[Global Corruption Report 2007] Lessons Learned about Fighting Judicial Corruption

6 Lessons learned about fighting judicial corruption

Theories as to how to combat corruption in the judiciary have varied from decade to decade. New selection systems, higher salaries, guaranteed tenure, ethical training, courtroom automation and improved monitoring and discipline have all been tried at one point or another – with variable rates of success. Linn Hammergren compares the judicial reform of four Latin American countries since the 1980s, focusing on the contrasting roles of Supreme Court and judicial council as the organising power behind the judiciary. Oluyemi Osinbajo describes efforts to rebuild the integrity of the judiciary in Lagos state after 30 years of neglect under Nigeria's military dictators. In China, the authorities are increasingly aware of the need for an independent and apolitical justice system to meet the demands of the 21st century, but are still uncertain of how much power to cede. Finally, Fabrizio Sarrica and Oliver Stolpe examine attempts by the UN Office on Drugs and Crime to strengthen the rural justice sector in Indonesia, Nigeria and South Africa.

Fighting judicial corruption: a comparative perspective from Latin America

Linn Hammergren[1]

When Latin America's most recent judicial reform movement began in the 1980s, one complaint directed at courts and judges was corruption. Many citizens believed, rightly or wrongly, that judges sold their decisions or traded them against future favours from those with influence over their careers. They believed that 'free' justice came with a price tag. Other complaints may have been more frequently cited such as political intervention, the failure to protect basic human rights and outright collusion with authoritarian governments, but these issues also often related to corruption. For instance, where governments intervened in the judicial selection process, judges were chosen for their partisan connections or 'flexibility', rather than on merit, and therefore they started their careers with little reason to suspect that honest conduct mattered in furthering their careers. Lack of secure tenure (even in systems with formal judicial careers) put additional pressures on judges and encouraged them to act opportunistically during their unpredictable stay in office.

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The state of judicial corruption had earlier origins and was exacerbated under the authoritarian regimes of the 1970s and 1980s, but the subsequent democratic opening did not necessarily resolve it, rather in some cases the flourishing of democracy actually aggravated it. Incoming elected regimes often replaced a large portion of the bench, disregarding constitutional or due-process niceties, and sometimes with judges selected for their partisan leanings. New, mass-based parties seeking ways to attract followers sometimes treated the courts as just another place for patronage appointees. Greater independence for otherwise unreformed judiciaries led to the creation of internal mafias, resulting in lessened independence for lower-level judges. In several countries, members of high courts or councils divided up the remaining judgeships so that each could name his or her allies and protégés to lower positions.[2] With the emergence of organised, often drug-based, crime, these internal mafias were occasionally infiltrated by criminal elements. Judges also fell victim to the law of *plomo o plata* ('lead or silver') when insufficient protection left them exposed to physical threats. Finally, as courts began to exercise more political weight and to check unconstitutional programmes and policies (or became more active in trying corruption cases), the stakes were raised and a new round of handpicked justices appeared. In Peru, Venezuela, Argentina, Ecuador, Paraguay, and Bolivia,[3] national presidents forced out justices or entire Supreme Courts, or provoked mass firings of the bench, often using corruption as a pretext, but reputedly out of a desire to protect their personal and political interests. In short, democracy made the judiciary more important, but it also increased the motives and means for corrupting judges.

As judicial reform programmes emerged throughout the region from the early 1980s onwards, combating corruption was less frequently an explicit goal. Donors were chary of fomenting bad relations with the courts; governments may have avoided the topic for similar reasons; and judges were understandably reluctant to mention it. Nonetheless, many of the usual reform measures – new selection systems, higher salaries and budgets, real judicial careers with guaranteed tenure, training, courtroom reorganisation and automation, and law revision – were also seen as partial solutions. The connection is obvious in the case of selection, salaries and careers, but even new laws and methods for processing cases were believed to reduce vulnerabilities. For example, the introduction of oral proceedings was said to increase transparency, while better courtroom administration would reduce the chances for manipulating files (a problem as often attributed to court staff as to judges). More recently, ethics codes and related training were added as the most explicit response to any problems.

The explicit and implicit remedies have had an impact, and in several countries appear to have significantly reduced some of the most egregious forms of corruption. El Salvador's judicial council, which screens candidates on merit-based criteria, has improved the performance

2 The most famous example is Venezuela's 'judicial tribes' in Rogelio Pérez Perdomo, 'Reforma judicial, estado de derecho y revolución en Venezuela', in Luis Pásara, ed. *En Busca de una Justicia Distinta: Experiencias de Reforma en América Latina* (Lima: Consorcio Justicia Viva, 2004). Similar practices have been remarked in other countries, including Mexico, Paraguay, Nicaragua and Bolivia.

3 Alberto Fujimori reintroduced the practice in Peru following his 1992 *auto-golpe*. The most recent example was Evo Morales' successful effort in early 2006 to force the resignation of the chief justice of Bolivia and other court members because of allegedly corrupt or unconstitutional actions.

of justices of the peace. Formerly, these officials were little more than representatives of the major parties, and thus commonly indulged in a variety of suspect practices. The introduction of entrance examinations in Argentina, Guatemala, Peru, and several other countries is said to have raised the quality of new judicial appointees and eliminated candidates most likely to adopt undesirable behaviour. Invitations for civil society and citizen comments on candidates to Supreme Courts in Argentina, the Dominican Republic, Ecuador, Paraguay and Peru have at least revealed some questionable backgrounds, although those ultimately responsible for selection have not always taken this into account. Where adopted, the publication of asset declarations, performance statistics and judgements is said to have provided disincentives for rent seeking. Such simple measures as the creation of centralised document-reception offices and the random assignment of cases likewise reduce opportunities for matching a bribe giver with a bribe taker.

Nonetheless, complaints about corruption continue unabated. Public opinion polls conducted throughout the region since 1996 actually show declines in public confidence in the justice sector.[4] The polls' significance has been challenged. Critics argue that:

- Greater attention to the topic in a more open environment simply elicits negative assessments of what has always been
- The positive trend toward identifying and prosecuting corrupt judges has likewise fed public awareness and complaints
- Courts may be victims of confusion as to where the problems actually lie (with judges, prosecutors or police)
- There has been a general decline in public confidence in all government institutions.

Still, the fact that judiciaries often occupy the lowest public rankings (only slightly above political parties and politicians) and some fairly firm evidence of judicial misbehaviour in many countries suggest the need for more direct action.

Because the reforms have generally increased judicial independence, the resulting challenge is tricky. Direct, often unconstitutional, executive and legislative intervention would be a step backward. It sets a bad precedent and may produce a bench no better than the one it replaces. Had reformers accompanied independence-enhancing measures with mechanisms to increase institutional transparency and accountability, some problems might have been avoided. Convincing judges to adopt them after the fact may be extremely difficult and, to be fair, the issue of judicial accountability is an increasingly thorny one in all societies. What looks like simple transparency to one observer (e.g. the publication of court statistics or judgements) may appear to others as a source of undesirable pressure on judges. It also should be recognised that while judicial corruption is arguably more harmful to democratic development than is true of other public agencies,[5] courts are products of their political environment. Where corruption is rampant, judges will not remain untouched. If Chile and Costa Rica's courts receive better

4 Research by Justice Studies Center of the Americas in Santiago, Chile shows slight improvements across the region for 2004–05, but rarely reaching the 1996 levels. See www.cejamericas.org

5 J. Clifford Wallace, 'Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives', *California Western International Law Journal*, 28 (2) (1998).

ratings than those of Haiti, Honduras or Nicaragua, a good part of the explanation originates in the overall levels of corruption in the five countries. Still, the fight against corruption must begin somewhere and there are instances where the courts have done better than other public entities. To demonstrate and explore this point, the next sections examine two paired cases – that of Argentina and Brazil, and of the Dominican Republic and Paraguay – as examples of the different results attained by countries with objectively similar situations.

Argentina and Brazil

These federal, middle-income countries have relatively developed legal and judicial systems featuring secure tenure, an emphasis (more recent in Argentina) on merit appointments, high budgets and salaries, and an active legal community that includes the private bar. Apart from certain constitutional changes (in 1994 in Argentina, and in 1988 and 2004 in Brazil), neither has undertaken a comprehensive reform in recent years, depending instead on highly incremental, decentralised modernisation programmes. Before Argentina's economic and political crises of 2001–02, its rule of law rating on the World Bank index was higher than Brazil's (see table below). Its subsequent fall on this and other indices may be excessive, but few would question Argentina's historically greater problems with judicial corruption. If current scores exaggerate the problem, those prior to 2000 undoubtedly underplayed them. In both countries, however, judicial integrity and other performance indicators vary widely at the sub-national level; each has state or provincial judiciaries lying far below (or above) the national average. Some of these sub-national judiciaries have advanced further in introducing more complex reforms, although usually in one area only (e.g. criminal justice or efficiency), rather than across the board.

World Bank Rule of Law Ranking Among Selected Countries[6]

Country	Data set	Percentile rank (0–100)[7]	Standard deviation	Number of surveys/polls
Argentina	2004	28.5	0.12	15
	1996	65.7	0.15	10
Brazil	2004	46.9	0.12.	15
	1996	46.4	0.15	10
Dominican Republic	2004	38.2	0.13	12
	1996	33.7	0.19	5
Paraguay	2004	13.5	0.14	12
	1996	34.3	0.19	6

6 Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996–2004* (Washington D.C.: World Bank 2005).

7 Percentile rank refers to percentage of countries lower in the ranking (perceived as more corrupt). While the worldwide list has expanded since 1996, this will not affect the relative standing of the countries included here.

The global differences can be attributed to the Brazilian national and state judiciaries' greater functional independence or, put in other terms, a longer Argentine tradition of political interference at federal and provincial levels. Since Juan Perón's replacement of Argentina's federal Supreme Court in 1946, few governments have resisted the temptation to tinker with its composition.[8] In 1991, President Carlos Menem expanded the Court from five to nine members to create his 'automatic majority'. Taking advantage of a new procedural code, he also packed the federal criminal courts. Many of his appointees were criticised for inadequate qualifications and their performance in office.[9] Even under military dictatorship (1964–85) Brazilian leaders avoided such measures, finding other ways to prevent judicial intrusion in their policies.[10] In Argentina, interference was facilitated by the executive's legal role in appointing judges, a process managed at the federal level until 1998 by the Ministry of Justice. The shift to a judicial council has only partly remedied the problem:[11] the executive still nominates Supreme Court justices for senate ratification and the council, which vets other candidates, has a majority of non-judicial members. An executive-sponsored change to the council's organic law in February 2006 is widely perceived as opening the way to more intervention because it will give the executive direct or indirect control over the appointments of a larger portion of the council's now-reduced membership. (See 'Corruption, accountability and the discipline of judges', page 44.) In Brazil, there is a longer tradition of judicial management of appointments, except for the constitutional court and the national and state appellate courts, but even for the latter most appointees must come from within the career judiciary.

A further difference is that under Argentina's prior and current federal systems, disciplinary and other career management (including that for staff) does not lie with the Supreme Court but with an external body. Brazil leaves such matters in the hands of the high courts, as regulated – unlike Argentina – by national law. While practices in the Argentine provinces resemble those in Brazil, gubernatorial selection of high court judges undercuts their control of the lower bench. Moreover, Brazil has a well-developed system for monitoring first-instance judges in particular. Its *corregidorias* track judicial output, complaints and overall professional performance, using the results for disciplinary measures and promotions. Although this type of top-down control has been criticised elsewhere as a means of influencing lower judges' decisions, it does not appear to have been used to this end in Brazil, probably because the standards are largely objective.[12] Brazil's federal public ministry has also investigated judges

8 Gretchen Helmke, *Courts under Constraints: Judges, Generals and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005).

9 'Menem's justices' had 40 complaints registered against them by 2001. All 12 criminal judges in Buenos Aires have outstanding complaints and are widely criticised for irregular practices, as are many federal judges in the interior. See Pablo Abiad and Mariano Thieberger, *Justicia Era Kirchner: La Construcción de un Poder a Medida* (Buenos Aires: Editorial Marea, 2005).

10 In this sense Brazil's experience resembles that of Chile, whose military government (1973–90) kept judges on a short leash by limiting their powers and directing their judgements, but otherwise leaving the bench intact.

11 The council was constitutionally created in 1994 but not physically formed until 1998.

12 Younger judges interviewed did suggest a dampening effect on 'eccentric' lifestyles, but not on the content of their decisions. Quite the contrary, creative opinions are sought after as a means of demonstrating intellectual ability. The impact on juridical security is not entirely positive.

suspected of corruption,[13] compensating for what many believe is the courts' preference for easing these individuals into early retirement or positions where they can do less harm. As this suggests, Brazil's system is hardly perfect,[14] but its judiciary does try to control misbehaviour because of the threat it poses to institutional self-governance – a threat partially realised in 2004 when the executive successfully promoted the introduction of a national judicial council with some non-judicial members.

Dominican Republic and Paraguay

These two low-middle income countries share a history of problematic governments (including relatively recent periods of extended authoritarian rule), high levels of corruption, and weak institutions in the judiciary and public sector as a whole. Both initiated judicial reforms in the early 1990s, including replacement of their Supreme Courts, changes in the appointment process, higher judicial budgets and salaries, automation of case management and new criminal justice procedures.[15] They currently spend similar portions of their budgets on the courts, although far less than Brazil and Argentina. Salaries are also lower, especially in Paraguay where judges earn roughly half the Dominican amount.[16]

In Paraguay, the key reform element was the creation of a judicial council to manage lower appointments and a separate disciplinary board. Each includes representatives from the judiciary, legal community and other branches of government. Unfortunately, both are highly politicised and are believed to encourage, rather than combat, corruption. The council's 'merit' selection system relies heavily on a highly subjective personal interview and there are strong indications that candidates lobby individual council members to enhance their chances. The country lacks a judicial career, but judges renewed twice in their positions receive permanent tenure. Alleged Supreme Court corruption produced another executive-led replacement of nearly all members in 2004; the congressional opposition is currently threatening several justices with impeachment for an allegedly unconstitutional ruling that favoured the president's interests. As shown in the table, perceptions of corruption have worsened substantially since 1996. This is not surprising given the performance of the disciplinary board and council, and the Court's distraction with its own problems.

13 See Frederico Vasconcelos, *Juízes no Banco dos Réus* (São Paulo: Publifolha, 2005), for a review of recent scandals.

14 For discussions of some of these imperfections, especially regarding delays, unpredictability and an insular outlook, see Megan J. Ballard, 'The Clash between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil', in *Berkeley Journal of International Law* 17 (2) (1999); William C. Prillaman, *The Judiciary and Democratic Decay in Latin America* (Westport: Praeger, 2000); and World Bank, *Making Justice Count*: *Measuring and Improving Judicial Performance in Brazil*, Report no. 32789-BR (Washington D.C.: World Bank, 2000).

15 See World Bank, *Dominican Republic: Public Expenditure Review*, Report no. 23852 DO (Washington, D.C., 2003) and World Bank, *Breaking with Tradition: Overcoming Institutional Impediments to Improve Public Sector Performance,* Report no. 31763-PY (Washington, D.C., 2005) for brief discussions of the reforms' contents and results.

16 Figures on budgets and salaries come from a variety of official sources and are on file at the World Bank. One reason for Paraguay's lower salaries is its higher judge-to-population ratio and larger number of support staff. Of course nominal salaries should be compared with care given differences in the cost of living. Additionally, until a recent devaluation Paraguayan salaries had double their current value.

In the Dominican Republic a seven-member council, headed by the national president and with representatives from the legislature and judiciary, was formed to select Supreme Court members. The Supreme Court selects the other judges and supervises their career development. The first Court chosen by this method staged a renewal of the bench, requiring seated judges to compete with outsiders for tenured positions. It is generally agreed that this merit-based process improved the quality of the bench and temporarily decreased corruption. There are, however, complaints that bad practices are reappearing and that recent Supreme Court appointments have been highly politicised. The Dominican Supreme Court is using automated systems to track judicial performance, something not yet accomplished in Paraguay. It also has begun to focus on court staff, a project that was prevented in Paraguay because the Paraguayan courts' poorly qualified and often corrupt staff enjoy permanent tenure. In the Dominican Republic, as in Paraguay, a further problem is an unreformed prosecution body. In both countries, there is no prosecutorial career path and considerable external interference in appointments. In Paraguay members are chosen by the judicial council and by the executive in the Dominican Republic.

Review

The above discussion has focused on judicial appointments and career management because these are increasingly seen as the key to reducing corruption and improving other aspects of performance. New laws, ethics codes, training, improved court administration and automation can contribute to an effective, clean system, but qualified and motivated staff (not just judges) is the essential element. To this end, appointment systems have been modified, and responsibility for judicial selection and career management shifted from its traditional location, often to external councils. As indicated above and further demonstrated by other examples, the results have often been disappointing.

The introduction of judicial councils has not been an absolute disaster, but the few successes (El Salvador) are outweighed by the clear failures (to which Bolivia and Ecuador can be added) and several examples (Peru, Colombia) that have had ambiguous results.[17] There are certainly Supreme Courts that have done just as badly (Nicaragua, Honduras), using their powers to install their protégés and control their further actions. However, where courts have taken fighting corruption and improving performance to heart, they seem to do better.[18] Chile, Costa Rica and Uruguay – the region's 'most honest' judiciaries – are prime examples although, unlike Brazil and the Dominican Republic, they had the advantage of lower national levels of corruption. Courts more successful in fighting judicial corruption face other problems. Brazil and Costa Rica are notorious for slow, if relatively honest, justice; the Dominican Republic's possible backsliding suggests other limits to the approach. Two further caveats should be kept

17 See Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Washington D.C.: Carnegie Endowment for International Peace, Rule of Law Series, no. 26, 2002). Colombia's council suffers from difficult relations with judges and the executive, and also faces legal limitations regarding its ability to control its own administrative offices.

18 See Wallace (1998), op. cit., for a judge's argument that control of corruption must be left with the judiciary.

in mind. First, courts which have successfully made inroads in combating corruption have done so by changing their own practices – strengthening their administrative offices and delegating more responsibilities to them; creating internal councils or bodies to oversee career management; and introducing transparent processes and standards for appointments and promotions, thus undercutting their own ability to exercise arbitrary control over the lower bench. Second, the most successful courts have enjoyed longer periods of autonomous development – at the very least what one Chilean author calls 'bounded independence' – or political leaders' agreement to restrain their interventions in internal operations and especially in judicial career management so long as judges respect the implicit limits on interfering with government programmes.

The real question then is how the less favoured countries – those that have left career management with an unreformed court or transferred it to a problematic council – can advance in combating internal corruption and improving overall performance. A first answer is that the courts and councils cannot do it alone. Especially in these difficult circumstances, pressures and support for reform must come from political and civil society. In the Dominican Republic, an alliance of economic actors and NGOs pushed for change. Brazil's new external council was first headed by a constitutional court president with a political background and contacts. Despite the council's uncertain mandate, he promoted measures a career judge might avoid – an immediate end to judicial nepotism (relatives holding positions 'of confidence' for which they had not competed under transparent rules); reduction of excessive salaries and pensions; and the mandatory provision of performance statistics to the national data base – thus setting a precedent for the council's role in enforcing standards.[19] A second answer is that for courts or councils to respond to these pressures, they need a clear message from non-judicial stakeholders and the freedom to act upon it. Their freedom can be obstructed in various ways: by the threat of politically motivated removal (Argentina, Bolivia, Paraguay and Venezuela for the courts; Colombia for the council, currently fighting proposals for its elimination); by legal impediments (Colombia, Paraguay); and by additional political tinkering in court or council affairs (Argentina, Ecuador, Nicaragua, Venezuela and, most recently, the Dominican Republic). The final answer is that where the response is not forthcoming, and replacing the court or council seems inevitable, this should be done in the most transparent and participatory manner possible. External, usually executive, interference with a 'notoriously' corrupt judiciary is often popular, but usually makes things worse. Where preceded by broad-based discussions of the problems to be resolved and the necessary remedies, additional, self-interested manipulations are more likely to be contained and the new body will have a greater chance of adequately applying the many other measures needed to improve all aspects of judicial performance.

These other measures are important but their success, it is argued, rests on adequately selected and supervised judges and staff. That the various silver bullets (including the judicial favourite of higher budgets and salaries) have produced such uneven results is not because they are

19 Nepotism was already illegal but, like the excessive salaries, had been a rule that judiciaries chose to ignore.

ineffectual, but rather because their impact hinges on their being directed to producing the desired ends. That direction can come from an external council, but it is more easily assumed by a court that understands that its mandate includes ensuring that the entire judicial organisation operates according to the highest standards, including those related to basic honesty and fairness; and that its greater independence requires that it operate in a more transparent fashion, explaining and justifying its actions both to internal members and to the citizenry.

Sub-national reform efforts: the Lagos state experience

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Corruption is generally regarded as pervasive in Nigeria, affecting many of its institutions. The judiciary is no exception. Significant efforts have been made in Lagos state to tackle corruption in the judiciary, as this article documents, but in Lagos the battle is not over, and many other judiciaries have yet to implement anti-corruption initiatives.

The problem worsened during Nigeria's 30 years of military rule, one of the worst features of which was the weakening of all the justice institutions. In 1994 General Sani Abacha's regime established a panel of inquiry, headed by the renowned retired Supreme Court Justice Kayode Eso, to look into the activities of members of the judiciary. The panel recommended a series of reforms aimed at curbing judicial corruption. The panel also indicted 47 judges for alleged corruption, incompetence, dereliction of duty, lack of productivity or corrupt use of *ex parte* orders. The military regime failed to implement the recommendations of the Kayode Eso panel.

The civilian regime, which took power on 29 May 1999, set up another panel to review the work of the Kayode Eso panel. Following the report of the second panel, some of the indicted judges were either dismissed or compulsorily retired. The 1999 constitution created a central agency, the National Judicial Council (NJC), to tackle one potential aspect of judicial corruption – the appointment and removal processes. The NJC was charged with recommending candidates for the higher bench at federal and state levels, subject to senate confirmation in the case of the Chief Justice of Nigeria, Supreme Court justices, president of the court of appeal and the chief judge of the federal high court.[2] State governors appoint state judicial officers on the recommendation of the NJC. The NJC acts on the recommendation of the state judicial service commission (JSC), though this is subject to confirmation by the state assembly in the case of the chief judge of a state and the heads of *sharia* and customary appeals

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2 Sections 231, 238 and 250 of the 1999 constitution.

courts.[3] Vacancies are not advertised and, although some states have competitive examinations for short-listed candidates, appointments in most jurisdictions are not merit-based.

Contributing to the potential for corruption on the bench is judges' poor remuneration. There has been some improvement in judges' salaries, but this is generally with regard to the higher bench. Some states have improved salaries in the lower bench, but pay remains very low in most cases.

A blueprint for change

Lagos state is Nigeria's most populous, and the country's commercial and industrial nerve centre. It also has the largest judiciary, with 52 courts in the high court division and 118 courts in the magistrates' division, the largest number of policemen and the largest Ministry of Justice.

One of the major concerns of the civilian administration in Lagos after 1999 was how to deal with corruption in the administration of justice. Surveys of 100 lawyers who frequently used the courts showed that 99 per cent agreed that there was corruption in the Lagos judiciary. Eighty per cent of lawyers with 11 to 15 years post-qualification experience agreed that the prevalence of corruption was high or very high, while over 65 per cent of lawyers believed that confidence in the judiciary was very low.[4]

One aspect of the problem in Lagos was the long delay in trial processes. Figures showed it took a minimum of 4.25 years to conclude a case in the Lagos high court, and the delays were perceived to be both a cause and effect of corruption.[5]

For the new state government, these perceptions were simply too costly. Foreign and local investment suffered.[6] Few investors were prepared to risk entering agreements, which if disputed would depend on the highest or most influential bidder to obtain a favourable outcome. Furthermore, the interminable delay caused by rules of practice that permitted dilatory tactics by counsel at little or no extra cost made investments in Nigeria and Lagos state unattractive. Anecdotal evidence from estate agents showed that there had been a decline in the stock of houses being built for rental because tenants could keep a case of repossession endlessly in court or until a forced settlement was secured. Banks were also unwilling to grant loans on the security of real estate because of the difficulties of realising such securities. A litigant could easily hold up the process of foreclosure by going to court to challenge the transaction. With a 'cooperative' judge delays could be endless.

3 Section 271 of the 1999 constitution.

4 Lagos State Ministry User Perception Study, July 2000. Presented at the 1st Summit of Stakeholders on the Administration of Justice in the 21st Century, Lagos, 16 October 2000.

5 Ibid.

6 Most commercial law cases (shipping, company, intellectual property, banking, etc.) are federal, not state, cases. However, most foreign investors seeking to enforce contracts of various kinds (commercial contracts, employment contracts, etc.) will deal with state courts. Disputes over title to land or other matters relating to property, lease or compensation claims against oil companies are also generally within the state jurisdiction. Banking disputes, whether the customer is foreign or the bank is indigenously owned or wholly or partly foreign-owned, are all within state jurisdiction.

The new civilian administration in Lagos state developed a blueprint for reform of the justice system, with a special focus on addressing judicial corruption.

Some factors identified as pre-disposing to judicial corruption were:

- Poor remuneration of judicial officers and judges. Judges earned less than US $300 a month, along with an official car and home, both of which were withdrawn on retirement. Magistrates earned about US $50 a month. Neither official car nor accommodation was available. It was virtually impossible for an honest judge to buy or build a home from earnings alone.
- Long delays in the trial process constituted both cause and consequence of corruption, facilitating the corrupt use of judicial discretion.
- Appointments based on cronyism. The absence of any objective merit-based system for appointment of judges meant that the calibre of judicial appointees was suspect.
- Ineffective sanctions for judicial corruption and low detection rates due to high tolerance levels across society. The Lagos Ministry of Justice User Perception Survey indicated that 40 per cent of lawyers surveyed would not report judicial corruption because they felt that nothing would be done about it and 53 per cent of lawyers would not report judicial corruption through fear of being victimised.[7]

Corruption in the police force and the Ministry of Justice were probably more significant in the area of criminal justice. Bribes for bail were thought to be commonplace and in some cases police investigations could be stalled or hijacked. The Ministry of Justice or the office of the attorney general, which is constitutionally empowered to advise on prosecution, to prosecute or to discontinue prosecution in certain cases, were also criticised for delays in giving advice, or for giving wrong advice, as a consequence of corruption.

A new deal for judges

The Lagos Administration of Justice Reform project sought to address these problems, prioritising corruption in the judiciary and the Ministry of Justice. The reason for this focus was that these agencies fall within the state's legislative and executive jurisdictions, while the police do not.

In dealing with judicial corruption the project began with a review of the appointments procedure. A new process was introduced in Lagos state allowing for the participation of legal practitioners and the local bar association in the selection of judges. The bar association was required to write a confidential note to the JSC on the suitability of each nominee for appointment in terms of competence and integrity. After clearing nominees at state level, the NJC scrutinises the list according to a set of objective criteria before making final recommendation for appointment. In 2001 there were 26 vacancies in the high court of Lagos, mostly due to retirement. This gave hope that the new appointees, selected under the objective criteria, would be more open to reforms aimed at combating corruption.

7 Lagos State Ministry User Perception Study, op. cit.

The 'millennium judges', as they were called, were taken through six weeks of training, comprising interactive sessions with bar associations, civil society groups and senior judges. The focuses of these sessions were judicial integrity, public expectations of judicial conduct, the code of conduct for judges, etc. The opportunity of being together for six weeks enabled judges to bond and develop some shared values. Today examinations and interviews are also part of the judicial appointments procedure although the process does not yet amount to open competition since exams are only applied to individuals who have already been nominated by the JSC.

Regarding compensation for judges and magistrates, the state government consulted human resource experts on an appropriate remuneration for judges, having regard to what the private sector offered people of equivalent status. The result was a considerably enhanced package for judges and magistrates. Judges are now paid about US $3,500 per month and are given a house worth US $250,000 in a low-density neighbourhood, land worth about US $50,000, a car and about US $20,000 in shares in a blue-chip company. Magistrates earn about US $300 a month at entry level and are entitled to a piece of land and a government car.[8]

With regard to the discipline of judges, the reform policy dictated that every case of judicial corruption would be investigated and submitted to the NJC, which would then appoint an independent investigation panel to make recommendations. Prior to the NJC's creation in 1999, the JSC had been the sole adjudicator on disciplinary issues, providing an avenue for local interference in the process. This interference has now been effectively removed since the NJC membership is drawn from across all 36 states and the federal judiciary. It is important to note, however, that the NJC does not have the final say on the disciplining of judges. This lies with the governor or president, as the case may be. Moreover, in the case of chief judges, a resolution in the legislature is required, and the NJC has no role at all in the inferior courts.[9] As of 2002, three judges had been dismissed for corruption and 21 magistrates were laid off in a major reorganisation of the magistrates' courts. The JSC also investigated and penalised several cases of unethical behaviour by magistrates and abuse of judicial power.

New civil procedure rules were introduced that emphasise greater judicial control of the trial process and enable judges to impose costs to be borne personally by counsel for dilatory tactics. The new rules also allow only two amendments of claims or defences, and two adjournments where necessary. Another important innovation is a 'frontloading' requirement whereby all evidence, witness statements, briefs of arguments and other relevant documents are filed together

8 One criticism of this reform was that the wages might be perceived as unfair if set far higher than those of other public servants. However, wage differentials have always existed and can be justified in the case of judges for a number of reasons. Once appointed, judges are prohibited under the constitution from practising law as counsel before the courts, even after resignation or retirement: very few people in public service are required to make that kind of sacrifice. Moreover, the enormous power wielded by a judge over lives and livelihoods makes a strong case for ensuring that economic pressures are not so unbearable as to encourage compromised integrity. In Lagos we did not raise wages as a panacea for corruption: it was one of a number of measures, including appointment procedures, opening up channels for making complaints, ensuring that the complaints are fully processed and discipline applied, where necessary. It would be difficult to conclude that increased salaries alone accounted for the improvement.

9 The moment a judge is indicted by the NJC and a recommendation of termination of appointment is sent to the governor, his or her career is effectively ended in the judiciary since he or she remains suspended till the governor acts on the recommendation. The governor cannot ignore the recommendation as the judge will still be unable to continue to perform judicial functions.

before the case is listed. Furthermore, the new rules introduced referrals by an arbitrator judge in appropriate cases to a court-annexed, multi-door courthouse. This promotes a mediated solution that in many cases is more acceptable to parties than the winner-takes-all outcome of adversarial litigation.

The Ministry of Justice also introduced a Citizens' Mediation Centre where small civil claims could be mediated free of charge. This proved especially popular; considerably reduced the strain on magistrates' courts; and eliminated one avenue of corruption – payments to speed up or slow down the judicial process in magistrates' courts.

At the Ministry of Justice, the focus has been on ensuring that corrupt behaviour is more easily detected, investigated and penalised. The process of giving prosecutorial advice now requires more lawyers in the department of public prosecution to give their opinion before a decision to prosecute is taken. This invariably provides a further layer of checks and balances. At the time of writing, three lawyers had been cited for corrupt practices and have either been penalised or are undergoing a disciplinary process.

Electronic verbatim recording of proceedings has the potential to reduce trial times, as well as enhance the transparency of proceedings and reduce the possibility of manipulating the record for corrupt purposes. Since 2002, high courts have migrated manual processes, from filing to publication of judgements, to automated systems with the aim of reducing inefficiencies and delays in filing and processing documents, and to enable on-line access to court records and reports. Computerisation will open up court records to greater public scrutiny and enable the public to make their own judgements on individual judicial output and efficiency.

Trial time down by nearly half

The results of the Lagos Administration of Justice Reform project have been positive. In terms of discipline, the number of cases uncovered by the NJC Council has decreased since the reforms were implemented and it has not investigated a case since 2002. Although this does not mean that judicial corruption no longer takes place, it can be taken as a measure of improvement.

Secondly, the consensus of lawyers is that judicial corruption is no longer a significant issue in the Lagos judiciary.[10] Delays in the trial process have been drastically reduced, with average trial time shortening by about 40 per cent since the new procedural rules were introduced. The number of pending cases fell from 40,000 in 1999 to 11,230 in 2005.

The Lagos reforms have also had national impact. The Lagos model has become the benchmark for judicial remuneration. The Chief Justice of Nigeria has recommended that other states adopt the new civil procedure rules of Lagos state, with appropriate amendments to reflect local conditions. Verbatim recording of proceedings is now in place in some federal courts in Abuja, the capital, although there are concerns over low utilisation in federal high courts.[11]

10 Anecdotal evidence collected by the authors.

11 The problem is not so much a reluctance to use verbatim systems, but the fact that the federal high courts do not have a cadre of court recorders and transcribers. Recording proceedings is not particularly useful to the judge who has to review evidence and write a ruling if the recording cannot be transcribed. The Lagos judiciary engaged and trained 120 university graduates, of whom around 70 were lawyers, to work as court recorders and transcribers.

There have also been challenges that are worth noting. The first is that not much has been achieved with regard to police corruption. This has had several negative impacts on the judiciary: it means that a number of cases are corrupted before they reach the courts; and that confidence in the judiciary may be undermined as people conflate the police and other branches of the justice system with judges and court personnel. This is partly because the police force is a federal agency and states have little control over appointment, compensation, discipline or even the deployment of officers. The state criminal justice administration committee (comprising the judiciary, police, prisons and the Ministry of Justice) has sought to involve police in the formulation of policy. This has proved helpful, but decisive progress is elusive.

Secondly, Lagos state faced problems in the implementation of its performance evaluation schemes and code of conduct for judges, mainly due to the lack of an efficient system of monitoring and enforcement. Performance evaluation has proved particularly difficult due to uncertainty in establishing uniform benchmarks for performance of the different divisions of the court. For example, land cases are notoriously more complex than family cases. Is a judge in the lands division, who has concluded three cases in a year, less efficient than one in the family division, who has concluded 30 cases in the same period? A weighted system was experimented with, but was widely criticised by judges. With regard to the code of conduct, monitoring has proved a challenge especially where the conduct complained of does not amount to a corrupt practice.

Finally, the reforms in Lagos state need to be considered in the wider context of the Nigerian judiciary. So long as corruption is widespread in other parts of the judicial system, especially at the federal level, positive changes at state level will have less than the desired effect in the fight against judicial corruption.

The rule of law and judicial corruption in China: half-way over the Great Wall

Keith Henderson[1]

The legal-judicial transformation taking place behind China's Great Wall outpaces most other developing and transitional countries, but is reaching a critical crossroads. If the pace of judicial reform is maintained and implemented, it has the potential to impact on China and the world's future as much as the economic reforms of the last two decades. The judicial system is emerging as a key institution in the reform process, and key decisions related to judicial

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independence in coming years will largely determine China's stature and place within the global community, and the government's relationship with its citizens.[2]

In a relatively short period of time, new criminal, civil and administrative law codes, anti-corruption laws, as well as thousands of judicial, economic and administrative regulations have either been passed, repealed or undergone substantial reform. Property rights and institutional reforms have also been enshrined in the constitution, an important Judges Law professionalising the judiciary has been passed and a number of international treaties have been ratified. For the first time in modern Chinese history, the courts and legal profession are emerging as important, professional institutions with growing power.[3] The main question is whether China's leaders will now make the structural, judicial and political reforms necessary to address corruption and create an independent judiciary – albeit with Chinese characteristics.

China has a continental or civil code legal system that emphasises codified statutory law over case law. The court system has four levels: 3,000 or so basic people's courts at the local level; 390 intermediate people's courts at city and prefecture levels; 31 high people's courts at provincial level; and one Supreme People's Court (SPC) in Beijing at the national level.

Within this structure, there are approximately 200,000 judges. It is noteworthy that there are estimated to be twice as many judges in China as practising lawyers. Anecdotal reports suggest that some cases at the local level are still conducted with a sole judge, although the law provides for trial by a judge and two citizens, the so-called 'lay judges or assessors'.[4] Cases deemed to be 'major and complex' are sometimes decided by court adjudication committees, composed of senior judges who collectively discuss and decide cases. Depending on the nature of the case, this is done after consulting with the Communist Party political-legal committee.[5] While these kinds of cases are generally thought to be the exception not the rule, there is no empirical way to know what the situation is in practice.

2 For purposes of this paper the judiciary refers specifically to the courts. However, the judiciary in China also consists of the procuratorate, the Ministry of Public Security (police) and judicial administrative organs. Any generalisations in this paper should be qualified: it is important to realise that the level of professionalism of the courts and local government varies considerably in a country as large as China.

3 More than 300 new laws and resolutions have been passed in less than two decades. Since 2000, the Supreme People's Court has issued more than 200 related 'judicial interpretations' and 328 'judicial suggestions'. There are now close to 3,000 judicial interpretations, all of which have been reviewed from a WTO-compliance perspective. Whether reform will continue in the Second Five-Year Reform Plan for the People's Courts (2004–08), which contains many more difficult, second-generation reforms, including institutional checks and balances, and enforcement of the rule of law, remains in question. See www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=38564

4 Decision of the Standing Committee of the National People's Congress Regarding the Improvement of the System of People's Assessors, 1 May 2005. From the author's interviews with procurators, scholars and judges, this regulation is seen as an important judicial independence reform, while others believe that neither judges nor the adjudication committee – as long as it exists as is – will ever allow lay judges or assessors to make final court decisions. According to informed scholars who have studied the system at the local level, most assessors have never received training and do not fully understand their responsibilities.

5 Reform or abolition of the court's adjudication committees has been debated for many years, but it was not included in the Second Five-Year Reform Plan. These committees are composed of senior party members, including the local head of Public Security, who sometimes sits on the party's political-legal committee. Since this committee often includes senior judges and non-judges who did not sit on the panel hearing the actual case, their retention would appear to violate the constitutional and international right to an open trial. In cases in which these committees make the decision, many scholars believe their action would appear to render more junior, sitting judges somewhat powerless in practice; it also opens the door to opportunities for judicial corruption.

Decisions by courts do not establish legal precedents, but important decisions by the SPC are highlighted in official guidance and have precedential effects. In addition, while the SPC and courts around the world issue internal court rules, the SPC is somewhat unique in that it issues 'judicial interpretations' of laws, regulations and conflicting lower-court decisions, which are theoretically binding on all courts. This body of lesser known jurisprudence is important in China where laws and regulations are quickly evolving, and are often conflicting and ambiguous.

Local courts of first instance hear approximately 80 per cent of cases in China, with the statutory right of review at the next court level. While this is analogous to the trial and appeal process in other legal traditions, all courts at the trial and appellate levels have the discretionary right to grant an appeal. The right to petition for an unlimited number of appeals opens the door for uncertainty, delayed justice and corruption. As in other countries, many perceive that a number of corruption cases are arbitrarily brought against political enemies or economic competitors, and against junior rather than senior officials, although this is difficult to verify. Cases involving corruption and bribery in the private sector have recently become a new high priority.[6]

Centralised power vs. judicial independence

Until relatively recently China had no tradition of separation of powers and the courts were seen as little more than another administrative agency. Indeed, the scholar He Weifang writes: 'The most significant impact of this traditional model of a highly centralised government is that it prevented knowledge and development of judicial independence. It didn't even provide the context for this principle.'[7] Aside from judicial independence there persisted an image of upright and incorruptible officials, and a public expectation of fair and honest judges.

Article 126 of the constitution explicitly proclaims that 'the people's courts shall, in accordance with the law, exercise judicial power independently, and are not subject to interference by administrative institutions, public organisations or individuals.' However, this provision directly contradicts article 128, which states that the SPC 'is responsible to the National People's Congress (NPC) and its standing committee', and that the 'local people's courts at different levels are responsible to the organs of state power which created them'.

The latter article subjugates the SPC to the Chinese legislature.[8] Concomitantly lower courts are subject to the oversight powers of the provincial and local congresses, although the latter's capacity to perform this task is limited. Local congresses are theoretically responsible for

6 Asia-Pacific Economic Cooperation, 'Summary of Anti-corruption Efforts in China', APEC policy statement, 24 April 2006. Available at www.apec.org It is telling that this otherwise well-reasoned policy statement expressly adopts a holistic approach to addressing and preventing corruption, but barely mentions judicial reform or judicial corruption as priorities.

7 He Weifang, 'Judicial System and Governance in Traditional China', paper presented at the Canada-China Governance Dialogue Seminar, Ottawa, Canada, June 2005.

8 Note that the legislature is 'elected' from within the one-party system construct but does not meet global standards as a publicly elected body through free and fair elections.

courts' financial and personnel decisions, but in practice they are subject to local government officials who control the judicial and congressional purse-strings.[9] Court presidents are nominated in consultation with the local government/party leadership, and only then formally approved by the congressional standing committee.

A multi-layered horizontal and vertical judicial structure and decision-making process, coupled with reliance on local government funding, provides many opportunities for judicial interference and corruption.

At the same time, China's economic boom and growing international obligations are generating demand for a judiciary that can resolve disputes fairly and effectively through impartial rules and procedures. The Chinese leadership recognises that the independence of the judiciary, as defined by the international community, has positive consequences for trade, investment and financial markets. Perhaps most importantly, it understands that the judiciary is an important dispute-resolution or complaint mechanism that has the potential to promote social stability. Recent empirical research of stock market reactions to key court and NPC decisions in Hong Kong and Beijing supports the notion that the extent to which the judiciary decides cases impartially has a positive effect on financial markets.[10]

Networks, bribery and political interference

While judicial corruption emerged as a public issue as early as 1992, most cases have been brought since the late 1990s. There are many reasons for the emergence of the issue, including the expanding role of the courts in the economy and political process, and more judicial transparency and accountability within a legal system that is based more on professional standards and procedures than on relationships or customs. China's liberalised marketplace and its commitment to adhere to global transparency and non-discrimination practices, such as those of the World Trade Organization and various human rights treaties, have helped expose some of the secretive networks in both the public and private sectors.

These internal and external forces have forced new demands on the judiciary and highlighted its important institutional role. Citizens are going to court in record numbers. Indeed, some 4.4 million civil cases were filed in 2005, more than double the total a decade ago.[11] Behind this surge is the theory that everyone, even party officials, should be held accountable under the law.

In 1998 the SPC included a number of anti-corruption elements in its five-year judicial reform programme that targeted the 'moral integrity of judges'.[12] While there is a dearth of data, many

9 Some provincial congresses and certain committees in the National People's Congress have been trying to play a more active oversight role in recent years. For instance, computer systems have been established to assist legislatures in keeping an eye on government expenses. Not unlike the judiciary, the congresses are becoming more important institutions, but they remain ultimately subservient to the party and government.

10 Emily Barton Johnson, 'Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong', *Harvard International Law Journal*, vol. 43, no. 2 (summer 2002).

11 2006 SPC Report to the National People's Congress.

12 *People's Daily* (China), 20 June 2003.

believe that judicial corruption is a serious problem, particularly at the local level. The main forms of judicial corruption relate mainly to either pure bribery or, in sensitive cases, political interference from government or party officials. In the celebrated Wuhan court bribery case, it appeared to be systemic and organised at all levels of the judiciary (see below).

Some of the most common methods of effectuating corruption in the judiciary include:

- Fabricating rulings in exchange for money
- Blackmailing litigants into paying for, or excluding, evidence
- Making decisions based on instructions from local government, party or senior judicial officials, rather than the law or facts
- Assigning, dismissing, delaying or refusing to accept cases, or refusing to properly enforce court decisions
- Extorting kickbacks from intermediaries for passing cases to certain judges
- Trading law enforcement services for personal gain
- Taking bribes from the plaintiff and defendant (or their lawyers), or both
- Manufacturing court cases
- Embezzling court funding
- Bowing to the demands of local officials, criminal networks, local clans, social networks or economic interests
- Abusing the power of judges to order suspension of business operations, the confiscation of property, the eviction of tenants, or fair compensation and labour rights.[13]

The Wuhan affair

In response to demands for a more fair and effective judiciary, the SPC issued a code of ethics in 2003 setting down 13 rules strictly prohibiting certain corrupt behaviour. That same year the NPC joined the anti-corruption fight by embracing open trials, the separation of trials from enforcement and monitoring, evaluation of judges, and amendments to the criminal code that laid down a 10-year prison term for abuse of judicial power. Since then, thousands of judges and other court staff have been arraigned or prosecuted for corruption.[14] For example, in 2004 the procuratorates[15] opened 9,476 investigations into law enforcement personnel and judicial staff, almost 67 times the number in the early 1990s. This number is very small

13 Fan Ren, 'Calling for an Independent Judiciary', *Beijing Review*, no. 23, 10 June 2004.

14 While the accuracy of the data on judicial corruption is open to question, 794 judges were investigated and punished in 2003. Two scholars report that over 24,000 court employees were arraigned or prosecuted for corruption in 2002 (see *Global Corruption Report 2004*). However, the number of public complaints against them dwarfs the number of judges and court officials under investigation. In the same year, citizens filed 435,547 complaints against judges, prosecutors and police.

15 Various institutions are responsible for addressing government corruption, including the procuratorate, the Ministry of Supervision and various disciplinary bureaus within government agencies. The procuratorate, like the courts and police, has judicial inspection bureaus for rooting out internal corruption and they are charged with addressing judicial corruption. It is a multi-layered institution with branches at local, city and provincial levels that ultimately report to the Supreme Procuratorate in Beijing.

in comparison to the number of judges and judicial personnel in China, however. A review of the World Bank's annual World Business Survey indicates that overall corruption in China appears to be less than in other developing countries with similar per capita income.[16]

From the late 1990s to 2006, senior officials investigated for corruption included the former chief procurator of Shenyang municipal procurator's office, the former vice-procurator of Jiangsu province, the former presidents of the high courts in Liaoning, Guangdong and Hunan provinces, and the former director general of Jiangsu province's anti-corruption bureau. The number of high-level judges charged and convicted of corruption in China can probably be explained, in part, by the fact that it is easier and less costly to bribe one senior judge than all the members of the court's adjudication committee.

The most revealing case in China's anti-corruption campaign is the Wuhan court affair. In Wuhan, Hubei province, 91 judges were charged with corruption, including a vice-president of the high court, two presidents of the intermediate courts and two presidents of the basic courts. The ringleaders, two former Wuhan intermediate court vice-presidents, were ultimately convicted of corruption and sentenced to 6½ and 13 years in prison. Ten judges under their supervision were also sent to jail and a 13-member group was found to have pocketed almost 4 million yuan (approximately US $510,000). The investigation implicated more than 100 other judges and court officials, who were disciplined or reassigned to other courts. Finally, 44 lawyers were investigated and 13 were charged with bribery.[17]

The significance of the Wuhan affair is threefold. First, it signalled that senior officials were committed to rooting out judicial corruption. Secondly, it provided the impetus for more, not less, judicial reform. Thirdly, and for the first time, it revealed a ring of corrupt judicial and law enforcement networks running a system of bribery at all levels. By the end of the investigation in 2004, 794 judges in China had been disciplined for irregularities (though only 52 were investigated for serious crimes). China's Chief Justice Xiao Yang has reported that the number of corrupt judges and court officials had fallen steadily from 6.7 per 1,000 in 1998 to 2 per 1,000 in 2002,[18] although this is difficult to verify independently.

In 2006, Chief Justice Xiao and Minister of Justice Zhang Fusen announced a crackdown on the relationship between judges and lawyers following a 2004 ruling by the SPC to regulate control between them. Zhang said that some of China's 100,000 lawyers depended on bribes to win lawsuits and that the income gap between judges and lawyers made this type of corruption more likely. He urged courts to improve judges' working and living conditions so they could better resist the lure of private interests. Rules governing 'justifiable relationships between judges and lawyers' were announced, and lawyers' associations and the public were asked to report any improper behaviour.[19]

16 See www.worldbank.org/wbi

17 *Newsweek* (China), 19 April 2004.

18 *Newsweek* (China), 19 April 2004; and United States House International Relations Committee Hong Kong Brief at www.house.gov\international_relations

19 *People's Daily* (China), 4 June 2006. The regulation prohibits judges from, among other things, having any financial relationship with litigants or lawyers, or having *ex parte* communications.

Judicial education and standards

The Judges Law of 1995, strengthened in 2001, aimed to professionalise the judiciary for the first time in contemporary Chinese history. The law was a significant accomplishment in that it raised the qualifications bar for all judges, who are now required to have a college degree and pass a national examination.[20]

It also outlined the process for appointing, promoting, dismissing and disciplining judges and stated that judges may not:

- Embezzle or take bribes
- Practise favouritism in breach of law
- Abuse power to violate the lawful rights and interests of citizens
- Abuse power to seek profit for themselves or others
- Meet in private with litigants and their representatives
- Accept their gifts and favours.

Judges who engage in such acts can be disciplined to varying degrees, ranging from a warning and dismissal from office to prosecution for criminal liability.[21] Over the last two decades the percentage of judges with college degrees has risen from about 17 per cent to over 51 per cent nationally. Note that the percentage is reported to be considerably higher in some jurisdictions like Shanghai.[22] There is a national judges' college in Beijing and over 20 affiliated regional colleges, but their financial and human resource capacity is seen as inadequate to carry out the task at hand.

In addition to the Judges Law, the first national judicial code of ethics was promulgated in 2001, which reflects some but not all the conflict of interest guidelines and best practices found in the Bangalore Principles on Judicial Independence. Observers admit that more effective and definitive internal mechanisms and court guidance are needed to enforce the rules in practice.

Next steps

While much of what China needs to do to address judicial corruption is exemplified in the 60-plus reforms found in the new 2005 Five-Year Judicial Reform Plan and in China's anti-corruption efforts, neither fully confront the underlying causes of judicial corruption. The question for

20 In 2004 the Ministry of Justice published the Programme on State Judicial Examination. Other important foundational laws include a Lawyers' Law and Procurator Law (both revised 2001). Together these laws are believed to have played an important role in professionalising the judiciary and elevating its status.

21 See 'China's Judiciary' at China Internet Information Centre. Available at www.china.org.cn/english/Judiciary/25025.htm

22 Numbers reported in international media vary. The most reliable official statistics appear to be reflected in an article entitled 'China's Supreme People's Court Announces Stricter Standards for Judges', BBC Monitoring International Report, 27 October 2003. For example, in Shanghai over 80 per cent of the judges have attained at least a bachelor's degree, about 7 per cent have master's degrees and about 4 per cent have doctorate degrees, *Shanghai Morning Post* (China), 10 December 2004.

China is no longer whether it should create an independent judiciary, but how to do it. No foreigner can write the prescription for China's corruption woes, but for a prescription of what not to do, a few global lessons learned from other countries can offer some guidance.

- The answer is not so much the passage of reforms and new laws; rather it is their application and enforcement in practice. An independent judiciary with integrity is essential to making this happen, and to developing a rule of law culture.[23] Fair, efficient and effective implementation of the law will not be an easy journey for China where government officials hold the ultimate legal reins at local and national levels.
- Judicial corruption is fuelled when there are too many visible, invisible, legal and illegal forces involved in judicial processes. In China this includes: government, congress and party officials at the national, provincial, district and local levels; executives with state or private economic interests; organised crime and corruption networks; and senior judges, prosecutors and police. The limitation if not elimination of these legal and practical forces, both internal and external, is essential. One of the key questions therefore is when and how the internal and external judicial decision-making firewalls will be erected within the political context of establishing the rule of law in 21st-century China.
- Addressing and preventing corruption requires open, transparent, accountable, accessible legal and judicial processes, and professional judges with integrity. These processes include all key phases of the judicial system, including budgets, appointments, promotions, discipline, trials, decisions, appeals and enforcement. In China, making judicial processes more transparent and opening courtrooms to the public would seem to be among the very highest reform priorities.
- Judicial reforms must link up with broader economic, institutional and political reforms, and insulate the judiciary from both internal and external forces. In China this problem is particularly acute at the local level. Legal reforms should include both public and private sector corruption, and institutional and structural reforms should include making judicial independence and accountability a reality. These interconnected and institutional reforms may be the most difficult ones to carry out, but global experience tells us they have been the key to success in other countries.
- Enforcement of laws and court judgments. Promoting a rule of law culture requires senior government officials and the state to set the example. In China, the powers-that-be must be persuaded that a more empowered, independent judiciary will be both a market- and a crowd-pleaser, as well as good politics. They must also believe that the judiciary will be an efficient, dispute-resolution mechanism that will promote social harmony and that it will not be a serious threat to their grip on power. These are tall orders in any country and will require the Chinese authorities to make some tough decisions.
- Promoting judicial and anti-corruption reforms requires a solid understanding of the underlying causes and a holistic, prioritised strategy that includes systematic monitoring

23 This includes independent courts, prosecutors and police as well as an independent legal profession. See Violaine Autheman and Keith Henderson, *Global Best Practices: Judicial Integrity Standards and Consensus Principles* (Washington D.C.: IFES, 2004).

and reporting. It also requires serious public and business community engagement. The United Nations Convention Against Corruption (UNCAC) is an important strategic framework for assessing, promoting and implementing anti-corruption and judicial reforms, and for measuring reform progress. In China, the overriding challenge is to take the political and legal steps necessary to actually implement the judicial independence principles and anti-corruption laws it has committed to in its own constitution, and in the various treaties and instruments it has ratified or embraced. These include the UNCAC and the 1995 Beijing Principles, which by any standard are among the best consensus norms in these areas.[24]

Assisting judicial reform: lessons from UNODC's experience

Fabrizio Sarrica and Oliver Stolpe[1]

Since 2000 the UN Office on Drugs and Crime (UNODC) has been supporting the development and implementation of good practices in judicial reform through its Global Programme against Corruption. UNODC's initial rationale for addressing judicial reform stemmed from the accounts of widespread corruption in the judiciary in many parts of the world. It soon became evident, however, that judicial corruption could only be addressed effectively as part of a broader, systematic and sustainable approach aimed at enhancing both the integrity and the capacity of the judiciary and the courts.

UNODC has provided support in strengthening judicial integrity and capacity to Nigeria, South Africa, Indonesia, Mozambique and Iran among other countries, cooperating with a variety of partners including UNDP, GTZ, DFID, USAID and others. This paper draws on experiences in Indonesia, Nigeria and South Africa, which show that local-level reforms can have a positive impact on experienced or perceived corruption if sensitive to the local socio-economic context. It aims to be candid about obstacles encountered and to explain how and why certain aspects of the projects were unsuccessful. All projects were implemented first in a few pilot jurisdictions, before being evaluated and in some cases replicated in other parts of the country.

24 Statement of Principles of the Independence of the Judiciary ('Beijing Principles') in the Law Association for Asia and the Pacific (LAWASIA) Region, 6th Conference of Chief Justices of Asia and the Pacific Region, Beijing, August 1995. This judicial declaration, which was approved by China's Chief Justice, clearly acknowledges the international definition of judicial independence and unofficially commits all signatory Asian countries to undertake a series of specific judicial independence reforms.

1 Fabrizio Sarrica and Oliver Stolpe work for the Global Programme against Corruption of the UN Office on Drugs and Crime, Vienna, Austria. The views expressed in the present publication are those of the authors, and do not necessarily reflect the views of the UN.

Project design and implementation

As a first step UNODC supports the conduct of comprehensive assessments to produce a complete and detailed picture of the status quo of the country's justice sector, adopting a variety of methodologies including desk research, surveys and focus groups.[2] The surveys, which represent the centrepiece of the assessment, are administered to a large set of people both inside and outside the justice sector. Typically they cover judges, prosecutors, court staff, lawyers, business people, court users (e.g. litigants, accused, witnesses and experts) and prisoners awaiting trial. All are asked questions about:

- Access to justice
- Timeliness and quality of justice delivery
- Independence, impartiality and fairness of the judiciary
- Levels, locations, types and costs of corruption within the justice sector
- Coordination and cooperation across the justice sector institutions
- Public trust in the justice system
- Functioning of accountability and integrity safeguards in the justice sector.

There were some problems administering the surveys. Justice-sector operators usually have very clear opinions concerning the shortcomings of the justice system and can propose appropriate remedies, thus they often do not see any specific benefit in conducting lengthy and costly assessments. In addition, they may fear negative results and that revealing them in the media will further undermine trust (although perceptions of the justice system are typically worse than experiences so the independent assessment may even counter negative perceptions among the general public). UNODC tried to overcome resistance by involving stakeholders in the review of the assessment methodology and its adaptation to the specific legal and institutional conditions of their country; and also in the review and interpretation of the raw data.

While all stakeholders were interviewed about their perceptions and experiences with regard to the police, UNODC did not include questionnaires for the police in its assessment methodology. Involving the police was considered impractical and was discarded for a variety of reasons. Stakeholders in different countries considered this a mistake; in some environments it was easier for police to refute the data on the grounds that they had not been involved in designing the assessment methodology or data collection, and that the perceptions of stakeholders were therefore biased.

In Nigeria, 5,766 stakeholders were interviewed across three states, Lagos, Delta and Borno; 2,485 stakeholders were interviewed in two Indonesian provinces, South Sumatra and South East Sulawesi; and 1,268 stakeholders were interviewed across three South African provinces, Gauteng, Mpumalanga and Northern Cape.[3] (For a contrasting view of justice-sector reform in Lagos state see 'Sub-national reform efforts: the Lagos state experience' on page 146).

2 See UNODC, 'Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces', technical assessment report, Vienna-Jakarta, March 2006; UNODC, 'Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States', technical assessment report, Vienna, January 2000; UNODC, 'Assessment of the Integrity and Capacity of the Justice System in South African Courts', technical assessment report, Pretoria-Vienna (unpublished).

3 Evidence-based planning is only possible where the data have a high level of credibility with regard to sample size, methodology, specificity of information obtained, and the independence and professionalism of the entity responsible

One focus of the assessments was the frequency, nature, cost and causes of corruption in courts, with the aim of exploring where and how corruption occurs. Experience and perception of corruption are both explored. In Nigeria and Indonesia all respondents experienced bribery to a greater or lesser extent and based their perceptions on experience, whereas South Africans had low experiences of corruption yet more than half of court users believed there was corruption in the justice system.

The causes of corruption differed. In Nigerian courts the main reason to pay bribes is to expedite the court process or be granted bail; in Indonesia bribes are mainly paid to obtain a more favourable judgement or sentence. Other court-related procedures identified as related to corruption included: delays in the execution of court orders; unjustifiable issuance of summons; prisoners not being brought to court; lack of public access to court records; disappearance of files; unusual variations in sentencing; delays in the delivery of judgements; high rates of decisions in favour of the executive; and appointments resulting from political patronage.

On the issue of corruption within the judiciary there were variations in response according to profession and gender. In Nigeria lawyers and business people were more likely than court users and judges to experience corruption and to perceive the courts as corrupt. Also in Nigeria, female judges perceived the justice system in general as less fair and impartial than their male colleagues.

In South Sumatra lawyers had the worst opinion of the judicial system, while in South East Sulawesi it was businesses and court users who evaluated the integrity of the judiciary most negatively. Only 4 per cent of the judges sampled in South Sumatra admitted any knowledge of incidences of bribery among their peers, compared with 62 per cent of lawyers and 45 per cent of court users who knew of a concrete case in which a court user paid a bribe.

With regard to the independence, impartiality and fairness of the courts, users and operators in all three countries were sceptical. In Nigeria, half the judges agreed that the government controlled the judiciary and more than half the lawyers regarded courts' decisions as influenced by politics. In Indonesia, half the judges and more than 60 per cent of prosecutors had experienced political interference. In South Africa, judges believed that politics, social status and race commonly affected the outcome of judicial decisions.

Public trust was assessed by exploring the inclination of users and businesspeople to use the courts. In Nigeria, between 30 and 50 per cent of users indicated that they would not use the courts again based on their prior experiences. In Indonesia, around half of users and up to 70 per cent of business people had not used the courts in the previous two years – though they needed to do so – because they perceived them as too corrupt or expensive.

Access to justice was a major problem in all three countries but it was found that access to information was often more problematic than physical or economic access to courts. In Indonesia, more than 60 per cent of people in prison awaiting trial were not aware of the possibility of bail and more than 70 per cent had not retained a lawyer. In several jurisdictions affordability turned

for data collection and analyses. The results would otherwise be challenged and further dialogue would then focus on the validity of the findings, rather than designing measures to address the problems identified.

out to be more closely related to the number of times a court adjourned a case, than to lawyers' fees. In Nigeria, court users had to face on average six to ten adjournments before resolving a case. Only 15 per cent of users found courts affordable. Access to justice has proven to be closely related to corruption. Analysis of the results of the assessments showed that respondents who had greater difficulties in accessing the courts were also more likely to be confronted with demands for bribes; people who had to return to court several times for the same case were the ones that were asked to pay bribes more frequently.

While the timeliness of proceedings differed significantly across countries, users tended to perceive courts as too slow. Nigerian courts were by far the slowest with users waiting on average 16 to 35 months to resolve cases, while in Indonesia users waited six to twelve months for adjudication. South African court users waited on average three to six months for cases to be resolved. Causes for delays differed between countries, ranging from high caseloads per judge and the complexity of procedural law to court staff delaying cases in order to solicit bribes from lawyers and court users.

The quality of service provided by courts was difficult to assess as stakeholders' opinions tended to reflect their general state of confidence in the justice system. For this reason the assessments sought to identify more objective indicators to provide an indirect measure of the quality of justice delivery. These included: the use of non-adversarial dispute resolution techniques; the availability of written guidelines concerning court management; the level of computerisation of the courts; the frequency and comprehensive nature of performance evaluation; and the predictability and consistency of jurisprudence. Courts in all three countries were found to make use of various techniques to resolve cases without adversarial proceedings. About 80 per cent of surveyed judges in Indonesia reported using mediation techniques, while on average 30 to 40 per cent in Nigeria insisted on receiving from lawyers a certificate that settlement attempts had been tried without success. In South Africa one third of judges interviewed reported using settlement conferences.

Levels of computerisation varied significantly. In Nigeria on average only 5 to 15 per cent of courts are equipped with computers and of these less than 4 per cent on average were being used for computer-based case management, while in Indonesia more than 70 per cent of courts are computerised. One shortcoming that affected courts in both countries was inconsistency in the application of the law.[4] In South African courts, it was the administration of court records that appeared most problematic with 68 per cent of magistrates experiencing problems with lost or displaced court files, and 28 per cent who felt it was 'difficult' or 'very difficult' to retrieve information from existing archives.

Implementing and monitoring reforms

Plans for reform stem from the assessment, and the intention is for ownership of the action plan to rest with stakeholders. This has proven more difficult than expected for a variety of reasons. Where institutions are weak, their capacity to manage and monitor implementation

4 More than 50 per cent of business people in both countries felt that courts were inconsistent in applying the law.

of action plans is underdeveloped. This is particularly true for judiciaries since they are typically small, limited in managerial capacity and unable to absorb additional time-consuming tasks. Moreover, while the projects targeted mainly the judiciary, substantial inputs were also required from other criminal justice institutions. Since the latter did not directly profit from the project, they were often reluctant to contribute.

UNODC sought to foster local ownership through the formation of implementation committees, comprising the Ministry of Justice, the judiciary, prosecution service, the police, prisons, the bar, NGOs, academia and the private sector. In some cases implementation committees also included a member of the local anti-corruption body. Committees were given responsibility for coordinating and managing implementation of the action plans. National meetings were organised at the end of the projects in order to share the findings of the assessment, evaluate action plans developed in the pilot jurisdictions, and review progress made and experience gathered from the implementation.

In line with the problems identified in the assessments, the projects focused heavily on improving access to justice by improving legal education; making information about one's case more accessible; and on reducing delays.

In Nigeria the most often cited impact was the establishment of a complaints system, consisting of complaints boxes and complaints committees to ensure their credible review. While this led to an initial increase of complaints, the complaints committees were far more efficient in responding to them. They also functioned as a filter, reducing the number of complaints that had to be seen and responded to by the chief judges. It also provided an opportunity to clarify responsibility for the grievance by informing court users when a complaint actually fell within the domain of the police or prisons, which helped to increase confidence in the courts. Pilot courts in Nigeria have started to report on complaints received and action taken through websites, annual reports and newsletters.

In Indonesia, however, the same system did not achieve a similar impact. By the end of the project, not one complaint had been received. It appeared that the complaints boxes were so conspicuously situated that it would have been impossible for a person to deposit a complaint without being seen. The evaluators proposed relocating the boxes outside the court premises and to consider the establishment of a P.O. box to receive complaints in future.

A number of projects focused on public education about due process rights and codes regulating the behaviour of judges, prosecutors and police through posters, flyers, stickers and TV and radio programmes. In one Nigerian pilot jurisdiction, the number of court non-appearances due to false expectations that bail required cash or some other form of payment was reduced. In Indonesia public declarations by the Chief Justice of intent to tackle judicial corruption within the framework of the project, along with integrity meetings and subsequent publicity, were credited with having catalysed the creation of an anti-corruption activist group in South Sumatra.

One of the overriding challenges UNODC faced throughout the projects was ensuring that the criminal-justice institutions all worked together toward a common objective. Despite efforts to

include all stakeholders in developing and implementing the action plans, the police and sometimes the prosecutor's office were uninterested and in some cases even obstructive (e.g. vandalising posters educating citizens about rights, loss of case files, untimely briefs to the prosecution, refusal to serve court notice, refusal to bring to court prisoners awaiting trial). This conflict stemmed from the parallel existence of several systems of justice delivery that did not necessarily recognise each other's legitimacy and jurisdiction (e.g. *sharia* or traditional rulers vs. secular courts). Moreover, strict interpretation of the separation of powers between the judiciary and the legislature/executive prevented the former in some countries from effectively influencing funding and budgetary decisions by the latter, with negative consequences for the long-term sustainability of the projects' achievements. For example only one state in Nigeria was able to secure additional funds from the state or federal government to continue to implement the action plan beyond the termination of the project.

Evaluation and impact

It is possible to draw some conclusions from the projects carried out so far. They have delivered some positive results, particularly in raising awareness; have illustrated the value of pilot testing; and produced sound data upon which decisions concerning extension and expansion of the programmes could be based. It became evident that the small, low-cost items (e.g. complaints boxes, posters) were the most visible achievements. Finally, the participatory and collaborative nature of the projects' development and implementation helped to foster support and enthusiasm.

However, the projects exhibited significant risks that could undermine the sustainability of their achievements. These included low salaries, which compel justice-sector operators to seek additional – sometimes illegal – sources of income, as well as overstaffing, leading to a weak culture of professionalism. Moreover, the frequent transfers of key professionals in the project, particularly members of the implementation committees, put at risk the sustainability and consolidation of the projects' achievements. Projects were designed and implemented on the assumption that once the action plans had been developed in the pilot jurisdictions, other donors, and local and national governments, would contribute directly, or through UNODC, to their further implementation. With few exceptions, it proved difficult to secure such support or to meet unrealistic expectations by justice-sector stakeholders with regard to the level of financial support UNODC would provide on an ongoing basis.

While UNODC continues to develop and implement new pilot projects on strengthening judicial integrity and capacity, it has also embarked on a second generation of projects that seek to expand assistance in countries where the pilot phase has been successfully concluded. Such second-phase projects provide an opportunity to learn from failures and build on successes. Through follow-up assessments it will be possible to fathom the real impact of measures, and determine their relative effectiveness.