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# **BALANCING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN A TRANSITIONAL STATE: The Case of Thailand**

David Pimentel\*

*Balancing judicial independence against judicial accountability is a classic problem, but the debate has often taken place without reference to specific legal cultures and traditions, and there is compelling reason to believe that the “right” balance may be different in different societies. Thailand is in transition, so the models of established Western democracies may be ill-suited to the problems and issues of the Thai judiciary. Moreover, independence and accountability are not ends in themselves, but means to the same end: that of fair, impartial, and effective justice. Independence can help, primarily by bolstering the “judicial courage” exercised by judges called upon to rule in difficult cases. Accountability can help as well, primarily by bolstering the “integrity” judges demonstrate in their performance on the bench. In light of this, the structural solutions for the judiciary under a new Thai constitution should be crafted in light of (1) the history, tradition, and culture of the Thai judiciary, (2) the degree of courage and integrity already manifested among Thai judges, and (3) those structures and mechanisms that can leverage the Thai judges’ strengths and ameliorate, or at least mitigate, their weaknesses. Until Thailand has a new constitution, the courts there will be seriously handicapped in playing their critical roles of providing fair and impartial adjudication and of protecting human and other legal rights. When, indeed if, constitutional checks and balances are put in place, the stage will be set for a calming of the turmoil in Thailand. But that can only happen if the judiciary is sufficiently*

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*empowered and independent to play that constitutional role, while showing both sufficient integrity to avoid corruption and sufficient restraint not to overreach into the political realm. In other words, the individual judges must exhibit both this courage and this integrity in their rulings. And the structure of the judiciary—the mechanisms for protecting the judges (to promote independence), and for policing them (to promote accountability)—will be important in facilitating that result, restoring public confidence in the legal and political system, and ultimately strengthening the rule of law in the Kingdom of Thailand.*

## TABLE OF CONTENTS

INTRODUCTION .....	157
I. IMPORTANCE OF JUDICIAL INDEPENDENCE .....	158
A. <i>Judicial Independence and the Rule of Law</i> .....	158
B. <i>Judicial Behavior Is the Ultimate Measure of Independence</i> .....	159
C. <i>Judicial Independence's Image Problem</i> .....	159
D. <i>Judicial Independence as a Means to an End</i> .....	161
E. <i>Independence from What/Whom?</i> .....	161
1. Independence from Political Influence.....	161
a. <i>Political influence in the absence of democracy</i> .....	161
b. <i>Political influence from the democratically-elected majority</i> .....	162
2. Independence from Crime Bosses or Other Non-Governmental Interests.....	162
F. <i>Institutional Independence v. Decisional Independence</i> .....	163
II. IMPORTANCE OF JUDICIAL ACCOUNTABILITY .....	165
A. <i>Accountable to Whom?</i> .....	166
1. Administering Judicial Discipline <i>Within</i> the Judiciary... 166	
2. Keeping Judicial Discipline Away from Majoritarian Politics .....	167
3. Establishing a Special Disciplinary Body Within the Judiciary .....	168
B. <i>Accountable for What?</i> .....	170
III. RECONCILING/BALANCING INDEPENDENCE AND ACCOUNTABILITY 172	
A. <i>Independence and Accountability: Why the Two Concepts Don't Actually Conflict</i> .....	172
B. <i>Decisional Independence and Accountability: Finding the Right Judges</i> .....	172
C. <i>Decisional Independence and Accountability: Finding the Right Structures</i> .....	173

IV. CHALLENGES FOR THAILAND IN PARTICULAR.....	175
A. <i>Constitutional Transition Presently Underway</i> .....	175
B. <i>Perceptions of the Rule of Law</i> .....	177
C. <i>Informal Survey Results</i> .....	179
CONCLUSION .....	182
ANNEX A.....	183

## INTRODUCTION

Judicial independence and judicial accountability have long been viewed as in tension with each other. The assumption is that any effort to strengthen judicial independence makes it difficult to hold judges accountable, and that any accountability initiative undermines judicial independence. Accordingly, much attention has been devoted to striking the “right” balance between these two concepts, both of which are important, but each of which can be advanced only at the expense of the other. The debate about how these two should be balanced, however, has often taken place without reference to specific legal cultures and traditions, and there is compelling reason to believe that the right balance may be different in different societies.<sup>1</sup>

Thailand is facing particular challenges at present as a transitional state, under martial law until April 2015, and still awaiting approval of a new constitution. The proper role and power of the judiciary in such a state is difficult to define and even harder to implement. But a more nuanced understanding of the classic independence v. accountability debate may help craft meaningful and effective solutions for Thailand.

The starting point is to understand that independence and accountability are not ends in themselves, but means to the same end: that of fair, impartial, and effective justice. Independence can help, primarily by bolstering the judicial courage exercised by judges called upon to rule in difficult cases. Accountability can help as well, primarily by bolstering the integrity judges demonstrate in their performance on the bench. In light of this, the structural solutions for the judiciary under a new Thai constitution should be crafted in light of (1) the history, tradition, and culture of the Thai judiciary, (2) the degree of courage and integrity already manifested among Thai judges, and (3) those structures and mechanisms that can leverage the Thai judges’ strengths and ameliorate, or at least mitigate, their weaknesses. The future of the Thai legal system, and particularly its prospects for the rule of law, depend on a sensitive implementation of these considerations.

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1. David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity*, 57 CLEV. ST. L. REV. 1 (2009) [hereinafter Pimentel, *Reframing the Debate*].

## I. IMPORTANCE OF JUDICIAL INDEPENDENCE

### A. *Judicial Independence and the Rule of Law*

The concept of the “rule of law” was first spelled out by A.V. Dicey, a nineteenth century constitutional theorist, who was careful to specify that punishment for crime could come only for violating pre-existing laws and after sentencing *by regular courts*, and that rights are protected by *ordinary legal processes*.<sup>2</sup> It follows that a functional court system—one that will dispense justice according to these pre-existing laws, and following ordinary legal processes—is essential to the rule of law. Corrupt court systems cannot deliver justice, and independence is a necessary bulwark against such corruption and a critical precondition for the rule of law itself.<sup>3</sup>

Put another way, if the law is to be enforced evenhandedly, if no one is to be above the law,<sup>4</sup> the judges must be free to act independently in applying the law and rendering judicial decisions. If Thailand is to have a “government of laws and not of men,”<sup>5</sup> it needs a court system that respects law more than it respects the power of any individual(s). Thailand’s constitutional history, dating back to 1932, demonstrates a long-standing commitment to democratic principles, values embraced by the Thai people now for generations.<sup>6</sup> And although the country has been through serious political upheaval in recent years, including the present struggle to establish yet another constitution, the monarchy—with all of the moral authority it commands in Thailand—has been a stabilizing rather than a disruptive influence in the attempt to establish a secure and functional democratic society. Accordingly, it is no threat to this monarchy to suggest, as Thomas Paine did, “For as in absolute governments the King is law, so in free countries the law ought to be king.”<sup>7</sup> Paine was speaking at the time of the American Revolution, and his rhetoric reflects the anti-royalist sentiment of his society and his time, but the principle remains, that if the rule of law is to prevail, there must be a supremacy of law, and equality before it.

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2. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 70 (2006).

3. Samuel L. Bufford, *Defining the Rule of Law*, 46 JUDGES’ JOURNAL 16 (2007).

4. Popular definitions of the rule of law almost always include this requirement that all be equal before the law and that no one is “above of the law.” See, e.g., Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 38–39 (Thomas Carothers ed., 2006).

5. MASS. CONST. art. XXX.

6. *Thailand: A Democracy at Risk: Hearing Before the H. Comm. on Foreign Affairs Subcomm. on Asia and the Pac.*, 113th Cong. (2014) (statement of Scot Marciel, Principal Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs) (citing Thailand’s “democratic tradition” and urging support for “efforts to move Thailand back towards” it); *Thailand Profile – Timeline*, BBC (Aug. 19, 2015), <http://www.bbc.com/news/world-asia-15641745> [<https://perma.cc/GS7Z-8JAY>] (In 1932, “Constitutional monarchy [was] introduced with parliamentary government”).

7. 1 THOMAS PAINE, THE WRITINGS OF THOMAS PAINE (Moncure Daniel Conway ed., 1894).

The task falls to the judiciary, then, to ensure the fair and even-handed application of the law. That requires a judiciary that is independent enough to resist improper influence, including pressure from the politically powerful. It requires a judiciary that exercises its authority according to higher principles of integrity and justice.

B. *Judicial Behavior Is the Ultimate Measure of Independence*

Judicial independence is usually defined in terms of freedom from outside influence. Judges who face pressure, or consequences, for the merits of their decisions will have difficulty deciding cases impartially—the outside influence is deemed to have impinged upon their independence. Accordingly, great efforts are made to neutralize those influences and to insulate judges from any potential retaliation for their decisions. The aim is to give the judges sufficient protection—*e.g.*, structural provisions that grant them job security (often life tenure), guarantees that their salaries will not be reduced, provision of adequate security, etc.—that they can make independent judgments without fear of consequences.

But such consequences and influences can never be eliminated completely. No doubt a judge who makes a politically unpopular decision will face social opprobrium at the very least. The judge may also damage her prospects of elevation to a higher court. The judicial structure can do only so much to minimize the exposure of judges to such consequences.

Accordingly, what is critical is not so much the structures themselves, but whether the judge can/will withstand or ignore such outside influences. The judge needs to show judicial courage, shrugging off inappropriate influences, and making independent judgments regardless of the consequences to her personally. Viewed from this perspective, the “judicial independence” structure—that attempt to minimize the consequences judges may face for their unpopular decisions—is important only to the extent it may embolden the judge to demonstrate judicial courage. At the same time, a judicial system demonstrates the virtue of judicial independence not in terms of the structural safeguards that exist to protect judges, but by the behavior of the judges themselves. Judicial independence is achieved only when the judges have developed a practice and tradition of acting independently.

C. *Judicial Independence’s Image Problem*

Judicial independence is not a particularly compelling rallying cry. The public rarely takes to the streets to protest against the lack of judicial independence. The legal community is likely to appreciate the critical role that judicial independence plays in a functional system—the lawyers who appear before the courts will certainly be cynical about their own work if they perceive the judges’ decisions being influenced or controlled by external forces, political or otherwise. There are a couple of reasons the public is likely to frame the issue differently, however, and to feel less sympathetic to the judicial independence cause.

First, they may not be at all happy that judges can exercise independence to subvert the agendas of their elected leaders, which in a democracy, should be expected to reflect the will of the majority.<sup>8</sup> It is a marginalized minority, unable to implement its agenda through the political process, that benefits from an independent judiciary. They may demand some independence for the courts in the hope that courts will raise barriers, or impose limits, on the political initiatives of the party in power. While the minority's plea for judicial independence might be rooted in its commitment to principles of good governance, it is just as likely to be driven by self-serving efforts to pursue its own agenda. It will almost certainly be perceived that way. The majority in turn, aggrieved by judicial decisions that subvert its *own* agenda, will brand the judges as activist judges and condemn these exercises of judicial independence.<sup>9</sup>

Second, the public is likely to interpret the term "judicial independence" to speak to the judges' personal privileges, comforts, or amenities. Those issues are unlikely to engender public sympathy; after all, judges are already perceived as privileged and powerful people. But, as U.S. District Judge John L. Kane (D. Colo) cautioned, "We must all understand that judicial independence is not for the protection of judges, but for the protection of the public."<sup>10</sup> Otherwise, "judicial independence" is likely to be viewed as a low priority, and more likely a problem in need

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8. See, e.g., U.S. President Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary, (Mar. 9, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 123-24 (Samuel I. Rosenman ed., 1941).

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses. It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.

*Id.*; JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 5 (2006) ("Critics of judicial activism frequently charge that whenever a court strikes down a law, it effectively thwarts the will of the majority that passed that law."); see also Frances Kahn Zemans, *Pound Revisited*, 48 S. TEX. L. REV. 1063, 1066 (2007) (regarding "President Roosevelt's court-packing plan . . . [m]embers of the court were attacked as activist judges who were imposing their will over the legislative and executive branches of government.").

9. See, e.g., Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 912 (2006).

10. Judge John L. Kane, Jr, Keynote Address at the National Association of Administrative Law Judges 1997 Annual Meeting and Conference in Denver, Colorado: Public Perceptions of Justice: Judicial Independence and Accountability (Sept. 29, 1997).

of a remedy.<sup>11</sup> Indeed, the public, particularly a disenfranchised public, is likely to view judges as highly entitled and perhaps overdue for a humbling of some kind.

#### D. *Judicial Independence as a Means to an End*

Acknowledging the potential for this misperception, some who actively promote the independence of the judiciary have begun using different terminology, insisting that they are working toward a judiciary that is impartial or fair, rather than one that is independent.<sup>12</sup> Of course, this is not mere semantic subterfuge. Judicial independence is important only because it is an essential precondition to the judiciary playing its proper and meaningful role as an impartial and fair arbiter of disputes, and protector of rights. It is a means to an end, not an end in itself. And what is the ultimate “end”? We could call it “the rule of law,” although that hardly helps, as there is so much dispute over what it really means. A more meaningful, and hopefully less controversial formulation would be “fair, impartial, and effective justice.” And it is not difficult to see why an independent judiciary—one that can’t be swayed by political pressure, money, threats, etc.—is essential to achieve that.

#### E. *Independence from What/Whom?*

##### 1. Independence from Political Influence

###### a. *Political influence in the absence of democracy*

In a society dominated by a political strong man,<sup>13</sup> the independence of the judiciary is particularly at risk. The authoritarian leader will

11. When the Thailand Institute of Justice (TIJ) held a seminar on September 29, 2015, on Judicial Independence and Accountability, it surveyed its audience on whether they thought the Thai judiciary needed more independence, nearly half (49.4%) responded that they thought the judiciary already had too much independence. See Annex A; see generally, Kelly J. Varsho, *In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?*, 27 N. ILL. U. L. REV. 445, 452–53 (2007) (“[A]n independent judiciary is accountable to no one. People argue that there can be too much judicial independence; since judges are government officials who exercise plenary power, they should be accountable to the public.”).

12. See, e.g., Shirley S. Abrahamson, *Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3 (2003) (recognizing “fairness” and “impartiality” as ideals sought as the ends of judicial independence and accountability); *American Bar Association Standing Committee on Judicial Independence*, A.B.A., [http://www.americanbar.org/groups/committees/american\\_judicial\\_system/subcommittee-on-state-courts/about\\_us.html](http://www.americanbar.org/groups/committees/american_judicial_system/subcommittee-on-state-courts/about_us.html) [https://perma.cc/J5Z6-WVF5] (last visited Jan. 30, 2008); *Our Mission*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/about> [https://perma.cc/8MDW-QJJB] (last visited Jan. 30, 2008); *Justice at Stake’s Mission*, JUSTICE AT STAKE, <http://www.justiceatstake.org/about/index.cfm> (last visited Jan. 30, 2008).

13. Some have characterized Thailand as one such society. See, e.g., Rodion Ebbighausen & Gabriel Dominguez, *General Prayuth: Thailand’s New Strongman*, DEUTSCHE WELLE (May 27, 2014), <http://www.dw.com/en/general-prayuth-thailands-new-strongman/a-17665821> [https://perma.cc/9K6C-H4JX]; Sebastian Strangio, *The Strongman of Siam*, FOREIGN POL’Y (May 21, 2015), <http://foreignpolicy.com/2015/05/21/>



insist on being above the law, if not the law himself. It is difficult to ask, or to expect, a judiciary to withstand such raw political power. Indeed, the problem is likely to be far worse than simply exempting that individual from the reach of the law. More likely the captive courts will be forced to do the bidding of that leader—protecting his friends and political allies, and persecuting his enemies and anyone who threatens his power.

*b. Political influence from the democratically-elected majority*

At the same time, even in a democracy, there must be limits on the authority of the majority. No doubt lawmaking is entrusted to democratic majorities and their representatives in the legislatures, but minorities have rights too, rights that should be protected against majoritarian authority. The majority won't like it, of course, as discussed above. But it is here that the judiciary plays a critical role, and where the need for its independence becomes so compelling.

As Alexis de Tocqueville observed, in a democratic society, the role of the judiciary is to protect the minority from the “tyranny of the majority,”<sup>14</sup> lest the rights of minorities be swept aside entirely. If the courts are the protectors of unpopular minorities, it naturally follows that the democratic majority may disapprove of a given judicial intervention. And the elected political branches of government, reflecting the views of the electorate, may be unhappy with the judiciary's imposition of limits, Constitutional or otherwise, on the majority's ability to pursue its agenda unchecked, i.e., its power to trample the rights of any unpopular minority. It is inevitable that political pressure will be brought to bear against any judiciary that is filling its proper role of protecting that minority,<sup>15</sup> and the judiciary must be independent enough to withstand that pressure.

## 2. Independence from Crime Bosses or Other Non-Governmental Interests

But judicial independence goes beyond insulating judges from the political process and political pressure. Judges may also be subject to threats and pressure from litigants, including society's criminal element.<sup>16</sup>

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the-new-king-of-siam-thailand-prayuth-junta/ [https://perma.cc/3XAY-CVSR].

14. See generally 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 269–72, 288–89 (Phillips Bradley ed., Vintage Books 1957) (1835).

15. Critics lament a lack of judicial independence, and particularly a politicized judiciary, in Thailand today. See, e.g., Kevin Hewison, *Judicial Politicization as Political Conservatism*, *CULTURAL ANTHROPOLOGY* (Sept. 23, 2014), <http://www.culanth.org/fieldsights/565-judicial-politicization-as-political-conservatism> [https://perma.cc/4WXR-UNV4].

Constitutional court judges have sometimes declared their political neutrality, claiming that their interventions are intended to maintain the rule of law, protect electoral minorities, and check the power of elected politicians. However, their record denies this and most observers concur that the judiciary is a steadfast ally of . . . political groups. . . . There is no judicial independence in Thailand, and there will not be for the foreseeable future . . .

*Id.*

16. Thailand's judiciary appears to be vulnerable to some of these influences.

Organized crime has, historically, been quick to recognize the value of having judges “on their side,” and has tapped its considerable expertise in the field of extortion and bribery to influence judges in corrupt ways.<sup>17</sup> Otherwise honest judges have certainly been influenced by either the generosity of the donor or by genuine fear. Judges are certainly vulnerable to threats of blackmail,<sup>18</sup> personal violence, or any type of harm to the judges’ loved ones.

Here the line between independence and accountability gets blurred. If judges are “in the pocket” of the mob, the public is not likely to view it as a problem of an insufficiently independent judiciary, but of an insufficiently accountable judiciary. Nonetheless, it is a matter of improper influence; such attempts to influence judges will always be there. Judges need to be independent enough to be able to resist or ignore these manipulative forces from outside of government every bit as much as they need to be independent of political influence.

#### F. *Institutional Independence v. Decisional Independence*

It is also important to note the distinction between the independence enjoyed by judges in their individual decisions and the independence the judiciary as a whole enjoys from the other branches of government. The latter may be termed “institutional independence” and usually reflects separation of powers principles. As matter of constitutional structure, it is important that judicial governance rest within the judiciary itself, minimizing legislative and executive control over court operation and administration, including staffing and budgeting.<sup>19</sup>

Institutional independence can be threatened if other branches of government attempt to influence the judicial system in its functioning, and this can happen despite separation of powers structures enshrined in the constitution. The legislature, for example, is typically responsible for the judiciary’s budget and is certainly capable of abusing that power either to threaten the courts with budget cuts or to micro-manage its

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In 2014, seven judges were disciplined, four of which were removed from office for “corruption.” See Veera Prateepchaikul, *Judge Sackings Send Shockwaves Across the Benches*, BANGKOK POST (Nov. 8, 2014), [http://www.bangkokpost.com/print/426077/\[https://perma.cc/C5P5-HJD6\]](http://www.bangkokpost.com/print/426077/[https://perma.cc/C5P5-HJD6]).

17. See Abrahamson, *supra* note 12, at 10 (discussing how threats of physical harm impair judicial independence); see generally CHARLES R. ASHMAN, *THE FINEST JUDGES MONEY CAN BUY, AND OTHER FORMS OF JUDICIAL POLLUTION* (1973) (documenting the cases of dozens of corrupt judges); ROBERT COOLEY, *WHEN CORRUPTION WAS KING: HOW I HELPED THE MOB RULE CHICAGO, THEN BROUGHT THE OUTFIT DOWN* (2004) (recounting the historical perspective of a mob attorney turned state’s evidence).

18. No doubt most people have embarrassing secrets they would prefer to keep quiet. Judges, given their positions of public trust, have even greater reason than most to care about their reputations and the respect they can command in the community.

19. See the discussion about the composition of judicial councils *infra* Section II.A.3.

priorities and operations through earmarked funding.<sup>20</sup> Legislatures can also use lawmaking powers to change courts' jurisdiction. Executive branch authorities who may present a budget to the legislature, and who exercise veto authority of legislative enactments, similarly wield power over the judicial branch.<sup>21</sup> Depending on how judicial appointments are done—in the U.S. both the executive and the legislature play an essential role—either of these two branches could retaliate against the judiciary by refusing to fill vacancies on the bench, leaving the judiciary understaffed and unable to function effectively.<sup>22</sup>

One approach to limit the legislature's budgetary control over the judiciary is to guarantee the judicial appropriation in the constitution itself. Costa Rica's constitution, for example, provides that six percent (6%) of the annual budget is to be allocated to its judiciary, depriving the legislature of the ability to use its power over budgets to pressure or influence the judiciary.<sup>23</sup> Similar provisions appear in the constitutions of Paraguay (3%) and Venezuela (2%).<sup>24</sup> It does not appear that any coun-

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20. J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 246 (2001) (“The legislature’s control over the provision of financial resources to the judiciary prevents the judiciary from being completely independent from the rest of the government.”).

21. Indeed, until 2000, the Thailand’s Ministry of Justice had control over the judiciary’s administration, including its budget. INST. OF DEVELOPING ECON., THE JUDICIAL SYSTEM IN THAILAND: AN OUTLOOK FOR A NEW CENTURY 17–19 (2001).

22. There can be little doubt that refusal to fill judicial vacancies (i.e. to confirm the President’s nominees) has been utilized in the U.S. Senate, although the motivation usually appears to have more to do with partisan politics (frustrating the President’s efforts to put like-minded judges on the bench) than with retaliating against or otherwise harming the judiciary. See Timothy M. Phelps, *Republican Senate Accused of ‘Slow Walking’ Obama’s Judicial Nominees*, L.A. TIMES (Oct. 2, 2015), <http://www.latimes.com/la-na-senate-judges-20151002-story.html> [<https://perma.cc/7HJ8-VS7N>].

23. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [CONSTITUTION] NOV. 7, 1949, art. 177, *translated in* WORLD CONSTITUTIONS ILLUSTRATED 38 (Jefri Jay Ruchti ed., 2016) (“[N]o less than six percent of the ordinary revenues calculated for the economic year will be allocated to the Judicial Power.”).

24. CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [CONSTITUTION] June 20, 1992, art. 249, *translated in* WORLD CONSTITUTIONS ILLUSTRATED 59 (Jefri Jay Ruchti ed., 2012) (“The Judicial Power enjoys budgetary autonomy. In the General Budget of the Nation an amount will be allocated to it not inferior to three percent of the budget of the Central Administration.”); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 20, 1999, art. 254, *translated in* WORLD CONSTITUTIONS ILLUSTRATED 55–56 (Jefri Jay Ruchti ed., 2010).

The Judicial Power is autonomous, and the operating, financial and administrative autonomy of the Supreme Tribunal of Justice is hereby established. To this end, in the national general budget a variable annual amount at least equivalent to 2% of the ordinary national budget shall be allocated to the justice system in order to enable it to function effectively; such amount shall not be reduced or modified without authorization in advance from the National Assembly.

try in Asia has adopted such an approach, although it has been advocated for Nepal.<sup>25</sup>

Threats to the judicial branch as a whole can certainly influence individual judges in their decisions as well. Some judges may even be pressured by their own colleagues on the bench to avoid irritating the legislative and executive branches, lest the entire judiciary be made to suffer as a result. So there is potential overlap between institutional independence and the more personal, decisional independence of the individual judge.

However, institutional independence does not guarantee decisional independence. If the leadership of the judiciary has a particular ideological orientation,<sup>26</sup> judges at lower levels may feel considerable pressure to make their decisions conform to it. Judges who hope for career advancement, including elevation to higher level judgeships, may be particularly vulnerable to this type of influence. This has been cited as a difficulty in Japan, where institutional independence is strong, but the decisional independence of the individual judges suffers terribly from influence coming from *within* the judiciary.<sup>27</sup>

But most of the focus on judicial independence is not on separation of powers and the judicial branch's entitlement to autonomy in the system of checks and balances. The issue, as it concerns justice and the rule of law, is the content of the courts' decisions, and the independence that judges feel to render those decisions without the interference of outside forces and influences.

## II. IMPORTANCE OF JUDICIAL ACCOUNTABILITY

The opposite side of the coin is judicial accountability. It is not enough for judges to be independent. Freeing them from outside influence may not be enough to ensure "fair, impartial, and effective justice." The judge must also pursue her responsibilities with at least a minimum degree of integrity. Indeed, judicial independence is supposed to protect the judge from personal consequences that come from making an unpopular decision,<sup>28</sup> thereby freeing the judge from fear, and enabling her to rule on the merits of the case. By insulating the judge from consequences for her decision, we free her to do the right thing without fear of reprisal.

25. David Pimentel, *Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal*, 9 WASH. U. GLOBAL STUD. L. REV. 283, 311 (2010) (quoting an E-mail from Dr. Ram Krishna Timala, Registrar of the Supreme Court of Nepal (June 18, 2009, 03:33 CST) (on file with author)).

26. This was an issue in Turkey until a few years ago. See discussion *infra* notes 78–80.

27. David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 37 (Peter H. Russell & David M. O'Brien eds., 2001).

28. One might also argue that judicial independence is compromised not only when the judge is intimidated into avoiding an unpopular outcome in the case, but also when a judge is aware that personal benefits (promotion, etc.) inure to the judge who secures a popular outcome in a case.

Of course, protecting a judge from consequences for her decisions may just as easily free her to do the wrong thing without fear of sanction.

The important value, therefore, is not so much judicial accountability as judicial integrity.<sup>29</sup> We demand accountability because we believe it is necessary to persuade judges to resist the temptation to engage in corruption. Indeed, if the ultimate goal is “fair, impartial, and effective justice,” judicial accountability is important only to the extent that it persuades judges to avoid bad behavior, or effects the removal of judges who indulge in it. If corruption or other judicial misconduct is not a problem, then accountability—i.e., a mechanism for disciplining errant judges—serves little purpose. Rather than worrying about how best to impose judicial accountability, we should focus on how best to promote judicial integrity.

Of course, judicial accountability cannot be so easily dismissed. Corrupt judges do exist, and there has to be some way of removing them from the bench. Moreover, the public may need to be reassured that there is a means of disciplining and removing judges. The specter of a judge who is entirely untouchable, who enjoys impunity for any and all of her judicial actions—embodying the Platonic ideal of judicial independence—would likely spark outrage from the public and undermine confidence in the judiciary overall. Accordingly, it is not surprising that judicial accountability, like judicial independence, has been recognized as a bulwark of the rule of law.<sup>30</sup>

#### A. *Accountable to Whom?*

However, creating an accountability mechanism inevitably creates a dilemma. Whoever has the power to discipline or remove judges also has the power to influence them. The creation of accountability, the very possibility of discipline, therefore, necessarily undermines the judge’s independence. Judges who have reason to fear the disciplinary authority will necessarily be reluctant to render decisions unpopular with that authority.

##### 1. *Administering Judicial Discipline Within the Judiciary*

The question then, is who can be trusted with the power to discipline and remove judges? The easier question may be who should *not* be entrusted with this authority: anyone with a political agenda. Routine judicial discipline, therefore, should probably be carried out entirely *within* the judicial branch, by fellow judges who already enjoy some measure of judicial independence. Judges may have great incentive to police their own institution and drum “bad apples” out of the judiciary altogether. Any corruption tolerated within the judiciary, or perception thereof, harms everyone, as the legitimacy of the judiciary is undermined.

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29. Pimentel, *Reframing the Debate*, *supra* note 1.

30. See Bufford, *supra* note 3.

Because the judiciary is the non-political branch of government, this will keep judicial discipline one step removed from political influence. Partisan agendas seem unlikely to dominate in a disciplinary regime implemented by non-partisan judges. Moreover, every judge on the disciplinary panel is keenly aware of the importance of judicial independence—as someone who enjoys it and relies upon it—and will carry out disciplinary proceedings with particular sensitivity to its impact on judicial independence. It is not a guarantee that judicial discipline will be beyond the reach of politics, of course—the problems within the judiciaries of Turkey<sup>31</sup> and Japan<sup>32</sup> are cases in point—but it is nonetheless provided at least one layer of insulation from political influence on judges' decisionmaking.

## 2. Keeping Judicial Discipline Away from Majoritarian Politics

Of course, it is tempting to suggest that judges should be accountable to the people, to the populace that they serve. This thinking has prompted many states in the United States to adopt systems of electing judges by popular vote; it allows the voters to remove a judge who has lost their confidence. The Maoists in Nepal advocated having the judiciary governed by a special committee of the parliament, a committee of elected officials who, as members of parliament, represent the people who elected them to their seats.<sup>33</sup> This proposal was justified on the ground that judges should be “accountable to the people.”<sup>34</sup>

The problem with this, of course, is that it makes the judiciary accountable to majoritarian politics, and effectively undermines the ability of the judiciary to perform its constitutional role discussed above: “to protect the minority from the tyranny of the majority.”<sup>35</sup> Courts need to be able to give constitutional protection to unpopular parties, and should not be subject to the shifting winds of politics. Putting the judiciary under the thumb of the legislature, or even the voting public, can only politicize the judiciary and make it difficult for judges to give due weight to the rights of those who, due to their status as a political minority, are outside the circles of power and influence.

Selecting judges by popular election, which looks attractive from some perspectives—including the ease of removing a judge widely known to be corrupt<sup>36</sup>—is a particularly problematic approach to accountability

31. See discussion *infra* at notes 78–80.

32. See *O'Brien & Ohkoshi*, *supra* note 27 (observing how judges in Japan suffer from pressure to conform to the preferred ideology of the judiciary). But the judiciary is a better place to center the disciplinary power as it is usually at least one step removed from majoritarian politics.

33. David Pimentel, *Judicial Independence at the Crossroads: Grappling with Ideology and History in the New Nepali Constitution*, 21 *IND. INT'L & COMP. L. REV.* 207, 220–21 (2011).

34. *Id.* at 216.

35. See discussion *supra* p. 7 and note 14.

36. In the United States, Judge Harry Claiborne continued to collect his salary as a federal judge even after he was convicted of felony tax evasion and sent to prison.

for other reasons as well. Charles Geyh documents thoroughly the problems with judicial elections in his article *Why Judicial Elections Stink*.<sup>37</sup> Among his concerns are (1) the fact that public is ill-informed about judicial candidates, and (2) the fact that any attempt to run a campaign—which might better inform the voting public—requires the unseemly solicitation of campaign contributions.<sup>38</sup> Giving money to judges (or to judges' election campaigns) creates terrible appearances at the very least,<sup>39</sup> and introduces a powerful corrupting influence. Finally, judges seeking election (or re-election) may be tempted to make promises (or issue rulings) that pander to popular sentiment, at the expense of justice in the individual case.

### 3. Establishing a Special Disciplinary Body Within the Judiciary

As already suggested, the best approach to policing and disciplining judges is to keep it inside the judiciary, carried out by a disciplinary panel or committee composed of fellow judges. This is consistent with principles of institutional independence, and minimizes the potential for politicization of the judiciary.

The composition of the body that oversees judicial discipline—or indeed the body that oversees an independent judiciary—is a matter of particular concern if judicial independence is to be preserved.<sup>40</sup> The emerging consensus is that judiciaries are best governed by a judicial council composed mostly of judges.<sup>41</sup> The Universal Charter of the Judge

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The mechanism to remove him from office—impeachment by the full House of Representatives, and then trial before the U.S. Senate—was sufficiently cumbersome that it took considerable time to force his removal from office. MARY L. VOLCANSEK, *JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE* 19, 42, 51–63 (1993).

37. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54–55 (2003).

38. *Id.*

39. *See, e.g.*, *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 873, 886 (2009).

It is worth noting that the U.S. Supreme Court recently considered a ruling [in the *Caperton* case] of the Supreme Court of West Virginia, after a litigant spent \$3 million in campaign contributions to get a more sympathetic justice onto that court. The campaign was successful, and the newly elected judge then cast the deciding vote to reverse a \$50-million judgment against the campaign contributor. The U.S. Supreme Court ruled that the newly elected justice should have recused himself from the case based, if nothing else, on the problematic perceptions. Nonetheless, it was a close (5-4) decision, which raises very serious concerns about the integrity of the judicial system when the judgeships themselves are subject to popular vote.

David Pimentel, *Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal*, 9 WASH. U. GLOB. STUD. L. REV. 283, 293–94 (2010) [hereinafter Pimentel, *Constitutional Concepts*].

40. A more thorough discussion of judicial councils can be found at Pimentel, *Constitutional Concepts*, *supra* note 39, at 294–311.

41. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 104 (2009). In a recent count, an estimated sixty percent of the world's judiciaries were governed by such councils, up from a mere ten percent at the end of the 1970s. *Id.* at 105. The mere existence of

provides that “judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation.”<sup>42</sup> The Palermo Declaration endorses a “Supreme Council of Magistrates” be “entrusted with the administration and discipline of the judiciary” in order to guarantee the independence of the judges.<sup>43</sup> The Beijing Statement of Principles of the Independence of the Judiciary (the “Beijing Principles”) suggest that such a council “should include representatives [of] the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.”<sup>44</sup> The Council of Europe has recommended that “[i]n order to safeguard its independence, rules should ensure that, for

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a judicial council guarantees little, of course. Judicial councils “may serve more as a barrier than as an avenue to judicial independence and accountability, particularly in countries where corruption is systemic or the judiciary is controlled by the executive.” VIOLAINE AUTHEMAN & SANDRA ELENA, *GLOBAL BEST PRACTICES: JUDICIAL COUNCILS: LESSONS LEARNED FROM EUROPE AND LATIN AMERICA* (Keith Henderson ed., 2004).

42. *Universal Charter of the Judge*, INT’L ASS’N OF JUDGES art. 11 (Nov. 17, 1999), <http://www.iaj-uim.org/universal-charter-of-the-judges/> [<https://perma.cc/59AG-L22C>]. The Charter has been approved by the member associations of the International Association of Judges and was unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei, Taiwan on November 17, 1999. *Id.* at pmbl.

43. The Palermo Declaration is a draft additional protocol to the European Convention on Human Rights, articulating a model for the elements of a judiciary statute, which calls for the creation of a “Supreme Council of Magistrates.” *Elements of a European Statute on the Judiciary: Palermo Declaration*, MAGISTRATS EUROPÉENS POUR LA DÉMOCRATIE ET LES LIBERTÉS [MEDEL] [EUROPEAN ASS’N OF MAGISTRATES FOR DEMOCRACY AND FREEDOMS] § 3.1 (Jan. 16, 1993), <http://www.medelnet.eu/images/stories/docs/Palermo.pdf> [<https://perma.cc/B3H3-HY7L>].

44. Law Ass’n for Asia and the Pac., *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, ASIANLII art. 15, <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html> [<https://perma.cc/6UH8-ZJNB>] (last visited Mar. 17, 2016) [hereinafter *Beijing Principles*].

The Beijing Statement of Principles of the Independence of the Judiciary finds its origins in 1982 in a statement of principles formulated by the Law Association for Asia and the Pacific (LAWASIA) Human Rights Standing Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo (“the Tokyo Principles”). The decision to formulate the current Statement was made at the 4th Conference of Chief Justices of Asia and the Pacific in Perth, Western Australia in 1991. . . . [A] first draft . . . was presented to the 5th Conference in Colombo, Sri Lanka, in 1993. In light of comments received at that conference and subsequently, and following further consideration at the conference in Beijing in August 1995, the Statement of Principles was adopted by the Chief Justices from 20 countries in the Asia Pacific. A revised version of the Statement . . . was adopted in its final form at the 7th Conference of the Chief Justices in Manila in August 1997. The Statement has now been signed and subscribed to by 32 countries in the Asia Pacific region.

David K. Malcolm, *Foreword* to Law Ass’n for Asia and the Pac., *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, ASIANLII, <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html> [<https://perma.cc/6UH8-ZJNB>] (last visited Mar. 17, 2016).



instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.”<sup>45</sup> The European Charter on the Statute for Judges envisages “an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”<sup>46</sup>

Diversified membership can help assure the judicial council’s independence. When lower court judges are represented on the council, and elected by their peers, those members of the council will have a different constituency than the Supreme Court judge(s) who may sit beside them on the council. It may also be advisable for the council to have representation from different geographical regions.<sup>47</sup> If the independent legal profession has representatives on the council, as suggested by the Beijing Principles,<sup>48</sup> they too bring a distinct perspective, and are accountable to a different constituency. The diverse constituencies served by a diverse membership on the council is a safeguard against any one person or political institution gaining too much control over the judiciary, and thereby undermining its independence.

Brazil has taken this approach in a 2004 constitutional amendment.<sup>49</sup> Its judicial council now consists of nine judges, two prosecutors, two lawyers, and two lay persons appointed by the legislature.<sup>50</sup>

In any case, routine judicial discipline should normally be administered by a judicial body, operating inside the judiciary under the auspices of an independent judicial council. This provides the best hope of avoiding politicization of judicial accountability, and the consequent threat to judicial independence.

## B. *Accountable for What?*

Whoever has the power to discipline judges needs carefully drawn guidelines for what constitutes grounds for discipline. The threat of discipline will necessarily lurk in the back of the mind of any judge faced with a controversial or politically-charged case. Could the decision itself prompt

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45. Council of Europe, Council Recommendation No. R (94) 12 of Oct. 13, 1994, principle I, § 2 (c), <https://advokat-prnjavorac.com/legislation/Recommendation.pdf>.

46. Council of Europe, European Charter on the Statute for Judges § 1.3, July 10, 1998, [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf) [<https://perma.cc/4LNT-DU3L>].

47. In the U.S. federal courts, the governing body of the judiciary, known as the Judicial Conference of the United States, is composed of approximately half trial judges and half appellate judges, one of each from all 13 circuits around the country. 28 U.S.C. §§ 331, 332(a)–(b) (2006). This gives significant representation to lower court judges and to all geographic regions, each of which may have distinct needs or concerns.

48. *Beijing Principles*, *supra* note 44.

49. Garoupa & Ginsburg, *supra* note 41, at 111 n.35.

50. *Id.* Brazil’s approach helps diversify the council’s membership, however, allowing the legislature to appoint two members of the council is inconsistent with separation of powers principles.

disciplinary proceedings against the judge? If so, or if the judge perceives it to be so, the accountability mechanism will deal a serious blow to judicial independence. Even in the United States, a single decision by a judge may prompt calls for that judge's impeachment and removal.<sup>51</sup>

For this reason, the federal courts of the United States have made it clear that the merits of a court decision can *never* be the basis for judicial misconduct proceedings. The controlling statute calls for dismissal of a misconduct complaint "directly related to the merits of a decision or procedural ruling."<sup>52</sup> The accompanying Rules for Judicial-Conduct and Judicial-Disability Proceedings, include in the Comment to Rule 3, the following explanation:

Rule 3(h)(3)(A) tracks the Act . . . in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling.<sup>53</sup>

The rules and commentary make it clear that anyone unhappy with the merits of a judge's decision in their case can seek relief only by way of the appellate process. But the decision itself, or its merits, is not, and cannot be, construed in any way as judicial misconduct.<sup>54</sup>

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51. See the discussion of the public reaction to Judge Harold Baer's controversial decision to suppress evidence in a drug case, including condemnations from a wide array of powerful public officials, including the White House. John Q. Barrett, *The Voices and Groups that Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 1, 2 n.4 (1996). Members of Congress, who had the power to remove Judge Baer, openly discussed the possibility of impeachment, *id.* at 3 n.6, but in the end, Judge Baer changed his decision and the matter was dropped. The change of the decision is itself cause for concern, as it suggests that the judge may have succumbed to this pressure and to these threats.

52. 28 U.S.C. § 352(b)(1)(A)(ii) (2012).

53. JUDICIAL CONFERENCE OF THE UNITED STATES, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2015).

54. The Rules go on to explain the types of conduct that could be actionable (would not be deemed "merits-related") notwithstanding their close association with the judges' disposition of the case:

Conversely, an allegation—however unsupported—that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness—"the merits"—of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants, attorneys, or others in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

*Id.* at 6.

### III. RECONCILING/BALANCING INDEPENDENCE AND ACCOUNTABILITY

Recognizing that there is tension between the concept of judicial independence and judicial accountability, Thailand must find an appropriate balance in its pursuit of both. What type of judicial structures need to be in place to ensure that an optimal balance is struck? The issue is a timely one as Thailand considers adoption of a new constitution.

As I have argued elsewhere,<sup>55</sup> the structures that support judicial independence are blunt instruments in pursuing what really matters. Structural protections for judges, designed to insulate them from outside influence, serve primarily to bolster their judicial courage to ignore such influences, but that courage is the important thing. Similarly, judicial accountability mechanisms are only a surrogate for what really matters: the integrity of the judges themselves. Structural mechanisms for disciplining judges are meaningful only if they succeed in inducing ethical behavior among judges, and/or if they are effective in removing the miscreants from the bench.

#### A. *Independence and Accountability: Why the Two Concepts Don't Actually Conflict*

The perceived conflict between independence and accountability is really nothing more than a tension between the means typically employed to foster each. Surely those approaches need to be balanced. But the factors that really matter, judicial courage (to act independently, regardless of the consequences) and judicial integrity (to act ethically, regardless of whether anyone is watching) are fully compatible and mutually reinforcing. Indeed, it often takes serious courage to act ethically.

While the judiciary can be structured with protections for judges to encourage independence, and with disciplinary mechanisms to hold them accountable, the structure is not going to turn bad judges into good ones. Her performance on the bench may be influenced to some degree by the judiciary's constitutional structure, but that performance will be dictated far more by the judges' initial endowment of courage and integrity than by any mechanism for protecting or punishing the judge.

#### B. *Decisional Independence and Accountability: Finding the Right Judges*

This suggests that judicial selection—getting the right people on the bench in the first place—may be the most important priority in the effort to create an independent and accountable judiciary, one that will inspire confidence and promote the rule of law. Perhaps the focus on the “independence v. accountability balance” is misplaced because what *really* matters, what has a far greater impact than anything we can do to foster independence or hold judges accountable, is getting the right judges in the first place: judges with the courage and integrity to do the job right. It also suggests that judges who lack these qualities don't belong on the bench.

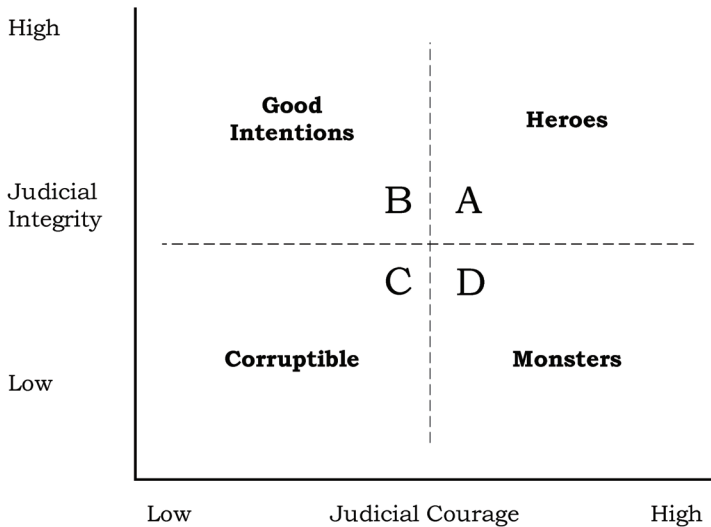
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55. Pimentel, *Reframing the Debate*, *supra* note 1.

C. *Decisional Independence and Accountability: Finding the Right Structures*

As for what balance the structure should strike—how much it should favor independence protections, and how much it should favor accountability mechanisms—the appropriate balance will be different in every society, responding to the degree of courage and integrity already demonstrated by that country’s judges. This can be demonstrated graphically.

Because every judge on the bench carries some endowment of courage and integrity, every judge could be plotted on the graph below, with their placement dictated by those two variables. The area on the graph can then be roughly divided into four quadrants, with the quadrants on the right side including those judges with high levels of courage, and with the quadrants at the top including judges with high levels of integrity.



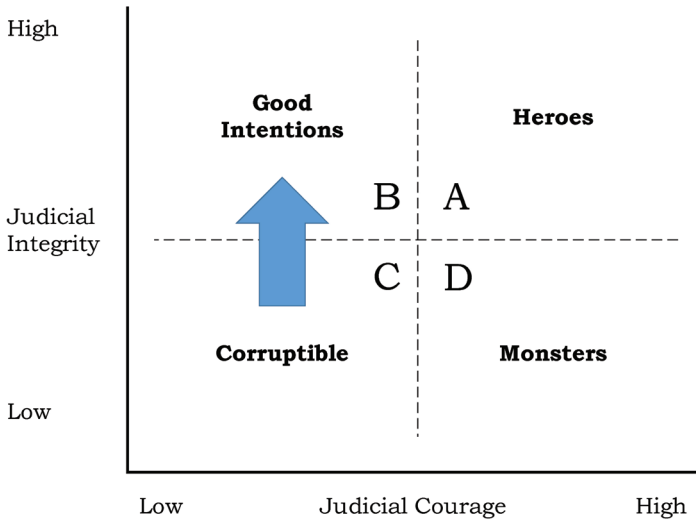
**Figure 1: Plotting Judicial Integrity Against Judicial Courage<sup>56</sup>**

Quadrant A (in Fig. 1) includes our “heroes,” the judges who exhibit both courage and integrity. Quadrant B includes judges with good intentions, judges who would like to do the right thing, but may be fearful or easily intimidated. Quadrant C includes judges with neither backbone nor ethics, easily corrupted. And Quadrant D includes the worst lot of all: judges with little integrity but with high levels of courage, fearlessly pursuing their own corrupt agenda. These “monsters” cannot be intimidated (too much courage) and therefore cannot be reformed with threats of discipline.<sup>57</sup>

56. *Id.* Figures 1–3 appeared previously in *id.* at 28–30.

57. *Id.*; THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 35–47 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993) (coining the term “monster” for a

Consider, then, what the impact will be if a stronger accountability regime is implemented. The judges who can be influenced are likely to make greater efforts to avoid corruption, as they fear detection and discipline. Figure 2 demonstrates that it will exert upward pressure on the judges in Quadrants B and C, the ones who can be easily influenced, as shown in Figure 2. Note that the judges in Quadrant D are unlikely to be affected; their high level of courage is likely to blunt the impact that fear of discipline has on their more timid colleagues. High courage judges are unlikely to be intimidated or influenced; they will follow their own compass without fear of consequences.

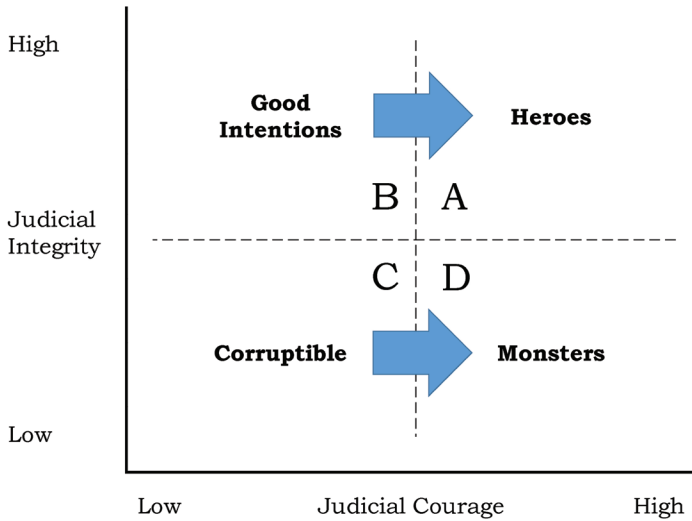


**Figure 2: The impact of a judicial discipline regime**

Consider instead what might happen if a new system of protections for judges is adopted, a system designed to strengthen their independence by insulating them from consequences for their actions. This will place rightward pressure on the judges in Quadrants B and C, emboldening them, and allowing them to exercise more courage. The impact is depicted in Figure 3 below:

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thoroughly corrupt judge).



**Figure 3: Impact of strengthened structural protections for judges**

This impact is very positive for the judges in Quadrant B, but if the bulk of the judges in this judiciary have low levels of integrity (and are in the bottom of the graph), the grant of additional independence will do more harm than good. It will take corruptible judges and turn them into monsters.

The upshot of this analysis is to illustrate that independence and accountability structures have to be balanced in a way that is very specific to the state of the judiciary in a given society. Bolstered independence can be a great reform, but only if there is already a high level of integrity in the system. If the level of courage is high, a strengthened accountability regime may have little impact in terms of reforming the sitting judges. In such a scenario, the disciplinary regime must focus on actually removing the “monsters,” because they have little prospect of ever being rehabilitated into proper and effective judges.

It is not clear where Thailand’s judges are on this graph, to the extent we can generalize about them at all. But there are some indications, set forth below.

#### IV. CHALLENGES FOR THAILAND IN PARTICULAR

##### A. *Constitutional Transition Presently Underway*

Thailand is in a state of transition. Since the National Council for Peace and Order seized control of the state in May 2014 and revoked the 2007 Constitution the country has been in constitutional crisis. A Constitutional Court continues to exist, and other public entities and offices

appear to be functioning effectively—remarkably so, given the lack of a constitutional order at present—but the society is not grounded in a firm legal foundation. The lack of a foundation in law would presumably make it more difficult for judges to stand on principle, resisting the pressures that they undoubtedly face. Indeed, without a constitution to set forth the principles judges should adhere to, judges may have nothing at all to stand on in their efforts to resist improper influence (from any source) in their adjudicatory role.

Originally, the military-controlled government had promised a new constitution almost immediately, and elections by October 2015.<sup>58</sup> However, the Constitutional Drafting Committee was unable to complete and circulate a draft until Spring 2015.<sup>59</sup> The draft was widely criticized and debated, with some going so far as to condemn it as “a step back” that “deprives people of the rights they earlier enjoyed,” and would “give unlimited power to th[e] government.”<sup>60</sup> Whether or not these criticisms were fair, the National Reform Council nonetheless rejected the draft 135-105 on September 6, 2015, which will result in even greater delays in the return to democracy.<sup>61</sup> Indeed it appears that even if a new charter is approved in the near future, it will be 2017 before elections can be held.<sup>62</sup>

In the meantime, the courts are adrift, as they lack defined constitutional powers.<sup>63</sup> The government has been criticized for abuse of power and denial of human rights—it has been accused of claiming “the power to close down the media, arrest people, [and] order for people to be shot.”<sup>64</sup> Under normal circumstances, the checks and balances of a constitutional democracy would empower the judiciary to rein in any such abuses of citizens’ human and legal rights. The courts’ practical ability to do so would depend in large part on its independence from the control of that government. But without a constitutional basis for the underlying

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58. *Thai Army Promises Elections in October 2015*, BBC NEWS (June 28, 2014), <http://www.bbc.com/news/world-asia-28069578> [<https://perma.cc/GZ5K-9WG2>].

59. Miles Kupa, *Thailand: A New Constitution for a New Kind of Democracy?*, AUSTRALIAN STRATEGY POL’Y INST.: THE STRATEGIST (May 4, 2015), <http://www.aspiratrat-egist.org.au/thailand-a-new-constitution-for-a-new-kind-of-democracy/> [<https://perma.cc/76YA-J236>].

60. Doug Bandow, *Thailand Suffers as Military Plans to Extend Control: Junta Delivers Oppression, Not Happiness*, FORBES (Sept. 1 2015), <http://www.forbes.com/sites/dougbandow/2015/09/01/thailand-suffers-as-military-plans-to-extend-control-junta-delivers-oppression-not-happiness/>.

61. Grant Peck & Hrvoje Hranjski, *Thailand’s Military-Installed Legislature Rejects Draft of Constitution*, TORONTO STAR (Sept. 6, 2015), <http://www.thestar.com/news/world/2015/09/06/thailands-military-installed-legislature-votes-down-draft-of-new-constitution.html> [<https://perma.cc/99ZC-NGJF>].

62. *Id.*

63. Martial law was lifted on April 1, 2015. The law that replaced it did little to reassure critics that there are any meaningful checks on the power of the military government now in control of Thailand. Kupa, *supra* note 59.

64. Editorial, *Trickery and False Promises in Thailand*, N.Y. TIMES (April 10, 2015), [http://www.nytimes.com/2015/04/11/opinion/trickery-and-false-promises-in-thailand.html?\\_r=0](http://www.nytimes.com/2015/04/11/opinion/trickery-and-false-promises-in-thailand.html?_r=0).

human rights, the courts may be powerless to assert themselves or otherwise to act independently on such issues.

### B. *Perceptions of the Rule of Law*

Indeed, it appears that public confidence in the courts has been declining in recent years. The World Justice Project, which conducts surveys of perceptions of legal systems around the world has documented a steady decline in both Access to Civil Justice and Effectiveness of Criminal Justice in Thailand over the past five years.<sup>65</sup> The cumulative effect of the decline is significant as, on a scale of 0 to 1.0, Access to Civil Justice fell by 35%, from 0.60 to 0.39, before rebounding in 2015 to 0.46.<sup>66</sup> Even with that late rebound, which reflects positively on the current government (which seized power in 2014), the overall decline is still almost one fourth. Criminal justice effectiveness, however, continued its decline at an unslackened pace after the coup, and has already fallen by 40%, from 0.71 to 0.43 (*see* Figure 4 below).

To put these numbers in context, Thailand's 2010 rating among countries classified as Lower-Middle Income States was, for Civil Justice second only to Colombia and, for Criminal Justice, first.<sup>67</sup> Among East Asia and Pacific States, Thailand was fifth in both categories, behind Singapore, South Korea, Australia and Japan (all High Income States).<sup>68</sup> Worldwide in 2010, it ranked sixteenth and thirteenth respectively in those two categories (Civil and Criminal).<sup>69</sup> By 2015, Thailand had fallen dramatically in WJP rankings: in Civil Justice, it fell from second to twenty-sixth in its income group, and from fifth to tenth in its region.<sup>70</sup> In Criminal Justice, it fell from first to fifteenth in its income group, and from fifth to tenth in its region.<sup>71</sup> Worldwide, over the five years from 2010 to 2015, it fell from sixteenth to seventy-fourth and from thirteenth to fifty-third respectively in those two categories.<sup>72</sup> Of course, the change in rankings

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65. Clearly the blame for this five-year decline cannot be laid solely at the feet of the military government now in power, which has ruled for less than two years. Indeed, as noted *infra*, the rating for Access to Civil Justice has rebounded slightly since the coup.

66. MARK DAVID AGRAST ET AL., WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2010, at 88 (2010) [hereinafter AGRAST ET AL., 2010 RULE OF LAW]; MARK DAVID AGRAST ET AL., WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2011 (2011); DAVID AGRAST ET AL., WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2012 - 2013 (2012); WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014, at 27 (2014); WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2015, at 30 (2015) [hereinafter WORLD JUSTICE PROJECT, 2015 RULE OF LAW].

67. AGRAST ET AL., 2010 RULE OF LAW, *supra* note 66, at 88.

68. *Id.* at 100–01.

69. *Id.* at 119.

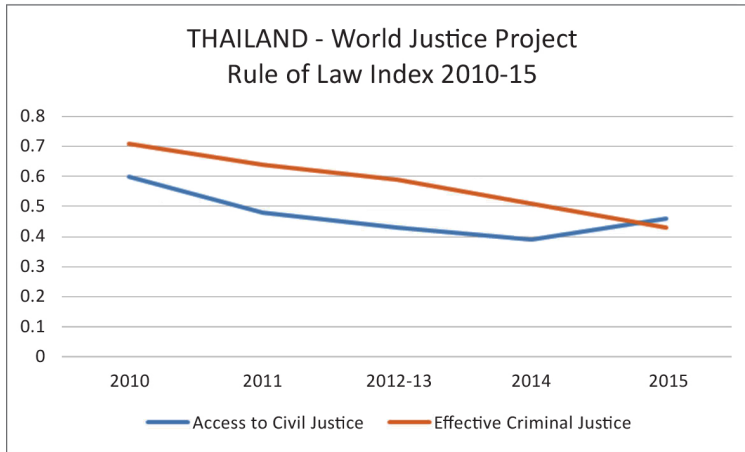
70. AGRAST ET AL., 2010 RULE OF LAW, *supra* note 66, at 88; WORLD JUSTICE PROJECT, 2015 RULE OF LAW, *supra* note 66, at 145.

71. AGRAST ET AL., 2010 RULE OF LAW, *supra* note 66, at 88; WORLD JUSTICE PROJECT, 2015 RULE OF LAW, *supra* note 66, at 145.

72. AGRAST ET AL., 2010 RULE OF LAW, *supra* note 66, at 88; WORLD JUSTICE PROJECT, 2015 RULE OF LAW, *supra* note 66, at 145.



may be misleading, as the decline may represent other countries' improvement as much as Thailand's decline. But the change is dramatic.

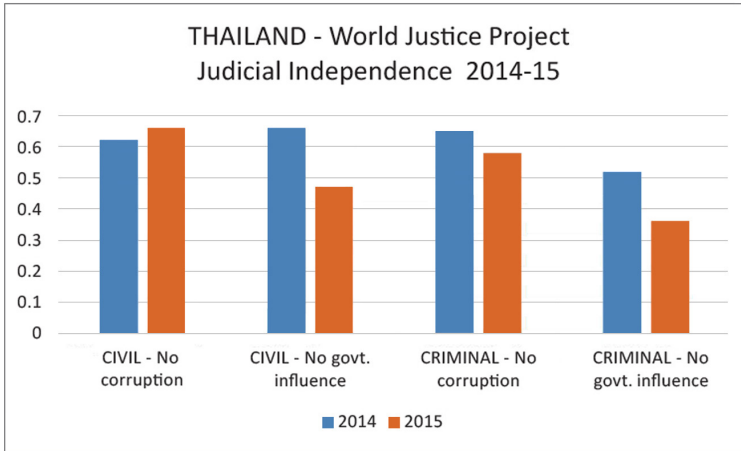


**Figure 4: WJP ratings for the Thai Judiciary 2010–15**

Other categories examined by the World Justice Project (WJP) give mixed messages. WJP's data reveals that the degree to which criminal courts are free from improper influence from the government has declined dramatically in the last year, posing a direct threat to the independence of the judiciary. The measure of freedom from improper government influence in criminal courts declined from .52 to .36 (over 30%) in a *single year*, while perceptions of corruption also worsened, although not as dramatically.<sup>73</sup> The good news is again on the civil side, where perceptions both on freedom from improper influence, and on corruption showed a corresponding improvement.<sup>74</sup> These changes are illustrated in Figure 5 below.

73. WORLD JUSTICE PROJECT, 2014 RULE OF LAW, *supra* note 66, at 185; WORLD JUSTICE PROJECT, 2015 RULE OF LAW, *supra* note 66, at 145. WJP's measure of corruption in the criminal courts also declined 11% from .65 to .58. WORLD JUSTICE PROJECT, 2014 RULE OF LAW, *supra* note 66, at 185; WORLD JUSTICE PROJECT, 2015 RULE OF LAW, *supra* note 66, at 145.

74. Freedom from corruption increased from .62 to .66, and freedom from improper government influence increased from .35 to .47. WORLD JUSTICE PROJECT, 2014 RULE OF LAW, *supra* note 66, at 185; WORLD JUSTICE PROJECT, 2015 RULE OF LAW, *supra* note 66, at 145.



**Figure 5: WJP ratings for the Thai Judiciary 2014–15**

The decline in judicial independence that we see on the criminal side is exactly what we would expect from the uncertain state of affairs, and the fact the country is going through a constitution-less transition. The fact that civil justice appears to be improving is surprising, but certainly a cause for hope, that the judges—at least on the civil side—may be asserting both their integrity and courage, maintaining independence and the rule of law despite the political upheaval.

### C. *Informal Survey Results*

Participants in the September 29, 2015, seminar hosted in Bangkok by the Thailand Institute of Justice, which included over 80 interested persons, had a chance to weigh in with their own perceptions, using anonymous “clickers.” The results, all of which are reported in Annex A, are a little hard to interpret—it was not, after all, a representative sample, or a scientifically controlled survey—but they are worth sharing for what they do reveal. About half the participants were employed in the public sector (courts, Office of the Attorney General, Ministry of Justice, and other government agencies). The remainder of the group included representatives of non-governmental organizations, students, professors, and other members of the public. The one thing that they all had in common was sufficient interest in the issue of judicial independence and accountability to attend the seminar.

Nearly half (49.4%) of the respondents felt that the Thai judiciary has too much independence, with 41% saying that the courts enjoy an appropriate level of independence. This is a curious result, given that in the very next question, 34% indicated that the most serious problem the Thai judiciary faces is intervention by political forces (19.5%) or other

special interests (14.6%). Such interference with judicial function is, by definition, a problem of inadequate independence. But the perception that there is too much independence is consistent with the response to a later question showing that about half (51.1%) felt that there was inadequate accountability, “because the Thai judiciary seems untouchable these days.”<sup>75</sup>

The “too much independence” response may be explained, perhaps, by the fact that almost half (48.2%) felt that the judiciary is out of touch with the people and do not understand how ordinary people feel. This degree of disconnectedness may explain the sense that the judiciary is too independent. Nonetheless, a majority felt that a good system of accountability would enhance the fairness and neutrality of the judiciary (54% saying “definitely yes” and 19% agreeing “maybe a little”).<sup>76</sup>

Few participants saw a serious conflict between judicial independence and accountability, with almost three quarters (73.5%) saying that it is possible to strike an appropriate balance between the two.

There was general concern among the participants (74.5% of them highlighting it) that giving judges broad authority to punish contempt of court may stifle criticism of the courts, and make them less accountable. Almost all of the participants (93.1%) acknowledged that the Supreme Court is capable of making mistakes, although it is hard to read too much into that statistic. It might indicate a lack of confidence in the Court if the question had not been phrased to emphasize that “nobody is perfect.”

The most serious threats to judicial fairness and efficiency were identified as (a) lack of moral courage (34%), (b) political power (26.2%), and (c) money (23%). All of these indicate potential issues with judicial independence.

Of particular interest is the impact of the legal tradition of issuing judgments in the name of the king. As rule of law commentators have long argued, culture and legal traditions play a very large role in establishing the rule of law, in terms of influencing both the behavior of legal actors and the perceptions of the public.<sup>77</sup> Overwhelmingly, respondents

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75. See *infra* Annex A.

76. In the experience of the author, doing judicial reform in various countries around the world, it is common for people frustrated with an underperforming judiciary to wish for stronger accountability mechanisms to police the judiciary. This notion is appealing in the abstract, but gets far more complicated when decisions have to be made about who will be empowered to police the judiciary. As discussed *supra*, it is enormously difficult to establish a body that can be trusted with such a task; obviously if that power is wielded by a political strongman, or a politically charged body, or anyone vulnerable to corruption, the accountability mechanism may accomplish very little indeed.

77. David Pimentel, *Culture and the Rule of Law: Cautions for Constitution-Making*, 37 FORDHAM INT’L L.J. ONLINE 101, 103 (2014) (“[S]cholars of comparative law . . . study how the varying legal systems around the world are shaped by the legal *tradition* of each place. A ‘tradition’ runs far deeper than a ‘system,’ of course. Systems can be changed with simple constitutional, or even legislative, reform. But a tradition is the product of history, of generations of experience with legal norms

(87.5%) felt that this tradition has an impact on judicial independence, with 75% believing it has at least a moderate impact, and 56.3% believing it has “very much” impact. What is not clear from the survey is what that impact on judicial independence is. At first blush, it can be salutary, as this couching of a judicial decision invokes royal authority and invokes the respect afforded by the culture to the king. This could bolster the independence of the judiciary, to rise above petty politics, ignore efforts to flex political muscle, and act with the dignity that the monarchy bestows upon its judges. On the other hand, invocation of the name of the king may foster the perception that the judiciary derives its authority from a higher power, and is therefore not subject to the checks and balances of the executive and legislative branches. An overly emboldened judiciary may become a political player in its own right, overstepping the bounds normally set for the judicial branch of government, and misusing its independence to pursue a political agenda of its own.

Concerns along these lines were raised in Turkey, where the judiciary was sometimes perceived to be pursuing its own political agenda—one of extremely strict national secularism—and frustrating the political branches in their efforts to give greater respect to the free exercise of religion.<sup>78</sup> Of course, the judiciary is supposed to be the non-political branch of government, and because it has no particular constituency other than Justice herself, it cannot be carrying out any political mandate beyond that of simply doing justice in the cases that come before it, and enforcing the mandates of the law.<sup>79</sup> In the end, the Turkish Constitution was amended to restructure the judiciary and dismantle the leadership of the third branch that was pursuing this agenda.<sup>80</sup>

There is insufficient information to conclude whether the judiciary is playing such a role in Thailand as well. If so—and the survey responses suggest that this *could* be the case—the judicial independence pendulum may need to swing back a bit, reining in courts and judges who may be overreaching their role and authority. In such a case, accountability mechanisms may need to be crafted to address such issues, but until there’s a constitution in place, it is hard to say what the courts’ role and authority will be, and therefore difficult to find or even define what may constitute judicial overreaching.

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and dispute resolution mechanisms.”) (citations omitted); *see also* RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* 98–107 (2012).

78. Mustafa Akyol, *The Next Battle for the Turkish Judiciary*, AL-MONITOR (Sept. 2, 2014), <http://www.al-monitor.com/pulse/originals/2014/09/turkey-judiciary-battle-gulen-akp.html#> [<https://perma.cc/H9J3-CT6N>].

79. Those in the Turkish judiciary targeted by the constitutional amendments would insist, of course, that the national secularism (Kemalism) they defended and enforced was called for in the Turkish constitution, and that they were simply enforcing the law.

80. The government pushed through constitutional amendments in 2010 designed to “democratize” the judiciary, and effect a moderation of the courts’ approach to enforced secularism. Akyol, *supra* note 78.

## CONCLUSION

These are difficult times for the Thai judicial system and the Thai people. As long as the country is without a constitution, the courts will be seriously handicapped in playing their critical roles of providing fair and impartial adjudication, and of protecting human and other legal rights. Judicial independence and accountability are key issues to be considered as the Constitution is drafted, to ensure that the Thai judiciary of the future will be equipped to function effectively.

In considering these issues, it is important to keep in mind that independence and accountability in the judiciary are simply means to an end, and that the ultimate objective is fair and impartial justice. The most important factor in producing that is in the character of the judges themselves: the courage they demonstrate in doing justice even when it is unpopular with powerful people, and the integrity that they show to resist corruption and remain true to core principles. When judges demonstrate such qualities, they should be supported and protected. And the selection of new judges should screen candidates for these qualities in particular.

When the constitution is in force, when checks and balances on political power are in place, the stage will be set for a calming of the turmoil in Thailand. But that can only happen if the judiciary is sufficiently empowered and independent to play that constitutional role while showing both sufficient integrity to avoid corruption and sufficient restraint not to overreach into the political realm. In other words, the individual judges must exhibit both courage *and* integrity in their rulings. The structure of the judiciary—the mechanisms for protecting the judges, and for policing them—will be important in facilitating that result, restoring public confidence in the legal and political system, and ultimately strengthening the rule of law in the Kingdom of Thailand.

## ANNEX A

**VOTING RESULTS FOR THE SEMINAR ON BALANCING JUDICIAL  
INDEPENDENCE AND ACCOUNTABILITY**

Thailand Institute of Justice  
Landmark Hotel, Bangkok, Thailand  
September 29, 2015  
(done with anonymous clickers)

<b>First Session: Voting to explore our seminar participants' opinions on judicial independence</b>		
1. From which organization do you come? (65 votes)		
	a. Court	20.0%
	b. Office of the Attorney General—Public Prosecutor Office, Police, Department of Special Investigation (DSI)	15.4%
	c. Ministry of Justice	9.2%
	d. Other Government Agencies	9.2%
	e. NGOs / Independent Organizations	6.2%
	f. Academic / Professor	6.2%
	g. Collegian / Student	9.2%
	h. Normal People	21.5%
	i. Special People	3.1%
2. How will you evaluate your level of knowledge about judicial independence and accountability before the seminar? (79 votes)		
	a. Very much	3.8%
	b. So-so	51.9%
	c. Very little	44.3%
3. What is your opinion on judicial independence in Thailand? (83 votes)		
	a. The Thai judiciary system has proper independence.	41.0%
	b. The Thai judiciary system has too much independence.	49.4%
	c. Thai judiciary system lacks independence.	9.6%
4. In your opinion, which of the following is the greatest concern for the Thai judiciary? (81 votes)		
	a. Lack of good management	13.4%
	b. Lack of public confidence	6.1%
	c. Lack of transparency	9.8%
	d. Lack of external accountability	22.0%
	e. Lack of interaction/involvement with the people	11.0%
	f. Intervention by political power	19.5%
	g. Intervention by certain kinds of special power/influence	14.6%
	h. There is no problem with the Thai judiciary system. Problems in the Thai criminal justice system are usually from other state agencies such as police, public prosecutors, independent entities, etc.	3.7%
5. In your opinion, which court is most trusted/reliable? (81 votes)		
	a. The Court of Justice, which includes the Criminal Court, Civil Court, District Court, Labor Court, and Juvenile and Family Court	27.2%
	b. The Administrative Court	14.8%

	c. The Constitutional Court	6.2%
	d. Kaifeng Court <sup>81</sup>	22.2%
	e. Not sure	29.6%
6. As an ordinary citizen, do you feel you have ownership of your judiciary? In other words, do you really care if your judiciary system is in good shape or not? (83 votes)		
	a. I very much care if our Thai judiciary is in good shape because they have always been the people's last reliable resource. We believe in them since we can always depend on them.	28.9%
	b. So-so	22.9%
	c. No because they have no interaction/involvement with the people. Therefore, they do not really understand how we feel.	48.2%
	d. No comment / I have no interest in Thai judiciary system	0.0%
7 Considering the topic of this seminar, do you think there's any contradiction between judicial independence and judicial accountability? (83 votes)		
	a. Definitely yes, because you could only have one or the other.	2.4%
	b. No, I think we can strike the balance between the two.	73.5%
	c. Not sure, I don't know much about judicial independence and accountability.	24.1%
<b>Second Session: Voting to explore our seminar participants' opinion on judicial accountability</b>		
1. In your perception, what is the present level of judicial accountability in Thailand? (43 votes)		
	a. Too much accountability; it affects judicial independence.	6.7%
	b. Too little judicial inspection; the Thai judicial is seemingly untouchable now.	51.1%
	c. Proper.	26.7%
	d. Not sure.	15.6%
2. You think scope of role of the Thai Judicial Commission is . . . (43 votes)		
	a. Too broad	12.2%
	b. Too little	28.6%
	c. Proper	30.6%
	d. Not sure	28.6%
3. Do you agree with the restructuring of the Office of the Judicial Commission by having outsiders as members of the Commission as well? (55 votes)		
	a. Agreed	58.0%
	b. Not agreed	30.0%
	c. Not sure	12.0%
4. Do you think broad application/interpretation of the offence of contempt of court would cause any effect to judicial accountability? (55 votes)		
	a. Not sure	7.3%
	b. No	18.2%

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81. One of the most famous courts in the internationally well-known Chinese historical literature, Bǎo Zhēng. This court is fictitious and has nothing to do with the real justice system in the modern world, but if a significant number of people vote for this one there is then an implication on the participants' perception of Thai courts.

	c. Yes because it may prevent criticism on court ruling that may be faulty	74.5%
5. Do you think it is possible for the Supreme Court to make a judgement by mistake and not exactly according to the applicable law? (58 votes)		
	a. Yes, nobody is perfect	93.1%
	b. No, since all judges are neutral and very good at what they do	6.9%
6. Do you think the jury system has any conceptual/ideological linkage to the issue of judicial accountability? (59 votes)		
	a. No.	11.9%
	b. Yes, directly.	42.4%
	c. Somehow yes, but quite indirectly.	32.2%
	d. I don't know the answer because I don't know what a jury system is.	13.6%
<b>Third Session: Voting to explore our seminar participants' opinion on what could be other relevant crucial factors for the judicial role</b>		
1. Which of the following factor you think would affect judicial fairness and neutrality the most? (61 votes)		
	a. Political power	26.2%
	b. Money	23.0%
	c. Certain kinds of special power/influence	9.8%
	d. Public pressure	6.6%
	e. Lack of judicial moral courage	34.4%
2. What is your opinion on the judicial role in the past Thai political crisis? (62 votes)		
	a. They have been involved creatively by helping to find solutions for society.	11.3%
	b. Their involvement might seem biased to some people.	30.6%
	c. It must be considered separately on the role of each court whether it's Court of Justice, Constitutional Court or Administrative Court	53.2%
	d. The judiciary stayed very neutral. It's actually the society and politics that tried to involve them.	4.8%
3. When the judiciary has a high level of independence but not enough internal or external accountability, how would it affect the judicial role and power? (62 votes)		
	a. Such a situation will yield a negative impact to the judicial role and power because it opens it to abuse of power and misconduct.	41.9%
	b. Such a situation will yield a positive impact to the judicial role and power because the judiciary will be protected against bad influences.	37.1%
	c. There should be no impact because judges normally know how they should behave and perform their duties according to their morality and code of conduct.	11.3%
	d. Not sure	9.7%
4. Do you think the traditional perception that the Court gives judgements in the name of the King has any relation to judicial independence in Thailand or not? (64 votes)		
	a. Yes, very much.	56.3%
	b. Yes, moderately.	18.8%
	c. Yes, but very little.	12.5%
	d. Not sure.	12.5%



5. Do you think if Thai judicial system is substantially under checks by external mechanisms and truly accountable to the people, it would enhance the fairness and neutrality of the judicial power or not?		
	a. Definitely yes.	54.0%
	b. Maybe just a little.	19.0%
	c. No / I don't think so.	6.3%
	d. I think Thai judicial system is already fair and neutral.	19.0%
	e. Not sure.	1.6%