work secrets and tasks under their competence as civil servants, as well as perform other tasks where their consulting has a reasonable probability of causing damage to the national interest (Article 17).

The 1998 Ordinance on Civil Servants also provides that a civil servant who violates the laws, but not to the extent of being criminally liable,<sup>143</sup> shall be subject to one of the following forms of discipline:

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<sup>142</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 15.

<sup>143</sup> Chapter XXI of Criminal Code 1999 sets out crimes relating to the abuse of administrative positions.

reprimand; warning; wage reduction; demotion; removal or dismissal.<sup>144</sup> The seriousness of the transgression dictates the severity of the discipline. In addition, under these provisions judges can also be removed or dismissed whether or not they are prosecuted for criminal liability.<sup>145</sup>

However, the law and regulations do not offer clear guidance on how to determine whether a judge lacks the required qualities of judicial office. Before the issuance of the new 2002 Ordinance, Vietnam had no ethical standards for judges,<sup>146</sup> although a mechanism for the removal of judges was set out. While there are now provisions on the moral qualities required of judges,<sup>147</sup> they remain broad and imprecise.

One issue directly affecting judicial quality is the number of "wrong and unjust judgments" (*an oan, sai*). In 2002, 31.2 % of criminal judgments and 46% of civil and family judgments were corrected.<sup>148</sup> However, the new regulations have not provided a clear mechanism for removal of judges who have a remarkable number of "wrong and unjust judgments." As noted in a leading legal newspaper, judges with high rates of judicial error can only be removed in accordance with the general provisions set out below.<sup>149</sup>

A judge can only be removed from office when he or she is dismissed by the Supreme People's Court's Chief Justice on the recommendation of the relevant Judicial Selection Council.<sup>150</sup> The Judicial Selection Council has the power and responsibility of investigating whether a judge remains qualified for the position and/or whether there has been a breach of the law.<sup>151</sup>

Where only discipline and not removal is at issue, the Chief Justice of the court where the judge sits has responsibility for preparing a discipline dossier. The dossier must include:

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<sup>144</sup> ORDINANCE ON PUBLIC EMPLOYEES, art. 39 (1998) (*translated in* 10 CONG BAO [OFFICIAL GAZETTE] 3 (Apr. 10, 1998)).

<sup>145</sup> Chapter XXII of Criminal Code 1999 sets out judicial crimes, while the power to dismiss a judge rests in Article 30(1) of the 2002 Ordinance on Judges and Jurors of People's Courts.

<sup>146</sup> Article 11 of the 1993 Ordinance On Judges and Jurors provided that judges "should not carry out any other business activities or other services." It was therefore much less restrictive of judicial conduct than the later Ordinance. *See also* Le Thi Thu Ba, *supra* note 50, at 167; Chi Thi Cua Bo Truong Bo Tu Phap So 01/2000/CT-BTP Ngay 24 Thang 2 Nam 2000 Ve Viec Thuc Hien Cac Cong Tac Trong Tam Nam 2000 Cua Nghanh Tu Phap [Directive of Minister of Justice No. 01/2000/CT-BTP on Key Tasks of the Judiciary in 2000] (Feb. 24, 2000).

<sup>147</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, art. 30(2)(d).

<sup>148</sup> *See* Mai Ngoc Trinh, *supra* note 47, at 5 (containing a part of Report of Chief Justice of Supreme People's Court before National Assembly Congress on Nov. 13, 2002).

<sup>149</sup> *See* Mai Ngoc Trinh, *supra* note 47, at 7 (interview with the Deputy Chief Justice of Supreme People's Court about the new Ordinance on Judges and Jurors of People's Courts).

<sup>150</sup> ORDINANCE ON JUDGES AND JURORS OF PEOPLE'S COURTS 2002, arts. 26-28.

<sup>151</sup> *Id.*

- A self-criticism report prepared by the judge facing disciplinary procedures;
- The minutes of the meeting of the Court Disciplinary Board where that judge works.<sup>152</sup>

In cases of discipline of judges, the dossier will be reviewed and examined by the Judicial Selection Council of the relevant court level before its submission to the Chief Justice of the Supreme People's Court for final decision. As discussed in Part IV, the Judicial Selection Council operates on the basis of collective decision-making and majority vote.<sup>153</sup>

In principle, judges, like other civil servants or National Assembly delegates, are not requested to follow the Party's guidelines or instructions in their decisions. In reality, most judges are Party members,<sup>154</sup> which means that they must comply with the Party's rules and decisions.<sup>155</sup> This is common in other socialist countries.<sup>156</sup> One of the consequences of Party membership is that judges may be disciplined by the Party's internal procedures if it is found that they have violated the Party's rules.<sup>157</sup> Some researchers point out that Party discipline imposes heavier penalties than administrative discipline. Specifically, the Party can reprimand, warn, dismiss judges from office, or expel them from the Party.<sup>158</sup> The latter sanction is considered particularly severe. Thus, the Party may terminate a judge's career and invoke other discipline or punishments for failure to follow the Party mandate.<sup>159</sup>

The rules and regulations of the Party are both political and discretionary. As such, they are a powerful tool in the hands of the Chief Justice and the Judicial Selection Councils. Within the Vietnamese socialist system, the Party customarily restrains the behavior of Party members by threatening the withdrawal of privileges such as healthcare and education.<sup>160</sup> In the case of judges, this is made possible by their five-year terms and the need for documented Party approval as part of the application process.

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<sup>152</sup> Ministry of Justice and Special People's Court Inter-Circular No. 05/TTLN, Guide on the Ordinance on People's Judges and Jurors, pt. IV, 1(b) (Oct. 15, 1993).

<sup>153</sup> See *supra* Part IV.C.

<sup>154</sup> See *supra* Part III.D.

<sup>155</sup> Interview by Penelope Nicholson with an anonymous barrister (Sept. 5, 1996). See also Politburo Resolution No. 8-NQ/TW, On Justice Reform (Jan. 2, 2002).

<sup>156</sup> JANOS KORNAI, *HE THONG XA HOI CHU NGHIA - KINH TE CHINH TRI CUA CHU NGHIA CONG SAN* [SOCIALIST SYSTEM - THE POLITICAL ECONOMY OF COMMUNISM] 35 (2002).

<sup>157</sup> STATUTE OF THE VIETNAMESE COMMUNIST PARTY 2001, arts. 2(1), 2(2), 39(1), 40(1) and 47.

<sup>158</sup> *Id.* art. 35.

<sup>159</sup> KORNAI, *supra* note 156, at 40.

<sup>160</sup> *Qui Dinh Ve nhung dieu Dang vien khong duoc lam* [Politburo Regulation No. 19-QD/TW, On Banned Works for Party's Members] (Mar. 11, 1995).

However, it would appear that these threats are insufficient on their own to ensure a corruption-free and ethical judiciary.

An internal report of the Vietnamese Communist Party reports that it reviewed and disciplined the actions of 17,288 Party members in 2001, a figure representing 0.8% of total Vietnamese Communist Party membership.<sup>161</sup> Of the 17,288 Party members investigated, 6794 were reprimanded, 870 were removed from office, 7126 were warned, and 2498 were expelled from the Party.<sup>162</sup> Earlier research has demonstrated that the State is prepared to publicly castigate judges and court clerks for improper conduct.<sup>163</sup> In recent times, several cases have been reported in the press.<sup>164</sup> However, given that most lawyers report the need to foster good "relationships" with judges and that it is common to make payments on behalf of one's client, corruption is much more widespread than state intervention indicates.<sup>165</sup>

#### VIII. CONCLUSION: COMMUNIST PARTY'S POLITICAL INFLUENCE IS INTACT

The judicial independence purportedly created by the Vietnamese court reforms instigated since 2002 needs not be taken at face value. More specifically, analysis of the reforms reveals that while the courts are much more independent of both the Ministry of Justice and the National Assembly than in the past, they remain intrinsically connected to and lead by the Communist Party of Vietnam. As a result, any assertion that Vietnamese judges are independent from Party-State influence is false. The Vietnam Communist Party continues to have a firm hold on the appointment and removal of judges.

This situation reflects the more general set-up of Vietnamese political institutions. There is no separation of powers between the Parliament, the executive, and the courts. The Party leads and the State manages all political and administrative functions. The courts merely give effect to the Party policy and law.

The appointment and dismissal of judges, in combination with the very short terms, limited tenure, poor pay and limited opportunity for skills-

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<sup>161</sup> *Tình Hình Thi Hành Kỷ Luật Trong Đảng Năm 2001 [Report on Members' Obedience to the Communist Party's Regulations in 2001]*, THÔNG BÁO NỘI BỘ [INTERNAL NOTICE OF COMMUNIST PARTY] 13 (Mar. 2002).

<sup>162</sup> *Id.*

<sup>163</sup> Nicholson, *supra* note 25.

<sup>164</sup> For example, Ho Ngoc Cu, Nguyen Thap Nhat, Nguyen Thi Hang, Nguyen Dien Khoi, and Dao Ba have all been cited for corruption.

<sup>165</sup> See generally Nicholson, *supra* note 25.

based promotion, means that judges remain tightly controlled by the Party. While the courts and the Party may be in the process of becoming more responsive to public sentiment,<sup>166</sup> this process is not reflected in an institutional de-coupling of Party and courts.<sup>167</sup> In fact, it may even be that it confirms the interconnection between these institutions. It is not the aim of this paper to criticise the Vietnamese courts for being different from Western style courts. Vietnam is in the process of constructing a socialist law-based state, which seeks to transform traditional Marxist conceptions of state and law to those sought by the contemporary socialist-oriented market economy. However, to the extent that claims of independence circulate, they should be understood in light of the continuing connections between Party and courts.

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<sup>166</sup> Mark Sidel, *Law, the Press and Police Murder in Vietnam: The Vietnamese Press and the Trial of Nguyen Tung Duong*, in *THE MASS MEDIA IN VIETNAM* 97-98 (Marr ed., 1998). See also Nicholson, *supra* note 25, at 201-18.

<sup>167</sup> For a discussion about the complex relations between the media and the state, see Russell Hiang-Kheng Heng, *Media Negotiating the State: in the Name of the Law in Anticipation*, 16(2) *SOJOURN* 213-237 (2001).



**Table 2: Relevant Legislation of the Socialist Republic of Vietnam**

| TYPE OF LEGISLATION        | AUTHOR                                | DATE       | SUBJECT                                                                                      |
|----------------------------|---------------------------------------|------------|----------------------------------------------------------------------------------------------|
| Directive No13/SL          | Chairman Ho Chi Minh                  | 1/24/1946  | On Court Organisation and Judges                                                             |
| Decision 91/HDBT           | Ministers Council<br>(now Government) | 9/26/1981  | On the Organization and Tasks of Central Administrative College                              |
| Decision 173/TT            | Ministry of Justice                   | 2/16/1992  | On the Management of the Budget of the Court of Provinces and Districts                      |
| Constitution               | National Assembly                     | 4/18/1992  |                                                                                              |
| Law                        | National Assembly                     | 10/7/1992  | On the Organization of the People's Procuratorate                                            |
| Law                        | National Assembly                     | 10/10/1992 | On the Organization of People's Courts                                                       |
| Resolution 37 NQ/UBTVQH9   | Standing Committee of N/A             | 5/14/1993  | To explain some issues on the implementation of Ordinance on Judges and People's Assessors   |
| Decree 38/CP               | Government                            | 6/4/1993   | On the Authority and Responsibility of the Ministry of Justice                               |
| Inter-circular No. 05/TTLN | Ministry of Justice and Supreme Court | 10/15/1993 | Guidelines on the Ordinance on Judges and People's Assessors                                 |
| Code                       | National Assembly                     | 6/23/1994  | Labour Code                                                                                  |
| Law                        | National Assembly                     | 7/5/1994   | On the Organization of People's Councils                                                     |
| Law                        | National Assembly                     | 10/28/1995 | On Amendments and Supplements to a Number of Articles of the People's Court Organization Law |
| Law                        | National Assembly                     | 3/20/1996  | On State Budget                                                                              |

| TYPE OF LEGISLATION                       | AUTHOR                    | DATE       | SUBJECT                                                                          |
|-------------------------------------------|---------------------------|------------|----------------------------------------------------------------------------------|
| Decree No. 70-CP                          | Government                | 6/12/1997  | On Court Charges and Fees                                                        |
| Ordinance                                 | Standing Committee of N/A | 1998       | Ordinance on Civil Servants                                                      |
| Law                                       | National Assembly         | 5/20/1998  | On Amendments and Supplements to a Number of Articles of the Law on State Budget |
| Law                                       | National Assembly         | 6/12/1999  | Law on the Vietnamese Fatherland Front                                           |
| Code                                      | National Assembly         | 12/21/1999 | Criminal Code                                                                    |
| Directive                                 | Minister of Justice       | 2/24/2000  | On the Key Tasks of the Judiciary in 2000                                        |
| Law                                       | National Assembly         | 6/9/2000   | On the Amendment of Law on Criminal Proceedings                                  |
| Internal Notice                           | Communist Party           | 2001       |                                                                                  |
| Official Letter No14/2002                 | Supreme Court             | 2002       | Submission Report on the Amendment of Law on the Organization of People's Court  |
| Resolution No. 08/NQ-TW of the CPV        | Politburo of CPV          | 1/2/2002   | On Justice Reform                                                                |
| Resolution No. 19- QD/TW of the Politburo | Politburo of CPV          | 1/3/2002   | On Banned Works for Party Members                                                |
| Law                                       | National Assembly         | 4/2/2002   | On the Organization of People's Courts                                           |
| Ordinance 02/2002/PL-UBTVQH11             | Standing Committee of N/A | 10/11/2002 | On Judges and People's Jurors of the People's Courts                             |
| Resolution 131/2002/NQ-UBTVQH11           | Standing Committee of N/A | 11/4/2002  | On Judges, People's Assessors and Prosecutors                                    |
| Resolution No 353/2003/NQ –               | Standing Committee of     | 2/25/2003  | On the Personnel and the Quantity of Judges in the Supreme People's              |

| TYPE OF LEGISLATION                                        | AUTHOR                                                                                                                 | DATE     | SUBJECT                                                                                                                                                                                    |
|------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|----------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| UBTVQH11                                                   | the National Assembly                                                                                                  |          | Court 2003                                                                                                                                                                                 |
| Inter-Circular No.01/2003/TTL T/TANDTC-BQP- BNV-UBTWMTTQVN | Supreme People's Court-The Ministry of Defence-The Ministry of Interior-The Vietnam Fatherland Front Central Committee | 4/1/2003 | Guidelines on Ordinance on Judges and Jurors of the People's Courts.                                                                                                                       |
| Decision No.46/2003/QD-TCCB                                | Supreme People's Court                                                                                                 | 4/2/2003 | Promulgation of the Working Regulation of the Judicial Selection Councils of the provincial-level People's Courts, district-level People's Courts and military zone-level military courts. |
| Decision No.46/2003/QD-TCCB                                | Supreme People's Court                                                                                                 | 4/2/2003 | Promulgation of the Working Regulation of the Judicial Selection Councils of the provincial-level People's Courts, district-level People's Courts and military zone-level military courts. |

### Notes

The following sources provide the legislation listed above:

The National Assembly Database, LAWDATA

*Tong Thuat Chung Ket Qua Chinh Nghien Cuu de Tai*, (General Abstract of the Principal Research) (Hanoi 1996) (unpublished) (on file with authors)

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