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Part two

Country reports on judicial corruption

Introduction

Transparency International

This year, uniquely, the country reports section of the *Global Corruption Report* focuses on the cover theme: judicial corruption. In so doing it deepens the analysis contained in the comparative essays in part one by presenting studies that focus on judicial corruption in individual national jurisdictions. As in past years, the country reports are largely written by members of TI's national chapters around the world. In previous years it was up to each TI national chapter to select the corruption-related topics discussed in their reports. Time and again the judiciary emerged as the preferred focus.

Most of the reports in this section are from countries where judicial corruption is systemic and where TI national chapters are already campaigning on the issue in a bid to remedy the fact. Each begins with a set of indicators on the judiciary, which provides context for later analysis of access to justice, judges' salaries and other aspects of the judicial system that either encourage or discourage corruption. Some data could not be obtained, which is indicative of the level of transparency in the country concerned.

The following table describes the main corruption problems identified in the country studies, which are reflected in the recommendations to this book (see Executive Summary). The left-hand column lists recommendations; the central column describes how corruption manifests itself when the requirement is absent, weak or disregarded; and the right-hand column indicates the country reports that address that particular issue.

Recommendation	Corruption risk if recommendation is not complied with	Country reports where this issue is explored in detail
1. JUDICIAL APPOINTMENTS		
• **Merit-based appointments**. The process should involve an independent body composed of judges, lawyers, academics, lay professionals and civil society representatives. Vacancies, job requirements and selection criteria should be widely advertised.	**Deferential judges** appointed by the president/executive or by a judicial body that is influenced by the executive. **Poor quality judges**. Individuals who are not fully competent may be appointed (in worst cases 'buying' their jobs); prospective judges might be less certain of the basis for their selection.	Algeria, Azerbaijan, Bangladesh, Cambodia, Czech Republic, Egypt, Georgia, Israel, Kenya, Kuwait, Morocco, Nepal, Pakistan, Panama, South Africa, Sri Lanka, United Kingdom, Zambia

(*Continued*)

Recommendation	Corruption risk if recommendation is not complied with	Country reports where this issue is explored in detail
2. TERMS AND CONDITIONS		
• **Decent salaries, working conditions and status for judges**, commensurate with their experience and professional development for the entirety of their tenure. Good working conditions include freedom from threats to personal security. The constitution should contain entrenched safeguards against the manipulation by the legislature of salaries, promotions, assignments and general working conditions, including post-employment conditions.	**Extortion.** Poorly paid judges might be susceptible to the temptation of soliciting or accepting bribes. **Brain drain** as judges and lawyers who are competent to seek alternative employment move into private practice. **Perpetuation of corruption.** Where society holds judges in low regard, parties to a case might be emboldened to offer bribes. **Manipulation of finances and court management for political gain.** Salaries might be kept artificially low and supplemented with bonuses for compliant judges.	Algeria, Argentina, Azerbaijan, Bangladesh, Cambodia, Egypt, Georgia, India, Kenya, Mongolia, Nepal, Pakistan, Palestine, Papua New Guinea, Philippines, South Africa, Turkey, Zambia
• **Transparent and objective/ random case assignment**, administered by judges on the basis of an objective system; individual judges should not be assigned to courts where they have close links to local politicians.	**Allocation of cases to pro-government or pro-business judges**; punishment of independent judges by sending them to difficult locations; or barring them from high-profile cases.	Cambodia, Pakistan, Sri Lanka, Turkey
• **Adequate professional training** for judges through an organised, systematic and continuing programme of education. An independent judicial council (consisting of actors such as judges and bar associations) should have responsibility for judicial education.	**Poor judicial decision making.** Lack of knowledge and analytical skills; inability to assert authority and maintain accountability function. **Weak ethical values.** More likely to require or accept bribes; more likely to abuse court processes to delay cases for personal gain.	Algeria, Azerbaijan, Cambodia, India, Mexico, Morocco, Romania, Zambia

(*Continued*)

Recommendation	Corruption risk if recommendation is not complied with	Country reports where this issue is explored in detail
• **Measures to ensure that cases and appeals are dealt with expediently, and that cases are heard and judgements delivered without undue delay**. The judicial system should have adequate resources to function, including a sufficient number of judges, court staff and equipment; rules of court should discourage excessive adjournments and ensure that judges have adequate time to both hear cases and prepare judgements. Where there are excessive backlogs, it might be necessary to prioritise and sometimes purge old cases.	Excessive workload leads to **inefficiencies or delays** in judicial processes, providing an avenue for corruption to expedite cases.	Azerbaijan, Bangladesh, Costa Rica, Czech Republic, Georgia, Guatemala, India, Nigeria, Paraguay, Philippines
3. ACCOUNTABILITY and DISCIPLINE		
• **An independent disciplinary body with autonomy to make decisions on dismissals, and accessible complaints procedures**. An independent constitutional body should receive and scrutinise serious complaints against judges that might lead to dismissal; all disciplinary procedures should allow for initial investigation by the judiciary; judges must have the right to a fair hearing, legal representation and an appeal.	Political influence in the removals process can lead to **independent judges being removed**, sometimes in purges of several judges, prior to their replacement with judges more amenable to government. Conversely, if the disciplinary body is composed entirely of judges, they might be lenient with their peers, thereby **diminishing the chance of corruption being properly detected and punished**	Algeria, Argentina, Cambodia, Czech Republic, Georgia, Guatemala, Kenya, Mongolia, Nigeria, Pakistan, Poland, Turkey, Zimbabwe
• **Security of tenure** protected and guaranteed in the constitution. Judges should not be removed for any other reason than misconduct, poor performance or inability to carry out functions.	**Deferential judiciary.** Judges who fear punishment or removal for decisions against the state and its employees might not issue robust decisions against arbitrary government decisions.	Algeria, Argentina, Bangladesh, Kenya, Pakistan, Paraguay

(*Continued*)

Recommendation	Corruption risk if recommendation is not complied with	Country reports where this issue is explored in detail
• **Immunity, limited by liability for criminal activity,** should be granted to judges, but restricted to their decisions and opinions; laws on judicial immunity should not prevent the prosecution of judges for corrupt acts.	Lack of immunity provisions means judges are not free to give clear judgements, as they will be **fearful of recrimination**; judges who abuse immunity and contempt protections degrade the justice system and foment a **culture of impunity** for corruption crimes.	Croatia, Georgia, Nepal, Palestine
4. TRANSPARENCY		
• **Transparent court decisions, procedures and fees,** facilitated by adequate IT resources that provide judges with access to information and the possibility of communicating with one another, making it easier to track and retrieve case files. Judicial proceedings should be public, with limited exceptions (e.g. concerning children), and reasons for decisions should be published.	**Impropriety goes undetected** and judges feel they are not scrutinised for impartiality and adherence to the letter of the law in decision making. **Poor quality decision making**, since judges lack access to information and cannot communicate with each other; judges who stray from reasoned and objective decision making might not be detected. **Risk of disappearance of case files** and delays in retrieving case files, which increases the potential for extortion to expedite cases.	Algeria, Cambodia, Croatia, Georgia, Mexico
• **Clear conflict of interest rules and monitored, periodic declarations of assets**. Judges must declare any conflicts of interests as soon as they become apparent and, where a judge is unable to decide a matter impartially (or appears so to an objective observer), must disqualify him or herself.	**Inability to detect corruption** when assets are not declared, or to **counter perception of corruption** by demonstrating the lawful origins of visible wealth. **Lack of impartiality** when the judge rules in favour of the party he or she has an interest in, including donors to election campaigns in countries where judges are elected, not appointed.	Cambodia, Costa Rica, Georgia, Guatemala, India, Peru, Philippines, Poland, Sri Lanka

(*Continued*)

Recommendation	Corruption risk if recommendation is not complied with	Country reports where this issue is explored in detail
• **Participation of civil society actors (NGOs, court users, media and academics)** to monitor judicial procedures, in particular appointments and dismissals, and decisions in order to detect corrupt and unfair practices in the judiciary. Civil society should be free to operate unimpeded in an environment open to debate and criticism, and contempt of court and defamation rules should not be abused to inhibit debate.	**Debates on unfair and corrupt practices are stifled and corruption is not uncovered**, so that the corrupt can act in the knowledge that they will not be scrutinised. A poorly informed civil society may create pressure on judges so that **independent and impartial judgement is hindered**, rather than promoted.	Cambodia, Egypt, Mongolia, Pakistan, Palestine, Panama, Philippines, Romania, Zimbabwe

Algeria's judiciary: from bad beginnings to an uncertain future

Legal system: Common law, inquisitorial (with elements of Islamic law), prosecution part of judiciary
Judges per 100,000 population: 3.0[1] *Judge's salary at start of career:* US $635[2]
Supreme Court judge's salary: US $1,130–1,410[3] *GNI per capita:* US $2,730[4]
Annual budget of judiciary: US $310 million[5] *Total annual budget:* US $22.1 billion[6]
Percentage of annual budget: 1.4
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes, but with difficulty due to bureaucracy
Code of conduct for judges: Yes

1 Syndicat des Magistrats (2006) 2 Ibid. 3 Ibid. 4 World Bank Development Indicators (2005)
5 Loi de finances (2007) 6 Ibid.

Under one-party rule since independence in 1962, Algeria attached little importance to the role of the judiciary in society. Judges were on a par with other civil servants until the adoption of a series of constitutional revisions in 1989, which marked the beginning of a brief democratic interlude. A 1969 law defined the judiciary as a function 'at the service of the socialist revolution'.

The government managed the careers of judges and law officers[1] directly, and judicial independence did not exist. It was only in 1989 that a Law on the Status of Judges and Law Officers established the judiciary as an 'autonomous power'. A constitutional amendment introduced in 1996 stipulates that: 'The judiciary is independent. It is exercised within the framework of the law.'

The 'supreme law officer' decides…

The Algerian system has a two-tier structure, lower courts and courts of appeal, whose activities are regulated at the highest level by the Supreme Court. The state council is responsible for regulating the work of the administrative courts. The Supreme Court and the state council guarantee the consistency of case law across the country and ensure respect for the law. Article 147 of the constitution stipulates that 'judges obey only the law'. In the 37 higher courts, the public prosecutor's department is represented by the principal state prosecutor, who derives his authority from the Ministry of Justice.

The president of the republic is the 'supreme law officer' under article 72 of the constitution and has the power to transfer or promote judges. These transfers, which happen regularly, are never explained. Further down the scale, decisions on the future of other law officers are taken by the Minister of Justice. The Minister may shift a judge to a post as prosecutor or investigating magistrate, and vice versa. The process is not transparent, feeding concerns that sanctions may be imposed without justification or that corrupt judges may go unpunished. Measures are often taken to penalise judges who are thought 'too' independent, for example by transferring them to remote locations or punishing them for alleged bribe taking.[2]

In lower courts and courts of appeal public prosecutors often have more power than presiding judges, who are shackled by court bureaucracy. In mid-2006 lawyers in Algiers boycotted hearings in protest against bribe taking by judges. 'The principal state prosecutor has created ill-feeling by making the judges and law officers believe that the lawyers are accusing them of corruption. This leads to conflict between judges and lawyers when the real problem is the way he runs the public prosecutor's department as if it were his private property,' reported Abdelmadjid Sellini, president of the Algiers bar and a well-known lawyer.[3]

Under the constitution, judges are responsible to the supreme judicial council (CSM), a disciplinary body with limited autonomy chaired by the head of state and co-chaired by the Minister of Justice. It meets behind closed doors to decide dismissals, suspensions and promotions under the supervision of the chief presiding judge of the Supreme Court. Nevertheless, the CSM has little room for manoeuvre. It is not empowered to investigate cases of corruption, a task that falls to the general inspectorate in the Ministry of Justice which in turn passes its conclusions to the CSM. Because of these links, the inspectorate is far from neutral: its reports are not made public and its findings are not subject to appeal. For example, two law officers in the regional capital of Oran were suspended in June 2006 for 'falling short of their professional obligations'. The reasons for these shortcomings were never publicly explained.[4]

1 Mainly state prosecutors and other court officials.
2 See William D. Meyer, 'Shifting the "Power" in Algeria', *Judges' Journal*, Spring 2003, available at www.abanet.org/jd/publications/jjournal/2003spring/meyer.pdf 'Given their economic circumstances, judges may accept recompense under the table for informal assistance. In a land of few secrets, such behaviour is tolerated but remembered. Should a judge later display unwanted independence, old files can be dusted off and legitimate charges drawn up.'
3 *El Watan* (Algeria), 19 June 2006.
4 *El-Khabar* (Algeria), 26 June 2006.

The maintenance of a state of emergency since 1992, in defiance of the constitution and Algeria's human rights obligations, complicates matters further. The emergency gives wide-ranging powers to the administration and the police with no counterweight guaranteeing respect for judicial norms. Adding scope for corruption, according to sociologist Lahouari Addi, is the rise in the price of oil, which 'has sharpened the appetite of those billionaires who corrupt state employees, members of the security services and law officers to get what they want, offering not dinars but thousands of euros'.[5]

Signs of an Algiers spring?

In September 2004, parliament passed a new institutional law defining the status of judges and law officers after a long period of stalling.[6] According to the authorities, the purpose was to strengthen judges' independence by ensuring the financial autonomy of the CSM, which will also take charge of judges' training and their retirement packages. CSM decisions must still be endorsed by the president and the Minister of Justice, however. This body will only be truly independent when the involvement of the executive is limited, all its members are elected and there is transparency in its functions and decision making.[7]

The CSM only achieved real independence for three years from 1989 to 1992. In 1989 a law granted decision-making powers to the commission, which was made up mainly of judges and law officers elected by their peers. After the state of emergency was declared in 1992, elections ceased, parliament was dissolved, the president resigned, violence began and the number of elected members on the CSM diminished, reducing its autonomy. That same year an executive decree reworked the Law on the Status of Judges and Law Officers, drastically curbing the CSM's powers, and the rights of judges and law officers.[8] The authorities justified the step by pointing to the political instability affecting the country. From 1992 to 1999, the CSM met rarely. In 2006 the CSM's composition underwent 'a minor revolution' after which the number of elected magistrates was once again in a majority, to the detriment of the government representatives.[9]

As part of the 2004 reforms, the government increased judges' salaries to help them avoid the temptations of corruption. Nevertheless, a judge's monthly salary is the equivalent of only US $720 in dinars, lower than the average for judges in Morocco and Tunisia. It also published a new statute setting out their rights. Article 29 introduced security of tenure, which judges now enjoy after 10 years of service. Under the same provision,

5 *Le Monde-diplomatique* (France), April 2006.
6 *Liberté* (Algeria), 13 June 2004.
7 The National Union of Judges (SNM) considers that executive decree 05/92 (see note below) gave rise 'to a whole range of anomalies and inconsistencies, from arbitrariness in the decision-making process to settlements of old scores, including bizarre accusations against judges and law officers which gravely impugned their honour and dignity, and sometimes involved their suspension on the basis of spurious and mostly non-existent grounds'. From SNM's contribution to the preparation of the Law on the Status of Judges and Law Officers in 1998.
8 Executive decree 05/92 of 24 October 1992 conferred on the Minister of Justice the powers to appoint and grant tenure to judges and law officers that were previously the prerogative of the CSM. Membership of the CSM was reduced to 17, of whom only six were judges and law officers elected by their peers. Even counting the two judges and law officers who are *ex-officio* members (chief presiding judge and state prosecutor to the Supreme Court), judges and law officers were in the minority. Four key figures appointed by the president joined CSM: the head of the civil service and three directors from the Justice Ministry.
9 In accordance with institutional law no. 04-12 of 6 September 2004, the CSM now contains 10 elected judges and law officers, while the president can appoint six people of his choice. To these are added the chief presiding judge and the state prosecutor of the Supreme Court, who are *ex-officio* members.

a judge cannot be transferred without his or her consent. The new law reassured judges about their careers and professional advancement. The government has appealed to UNDP, the United States, Germany, Italy, France, Canada and the United Kingdom for help with training and specialisation programmes.

'Judges are no angels'

The fight against corruption must involve society as a whole. One or two pieces of legislation are not enough; nor are a handful of organisations with no power. In 1996 the authorities established the National Anti-Corruption Observatory but, lacking status and political will, it never truly functioned and was dissolved in 2000. Similarly, there is a need to accelerate the reform of the judicial system begun six years ago, but which is now making slow progress.[10]

In January 2006 parliament passed a law setting up a comprehensive anti-corruption strategy as part of its fight against this problem. Criticised by legal experts, the law was intended to fill a gap in the Criminal Code. It lays down prison sentences and heavy fines for public servants, judges and law officers, police and administrators found guilty of corruption or misappropriation of public funds. It provides for a new centre to raise public awareness, and to furnish information and guidance on how to challenge corruption.[11]

On 18 June 2006, the CSM struck off for life two judges allegedly involved in a corruption scandal. No information emerged as to what the judges had done, or on possible proceedings against them. Neither of them appealed the decision. In late 2005, the CSM studied the files of 17 more judges who have been penalised. 'Judges are no angels,' observed the Minister of Justice, Tayeb Belaïz.[12]

It is the first time since independence that so many judges have been dismissed, and so publicly. 'The process of cleaning up the system has so far led to the dismissal of a total of 60 judges and law officers who were found guilty of punishable offences,' the Justice Minister told the national press agency. 'This is not a quick fix, but a long-term enterprise that needs to be sustained until harmful elements have been eradicated.'[13]

Before announcing the dismissals, Belaïz declared: 'The time for impunity is over.'

Khalifa scandal grinds on

The Khalifa affair has been a matter of public concern for more than two years.[14] It centres on the trial of Rafik Khalifa, a businessman currently based in London, who allegedly misappropriated the equivalent of US $2 billion with the complicity of officials at every level. The file is being handled by the court at Blida (50 km from Algiers) with an appearance of 'transparency' that involves leaking inside information to the press. This clear breach of the confidentiality of the investigation shocked neither the media nor legal professionals. A judge at the court of Algiers, with close ties to the head of the Khalifa group, was removed from his post in total secrecy.[15]

Fayçal Métaoui (editor of El Watan, Algiers)

10 Mohand Issaâd, a specialist in international law who chaired the National Commission for the Reform of the Judicial System with distinction, was the first to note that the judicial reforms had come to a standstill. 'There is no real will to reform the judicial system,' he said. See *Quotidien d'Oran* (Algeria), 28 February 2002.

11 Cabinet communiqué, 13 April 2005.

12 *El Watan* (Algeria), 19 December 2005.

13 Algérie Presse Service (Algeria), 15 December 2004.

14 For further information, see *Global Corruption Report 2004* and *Global Corruption Report 2006*.

15 The principal defendant in the affair, Rafik Khalifa, told the French weekly *VSD* in April 2006 that the Algerian authorities 'are unable to commence the Khalifa trial. They have not carried out any financial audit of the liquidation of the Khalifa group.'

Azerbaijan's yawning gap between reforms on paper and in practice

Legal system: Civil law, inquisitorial, prosecution part of judiciary
Judges per 100,000 people: 4.1[1] *Judge's salary at start of career:* US $11,756[2]
Supreme Court judge's salary: Not obtained *GNI per capita:* US $1,240[3]
Annual budget of judiciary: US $31.2 million (incl. prosecutor)[4]
Total annual budget: US $3.9 billion[5] *Percentage of total budget:* 0.8
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* No

1 Council of Europe (2002) 2 *Zerkalo* (Azerbaijan), 9 May 2006 3 World Bank Development Indicators (2005)
4 Law on State Budget (2006) 5 Ibid.

Judicial corruption and lack of independence are serious problems in Azerbaijan. The government has been working with the Council of Europe since 2000 on a reform strategy aimed at ensuring greater independence among judges, and improved procedures for their selection and appointment. The reforms have gone some way towards addressing the problems, but failed to provide radical change. Progress has been made in creating a legislative and institutional framework to govern the judicial system, but there is a discrepancy between the letter of the law and its implementation.

According to Freedom House, Azerbaijan's rating for judicial independence in 2006 remained at 5.75 out of 7 (where 7 represents the lowest level of democratic progress), owing to an increase in politically engineered trials.[1] Even the country's leadership admits that the judicial system does not adhere to the rule of law. On 11 February 2005, President Ilham Aliyev pointed out that courts work too slowly and produce unfair judgements, especially in disputes between private companies. He emphasised the need for serious reform – but did not refer to corruption in the judiciary.[2] According to Fuad Mustafayev, deputy chairman of the opposition Popular Front Party, judges in Azerbaijan pass judgements based on two principles: for political reasons or, in a judicial equivalent to the construction 'tender', they rule in favour of the highest bidder.[3] Lawyers complain that they have been turned into 'brokers', rather than legal defenders.

According to the Advocacy and Legal Advice Centre (ALAC) operated by TI Azerbaijan in the capital, Baku, and Ganja, the third largest city, around one fifth of all corruption complaints received in its first year of operation concerned

1 Freedom House, *Nations in Transit 2006* (New York: Freedom House, 2006). See www.freedomhouse.org
2 *Azerbaijan* (Azerbaijan), 4 February 2006.
3 *Baku Kheber* (Azerbaijan), 24 April 2000.

judges, courts and the agencies responsible for enforcing sentences. The number of complaints about justice was 286 as of 30 June 2006. Most related to allegations of corruption by judges, or bailiffs who failed to enforce court decisions.

More judges in the pipeline

The operation of the judiciary and court structure is set out in Azerbaijan's Courts and Judges Act 1997. The act was amended in December 2005 when a law on the judicial-legal council was also approved. These two pieces of legislation introduced new recruitment examinations for judges (see below); extended to judges the financial requirements set forth in the 2004 Law on Combating Corruption, including the submission of tax returns and restrictions on gifts; provided for the creation of a committee to select judges and establish a training programme for candidates for the judiciary; and created a channel for individuals and businesses to complain about alleged judicial corruption. Citizens can appeal directly to the judicial-legal council, which has the power to initiate proceedings against judges accused of corruption.

Two laws adopted in December 2004 reviewed the immunity of judges, simplifying disciplinary procedures and lifting immunity when sufficient evidence has been found. Experts believe this issue has been 'addressed only procedurally, without defining substantive criteria'.[4] No statistics are available on cases where judicial immunity has actually been lifted.

A number of institutional reforms were introduced in line with the above amendments. Local courts were established in December 2005 to multiply the number of dispute-resolution forums in a bid to speed up the delivery of justice. These included courts of appeal in Baku, Ganja, Sumgait, Ali-Bayramli and Sheki; a court of serious crimes in the enclave of Nakhichevan; and economic courts in Baku-2, Sumgait and Sheki.

In January 2006 the president signed a decree ordering the judicial council to calculate the number of judges needed to staff the new and existing courts. To prevent abuse of power and corruption, the decree also required the relevant bodies to prepare a code of conduct for judges.

President has the final word

The judicial council was established in 2005 to ensure the smooth running of the judicial system; oversee the selection, transfer and promotion of judges; evaluate performance; and deprive corrupt or incompetent judges of immunity. The 15 council members are appointed by the president, parliament and the constitutional court, and include the Minister of Justice, chairman of the Supreme Court, two judges from the courts of appeal and first instance courts, a judge of the Supreme Court of the Nakhichevan Autonomous Republic, and representatives from the bar association, the prosecutor's office and the Ministry of Justice. The public has no say in the selection process. *De jure*, the judicial system is an independent branch of power, selecting a chairman from among its ranks every two and a half years. However, the members 'opted' to select the Minister of Justice as chair, handing *de facto* control of the council back to the executive branch.

The end of 2005 saw the organisation of the selection process for new judges. A written test on the law was held in September and an essay-writing competition followed in November. Successful candidates were invited to a final verbal test in February 2006. Observers from civil

4 'Monitoring of National Actions to Implement Recommendations Endorsed during the Reviews of Legal and Institutional Frameworks for the Fight against Corruption', adopted at the 5th Monitoring Meeting of the Istanbul Anti-corruption Action Plan on 13 June 2006 at OECD, Paris.

society and the international community witnessed all three stages of the selection process and reported no violation of procedures. The 56 successful candidates were enrolled in a training programme that was still in progress in June 2006. Candidates are subsequently expected to pass an interview with the judicial council, which will present the list for the president's approval. Thus, the executive still has the final word in the new selection process. Supreme Court judges also owe their positions to the executive branch, as does the general prosecutor.

Procedural deficiencies

The current system allows court officials to decide whether or not to hear a case without referring to legal provisions or giving any explanation. Judges may also pass judgements that do not reflect the laws of Azerbaijan or which conflict with statutory civil rights. In the case of Adil Gahramanov, one of five supporters of former president Ayaz Mutalibov who were found guilty of plotting a coup d'état in October 2001, the judge passed two contradictory sentences in the same case, one finding for the defendant and the other for the claimant.[5]

Court litigation is extremely time-consuming. This is especially ruinous for private companies, which usually prefer to drop a case or 'negotiate with the judge'. Parties in litigation have many opportunities to drag out a case because the legislation prevents a court from proceeding to a decision if the other party does not appear in court. There is no punishment for the defaulting party. On average about 5 per cent of businesses use courts in Azerbaijan, compared with 30 per cent in Europe and Central Asia.[6]

Judges lack discipline

Judges' salaries are low and their workload heavy. Azerbaijan has only 4.06 judges per 100,000 people, compared to a ratio of 25.3 in Germany. This is the lowest number of judges per capita in the region. The annual salary of a local court judge in Azerbaijan – after a recent significant rise – is US $11,635, compared to US $23,800 in Estonia.[7]

Judges do not always adhere to working procedures. The judicial council annually reviews the results of monitoring organised by the Ministry of Justice to evaluate judges' performances. The most recent, in May 2006, resulted in sanctions against 10 judges for misconduct, including violations of dress code, holding hearings in private offices rather than in court, and prolonging cases.[8] None has been fired for corrupt practices, however, though such cases are numerous according to civil society data.

The Ministry of Justice and prosecutor's office held several courses on anti-corruption issues for prosecutors, judges and police in 2005, but NGOs were not invited to participate in the development of the syllabus.

Another problem is judges' low level of professional development. Mirvari Gahramanli, chairwoman of the Committee for Protection of Oil Industry Workers' Rights, said judges are unskilled in adjudicating social or economic disputes and badly need training on the Labour Code.[9]

An equally serious problem is the lack of qualified lawyers. Until recently, only 370 members

5 *Baku Kheber* (Azerbaijan), 3 May 2006.
6 World Bank press release, 29 June 2006.
7 *Zerkalo* (Azerbaijan), 9 May 2006.
8 One of the admonished judges was Asif Allahverdiyev, chairman of the civil cases council of the Court of Appeal, who was dismissed on the grounds that his performance had been unsatisfactory.
9 *Baku Kheber* (Azerbaijan), 24 April 2006.

of the government-supervised collegium of advocates, or bar association, could represent in criminal cases. No new members were added from 1999 to 2004.[10] After amendments to the Law on Advocates in August 2004, 36 new members were added and a new bar association formed, but the Justice Ministry retained its veto on selection and 220 licensed lawyers were excluded. Although the bar then had some 400 members, only 50 regularly took criminal cases.[11] A further amendment passed in August 2005 simplified requirements for the excluded lawyers who were allowed to practise without taking the bar exam.

Lack of enforcement

The other main problem is that bailiffs lack the power, skills, resources and initiative to enforce decisions. For example, in ALAC case 137/87 a citizen complained that a cotton factory refused to pay outstanding wages even after a court had ordered it do so. The bailiff had simply not enforced the court decision. In case 135/88, a citizen complained a child had not been transferred to her custody from her divorced husband because the court executors failed to enforce the ruling. While there is no evidence that either case involved judicial corruption, they illustrate the scope that exists for corruption at all points in the law-enforcement chain even after a judicial sentence has been issued. Failure to enforce court decisions further undermines trust in the justice system.

When a decision is not implemented the bailiff is legally expected to prepare a fresh dossier for the judge, prior to a petition to the prosecutor's office to institute a charge of failing to respect a court ruling. This is rarely done in practice. An additional flaw is that bailiffs are not actually part of the judicial system, but fall under the executive branch.

Recommendations

Legislative reforms are urgently required to strengthen the independence of the judiciary. Among the most important are:

- The judicial council should not be accountable to the Justice Ministry
- Members should be selected from among retired judges, and representatives of culture, the arts and civil society
- Appointment of judges and the prosecutor general should be merit-based and made by parliament upon recommendation by the judicial council
- Responsibility for monitoring court performance should be transferred from the Ministry of Justice to the judicial council.

Procedural changes are also needed:

- Courts should be required to provide written reasons for declining a case
- Reasonable time limits to be set on the duration of litigation
- Penalties should be established for when a party fails to appear in court
- Bailiffs should be given the resources to enforce court decisions
- Parliament, judiciary and the police should develop a witness protection programme.

Other important areas of reform are:

- All decisions of the Supreme Court, economic court and constitutional court should be published on the internet
- Anti-corruption education should be provided to all branches of the justice sector, with the active involvement and input of civil society
- Public anti-corruption education should be improved.

Rena Safaralieva (TI Azerbaijan, Baku)

10 OSCE, 'Report from the Trial Monitoring Project in Azerbaijan 2003–04' (Baku: OSCE, 2004). Available at www.osce.org/odihr/item_11_13762.html

11 Ibid.

Bangladesh: justice in disarray

Legal system: Common law, adversarial, plural (with elements of Islamic law), prosecution part of judiciary
Judges per 100,000 population: 0.6[1] *Judge's salary at start of career:* US $1,212[2]
Supreme Court judge's salary: US $4,812[3] *GNI per capita:* US $470[4]
Annual budget of judiciary: US $38.5 million[5] *Total annual budget:* US $10.4 billion[6]
Percentage of annual budget: 0.4
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges:* Yes

1 CIA World Factbook 2 *Bangladesh Observer* (Bangladesh), 17 May 2005 3 independent-bangladesh.com/news/sep/12/12092005mt.htm 4 World Bank Development Indicators (2005) 5 Ministry of Finance 6 Ibid.

Corruption is perceived as pervasive and continues to be a source of concern in Bangladesh's lower courts. A 2005 household survey by TI Bangladesh (TI-B) found that two thirds of the 18.8 per cent of respondents who used the courts in the preceding year had paid an average bribe of TK7,370 (around US $108) per case,[1] equivalent to 25 per cent of their annual income. The Supreme Court has enjoyed public confidence, which is reflected in efforts that are being made to bring the lower judiciary under its control and supervision.

Changing constitutional framework

Under the 1972 constitution the president appointed judges to the Supreme Court after consultation with the Chief Justice. The Supreme Court supervised and controlled appointments to the lower courts. A constitutional amendment in 1975 deleted the requirement that the Chief Justice be consulted on appointments, although consultation for Supreme Court appointments continued on the basis of convention until 1993 when six judges were appointed without consultation. This was a major public issue at the time but the matter was resolved by the cancellation of the appointments, and fresh appointments were made in line with practice. Recent departures from this convention have led to appointments that have circumvented the process of consultation, or not given due weight to the Chief Justice's views. Members of the legal profession and civil society have expressed serious concern about political considerations creeping into the process of judicial appointments.

In a landmark ruling in 1999 in what is known as the Masdar Hossain case,[2] the Supreme Court ordered the government to form an independent

1 For one or more interactions in the same year in the same litigation.
2 In *Ministry of Finance v. Masdar Hossain*, Hossain, a judge representing 400 other judges from the subordinate courts, argued that since judges and magistrates were part of the judiciary, they should not be controlled as if they were part of the civil service under the 1981 Bangladesh civil service rules. The high court agreed, striking out the 1981 rules as unconstitutional. When the government appealed, the appeals court confirmed the decision.

judicial services commission to oversee the appointment, promotion and transfer of members of the judiciary in consultation with the Supreme Court. A further 12-point directive called for a separate pay commission for the judiciary; radical overhaul of the lower courts; amendment of the criminal procedure; and new rules for the selection and discipline of members of the judiciary. Significantly, the Supreme Court did not insist on a constitutional amendment to rectify discrepancies in the judiciary's status, although the government had a sufficient majority to enact one.[3]

As a result the underlying legislation remains intact, and reforms have been piecemeal and long-drawn-out. Successive governments have obtained more than 20 separate time extensions to implement the Supreme Court's directives in full. The government did not announce the formation of the new judicial service commission until November 2004 (see below) and it was not expected to function until the new set of rules were in place.[4] High officials have been charged with contempt for distortion of the interpretation of the Supreme Court's order.[5] The delay has left the judiciary in a state of limbo for over half a decade (see below).

Magistrates as state functionaries

The Supreme Court has two divisions, appellate and high court. The latter hears original cases and reviews lower court decisions. The lower court is divided into criminal and civil courts extending over 64 districts. The criminal court is also a two-tier system: session courts hear trials for offences punishable with more than 10 years imprisonment, while magistrates' courts have sentencing authority for up to seven years.

Until the judicial services commission becomes fully functioning, all judges, except those in the Supreme Court and the high court, are answerable to one or more ministries: the metropolitan magistracy, for example, falls under the Ministry of Home Affairs (also responsible for the police),[6] while the Ministry of Establishment supervises district magistrates. Magistrates are responsible for a variety of non-legal duties, such as collecting taxes and overseeing government property, which vary according to which ministry employs them. In the absence of the separation of the judiciary from the executive, magistrates remain subject to the latter's administrative control and are thus susceptible to influence in the exercise of their duties. They are thus 'government functionaries who perform a role with the external appearance of a judge while undertaking a range of day-to-day activities on behalf of the state'.[7] As a consequence, the victims of corruption and other crimes committed by officials and their families, including members of the police, could find it difficult to obtain judicial redress in a lower court.

Backlog strangles justice delivery

Magistrates and judges exercise extensive discretionary power since there are limited accountability mechanisms in place. A district judge's salary is equal to that of a joint secretary,[8] although they do not enjoy comparable status.

3 Asia Foundation, 'Judicial Independence Overview and Country-level Summaries' (Manila: Asian Development Bank, 2003).
4 www.bangladeshlaw.org/news.php?id=6&PHPSESSID=7cad182811486795a311793eb4ba4178
5 *Bangladesh Observer* (Bangladesh), 23 October 2005.
6 Asian Human Rights Commission, 'Open Letter to the UN Special Rapporteur on the Independence of Judges and Lawyers', 11 August 2006.
7 Ibid.
8 A joint secretary is a senior civil service official two ranks below the secretary (the highest ranking civil servant in government). Below the joint secretary there are three ranks: deputy secretary, senior assistant secretary and assistant secretary. VIP (very important person) status starts from joint secretary. As the district judge does not enjoy the status of that rank, he is deprived of many facilities and perks, and his real income is less than that of a joint secretary. His official salary is TK16,800 (US $242) per month. Judges below district judges receive less.

The salary scale is inadequate to support a lifestyle worthy of a judge and is a disincentive to the professionals whose appointments might otherwise contribute toward raising the integrity and reputation of the courts.

Heavy workloads and poor disciplinary procedures are incentives to bribe taking and other corruption. There are 77 Supreme Court members and 750 other judges to dispense justice to a population of nearly 150 million people. Because of the Masdar Hossain ruling, no new appointments have been made to the lower courts since 1999 due to the lack of a judicial service commission; there are 210 outstanding vacancies.[9] The paucity of courts and judges is a major obstacle to justice delivery, along with organisational weakness, lack of qualified support staff and lacunae in procedure that permit lawyers to prolong hearings. A 2003 report noted that there were 968,305 pending cases, 344,518 in judicial courts, 395,905 in magistrates' courts, 127,244 in the high court and 4,946 with the Supreme Court.[10] This backlog strangles the rule of law and due process. Corruption enters through the case-rescheduling process; by bribing the right person, a docket can be moved forward for hearing.

Corruption in the broader justice system

Judges and magistrates stay in regular contact with other elements of the justice system that suffer from corruption. Clerks responsible for registering, filing and processing prosecutions extort money to provide information to the accused or to extract favours from magistrates in criminal courts. The TI B Household Survey 2005 revealed that lawyers elicit bribes from defendants, plaintiffs, or both. With a sample size of 3,000 households, the survey yielded 392 respondents who had paid bribes in exchange for judiciary services during the previous year. Just over 39 per cent said they had paid bribes through lawyers, who transmitted a portion to magistrates or judges. Public prosecutors reportedly extracted bribes from 4 per cent of respondents.

Another significant problem relates to the agencies responsible for enforcing judicial decisions. Courts often issue directives or recommendations directed at the government, which are flouted by administrative processes and law enforcement agencies.

Politicisation of judiciary

After 15 years in the Supreme Court, retired justice Naimuddin Ahmed confessed to never having previously heard members of the bar describe judges by their political party leanings, as 'Awami judges or BNP judges or Jamaati judges, which we hear today'.[11] In principle, the Supreme Court has powers to punish anyone who unlawfully tries to interfere with or influence a judge's functions. Ahmed recalled a district judge at the Druta Bichar Tribunal II of Dhaka who sought the Court's protection after two public prosecutors threatened him with transfer if he did not grant bail to the accused in a criminal case. Instead of leaping to his defence, the Supreme Court assented to the judge's transfer.[12] Political clout is demonstrated in the appointment of junior judges to senior posts in defiance of a tradition of appointing judges on the basis of seniority and experience.[13] 'Capability, efficiency, integrity, fearlessness and

9 *Daily Star* (Bangladesh), 15 October 2005 and 11 May 2003; Bangladesh Institute of Law and International Affairs.
10 Transparency International, National Integrity Survey Bangladesh (Berlin: TI, 2003). The Court Watch Study (2004) on Speedy Trial Act noted that the slow pace of justice allows over 30,000 cases to remain under trial for years in the Dhaka metropolitan sessions court.
11 *New Age* (Bangladesh), 28 July 2006.
12 Ibid.
13 Ibid.

character,' he wrote, 'have ceased to be the criteria for appointment, promotion and transfer.'

A supreme judicial council, comprising the Chief Justice and the two most senior judges, is vested with the power to enquire into allegations of misconduct by a judge of the Supreme Court. In April 2004 the council passed its first order removing a high court judge. It was alleged that newly appointed Judge Shahidur Rahman had been approached by a former client who was seeking assistance for a relative. The judge had indicated that he could help, kept with him the relevant file and some payment was made. The matter was brought to the attention of the Chief Justice by the president of the bar association. The accused judge asked the high court for judicial review of the order for his removal and obtained a stay. The appellate division then stayed the order of the high court division. The council's action reflected its concern with maintaining a high standard of integrity and served as a warning that similar cases would be taken seriously.

Reform efforts

The objectives of the US $60 million Bangladesh Legal and Judicial Capacity-building Project, funded by the World Bank and others, are to improve the efficiency, effectiveness and accountability of the justice-delivery system and increase access to justice, particularly among women and the poor. The six-year project (2001–07) consists of strengthened case management and improved court administration; phased installation of automated court-management information systems; training of district judges and court staff; and upgrading or renovation of court buildings. Implementation began in pilot district courts and the Supreme Court with a view to replicating the project, if successful. The new system includes computerisation and is expected to improve transparency, along with consistent and speedy handling of cases.

Other initiatives include the Canadian-funded Bangladesh Legal Reform Project, which works at the national level with the ministries and institutions responsible for juvenile justice, legal aid and Alternative Dispute Resolution in two pilot districts, Jessore and Gazipur.

The Anti-Corruption Commission (ACC) came into being in November 2004 with the appointment of three commissioners, including the chairman, Justice Sultan Hossain Khan. The commission's mandate is limited to investigation and framing charges. Although the ACC has framed charges against hundreds of individuals, it has procured few convictions. Many cases have been withdrawn by executive order, while others have been quashed in the high court apparently due to lack of merit.[14]

Recommendations

- The government must implement the judgement in the Masdar Hossain case without further delay. The judicial services commission, formed in 2004, contains only two members of the judiciary on its seven-person board.
- The appointments procedure for judges and other judicial staff must be made fair and impartial, and tenure protected. Salaries for judges, magistrates, prosecutors and police should be raised.
- Police, magistrates and judges must declare their assets and those of their families on entering office, intermittently during their tenure and after their departure. An independent body should verify and monitor such disclosures on a regular basis. The ACC should be mandated to monitor judicial corruption and take steps towards prosecution.
- The court record system should be computerised to allow litigants and their attorneys to access public files and track cases through to their resolution. A website should list

14 *Daily Star* (Bangladesh), 13 August 2005.

such information as the date of filing, location of file and the length of time a file has remained at each stage of the justice system.
- NGOs and media do their best to publicise miscarriages of justice. For them to work more effectively, the 1923 Official Secrets Act must be repealed and access to information liberalised.

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Corruption in the judiciary of Cambodia

Legal system: Civil law, inquisitorial, prosecution part of judiciary
Judges per 100,000 people: 1.0[1]
Judge's salary at start of career: US $3,804[2] *Supreme Court judge's salary:* US $5,268[3]
GNI per capita: US $380[4] *Annual budget of judiciary:* US $13.1 million[5]
Total annual budget: US $559.4 million[6] *Percentage of annual budget:* 2.3
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? No *Code of conduct for judges:* In drafting process

1 World Bank (2000) 2 Ministry of Justice 3 Ibid. 4 World Bank Development Indicators (2005) 5 *Cambodian National Gazette* (2006) 6 CIA World Factbook

As the extraordinary chambers in Cambodia move to try those responsible for human rights violations committed by the Khmer Rouge regime, attention has focused on corruption and executive interference in the judiciary. Judicial officers are among the least trusted government actors and provincial courts are among the least trusted institutions.[1] Businesses see courts as the most corrupt public institution,[2] a tool of political pressure that is incapable of fairly adjudicating cases. Chronic underfunding for judges and courts, coupled with a culture that places a high value on giving gifts to people in authority, contributes to high levels of petty corruption in Cambodia's courts.

Effect on ordinary citizens

From the moment one becomes involved with the judicial system, either as a defendant or as a party in a civil case, one encounters misuse of entrusted power for private gain. A Center for Social Development (CSD) study indicates that bribes intended to influence outcomes are considered morally wrong, but are commonly accepted.[3] Citizens distinguish between bribes that influence

1 Asia Foundation, 'Public Opinion Surveys on Judicial Independence and Accountability. Country Report: Cambodia' (Asian Development Bank, September 2004).
2 *Cambodia Daily* (Cambodia), 13 July 2006.
3 Christine J. Nissen, *Living Under the Rule of Corruption: An Analysis of Everyday Forms of Corrupt Practices in Cambodia* (Phnom Penh: Center for Social Development, 2006).

the outcome of a trial and bribes intended to facilitate service.

Lower court trials do not meet basic international standards, and lack transparency, consistency and due process. On average, less than 10 per cent of all defendants in cases monitored by CSD are acquitted, and although even complicated trials routinely last less than 10 minutes, sentences are severe.[4] In a recent trial in Phnom Penh municipal court, for example, the defendant was sentenced to five years in prison for attempted motorbike robbery: the judge based the conviction on the suspect's confession alone.[5] Witness testimony is usually read from the police report with no cross-examination by lawyers, and although the constitution requires criminal defendants to be provided with counsel, Ministry of Justice regulations allow hearings to go forward without counsel present. An estimated 50 per cent of all cases go forward without attorneys.[6]

Causes of judicial corruption

Low salaries and the courts' financial structure are significant causes of corruption. The government allocated 55.2 billion riel (US $13.1 million) to the judiciary in 2006, with each lower court allotted an annual budget of US $23,100.[7] There are 225 judges, or 17 per million people in Cambodia, and fewer than 300 practising lawyers.[8] The physical appearance of court buildings reflects the low budgetary priority. In Kandal provincial court, the wall of one courtroom is lined with shelves of mouldy documents. There are few typewriters.[9]

Judges received a 10-fold pay raise in 2002 in a bid to curb corruption. With a base rate of only 1.4 million riel (US $360) a month,[10] this had little impact on corruption because it was granted universally with no reference to performance. Observers say that the increased salary is insufficient to maintain a standard of living commensurate with the prestige associated with being a judge. The official way to gain entrance into the Royal School of Judges and Prosecutors (RSJP) is through a standard test.

Court clerks wield considerable power over cases, since they act as the gatekeepers to judges and write court records. While it is difficult to uncover substantiated cases of lower-level bribery, there is anecdotal evidence to suggest that much petty corruption is controlled by court clerks who charge informal fees to court users on a sliding scale, according to the complexity of the case. Some of this money is reportedly passed to judges in return for access to future cases. There is no transparent system to determine how clerks are assigned specific cases. Lawyers understand that clients will pay a higher fee when their case is complex.[11] Clerks make a standard civil service salary of 130,000 riel (US $33.35) per month,[12] which does not reflect the high cost of living in Cambodian towns. Training programmes for 800 clerks were introduced in 2005. Clerks will be re-certified and salaries will be performance-related.

Insufficient separation of powers

The international experts who wrote the 1993 constitution imported a liberal democratic model

4 *Court Watch Bulletin* (Phnom Penh: Center for Social Development, September 2005).
5 Observation in Phnom Penh Municipal Court, 13 June 2006.
6 *Phnom Penh Post* (Cambodia), 10–23 March 2006.
7 *Cambodian National Gazette*, January 2006.
8 Bar Association of the Kingdom of Cambodia, *Directory of Lawyers 2005–06* (Phnom Penh: Bar Association of the Kingdom of Cambodia, 2006).
9 Interview with Khieu Samet, President of Kandal provincial court, 8 June 2006.
10 Raquel Z Yrigoyen Fajardo, Kong Rady and Phan Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples* (Phnom Penh: Ministry of Justice and UNDP, 2005).
11 Interview with Ry Ouk, partner in Bou, Nou and Ouk law firm, 15 July 2006.
12 *Pathways to Justice* (2005), op. cit.

that explicitly established the judiciary as independent, but there is a wide gulf between the constitutional principle and what happens in practice. Many judges have connections with the ruling Cambodian People's Party, which can compromise their impartiality in cases involving the government or party officials.[13]

No formal system exists for transferring, promoting or dismissing judges. In March 2005 Prime Minister Hun Se announced his 'Iron Fist' policy against corrupt officials. In May 2005, he shifted control of the supreme council of the magistracy to the Ministry of Justice in contravention of the constitution, which states that it should act as an independent disciplinary body. As of mid-2006, two trials had been initiated against judges under the new policy, one in Phnom Penh and the other in Battambang. Observers expressed concern that both cases were politically motivated and not about corruption at all. The UN Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai, questioned whether the prime minister's actions complied with the constitution.[14]

The Cambodian bar association is perceived as another tool through which the government asserts its control. In 2004, the head of the bar association gave Hun Sen and several other high officials licences to practise law despite their lack of credentials.[15] Because of this a new bar association president was elected, but he has yet to take office because the former leadership will not cede control. Several hundred applications to the bar have been reportedly frozen for political reasons, despite a chronic shortage of judges and lawyers. These problems contribute to a general lack of respect and trust for the judicial system as a whole.

Public access to judicial decisions and laws

Parliament regularly passes new laws and the ministries issue their own regulations, but they are not readily available to the public. In August 2005 the National Assembly passed an Archives Law allowing public access to documents that do not compromise national security, but in practice the government tightly controls what is accessible.[16]

Judicial opinions are not documented in a transparent way.[17] The Supreme Court publishes its decisions for use in the schools of law and the magistracy, and occasionally distributes them to lower-level courts, but there is no general resource where lawyers can gain access to them.[18] Trial court judges' rulings are read out and written up by the clerk, but judges rarely explain their reasoning or note it in the court record, though the law requires this.[19]

Legal-judicial reform efforts

In December 2004 the government promised to legislate a package of eight laws to strengthen the judiciary by the end of 2005, but as of August 2006 none had passed. The draft laws received little public attention. A similar fate befell the

13 Commission on Human Rights, 'Report of the Special Representative of the Secretary-General for Human Rights Yash Ghai', 8 February 2006.
14 Ibid.
15 Ibid.
16 US Department of State, *Country Report on Human Rights Practices 2005 – Cambodia* (Washington D.C.: US Department of State, 2006). Available at www.state.gov/g/drl/rls/hrrpt/2005/61604.htm
17 Interview with Nou Teperith, partner in Bou, Nou and Ouk, 15 July 2006.
18 Interview with Kim Sathavy, Supreme Court judge and former dean of the Royal School of Judges and Prosecutors, 30 May 2006.
19 Interview with So Mosseny, Center for Social Development, 13 June 2006.

Anti-corruption Law, which would criminalise the acceptance or solicitation of bribes by all government officials and make attempted bribery of a judge a specific crime. First drafted in 1994 and re-drafted in March 2006, the bill was not on the national assembly agenda in June 2006.

The government also pledged to pass more complete civil and criminal codes. A new civil procedure code is awaiting senate approval. Clearer and more complete codes of procedure are necessary to increase transparency in the legal system.

Informal or alternative dispute resolution (ADR) methods are popular at the local and village level. Several programmes are in development to regulate the system and provide legal training to the local leaders who act as mediators.[20] ADR relies on more traditional figures of power who are seen as less corrupt, less expensive and more familiar than members of the formal justice system.

Another project is the Kandal Model Court, an effort funded by the Australian government. The new court includes witness rooms and closed-circuit cameras. Other basic improvements to infrastructure, such as computerised record keeping, would make a big difference to accountability, but are not currently being considered. A key step would be to require judges to record the reasoning behind their decisions.

Several NGOs, including the Cambodian Defenders' Project, Cambodian League for the Promotion and Defence of Human Rights, Cambodian Human Rights and Development Association and Legal Aid of Cambodia, provide *pro bono* defence counsel, though they are inadequately funded and staffed. The Center for Social Development observes and monitors several courts, keeps a database of the cases they observe and publishes details of their observations in quarterly reports. Paññāsāstra University runs a student legal clinic that provides basic legal education to disadvantaged and rural communities. NGOs also focus on influencing the government through media attention. Many feel that these efforts could be better coordinated.

Significantly higher salaries and a larger infrastructure budget must be a part of any reform. An enforceable code of ethics could improve professionalism while a computerised record-keeping system would increase transparency. The committee on legal and judicial reform was working on a code of ethics in mid-2006 with the aim of reducing corruption by providing clearer guidelines on judicial conduct. As a younger, better-trained, generation of Cambodians moves up the hierarchy, there is potential for improvement. But when the judiciary operates with no resources and within a framework where corruption is so deeply rooted, there is only so much it can accomplish.

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20 *Pathways to Justice* (2005), op. cit.

Chile's partial success

Legal system: Civil law, adversarial system *Judges per 100,000 people:* 5[1]
Judge's salary at start of career: US $52,260[2] *Supreme Court judge's salary:* US $98,616[3]
GNI per capita: US $5,870[4] *Annual budget of judiciary:* US $240.5 million[5]
Total annual budget: US $24.8 billion[6] *Percentage of annual budget:* 1.0
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges:* No

1 Justice Studies Center of the Americas (2004–05) 2 Dirección de Presupuestos (www.dipres.cl) 3 Ibid.
4 World Bank Development Indicators (2005) 5 Dirección de Presupuestos (www.dipres.cl) 6 Ibid.

Chile is often cited as a success story of partial judicial reform. It is true that instances of the worst excesses of corruption, for example high court or trial court judges 'selling' sentences, have not been uncovered in the past few years. It is less clear, however, whether levels of administrative corruption have actually fallen. In the criminal justice system, at least, the replacement of closed judicial proceedings with transparent, oral proceedings has closed off some avenues of corruption.

Public perception does not reflect such improvements. A 2005 poll by the research centre Instituto Libertad y Desarrollo placed the judiciary in first place among public institutions most riddled with corruption, while a Mori poll conducted the same year by TI's national chapter found that the judiciary was second only to political parties in the list of corrupt institutions. Polls by the think tank Centro de Estudios de la Realidad Contemporánea show that trust in the justice system actually declined since 1990, when reform of the justice sector began.

Added to this apparent contradiction is the perception that the judiciary has not kept up with other institutions in terms of adopting a democratic and modern outlook. It is seen as aloof and resistant to change. To explain this it is necessary to trace the reform process to its origins in the restoration of democracy in 1990. The driving motivation for the initial reform was to weaken a Supreme Court that had served the interests of the Pinochet dictatorship. The Court resisted these initial reforms in collaboration with the conservative opposition. It appealed to the principle of independence in a bid to exclude itself from the drive to increase the transparency and accountability of Chile's institutions.

Successive waves of reform have sought to modernise the Supreme Court, and though they did not target judicial corruption specifically, they reduced the opportunities for patronage, particularly in the hiring and training of judges. The Judicial Academy was created in a first package of reforms in the early 1990s, partly to control the recruitment and career path of judges. A subsequent wave began in 1995 and involved deep reform of the criminal justice system. As well as moving to an accusatorial system with transparent oral procedures, it improved the public defence service, restricted the use of pre-trial

detention, introduced three-judge panels for major criminal cases and modernised administrative procedures. New court houses were built and considerable efforts went into training judges and court staff.

But problems remain. The criminal justice sector has a hierarchical structure of evaluation and control mechanisms that shape the careers of judges. Unfortunately, this structure has not improved accountability; rather, it has given way to a system that induces fear in lower court judges and causes appellate court judges to prefer to remain close to the executive branch of government, which exerts a significant influence in the appointments process.[1] Other elements contributing to mistrust are delays and the lack of transparency surrounding many judicial processes, in particular in the civil justice system where reforms have not been successfully implemented.

Bribery has diminished, but reforms have not been fully implemented

To analyse judicial corruption it is necessary to disaggregate the court systems. The criminal system has undergone drastic reforms, which were introduced piecemeal over five years. In some regions modern court systems have been in place for years, while in others they have only operated since June 2005. This may account for differences in real or perceived judicial corruption.

Reforms have yet to be extended to the civil justice system. Partial attempts were made on labour and family matters, but lack of coordination and investment hindered success. The civil justice system is scandalously slow in Chile and the government has not displayed the will needed to change this. A civil case that does not benefit from special treatment can take six to eight years before a judicial decision is reached. Certain practices are indefensible. The appointment of auxiliary personnel, including experts, is not transparent and guidelines on conflicts of interest are not followed.

At the level of superior courts, there have been cases where secondary court officials have taken bribes to ensure a particular case finds its way into a court listing, or that a file disappears; however, these situations generally pre-date the reform. It has been alleged that certain lawyers peddle influence over certain Supreme Court or appellate court judges. However, there has been no recent evidence of bribes to alter a judicial ruling.

In the criminal justice sector, the most serious pre-reform corruption cases involved court clerks, auxiliaries and expert witnesses, rather than judges. A prime example of court corruption is the extortion of bribes from the family of people in pre-trial detention in exchange for expediting a case. Two factors facilitated this process: ignorance of due process rights by defendants and their families; and excessive delegation of judicial functions by judges to court officials and administrators.

Since the reforms were implemented, the situation in the criminal justice sector looks quite different. Few corruption-related problems have been detected in the new system which, in contrast to the old, distinguishes clearly between the investigatory and accusatory roles (the responsibility of the public prosecutor's office, an autonomous body within the judiciary) and of the adjudicating function (responsibility for the oral criminal courts is also part of the judiciary). The new institutional design facilitates transparency and has eliminated certain functions that had served as conduits – or instigators – of judicial corruption. Under the old system there were only 79 criminal judges in the whole country, with

1 The Supreme Court draws up shortlists for Supreme Court and appeals court judges, and the appeals court of the relevant jurisdiction draws up the shortlist for trial court judges. The president appoints judges from these lists.

responsibility for investigating, accusing and judging. To deal with their heavy caseloads, criminal judges often delegated the investigatory and accusatory tasks to 'actuaries', court officials who were not necessarily qualified in law. The role of the actuary was abolished by the reforms and the importance of private lawyers was reduced by the creation of the office of public criminal defender.

Costs of corruption

Lack of equal access to justice is a major problem in Chile. Those who are prepared to pay for the best lawyers or for studies by experts can certainly improve their chances in court. It is the responsibility of judges and court staff to minimise differentials in access by consideration of the facts before the court and by refusing to be swayed by external inducements. Another potential cost of corruption is the trampling of the human rights of individuals involved in criminal cases, for example by extorting bribes in exchange for releasing suspects held in preventive detention; certainly it was human rights concerns that motivated the reforms in the first place. Nowadays, there is no evidence that corruption is undermining human rights or blocking general access to justice in Chile.

What's to be done?

The reform of the criminal justice system brought considerable progress in transparency as judicial proceedings became open and oral. But the same cannot be said of other areas of law. Attempts to reform Chile's family courts have failed mainly because they lacked careful planning based on consultation and consensus, and did not receive sufficient political support or funding. As a result, the reforms to juvenile and labour courts have generated frustration and those to civil courts have been paralysed.

Efforts to increase collegiality among lawyers would help to reduce corruption in courts. Chile is one of few countries in the Americas where membership of the bar association is voluntary.[2] Non-associated lawyers are not required to adhere to the code of ethics of the bar association. A bill to regulate ethical conduct of the entire legal profession was debated in 2003, but was not approved. A sense of professional unity might increase accountability for corrupt acts, especially if unethical acts were widely publicised.

With regard to employees of the public prosecutor's office, the prosecution of illegal acts committed while discharging their duties should rest in the hands of an internal comptroller's office (rather than the regional prosecutor's offices) in order to ensure continuous and impartial oversight. Regulations should be designed to enable more expeditious and more public investigations.

The following recommendations would enhance transparency and prevent corruption in the Chilean judicial system in general:

- Incorporate training in public service and ethics into training programmes for judges and lawyers
- Ensure that judicial decisions and sentences are not merely published, but are also made understandable
- Change appointment, promotion and evaluation systems for lower court judges in order to guarantee that they are merit-based and not dependent on the patronage of superior court judges or executive branch officers
- Implement fiscal control and supervision systems
- Enhance, improve and increase transparency.

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2 Professional bar associations were dissolved in 1981 and replaced by private associations.

Increased transparency helps curb corruption in Costa Rica

Legal system: Civil law, adversarial *Judges per 100,000 people:* 16.0[1]
Judge's salary at start of career: US $12,139[2] *Supreme Court judge's salary:* US $22,725[3]
GNI per capita: US $4,590[4] *Annual budget of judiciary:* US $208.4 million[5]
Total annual budget: US $5.5 billion[6] *Percentage of annual budget:* 3.8
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes *Code of conduct for judges?* Yes

1 Poder Judicial, Compendio de indicadores (2004) 2 Poder Judicial, indice salarial (2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Poder Judicial, Presupuesto (2006) 6 Asamblea Legislativa: Resumen Global Presupuesto (2006)

Costa Rica has taken great steps since the 1990s to strengthen the independence of the judiciary and create laws that operate in a framework of respect for human rights. The drivers of change were both national and international, combined in their efforts to consolidate democratic government in the region and to introduce economic reforms that required respect for the rule of law. Many advances have been made in the past decade and Costa Rica's judiciary is considered one of the least corrupt in Central and Latin America, but weaknesses persist.

Capacity building brings successes

Compared to other countries in the region, Costa Rica's judiciary has a high degree of independence, a low case burden per judge, high levels of public confidence and a high degree of transparency.[1]

Independence is guaranteed by the 1949 constitution, which states that the judiciary is only accountable to the law. If the legislative assembly proposes any change to the organisation and functioning of the judiciary, the Supreme Court must be consulted and two thirds of the 57 members of congress must approve. The constitution also stipulates that no less than 6 per cent of the national budget must be allocated to the judiciary, giving it relatively high financial independence. This sum has, however, been criticised for being too low to meet all demands, given that more than one third is absorbed by the public prosecution, the judicial investigations body and the public defence lawyers.[2] A proposal has been tabled to guarantee that the 6 per cent is awarded exclusively to judges and courts.

There are limits to the judiciary's institutional independence, however. The legislative assembly

1 See www.cejamericas.org/
2 Figures from the 2006 national budget, available at www.poder-judicial.go.cr/frames_transparencia.htm

elects magistrates, and some appointments have been criticised for being the product of political pacts, allegations that have not been proven. An appointments commission was created within the legislative assembly in 2001 with the aim of introducing a technical procedure with clear criteria for appointments. The constitution stipulates that magistrates can only be suspended by a secret vote of no more than two thirds of Supreme Court members, and not by the legislative assembly.

A supreme judicial council was created in 1993 to manage administrative and disciplinary functions, though it remains dependent on the Supreme Court. A Judicial Career Law enacted that same year eradicated the contemporary practice of interim judges serving for years on end after complaints by tenured judges. In 2000 internal competitions were held to ratify judges in their posts, replacing many long-term interim positions with tenured occupants.

A separate body, the tribunal of judicial inspection, receives complaints against court staff and other judicial personnel (though not magistrates, the attorney general and his deputy, or the director and deputy director of the judicial investigations body).

Transparency was a major consideration of the modernisation efforts, and under an Inter-American Development Bank-backed programme (aimed primarily at building the capacity of judges, the public prosecution and the ombudsman), laws, budgetary and performance figures, procurement reports, audits, annual reports and other relevant documents were published on the internet. The judiciary also decided to build an electronic case file so each case could be monitored.[3]

Perceptions of judicial corruption in decline

The wave of modernisation efforts of the 1990s included reforms aimed at building the capacity of the judicial system to tackle increasingly sophisticated corruption crimes. An adjunct prosecutor for economic, tax and corruption crimes was created within the prosecutions office, and special courts were established to hear crimes against the government, including tax fraud. These bodies are responsible for investigating and resolving crimes by public servants, including the crime of illicit enrichment. The judicial school provides continuous training to officials in the tax and public service jurisdictions, including the offices of the public prosecution and the economic crimes department of the judicial investigations body.

In spite of these new agencies many notorious corruption cases have yet to be resolved, including the Banco Anglo Costarricense case, which has been stuck in the courts for a decade. In 2004, three former presidents were implicated in a scandal involving exorbitant commissions paid by private companies for public contracts that the local press widely interpreted as bribes (see *Global Corruption Report 2005*). Two former presidents are under investigation.

The legacy of these high-profile scandals has been mixed. For many they reinforced the perception that elite powerbrokers still enjoyed impunity since not all of those incriminated faced trial and because of delays in the delivery of justice. For others, the fact that former presidents came under investigation was a source of optimism about the independence of the judiciary. One flaw that both cases served to highlight was the lack of protection for whistleblowers.

3 The Costa Rica system of juridical information contains the texts of all current laws, and all decisions by the Supreme Court, cassation court and constitutional court from 1989 onwards.

The Supreme Court approved a Code of Judicial Ethics for all judiciary personnel in 1999. In addition, law 7,333 established a set of incompatibilities to prevent irregularities in the performance of judicial staff. It prohibited judiciary employees from 'receiving any kind of remuneration from the interested parties in a judicial process for activities related to their positions'. It also forbade all officials to exercise a second job while serving in the judiciary, with a few specified exceptions.

The Law against Illicit Enrichment in 2004 required Supreme Court judges, their deputies and the general attorney to declare their assets annually. The general comptroller's office is responsible for maintaining the register of assets and investigating their veracity. The register is not accessible to the public, though it is possible to determine who has presented their statements and who has not.

These changes had some impact on perceptions of judicial corruption, though trust in the institution remains weak. In the University of Costa Rica's annual public opinion survey of 2006, 43 per cent of respondents said they had no trust in the justice system against 23 per cent who said they did, and 58 per cent believed there was corruption in the Supreme Court. These figures compare to 73 per cent who lacked trust in the justice system in 2000 and 71 per cent who thought there was a corruption in the Supreme Court.[4]

Continuing weaknesses

While the recent history of Costa Rica's judiciary can be viewed as an example of introducing best practice to eliminate corruption, there remain important flaws in the system. For example, there is no formal accountability mechanism for judges. Supreme Court judges are asked to present a voluntary account of their actions but, at the time of writing, only four of the 22 have ever done so. The current president of the Supreme Court presented a report of activities to the legislative assembly and general public.[5]

There are several aspects to judicial corruption in Costa Rica. One is administrative corruption associated with banks or big businesses, which use their influence to 'capture' the civil and commercial courts hearing their cases in order to speed them up. A civil or administrative case can take 10 years to be processed. Court processes are sluggish due to the increase in files that each court has to take on. The constitutional court, which has the best resources, attends to more than 20,000 cases per year.

Criminal prosecution is another area where delays can be significant, opening up an avenue for corruption. Complicated cases are slow and defence lawyers may seek further to delay the process by all means, including bribery, until the statute of limitations has expired. The case against the former presidents mentioned above took more than 18 months to investigate.

Adding to problems in criminal cases is the centralisation of powers that deal with corruption and economic crimes. The prosecution's office for economic crimes has experienced a notable increase in case files and a decrease in the number of cases completed per year. Such delays and failures to conclude erode credibility in the courts and raise suspicions of corruption, even though the delays may be due to case complexity alone.

4 University of Costa Rica, Proyecto de Investigación Estructuras de la Opinión Pública (Research Project on Public Opinion Structures) at www.ucr.ac.cr/documentos/Encuesta_opinion_2006.pdf

5 PNUD-FLACSO, *Desafios de la Democracia: Una Propuesta para Costa Rica* (Challenges of Democracy: A Proposal for Costa Rica) (San Jose: PNUD-FLACSO, 2006).

One result of corruption and inefficiency is impunity. A 2001 study by the Centro de Estudios Democráticos para América Latina found that 85 per cent of interviewees identified impunity as one of the most important aspects of judicial corruption in Costa Rica.[6] This perception improved following the appointment in 2003 of a new attorney general who went after some of the bigger sharks in the crime and corruption worlds, and introduced important organisational changes by expanding the budget and hiring additional prosecutors.

Recommendations

While the judiciary has made notable efforts to change the institutional culture and modify archaic administrative processes to improve court service, these efforts have not been sufficient to eradicate corruption. Good intentions at the highest levels of the judiciary have yet to filter down through the court structure and there are remote courts that are still susceptible to corruption, particularly in drugs-trafficking cases.

There are some actions that can be taken to tackle the supply side of corruption, including the adoption of no-bribes commitments by regular users of the court system, such as banks and big businesses.

More could be done to identify irregularities. The abundance of information about cases and court functioning would be utilised better if judicial statistics were checked for discrepancies. It would be possible to see, for example, whether a specific case progressed more quickly through the courts than similar ones and, if so, to find out why. Sentencing patterns could similarly be scrutinised.

The new attorney for ethics within the attorney general's office could play a role in cleaning up the broader judicial system by promoting a cultural shift in all public offices. However independent and strong the judiciary is in Costa Rica, corruption will only be eradicated through an integrated effort in which media and civil society have strong roles to play.

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José Pablo Ramos,
San José

6 José Manuel Villasuso, Cristina Rojas and Marco Vinicio Arroyo, *Corrupción en Costa Rica* (Corruption in Costa Rica) (San José: CEDAL/Friedrich Ebert Stiftung, 2003).

Croatia: still in transition

Legal system: Civil law, mostly inquisitorial, prosecution part of judiciary
Judges per 100,000 people: 43.7[1]
Judge's salary at start of career: US $29,651[2] *Supreme Court judge's salary:* US $67,330[3]
GNI per capita: US $8,060[4] *Annual budget of judiciary:* US $345.1 million[5]
Total annual budget: US $16.4 billion[6] *Percentage of annual budget:* 2.2
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* In drafting process

1 Justice Ministry (2006) 2 Ibid. 3 Ibid. 4 World Bank Development Indicators (2005) 5 Official Gazette no. 148 (2005) 6 Ibid.

The legacy of the communist era and numerous unsuccessful reforms during the 1990s continue to weigh heavily on Croatia's judiciary. When it was still part of the Socialist Federal Republic of Yugoslavia, the Croatian judicial system was politicised to a large degree. Many dissidents were tried and convicted in processes that were politically motivated.[1] At the same time, white-collar crimes were rarely prosecuted because company directors and chief executives belonged to the country's ruling party and were thus protected by their colleagues.

In the early 1990s the political system changed and the Croatian Democratic Union won free elections by a large majority. The new government introduced changes to all aspects of life, including the judiciary. Many judges left for higher wages in private practice or business, or because they were out of favour with the new regime. Courts struggled to function during the four-year Homeland War (1991–95) and the backlog of cases grew. Bribe paying, with the goal of pushing cases through the sluggish court system, was common though it is difficult to state whether or not judicial corruption worsened in this period since there had been no surveys during the communist period, or indeed a free press or political opposition to shed any light on it.

These elements fuelled the current situation in which the judicial system lacks transparency and incidents of corruption still occur. In March 2006 parliament adopted a National Programme for Curbing Corruption that stated that the government was aware of the scale of corruption and considered it a decisive factor in influencing Croatiaed accession to the EU. The EU Commission cited poor judicial performance as one of the bigger obstacles to faster accession and the November 2005 progress report called corruption a serious threat to society. The Commission

1 Vlado Gotovac, one of Croatia's most famous dissidents, was sentenced in 1981 to two years in prison (his second spell in jail) and was forbidden to appear in public because he had given foreign journalists an interview.

advised Croatia to set up internal controls in every area of administration to investigate corruption, based on accountable and transparent rules.

The nature and scale of the problem

Public opinion surveys suggest that Croatians regard the judiciary as one of the most corrupt sectors in the country. Surveys by TI Croatia also indicate a perception of high levels of corruption in the judiciary. In a survey in 2003, 80 per cent of respondents answered positively when asked: 'Do you think corruption is widespread in the judiciary?'[2]

Occasional cases uncovered by the media or civil society give some sense of the nature of judicial corruption. In September 2006 the Office for Corruption and Organised Crime (USKOK) filed charges of bribe taking, fraud and abuse of office against Zvonimir Josipovic, a former president and judge of the municipal court of Gvozd. He was indicted for exacting bribes worth up to US $4,000 from litigants to 'speed up' court processes. An investigation into his affairs began in 2005 when his assets were found to amount to HRK1.4 million (US $240,000).[3]

Another measure of judicial corruption is the database of complaints compiled by the Advocacy and Legal Advice Centre (ALAC), established by TI Croatia in 2004 as a service for citizens who have been directly affected by corruption. By the end of June 2006, half of all complaints submitted related to alleged judicial corruption. Most related to sentences the complainant considered surprising or illogical. Another common cause for complaint was that the judge had failed to open a case until the statute of limitation had expired without justification or explanation.

The Association of Croatian Judges acknowledges a degree of corruption among its membership but is careful to delimit what is understood as corruption. 'Wrong decisions', said the chair, Djuro Sessa, 'are corrected by higher courts and a wrong decision does not mean corruption.'[4]

At this writing only one judge has been convicted for corruption. Juraj Boljkovac was sentenced to three and a half years in prison for taking a €15,000 (US $19,000) bribe to arrange the release of a person in custody.[5] The case against Boljkovac began in June 2002 and lasted more than three years. According to the state judicial council (SJC), the body that appoints and supervises judges, five other members of the judiciary were under investigation for corruption in mid-2006.

The delay in dealing with alleged corruption by judges is in keeping with lethargy across the judicial sector. The number of unresolved cases has remained at over one million for many years and is only beginning to fall. According to Justice Ministry statistics there were 1.5 million unresolved cases in 2005.[6] A majority of these were criminal and stagnated at the lowest court level, the municipal courts. One reason for the high number was the rapid turnover of judges in the early 1990s and their replacement by less experienced practitioners.

A number of recent allegations involve bankruptcy proceedings. In February 2006 the state attorney's office accused several judges in the high commercial court in Zagreb of embezzlement, but the indictments were quashed after the SJC rejected a request to lift their immunity. As the scandal unfolded newspapers reported on unusual decisions by the high commercial court, such as a decision to borrow money from companies

2 'Questionnaire on Public Opinion on Corruption' (Zagreb: TI-Croatia, 2003).
3 Hrvatska radiotelevizija (Croatia), 27 September 2006. Available at vijesti.hrt.hr/ShowArticles.aspx?ArticleId=15242
4 Press release of Association of Croatian Judges, 3 March 2006.
5 Radio Free Europe/Radio Liberty, 23 September 2003.
6 Statistical Overview (Zagreb: Ministry of Justice, 2006).

involved in bankruptcy proceedings.[7] In the case of the Zagreb-based company Derma, the company lent K3.5 million (US $600,000) to the high commercial court for the renovation of the court house, even as it was fighting bankruptcy proceedings. When the proceedings, which began in 1992, were finally resolved in 2001, the court's debt was mysteriously written off.[8] Other allegations involving bankruptcy include suspected collusion between judges and administrators at the expense of creditors and debtors.

Attempts to curb judicial corruption

The authorities have tried to improve the judicial system since Croatia won independence, with an initial emphasis on ridding courts of political appointees. But political interference in the appointments process continues due to poor execution. The creation of the SJC to decide appointments and discipline judges and state attorneys was severely flawed. A first mistake was the delay in the body's creation. Secondary legislation regulating the SJC was approved in June 1993 but not implemented until November 1994, meaning vacancies lay unfilled for more than a year. More critical was the process of selection of members. The law states that nominations to the 15-member body are to be made by the Supreme Court, Justice Minister, chief state attorney, Croatian Bar Association and law schools. Each made their nominations, but most were rejected; the chief state attorney nominated 13 of the final 15. The SJC has been criticised for appointing judges according to political loyalty.

Another reform introduced allows judges to keep their positions until retirement, following a five-year probation period, rather than sit exams every three years as was the case prior to 1996. This has not had an impact on the case backlog or increased judges' efficiency, but it may have eliminated an avenue for corruption by judges who failed the exam.

More recently the Justice Ministry introduced a digitalised land registry in 2005, which increased public access to records and removed a source of potential corruption.[9]

The 2006 National Programme for Curbing Corruption includes chapters on the judiciary, health, local government, politics and public administration, economy and science, education and sport. With regard to the judiciary, the programme outlines a number of measures mainly aimed at increasing transparency and efficiency, for example by publishing all verdicts and schedules so the public can see the criteria used for allocating judges to particular cases. Another requirement is that judges and state attorneys must declare their assets. The programme calls for a thorough diagnosis of corruption problems, mechanisms to control the advancement of judges and continuous ethics training for everyone involved in the judicial system.

Conclusions

It is impossible to measure precisely the level of judicial corruption in Croatia, but enough is known to be able to make decisions about what tools might eliminate the systemic deficiencies that encourage the phenomenon. Representatives of the judiciary deny there is corruption in the system and cite statistics that support their claim: since the early 1990s only one judge has been sentenced for committing a corrupt offence. Nevertheless, the public is frequently surprised by sentencing that cannot easily be explained unless corruption had been an influence.

7 *Nacional* (Croatia), 27 February 2006.
8 *Slobodna Dalmacija* (Croatia), 1 April 2006.
9 See *Global Corruption Report 2006*.

Increased transparency and the requirement that judges explain their decisions could remedy judicial corruption, whether real or perceived. Public confidence is low and understanding of how verdicts are reached is hampered by opaque processes, particularly at lower court levels. The Supreme Court publishes verdicts online, but the majority of lower courts do not follow this practice. It is still difficult to obtain explanations of verdicts although the public is technically free to attend most sessions.

TI Croatia, Zagreb

Top-down control slows Czech judicial reform, despite EU impetus

Legal system: Civil law, inquisitorial, plural *Judges per 100,000 people:* 28.8[1]
Judge's salary at start of career: US $25,610[2] *Supreme Court judge's salary:* US $53,569[3]
GNI per capita: US $10,710[4] *Annual budget of judiciary:* US $514.3 million[5]
Total annual budget: US $43.6 billion[6] *Percentage of annual budget:* 1.2
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes
Code of conduct for judges? Yes, but only for members of the Union of Judges (around half the total) and only since 2005

1 Ministry of Justice (2006) 2 Ibid. 3 Ibid. 4 World Bank Development Indicators (2005)
5 Law no. 543/2005 on budget 6 Ibid.

With no specific survey available, it is difficult to establish the scope and nature of corruption in the Czech judicial system. Members of the judiciary claim that the scale is exaggerated given the functioning system of appeals and refer to statistics that claim only five judges have been convicted of corruption-related crimes since the early 1990s. On the basis of its anti-corruption hotline activity, the Justice Ministry says that corruption is non-existent. In 2004 – the first year of the line's operation – the public filed 100 allegations of corruption against judges, state attorneys and other public officials, of which 59 were forwarded to police for further investigation but none were brought before the courts due to lack of evidence. After the number of complaints declined in 2005, the ministry declared: 'The assumptions of the public concerning the extent of corruption in the judiciary are wrong. If they were correct, thousands of litigants and their legal representatives would most likely react thereon.'[1]

There is evidence that the judicial system is vulnerable to corruption in other ways. Firstly, court

1 Ministerstvo spravedlnosti ČR, *Protikorupční linka Ministerstva spravedlnosti – vyhodnocení za rok 2005 (Anti-corruption Hotline of Justice Ministry – 2005 Assessment)* (Prague: Ministerstvo spravedlnosti ČR, 2006).

proceedings are very lengthy. According to the Justice Ministry, the average length of civil and criminal proceedings in regional courts in 2004, respectively, was 550 and over 800 days.[2] Although this is primarily a human rights issue (as evidenced by the increasing number of successful complaints filed against the government at the European Court of Human Rights), lengthy proceedings can clearly be manipulated by courts to fit litigants' needs.

Court proceedings are lengthy for the following reasons:

- The number of cases submitted rose sharply in the first half of the 1990s due to the change of regime. Some courts have yet to overcome this legacy.
- The judicial system is poorly managed. Responsibility for outputs (timely and quality decisions) is detached from control over inputs (resources), which is vested in the Justice Ministry.[3] Intra-court management is poor and the lack of well-paid and qualified judicial staff burdens judges with administrative tasks.
- There is no universal, formal and transparent system of evaluating judges so as to provide a foundation for a quality, human-resource policy within the judicial system.
- Evaluation of judges is only conducted in some regional court districts and evaluation models are not compatible.[4]

Secondly, courts issue a large number of decisions that are not in line with prevailing decision making practice. This problem is acknowledged by the Justice Ministry in its strategic document, 'Stabilisation of the Judiciary Programme', and is confirmed by official statistics: courts of appeal confirm less than half of first-instance court decisions.

Decision-making practice is volatile because:

- A large number of new laws are adopted each year, and general codes, including the Civic Procedure Code, often change.
- Judges start their career in courts of first instance rather than courts of appeal. If novices worked in the appeal courts they would learn from the errors of first-instance judges, whose decisions they could examine under the tutelage of experienced colleagues.
- Appeal systems are ineffective: cases 'ping-pong' between courts without a decision.

Thirdly, the Justice Minister can interfere with judicial decision making by abusing his powers. This was illustrated by the exceptional dismissals of Attorney General Marie Benešová in September 2005 and Iva Brožová, head of the Supreme Court, in February 2006.[5] In Benešová's case, the official reason ('attorney general acting as a political figure') was merely an excuse in a long-standing quarrel between Justice Minister Pavel Němec and Benešová, which came to a head when the former sought to extradite a Qatari prince.[6]

In the Brožová case, the reason Němec gave for her dismissal ('weak position of the Supreme Court in the system of the Czech judiciary')[7] may have disguised the fact that Jaroslav Bureš, a former justice minister and personal enemy of

2 See the judicial statistics available at portal.justice.cz/ms/ms.aspx?j=33&o=23&k=3397&d=47145
3 See Ilona Bažantová and Marek Loužek, eds., *Potřebuje české soudnictví reformu? (Does the Czech Judiciary Need Reform?)* (Prague: Centrum pro ekononomiku a politiku, 2004).
4 Michal Štička, *Hledání rovnováhy mezi nezávislostí soudce a jeho odpovědností vůči veřejnosti (Seeking a Balance between Judicial Independence and Accountability)* (Prague: TI ČR, 2004).
5 The head of the Supreme Court is appointed and dismissed by formal decision of the president though the Justice Minister has a significant informal role in the process for he or she can initiate both the appointment and the dismissal.
6 *MF Dnes* (Czech Republic), 30 September 2005.
7 *MF Dnes* (Czech Republic), 3 February 2006.

Brožová, was reportedly interested in acquiring the post of Supreme Court judge (and possibly chairperson), which Brožová opposed.[8] Brožová appealed against the decision to the constitutional and supreme administrative courts and, according to a preliminary decision in the former, may ultimately prevail. With regard to the institutional balance between judiciary and executive, the ruling was definitely a good sign for the Czech Republic.

Political representatives may also attempt to interfere with judicial decisions. The Czech Republic retains a model of judicial administration based on a prominent role for the Justice Minister, who appoints and dismisses individual court chairpersons and can remove the heads of state prosecutors' offices. This prerogative is subject to insufficient constraints and can be abused as it allows the minister to appoint protégés who may informally exert influence on their subordinates' decisions.

Criticism has also been directed at bankruptcy proceedings where there have been instances of collusion between judges and administrators at the expense of creditors and debtors due to inadequate legislation.[9] Current bankruptcy legislation lacks transparency criteria for the appointment and removal of bankruptcy administrators by judges. One well-known case involves Usti nad Labem regional court judge Jiri Berka who in April 2005 was arrested and charged with criminal conspiracy and other acts as part of a bankruptcy-fraud ring responsible for asset stripping a number of companies.[10]

The work of police investigators and prosecutors in pursuing corruption-related cases is also far from ideal: official statistics show only a moderate rise in the number of convictions.[11] More important, there are indications that politicians systematically thwart the investigation of serious economic crimes and political corruption.[12]

EU criteria do not include independent judiciaries

Neither the Maastricht Agreement nor the Copenhagen Criteria explicitly mention judicial reform as a pre-condition for EU accession, but since the domestic judiciaries of member states are expected to cooperate with the EU Court in Luxembourg and to apply EU law in specific cases, it is no surprise that the EU pays close attention to judicial reform in candidate states.[13]

In the Czech Republic's case, the EU accession process had a relatively limited impact on the reform of the judiciary, the chief exception being the creation of a new career system. This was developed in collaboration with German judges and promises a solid ground for future reform.[14] Other aspects of cooperation with the EU included expert visits and reports, capacity-building events and investment in court equipment. In its monitoring report on the Czech Republic's preparations for membership, the European Commission criticised the length of judicial proceedings. Otherwise, it concluded: 'Access to justice is satisfactory, however not all citizens may be fully aware of their entitlement.'[15]

8 *MF Dnes* (Czech Republic), 1 March 2006.
9 See *Global Corruption Report 2005*.
10 *Czech Business Weekly*, 14 August 2006; US Bureau of Democracy, Human Rights and Labor, 'Country Reports on Human Rights Practices 2005'.
11 Ministerstvo vnitra ČR, *The Report on Corruption in the Czech Republic and on Fulfilment of the Updated Governmental Programme on Combating Corruption in 2004* (Prague: Ministerstvo vnitra ČR, 2005).
12 *MF Dnes* (Czech Republic), 30 May 2006.
13 Ivo Šlosarčík, *Reforma soudního systému ČR a vstup do Evropské unie (The Reform of the Judiciary and EU Accession)* (Prague: Europeum – Fórum pro evropskou politiku, 2002).
14 *Ekonom* (Czech Republic), 24 November 2005.
15 See www.evropska-unie.cz/cz/file_system/folder.asp?folder_id=18.

There are three reasons why so little judicial advancement has resulted from the accession process:

- The EU does not have particular requirements concerning the institutional design of the judiciary. It is 'interested', insofar as the outcome is concerned, but leaves the reform process to the candidate country.
- The Justice Ministry has suffered from immense instability over the past 16 years (the current minister is the 15th incumbent). Each has had a distinctive political vision, which he or she tried to implement, always unsuccessfully.[16]
- This instability is reinforced by the general unwillingness of parliament and the public to listen to the judiciary's calls for more administrative independence so as to improve the delivery of justice.[17]

Efforts have been made to clean up the justice system. The Union of Judges in November 2005 adopted a code of conduct inspired by the Bangalore Principles although it is too early to evaluate its impact. Priority areas for reform are:

- Enhance the administrative independence of judges *vis à vis* the executive. This includes involving representatives of the judiciary in discussions of the judicial budget and personnel matters.
- Introduce a career system for judges, specifically merit-based appointments and a proper evaluation system. Newly appointed judges should start their career in the appeal courts under the tuition of more experienced judges. Advanced training of judges should be conducted by an independent academy and not, as presently is the case, by an academy influenced by the Justice Ministry.
- Reform the system of appeals to prevent cases being continually referred between appeals bodies.
- Improve the law-making process to reduce the number of new laws.

Michal Štička (TI Czech Republic, Prague)

16 Ibid.

17 The representatives of judges have been trying to change the attitude of the public and to a large extent have been successful.

Egypt's judiciary flexes its muscles

Legal system: Civil law, both inquisitorial and adversarial (with elements of Islamic law), prosecution part of judiciary
Judges per 100,000 population: 16.4[1] *Judge's salary at start of career:* US $1,313[2]
Supreme Court judge's salary: US $10,245[3] *GNI per capita:* US $1,250[4]
Annual budget of judiciary: Not obtained *Total annual budget:* US $30.4 billion[5]
Percentage of annual budget: Not obtained
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* No

1 CIA World Factbook and National Democratic Party website 2 Figure is for lowest rank in the prosecution office; Law on Judicial Authority 3 Ibid. 4 World Bank Development Indicators (2005) 5 CIA World Factbook

It is impossible to talk about judicial corruption in Egypt without tackling the issue of judicial independence. The link between the two was uncovered in 2003 by appeal judge Yahya al-Refai in his resignation speech. Refai revealed the Ministry of Justice's methodical campaign to corrupt and divide judges, citing the handing out of generous bonuses to compliant judges while others survived on a meagre basic wage, and the requirement that judges provide the ministry with copies of civil and criminal suits against important officials.[1] Since then an increasing number of judges have been emboldened to talk about corruption and political interference in judicial affairs.

At the centre of the movement for reform is the Judges' Club. Established as a purely social association in 1939, it has developed over the decades into a professional union that is fiercely protective of a tradition of judicial independence which, despite threats from the executive, remains one of the most robust in the Middle East. Its political inspiration dates back to 1969 when president Gamal Abdel Nasser, angered by the refusal of the Club's members to join the single political party, the Arab Socialist Union, sacked 100 sitting judges in what is now recalled as the 'massacre of the judiciary'.[2]

Although these restrictions were later withdrawn and judges enjoy generous working conditions, the Ministry of Justice continues to exercise control over disciplinary and budgetary matters. The supreme judicial council (SJC), which oversees the functioning of the judicial system, is required to approve decisions in these areas, but its proximity to government, coupled with the fact that the

1 See *Global Corruption Report 2004*.
2 Nathan J. Brown and Hesham Nasr, 'Egypt's Judges Step Forward', in Carnegie Endowment for Internal Peace, *Policy Outlook,* May 2005. Available at www.carnegieendowment.org/publications/index.cfm?fa=view&id=16988&proj=zdrl

government appoints the public prosecutor – the gatekeeper to the criminal justice system – precludes independent investigation into corruption whether by politicians, businessmen or biddable judges.[3]

The Judges' Club had been trying for 20 years to reverse this lingering state control by proposing amendments to the Law on Judicial Authority of 1972. The recommendations of a national conference of judges in 1986 were developed into a draft law by 1991 that included: full fiscal autonomy for the judiciary; the transfer of the judicial discipline committee from the Justice Ministry to the SJC; and amendments to the rules of judges' pension funds. This draft was repeatedly endorsed by the General Assembly of Egyptian Judges, most recently in December 2004, though the government was unwilling to turn it into law.[4]

Elections provide reform opportunity

An opportunity to combine the Judges' Club's call for improved independence with growing demands for more representative democracy came in February 2005 when President Hosni Mubarak announced he was withdrawing a ban on the fielding of opposition candidates for the post of president in the elections of September 2005. Under article 88 of the 1980 constitution: 'The law shall determine the conditions which members of the Assembly must fulfil as well as the rules of election and referendum, while the ballot shall be conducted under the supervision of the members of a judiciary organ.'[5] This means that Egypt's 9,000 or so judges are transformed into monitors at Egypt's 54,000 polling stations at election time. Concerned that its role as electoral supervisory body would force it to legitimise rigged polls, as some reportedly found themselves doing in 2000, the members of the Judges' Club mutinied.

In April 2005 the Club's Alexandria branch threatened to boycott the elections unless judges were allowed to supervise all its stages from the preparation of voters' lists to the announcement of results, and unless parliament adopted legislation that would strengthen their independence from the executive.[6] One month later, the 'revolt' spread to Cairo where 2,000 judges backed the decision at an emergency meeting of the Judges' Club on 13 May.

After the first round of parliamentary elections, a Judges' Club working party set up to monitor electoral infractions demanded an official investigation into 133 incidents of fraud, voter intimidation and assaults by police – often on the very judges monitoring the voting.[7] Mahmoud Mekki and Hisham Bastawisi, both deputy chief justices in Egypt's highest appeal court, were summoned to appear before a disciplinary court in May 2006 for allegedly violating judicial rules by leaking to the press the names of judges suspected of colluding in rigging the parliamentary vote.

The campaign for judicial independence reached its peak from April to June 2006, mobilising support from civil society, opposition parties, the independent media and international rights groups. The government reacted by detaining protesters, but after the disciplinary court acquitted the two judges and 300 judges gathered in silent vigil outside the Cairo high court, it changed tack and met some of their demands.[8]

3 Ibid.
4 Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP), 3 April 2005. Available at www.acijlp.org.
5 Available at www.egypt.gov.eg/english/laws/Constitution/index.asp
6 BBC News, 14 May 2005. Available at news.bbc.co.uk/1/hi/world/middle_east/4509682.stm
7 Al Jazeera, 28 November 2005.
8 BBC News, 25 May 2006. Available at news.bbc.co.uk/1/hi/world/middle_east/4546333.stm

In June 2006, it used its majority to pass a bill amending the Law on Judicial Authority. While this improved on the 1972 law, the Judges' Club was not consulted during the drafting process and judges were less than satisfied with the result.

On the positive side the amendments give the SJC control of its own financial management and the budget of the judiciary and public prosecutor's office becomes independent of government. But the Justice Ministry and the SJC retain their authority over judicial inspection, and the recruitment, promotion and supervision of judges, and the government maintains unconditional authority to appoint the general prosecutor (see below) and the chairman of the SJC, undermining judicial independence and attaching judicial authority to the executive.

Nor does the new law protect the right of judges to freely establish associations to represent their professional interests, organise training and defend judicial independence. 'The Judges' Club should remain under the sole control of its own self-elected general assembly, answering to no other entity,' said Mahmoud Mekki.[9] 'The new law does not secure this, and in turn suggests that interference and meddling in the club's internal affairs could occur.'

The government's prosecutor

The effectiveness of the judiciary in combating corruption, ensuring accountability and deterring abuse is dependent on the integrity and independence of the investigation, indictment and prosecution processes. Formally, the public prosecutor's office in Egypt belongs unambiguously to the judiciary. Prosecution is mandated and regulated by the Law on Judicial Authority and, like judges, prosecutors cannot be impeached by executive order.

Ever since the post was created in 1875, however, the appointment of the prosecutor has been engineered by the executive to ensure that he (women are not allowed to work as prosecutors) poses no threat to the stability and interests of the regime, be it colonial, royal or republican. Over the years, the prosecutor's office has practically merged into government to the detriment of its integrity and public image.

Strengthening the integrity of the office lay at the heart of the campaign by judges to secure greater independence. Under the 2006 amendments, prosecutors and district attorneys will no longer report to the Minister of Justice, whose power has been reduced to 'monitoring and administrative supervision' of prosecutors.[10] The minister was also stripped of his power to launch disciplinary measures against prosecutors, a prerogative that now belongs exclusively to the public prosecutor. This, in theory, makes prosecutors immune from reprisal for independent conduct.[11] The appointment of prosecutors and district attorneys will also require the 'approval' of the SJC, in contrast with the previous law that only required the SJC to be consulted.[12]

These amendments fail to address the single most crucial obstacle to improvement of the public prosecutor's integrity: the fact that he is directly appointed by the president with no formal requirement for the approval of, or consultation with, the SJC.[13] Those advocating judicial independence blame the public prosecutor's unwillingness to challenge the regime's record on corruption on an appointments process based on recommendations from its powerful security

9 ACIJLP report, cited in *Daily Star* (Egypt), 5 July 2006.
10 Law on Judicial Authority (LJA), article 125.
11 LJA, article 129.
12 LJA amendments, article 1.
13 LJA, article 119.

apparatus. These forces consistently select long-time loyalists to fill the post.[14]

Prosecutor defends state of impunity

Given this context, the decision in July 2006 to appoint a career prosecutor, Counsellor Abdel Meguid Mahmoud, as public prosecutor was welcomed by many. Others expressed concern that Mahmoud was expected to follow in the footsteps of his pro-government predecessor since he had worked as his deputy for seven years.

Life tenure and the prospect of a more prestigious job on retirement are other features of the post. In the recent past public prosecutors have retired to take up senior judgeships or parliamentary positions.[15] Public prosecutors and judges who wish to remain relevant after their retirement know that their conduct in office will be meticulously examined for any signs of independence by the same powers they are supposed to hold accountable.

The strategy of appointing loyalists to this crucial post and feeding their loyalty with promises of future advancement has proven remarkably effective. Corruption and abuse by the security agencies, especially the Interior Ministry's State Security Intelligence (SSI) Department, are rarely prosecuted and punished. Public criticism of the role of the public prosecutor in perpetuating this state of impunity increased after a number of high-profile cases involving excessive use of force by SSI and other police officers went unprosecuted.[16]

The failure of the public prosecutor to address corruption and abuses by government employees has gained the office notoriety as a defender of the regime, in contrast with its constitutional mandate as the 'people's defender'. In a poll in March 2006 by HRInfo.net, a Cairo-based web portal, 40 per cent of 1,910 respondents said the public prosecutor's office defended President Mubarak's National Democratic Party; 34.5 per cent said it defended the government; and 13.6 per cent said it defended the police. Only 12 per cent thought the office defended Egyptian citizens.[17]

Hossam Baghat (Egyptian Initiative for Personal Rights, Cairo)

14 For example, Counsellor Maher Abdel Wahid, public prosecutor from 1999 to 2006, had been seconded to the Justice Ministry where he spent the previous 10 years as an assistant to the minister. His predecessor, Counsellor Ragaa El-Araby, public prosecutor for most of the 1990s, had previously chaired the Supreme State Security Prosecution Office.

15 Former public prosecutor Maher Abdel Wahid was appointed chief justice of the Supreme Constitutional Court in 2006, even though he had been away from the bench for two decades; retired prosecutor Ragaa El-Araby was elevated to the upper house of parliament where he is deputy chair of the powerful constitutional and legislative committee.

16 See, for example, 'Mass Arrests and Torture in Sinai', Human Rights Watch, February 2005. Available at hrw.org/reports/2005/egypt0205/ No prosecutions resulted, despite many appeals being lodged with the public prosecutors, alleging torture and mass detention by SSI forces following the October 2004 bombing of foreign and domestic tourists in Taba on the Sinai Peninsula. After the attacks, SSI forces conducted a campaign of mass detentions among the Bedouins of north Sinai from where it was assumed the perpetrators had come.

17 See www.hrinfo.net/sys/poll/index.php?poll_id=39

Georgia's accelerated anti-corruption reforms

Legal system: Civil law, adversarial, prosecution part of judiciary *Judges per 100,000 people:* 6.2[1]
Judge's salary at start of career: US $9,858[2] *Supreme Court judge's salary:* US $20,397[3]
GNI per capita: US $1,350[4] *Annual budget of judiciary:* US $27.5 million[5]
Total annual budget: US $1.6 billion[6] *Percentage of annual budget:* 1.7
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent[7]
Are all rulings publicised? Yes *Code of conduct for judges:* Yes (but not mandatory)

1 Department on Common Courts (2006) 2 Georgian Law on Remuneration (2005) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Ibid. 6 CIA World Factbook (2005). 7 By law the composition of the disciplinary body is balanced, but in practice all appointments in the High Council of Justice are influenced by the ruling party.

The first steps toward reforming Georgia's Soviet-era judiciary were taken in 1998 when the government initiated exams to eliminate incompetent judges and recruit more proficient lawyers to take up their positions. Unfortunately, the reform effort stalled shortly thereafter. Corruption re-emerged and spread to different spheres, leading to a decrease of public confidence. Widespread corruption, coupled with serious irregularities during the November 2003 parliamentary elections, resulted in mass protests in Tbilisi that culminated in the resignation of Eduard Shevardnadze as president. The current president and parliament were elected in 2004.

The new administration had a strong reform agenda. During 2004–05, the authorities carried out noteworthy reforms in education, law enforcement, licensing and other important sectors, but failed to focus on the judiciary. The Judicial Reform Index assessment report, released by ABA/CEELI in September 2005, named improper influence from the executive as one of the most serious issues facing Georgia's judiciary. 'Such influence is said to have increased since 2003,' the report charged. Some of the people questioned asserted that no court in Georgia had a reputation for independence.[1]

Until 2004 there were two main types of corruption in the judiciary: a judge taking a bribe from an ordinary citizen and delivering a verdict in his or her favour; and a judge reaching a decision on instructions from the executive. These two problems were interconnected: judges took bribes because they had low salaries and knew the government would do nothing about it; and the government did nothing to prevent judges from taking bribes because it rendered them vulnerable to manipulation or prosecution should they rule against the executive.

After 2004 the authorities increased judges' salaries, making them among the highest paid employees in public service, and tightened controls on bribery. Several judges were dismissed

1 See www.abanet.org/ceeli/publications/jri/jri_georgia.pdf

for accepting bribes in 2004–05.[2] This helped to put a stop to judges soliciting bribes, but concerns remain that the judiciary lacks independence from the executive.[3]

Under Georgian law the president appoints and dismisses judges of the common courts on the recommendation of the high council of justice.[4] Although judicial examinations are rigorous and objective, the final interview is not transparent and lacks clear selection criteria. This could lead to subjective decision making that is not based on qualifications and merits, but rather on factors such as personal relationships or political views.

Another avenue for influencing the judiciary is through disciplinary proceedings, ranging from warnings to the dismissal of judges. Although recently amended, the Law on Common Courts permitted disciplinary sanctions against judges for gross or repeated violations of the law in their decisions.[5] The ambiguity of the provisions purportedly enabled the high council to force a number of judges to resign and to dismiss several Supreme Court judges who had fallen out of favour for political reasons.[6]

In 2005 the government started to reorganise common courts by consolidating the existing courts of first instance into unified regional courts. The high council of justice's decision to appoint inexperienced judges to relatively high positions while placing more experienced ones on the so-called 'reserve list' was often made with no explanation to the judges in question and no clear criteria. What was more perplexing was that many seasoned judges were placed on the reserve list, while as many as one third of judicial vacancies were unfilled and case delays increased as a consequence. This had a chilling effect on sitting judges and raised concerns that the judiciary was becoming more susceptible to government influence.[7]

Another lever of influence, exclusive to Supreme Court judges, was an amendment to the Law on the Supreme Court that stipulated that judges would receive pensions equivalent to their current salaries of GEL1,000 (US $555.50) if they resigned before 31 December 2005. The clause was used to threaten some judges with dismissal and the loss of all benefits.[8]

The judiciary faces other difficulties, such as a lack of qualified personnel, poor infrastructure (including physical space as well as electronic equipment), inadequate financial support[9] and poor enforcement of judgements.[10] As a result,

2 See freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=7&ccrpage=31&ccrcountry=114
3 The US Department of State found that the prosecutor's office exerted 'undue pressure' on judges in 2004. See *Georgia: Country Reports on Human Rights Practices 2004*, 28 February 2005 at www.state.gov/g/drl/rls/hrrpt/2004/41682.htm. Amnesty International also expressed concern over pressure on the judiciary from the prosecutor's office. See web.amnesty.org/library/Index/ENGEUR560022005?open&of=ENG-2U4
4 The high council of justice is a presidential advisory body chaired by the president and composed of 19 members: the chair of the Supreme Court, the chair of the legal committee of parliament and the Minister of Justice are *ex officio* members; two members appointed by the president; five members appointed by parliament (of which four have to be members of parliament); and nine common court judges selected by the conference of judges upon recommendation of the chair of the Supreme Court. According to a proposed amendment, the president will relinquish the power to appoint all judges, but an additional law will be required to stipulate which body will assume that responsibility.
5 Chapter 1, article 2, point 1 of the Law on Common Courts provides that disciplinary sanctions will be instituted when there are gross violations of the law in trying a case.
6 See www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc_id=6847
7 See www.abanet.org/ceeli/publications/jri/jri_georgia.pdf
8 *Georgian Online Magazine* (Georgia), 26 December 2005.
9 www.abanet.org/ceeli/publications/jri/jri_georgia.pdf
10 Though enforcement is not the job of the judiciary, inadequate enforcement of judiciary decisions undermines its effectiveness.

the current functioning of the judiciary deters citizens from pursuing justice through the courts. According to the ABA/CEELI survey, almost half of Georgians surveyed do their utmost to avoid contact with the judicial system. An unreliable judicial system also negatively influences the investment environment. In 2004, parliament amended the Tax Code, introducing arbitration to provide an alternative to businesses that felt that the courts defended government interests. After the government lost several monetarily significant cases, the measure was abolished.[11]

Georgian and international organisations frequently call on the government to reform the judiciary and increase its independence. Domestic NGOs signed a group statement urging greater judicial independence. As well as pressure from NGOs, the government is seeking to develop stronger ties with the EU and has further conditions to meet through the Council of Europe and the EU's European Neighbourhood Policy. The government named judicial reform a priority for 2006 and in May President Mikheil Saakashvili announced the formation of a government commission on judicial reform that is expected to include representatives from international and local organisations.[12]

The success of reforms in the area of the judiciary depends on meeting the following set of measures, some of which are already being undertaken:

- Clear criteria need to be established to evaluate which judges retain their positions and which should not. The replacement of judges must be fully transparent, ensuring that the new generation is independent and professional.
- Financial and social guarantees should be enhanced to reduce the temptation to engage in corrupt activities.
- The High School of Justice (HSJ), a training centre for judges designed by the government, needs to be effectively implemented to provide training, re-training and evaluation of judges. More specifically, work needs to begin on the development of training curricula, training for HSJ trainers and improved financial mechanisms for the transfer of operational funds to the HSJ.
- The government intends to institute a jury trial system. Before this is adopted, it should be tested to evaluate its suitability.
- To prevent court trials from becoming excessively drawn out (some take years to resolve), it is necessary to increase the number of judges.
- To ensure transparency, an electronic database of submitted and resolved cases should be available for public reference.

If the government's programme of judicial reform is to yield sustainable results, it must put more effort into setting up a clear, realistic and transparent reform policy. Interested parties should be given an opportunity to agree broad principles and finer details, culminating in the process of drafting regulations. It is important that the government make public its goals for reforming the judiciary and provide for a streamlined dialogue with citizens.

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11 In April 2005, the Georgian Tax Code was amended to remove arbitration as one of the forms of resolving payment disputes.

12 As of June 2006 the commission had yet to undertake any substantive activities.

Computerised courts reduce delays in Ghana

Legal system: Common law, adversarial, plural *Judges per 100,000 people:* 0.9[1]
Judge's salary at start of career: US $5,290[2] *Supreme Court judge's salary:* US $8,488[3]
GNI per capita: US$450[4] *Annual budget of judiciary:* US $17.4 million[5]
Total annual budget: US $3.2 billion[6] *Percentage of annual budget:* 0.5
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges:* Yes

1 World Bank (2000) 2 Judicial Service of Ghana (2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Judicial Service of Ghana 6 CIA World Factbook (2005)

It is common in Ghana to hear litigants, lawyers and court users complain of the pervasiveness of corruption in the judicial system and the media are full of allegations about it. Chief Justice Kingsley Acquah acknowledges the problem and since his appointment in June 2003 has concentrated on reforming the judicial system. Speaking at the Fourth Chief Justices' Forum in Accra in November 2005, he accepted that corruption is a national problem and urged that criticism of judges should be seen as a means of correcting their mistakes and keeping corruption in check.[1]

Ghana's judicial system is composed of the Supreme Court, which interprets and enforces the constitution, and is also the final appellate court. The court of appeal, the second highest court, has jurisdiction over civil and criminal matters. The high court, which has original jurisdiction in civil and criminal matters, also has exclusive original jurisdiction in the enforcement of human rights. There are also regional tribunals, originally set up by the military regime (1982–88) to try crimes against the state, which have been incorporated in the conventional system. Finally, there are inferior courts, which include circuit courts, circuit tribunals, district magistrate courts and district tribunals.

From the perspective of judicial corruption, the structure of the existing system provides a modicum of accountability: lower court decisions tainted with corruption are likely to be overturned on appeal unless the litigant can afford to bribe his or her way through the appellate system. Another check on corruption is that lower court judges whose decisions are frequently overturned risk loss of promotion. That said, there are documented instances where judges whose decisions are subject to appeal have abused their discretion to stay proceedings in order to deny litigants the opportunity to appeal.[2] Previously

1 Chief Justice Kingsley Acquah, 4th Chief Justices' Forum (CJF) in Accra, 22 November 2005, quoted in *Ghana Review* (Ghana), 23 November 2005. Available at ghanareview.com/review/index.php?class=all&date=2005-11-23&id=12472

2 A judge was reportedly bribed to issue a restraining order against a person seeking to establish a complaint against the Christ Apostolic Church. The judge reportedly refused to sign her own judgement in order to frustrate the litigants from appealing her decision. *Ghanaian Chronicle* (Ghana), 21 June 2000.

judges were promoted on the basis of an evaluation of their decisions. This was one way of ensuring that those faced with more complex cases were able to make reasoned and rational decisions. Now the Chief Justice has discovered that not all judges are writing their own judgements, so a new method of evaluation is to be introduced: judges who are being considered for promotion will have to sit an opinion-writing test.[3]

Public perceptions of corruption

Surveys show that the public widely perceives corruption to exist within the judicial system. A 2004 governance profile by the World Bank found the majority of respondents (40 per cent) believed the judiciary to be 'somewhat' corrupt, followed by 39 per cent who believed it to be 'largely or completely' corrupt. This compared to 80.2 per cent who believed the legislature to be 'above or largely free from' corruption and 66.3 per cent who said the same of the executive. In 2005 Afrobarometer carried out a survey of perceptions of the performance of public institutions in Ghana. It found that the courts were one of the least trusted institutions, second only to police, with only a marginal increase in trust between 2002 and 2005.[4] It is important to note that the above survey did not differentiate between 'administrative corruption', where judicial support staff take a small sum for typing out a judgement quickly or carrying the file to the next desk, and 'operational corruption', where a judge's decision is influenced as a result of external incentives or pressures. Court users are more likely to experience 'administrative corruption' when they interact with staff who are managing their files or processing applications. Interaction with judges is usually through a lawyer and evidence of 'operational corruption' is harder to find.

A clear illustration of the difficulties of identifying the sources of corruption can be seen in the case of Justice Anthony Abada. He was accused of bribery in February 2004, but not prosecuted. Instead it was found that Jarfro Larkai, a man he knew, had purported to represent the judge when he informed the litigant's lawyer that the judge would be 'soft' on sentencing if he received a bribe of C5 million (US $560,000), and offered to act as the middleman. Police investigations found that Justice Abada knew nothing of this and did not receive any money, while Larkai was charged with accepting a bribe to influence a public officer.[5]

Other cases are more clear-cut. For example two high court judges, Boateng and Owusu, and a court registrar were arrested for stealing money from an escrow account held on behalf of litigants over a piece of land. The two judges are alleged to have connived with the registrar to withdraw the interest on the money for personal use. A disciplinary committee of the judicial council set up to investigate the matter found that there was a *prima facie* case of theft and referred the matter to the attorney general for criminal prosecution. The director of public prosecutions duly brought charges against the three men in an Accra high court. The trial is ongoing.[6]

Simplification and efficiency measures

In 2000, several initiatives were launched to enhance efficiency and speed up court processes. In 2005 the Reform and Project Management and Implementation Division of the judicial service was set up to oversee all reform projects.

3 *Ghana Review* (Ghana), 23 November 2005.
4 Afrobarometer 'Round Three Survey' (2005). Available from www.afrobarometer.org
5 www.ghanatoday.com, 20 December 2004.
6 *Daily Graphic* (Ghana), 20 April 2005. The disciplinary committee report was not made public and attempts to obtain a copy proved futile.

The judicial council carried out a review of the service conditions of judges, and this has led to a request that C50 billion (US $5.6 million) be allocated to the project in the next budget.[7]

The Complaints and Courts Inspectorate Division of the Judicial Service was inaugurated in October 2003 and receives complaints of corruption and influence peddling. Only three complaints were lodged in 2003–04 and four in 2004–05. These mainly concerned harassment of defendants who had pleaded non-liability for claims for repayment of funds, especially from circuit courts in the rural areas, and of harassing, intimidating and bullying parties before them. In the Chief Justice's view, such misuse of judicial power may justify the perception that another party in the case had corrupted the responsible judicial officer.[8]

A comprehensive code of ethics for judges and judicial officers was launched in January 2005 with a commitment by the Chief Justice that judges and magistrates would receive training in judicial ethics. One month later the judiciary received funds to build a new Judicial Training Institute.[9]

Other measures to improve efficiency are the introduction of 'fast-track courts' that aim to resolve cases within three months of initiating proceedings and provide access to documents and transcripts within 24 hours of a hearing; the introduction of electronic processes in some courts;[10] and the establishment of a commercial court in March 2005.

Communication with the public

Whether the above reforms succeed in reducing corruption in the judiciary is open to question. Given frequent discussion of the issue and the Chief Justice's pronouncements, it is safe to assume that the measures have had some impact. A website provides information about the judiciary and explains how to submit complaints. The judicial service has been issuing annual reports since 2004[11] and development of a Judiciary Watch project is underway with support from the German development agency, GTZ.[12]

There have to date been no successful prosecutions of judicial officials for corrupt practices even though documented allegations of judicial corruption abound. The case against Judges Boateng and Owusu has been marred by delays, adjournments, the prosecutor's poor health and 'the construction of new court buildings'.[13] If the case succeeds, it will be a land-mark in the fight against judicial corruption and demonstrate a political will to deal with it.

Dominic Ayine (Center for Public Interest Law), Mechthild Ruenger (GTZ) and Daniel Batidam (Ghana Integrity Initiative, Accra)

7 Justice Nana Gyamera-Tawaih, Commonwealth Magistrates' and Judges' Association (CMJA) conference, Accra, 31 July–4 August 2005.
8 Chief Justice Kingsley Acquah, CMJA conference.
9 For details of tender, see www.judicial.gov.gh/publications/ICB_IFT_JTI.htm
10 See www.judicial.gov.gh/court_automation/human_resources/home.htm
11 See www.judicial.gov.gh/about_us/legal_year/home.htm
12 GTZ, 'Supporting developing nations in the implementation of the UN Convention Against Corruption', PN 2004.2169.3. Available at www.gtz.de/de/dokumente/en-uncac-pilot-activities.pdf
13 www.ghanatoday.com, 17 January 2006.

Judicial corruption and the military legacy in Guatemala

Legal system: Civil law, adversarial, plural *Judges per 100,000 people:* 5.9[1]
Judge's salary at start of career: US $15,360[2] *Supreme Court judge's salary:* US $42,396[3]
GNI per capita: US $2,400[4] *Annual budget of judiciary:* US $87.9 million[5]
Total annual budget: US $4.2 billion[6] *Percentage of annual budget:* 4.2
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* Yes

1 Justice Studies Center of the Americas 2 Instituto de Estudios Comparados en Ciencias Penales de Guatemala 3 Ibid. 4 World Bank Development Indicators (2005) 5 Decreto 35-2004 del Congreso 6 Justice Studies Center of the Americas (2005)

The failure of the judicial system to protect human rights is one price of the armed conflict that Guatemala suffered from 1960 to 1996.[1] This was made abundantly clear when the thousands of human rights violations confirmed by the country's Truth Commission resulted in no investigations, trials or sanctions. The weakness of the justice system had repercussions for all judicial processes. There were no exemplary trials for acts of corruption and the political climate inhibited the denunciation of such cases out of fear of reprisal.

The problems of the judiciary have their origins in the era of armed conflict, which is why the Peace Accords contemplated an integrated reform of the justice system. Since the democratic opening in 1985, the public perception remains that the institutions of the justice system are weak and serve the interests of the powerful. A recent study drafted by the World Bank shows that 70 per cent of those surveyed consider that the justice system cannot be trusted, is applied only to the poorest and is manipulated by 'parallel powers'.[2]

One symptom of the weak court system is that vigilante justice has become frequent in the past 10 years. Faced with difficulties in accessing justice, procedural delay and the lack of convictions, people have taken justice into their own hands in regions where armed conflict had the greatest impact. From 1996 to 2002 there have

1 For an analysis of the impact of the armed conflict see the report of the Comisión para el Esclarecimiento Histórico (CEH), *Guatemala: Memory of Silence* (1999), available at shr.aaas.org/guatemala/ceh/mds/spanish/

2 The report, 'Diagnostics on Transparency, Corruption and Governability in Guatemala', was drafted by the World Bank at the request of the government of Guatemala, and produced in 2004 and 2005. It was based on a national poll of the perceptions and experiences of private companies, public employees, heads of household and civil society organisations. See www.comisionados.gob.gt/archivos/1138896134.doc

been 480 lynchings[3] and 32 in the first five months of 2006, according to the UN Verification Mission.[4] There have been no convictions of the people who incited the killings. In this context, it is important to mention the cultural-legal gap between indigenous and non-indigenous populations. Among the latter, there is a sharp contrast between what is legal and what is legitimate, which has given rise to efforts to recognise plural legal systems (particularly customary law) and to favour alternative means of resolving conflicts.

The system of justice comprises the Supreme Court (12 judges), the court of appeals (72 titular and 48 substitute judges), trial and sentencing judges (170), and justices of the peace (369). Higher court judges are appointed by congress, but can only be nominated and removed by the judicial career council, which is made up exclusively of members of the judiciary.

Causes of judicial corruption

The Peace Accord on the Strengthening of Civil Power and Function of the Army in a Democratic Society made judicial reform a priority, with the aim of eradicating corruption and the structural factors that favour it. A national commission of justice was created in 1997 to steer the reform process, comprising representatives of the relevant ministries, and social and private bodies with knowledge of justice issues. Its final report, 'A New Justice for Peace', contained a section that highlighted the close links between corruption and the strength of the institutions that make up the judiciary.

The report identified the following as the principal characteristics of judicial corruption:

- Misuse by judges of their powers to influence processes as a means of exercising pressure over the parties to the case
- Illegal extortion
- Accepting gifts and monetary incentives to accelerate resolutions and adopt other procedural measures
- Payments to avoid due process
- Cronyism and traffic of influence
- Loss of files or case materials
- Disappearance or adulteration of evidence and disappearance of confiscated possessions.

Two instances of these recently came to public attention. In the first, court official Manuel Vicente Monroy was brought to trial for impersonating Judge Víctor Herrera Ríos and demanding a bribe to free a defendant.[5] Another common occurrence is the disappearance of case files: in 2005, a trial court launched a case against the former prosecutor general, Carlos de León Argueta, in which this happened. Such cases are damaging to perceptions of the judiciary.[6]

Cases of suspected corruption are sent to the judicial disciplinary council, which can call a hearing at which complainant and plaintiff testify before the three-person panel that issues the sanction.[7] The principal weakness is that this is a process in which magistrates and justices judge their peers, creating uncertainty about independence. From its creation until 2005, the council had received approximately 3,000 complaints against judges and magistrates, most involving administrative errors linked to corruption.[8] According to

3 These figures can be consulted at www.nd.edu/~cmendoz1/datos/
4 Provisional information about lynchings in 2006 is summarised at www.prensalibre.com/pl/2006/mayo/08/141075.html
5 *Pensa Libre* (Guatemala), 5 May 2006.
6 *Pensa Libre* (Guatemala), 5 February 2005.
7 The statistics can be found at the Centre of National Judicial Analysis and Documentation (CENADOJ). See www.oj.gob.gt
8 *Prensa Libre* (Guatemala), 1 October 2005.

official figures, more complaints are filed against justices of the peace and trial judges than higher court judges.

Two other institutions that are crucial for justice are the responsibility of the executive and also provide avenues for corruption: the prison system and police. Many prisons are controlled by prisoners (members of organised crime, drugs traffickers or *maras* youth gangs). Congress has failed to table a law on prisons though the need for one has been on the agenda for two years. Of equal concern, the national police have a reputation for corruption and inefficiency. Deep reforms have been introduced in the past two years, purging corrupt officers, improving equipment, introducing new controls and improving salaries, but the results are not yet evident.

Politicisation of the judiciary

A 2005 study by the International Commission of Jurists[9] identified the politicisation of justice as a cause for concern. This is facilitated by the selection mechanism for judges in higher and lower courts. The constitution stipulates that congress elects Supreme Court and appeal court judges from a list drawn up by a judicial nominating commission, but practice indicates that the entire appointment process is politicised.[10] The list of nominees is made public, but not the number of votes each received, how each commissioner voted, whether the votes were reasoned and whether public opinion was taken into account.

One distinct problem is that each time a nominations commission is called, its members lack a standard methodology by which to evaluate candidates. New rules are drafted without drawing on previous experience, without making them public and without the obligation of selecting candidates with the most professional backgrounds.

This in no way guarantees that judges will resolve matters 'without influence, incentives, pressures, threats or undue interference, be they direct or indirect, from any sector or for any reason', as required under the UN Basic Principles on the Independence of the Judiciary. Some judges, especially in the Supreme Court, have talked about receiving 'instructions' on how to resolve certain cases if they wish to remain in their posts.[11]

Myrna Mack case

The Commission for Fighting Corruption in the Justice Sector, created in 2002, has a mandate to formulate policies and strategies that increase transparency and combat judicial corruption. The Commission has facilitated inter-institutional coordination on corruption and the implementation of programmes to sensitise officials about corruption, but has done little to demonstrate publicly the steps taken, and the results are known only in limited circles. Other efforts come mainly from civil society (see 'Civil society's role in combating judicial corruption in Central America', page 115).

There is a renewed interest in modernisation to lift barriers to justice. A bill has been presented to Congress to curb the abuse of the *amparo*, a writ designed to protect defendants against violations of their rights that, along with other

9 International Commission of Jurists, *Justice in Guatemala: A Long Path Ahead* (Geneva: ICJ, 2005). Available at www.icj.org/IMG/pdf/Informe_CIJ_Guatemala.pdf

10 The most recent selection of a Supreme Court judge is described at www.elperiodico.com.gt/look/article.tpl?IdLanguage=13&IdPublication=1&NrIssue=89&NrSection=1&NrArticle=3463www.elperiodico.com.gt/look/article.tpl?IdLanguage=13&IdPublication=1&NrIssue=95&NrSection=1&NrArticle=3707; and *Prensa Libre* (Guatemala), 29 September 2004.

11 *Justice in Guatemala*, op. cit.

challenges on the grounds of unconstitutionality and incompetence, has been misused in many cases to block judicial processes.[12] In the case of anthropologist Myrna Mack, who was allegedly assassinated by a military death squad in September 1990, the Inter-American Human Rights Court was forced to intervene on the grounds that the right to have the case heard by a competent, independent and impartial judge within a reasonable time had been violated by the use of at least 12 *amparo* writs that delayed the process for over three years.

The judicial system has become more open to addressing corruption and transparency over the past few years. There has even been progress, but until the problems are seen as integral and directly linked to issues of career, salary level, internal controls, accountability and elimination of conflicts of interest, any reform will be incomplete.

The recommendations from the Justice Commission are a blueprint for action but the list should be revised to take into account the commitments assumed by Guatemala when it ratified international anti-corruption conventions. Key recommendations that would help reduce corruption levels include:

- Modernisation: adequate distribution of financial resources, elimination of practices of corruption and intimidation
- Professional excellence: improved judicial training and career progression
- Access to justice: development of alternative dispute-resolution mechanisms and recognition of judicial plurality
- Efficiency: oral hearings, use of writs against judicial decisions (*amparos*).

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12 See www.congreso.gob.gt/archivos/iniciativas/registro3319.pdf.

Indolence in India's judiciary

Legal system: Common law, adversarial, plural, federal *Judges per 100,000 people:* 1.3[1]
Judge's salary at start of career: US $3,996[2] *Supreme Court judge's salary:* US $7,992[3]
GNI per capita: US $720[4] *Annual budget of judiciary:* US $45.3 million[5]
Total annual budget: US $125.3 billion[6] *Percentage of annual budget:* 0.04
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes *Code of conduct for judges:* Yes

1 Report of the Committee on Reforms of Criminal Justice System (March 2003) 2 indiabudget.nic.in/ub2006-07/bag/bog4-2pdf (2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 indiabudget.nic.in/ub2006-07/bag/bog4-2pdf 6 Ibid.

Although provisions for the independence and accountability of the judiciary exist in India's constitution, corruption is increasingly apparent. Two recent decisions provide evidence for this. One, a Supreme Court decision in the 2002 Gujarat communal riots, exposed the system's failure to prevent miscarriages of justice by acquitting persons close to the party in power.[1] The second involved the acquittal in 2006 of nine people allegedly involved in the murder in 1999 of a young woman, Jessica Lal, even though the incident took place in the presence of a number of witnesses. One of the accused was the son of a politician.

India's court system consists of a Supreme Court, high courts at state level and subordinate courts at district and local level. The Supreme Court comprises a Chief Justice and no more than 25 other judges appointed by the president. The Supreme Court has a special advisory role on topics that the president may specifically refer to it. High courts have power over lower courts within their respective states, including posting, promotion and other administrative functions. Judges of the Supreme Court and the high court cannot be removed from office except by a process of impeachment in parliament. Decisions in all courts can be appealed to a higher judicial authority up to Supreme Court level.

'Money power'

Corruption has two manifestations: one is the corruption of judicial officers and the other is corruption in the broader justice system. In India, the upper judiciary is relatively clean, though there are obviously exceptions. Proceedings are in open court and documents are available for nominal payment. The accused is entitled to copies of all documents relied on by the prosecution free of charge. Copies of authenticated orders can also be made. There is an effective system of correction in the form of reviews and appeals.

In the broader justice institutions corruption is systemic. There is a high level of discretion in the processing of paperwork during a trial and multiple points when court clerks, prosecutors and police investigators can misuse their power without discovery. This has provoked comments on the connivance of various functionaries in the system. 'Criminal justice succumbs to money power,' wrote former Supreme Court Justice, V. R. Krishna.[2]

The Center for Media Studies conducted a countrywide survey in 2005 on public perceptions and experiences of corruption in the lower judiciary and found that bribes seem to be solicited as the price of getting things done.[3] The estimated amount paid in bribes in a 12-month period is around R2,630 crores (around US $580 million). Money was paid to the officials in the following proportions: 61 per cent to lawyers; 29 per cent to court officials; 5 per cent to judges; and 5 per cent to middlemen.

Loss of confidence

The primary causes of corruption are delays in the disposal of cases, shortage of judges and complex procedures, all of which are exacerbated by a preponderance of new laws.

As of February 2006, 33,635 cases were pending in the Supreme Court with 26 judges; 3,341,040 cases in the high courts with 670 judges; and 25,306,458 cases in the 13,204 subordinate courts. This vast backlog leads to long adjournments and

1 *Zahira Habibullah Sheikh v State of Gujarat*, 2004 AIR SCW 2325; 2004 (4) SCC 158. See also www.frontlineonnet.com/fl2111/stories/20040604003029700.htm
2 *Times of India* (India), 7 March 2006.
3 TI India commissioned the survey conducted by the Center for Media Studies (2005).

prompts people to pay to speed up the process.[4] In 1999, it was estimated: 'At the current rate of disposal it would take another 350 years for disposal of the pending cases even if no other cases were added.'[5]

The ratio of judges is abysmally low at 12–13 per one million persons, compared to 107 in the United States, 75 in Canada and 51 in the United Kingdom.[6] If the number of outstanding cases were assigned to the current number of judges, caseloads would average 1,294 cases per Supreme Court judge, 4,987 per high court judge and 1,916 cases per judge in the lower courts. Vacancies compound the problem. In March 2006, there were three vacancies in the Supreme Court, 131 in the high courts and 644 in the lower courts.[7] Judges cope with such case lists by declaring adjournments. This prompts people to pay 'speed money'.

The degree of delays and corruption has led to cynicism about the justice system. This erosion of confidence has deleterious consequences that neutralise the deterrent impact of law. People seek shortcuts through bribery, favours, hospitality or gifts, leading to further unlawful behaviour. A prime example is unauthorised building in Indian cities. Construction and safety laws are flouted in connivance with persons in authority. In the words of former chief justice J. S. Anand in 2005, 'Delay erodes the rule of law and promotes resort to extra-judicial remedies with criminalisation of society . . . Speedy justice alone is the remedy for the malaise.'[8]

Recommendations for reform

Reforms to combat corruption in the judiciary must take into account all the components woven into the legal-judicial relationship, including the investigating agencies, the prosecution department, the courts, the lawyers, the prison administration and laws governing evidence. These issues are addressed in the 2003 report of the Committee on Reforms of the Criminal Justice System, known as the Malimath Committee, whose recommendations are still under consideration. Some of the measures could play a pivotal role and may have a salutary effect upon the justice system as a whole.

- **Increase the number of judges** Not only should the number of judicial officers be increased, existing vacancies must be filled more promptly to prevent the case backlog from further increasing. The Supreme Court recommends that the existing ratio of judges should be raised from 12 per million people to 50 in a phased manner over five years.[9] The Court has also directed central and state offices to fill all vacancies in high courts and the subordinate courts.[10]

- **Judicial accountability** While there is a rhetorical commitment to improving accountability in the judiciary, there is no effective mechanism for ensuring it. Following a 2003 constitutional amendment, a Judges Inquiry Bill was proposed in 2006 that would provide for a national judicial commission empowered

4 *Hindustan Times* (India), 19 March 2006.
5 From the report of the conference and workshops on 'Delays and Corruption in Indian Judicial System and Matters Relating to Judicial Reforms', organised by TI-India and Lok Sevak Sangh, in New Delhi, 18–19 December 1999.
6 Committee on Reforms of the Criminal Justice System ('Malimath Committee Report') (Bangalore: Ministry of Home Affairs, March 2003).
7 *Hindustan Times* (India), 19 March 2006.
8 Letter to the Prime Minister of India on 7 April 2005, reproduced in *South Asia Politics*, vol. 5, no. 1 (2006).
9 *All-India Judges Association & Others v Union of India*, 2002 (4) SCC 247.
10 *Tribune* (India), 6 April 2006.

to impose minor penalties upon errant judges.[11]

- **Codes of conduct** The higher judiciary initiated the adoption of a code of conduct for judges, called the Restatement of Values of Judicial Life, at the Chief Justices Conference of India in 1999.[12] The document includes conflict of interest guidelines on cases involving family members, and conduct with regard to gifts, hospitality, contributions and the raising of funds. The Bangalore Principles of Judicial Conduct were adopted in 2002, but the judicial system has yet to provide legal support to them.
- **Court record management** Introducing technology to manage court records has had some success in enabling the Supreme Court to reduce its backlog since 1998 by bundling cases that seek interpretation on the same subject. The government set up an e-committee in October 2005 under the chairmanship of Supreme Court Justice G. C. Bharuka to formulate a five-year plan for the computerisation of the justice-delivery system. It will provide computer rooms in all 2,500 court complexes, laptops to 15,000 judicial officers, and technology training to judicial officers and court staff. It will also provide a database of new and pending cases, automatic registries, and digitisation of law libraries and court archives. It promises video-conferencing in the Supreme Court and all high courts; digital production of under-trial prisoners so that they do not have to be brought to court for extension of remand; and distant examination of witnesses through video-conferencing.[13]
- **Recruitment** At present public service commissions at state level recruit the lower judiciary. There is a need for an 'All-India Judicial Service', with recruitment at a countrywide level and higher standards of selection.[14] This would improve the quality of the lower judiciary, as reiterated in a decision of the Supreme Court in 1992,[15] but no further move has been made.
- **Financial and administrative authority** The judiciary is critically short of funds for basic infrastructure. Court buildings, judicial lockups, prosecution chambers, spaces for witnesses, the computerisation of records, supply of documents, etc., all suffer from inadequate funding. Though the judiciary is an important entity, its finances are controlled by the legislature and implemented by the executive. In deciding expenditure, the judiciary has no autonomy. 'The high courts have the power of superintendence over the judiciary,' wrote the Chief Justice, 'but they do not have any financial or administrative power to create even one post of a subordinate judge or of the subordinate staff, nor can they acquire or purchase any land or building for courts, or decide and implement any plan for modernisation of court working.'[16]

TI India, New Delhi

11 *Times of India* (India), 7 March 2006.
12 Justice R. C. Lahoti, 'Canons of Judicial Ethics', National Judicial Academy, occasional paper no. 5 (2005). See nja.nic.in
13 See Justice G. C. Bharuka, 'Implementation of Information and Communication Technology in Indian Judiciary', newsletter of National Judicial Academy, vol. 2, no. 2 (2005).
14 Although this stipulation was incorporated in the 42nd amendment to the constitution (article 312) in 1977, it has not been implemented.
15 *All India Judges Case* AIR 1992 SC 165.
16 Newsletter of the National Judicial Academy, op. cit.

Israel's Supreme Court: still making up its own mind

Legal system: Both civil and common law, adversarial, plural
Judges per 100,000 people: 9.0[1]
Judge's salary at start of career: US $4,155[2] *Supreme Court judge's salary:* US $6,612[3]
GNI per capita: US $18,620[4] *Annual budget of judiciary:* US $45.1 million[5]
Total annual budget: US $62.1 billion[6] *Percentage of annual budget:* 0.07
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes *Code of conduct for judges:* Yes (in final stages of approval)

1 Central Bureau of Statistics (2005) 2 Ministry of Justice (2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Ministry of Finance (2006) 6 Ibid.

Although the judicial branch in Israel does not suffer from systemic corruption, isolated cases of judicial impropriety, coupled with the perception that political forces have attempted to influence important decisions, have undermined confidence in the institution.[1]

According to the ombudsman for judges in 2005, no complaints of corruption have ever been received against members of the judiciary.[2] Bribery is rare and there are mechanisms in place to isolate judges from party politics. There are a few limitations to judicial independence, however. First, four of the nine members of the judges' selection committee are political representatives. Secondly, over the past decade a growing number of politicians have made statements attacking the Supreme Court and questioning its decisions in controversial cases.

Under former Supreme Court president Aharon Barak, the court became known for its proactive stance.[3] Under Barak the Court limited the previously unlimited latitude given to police on whether or not to approve demonstrations; forbade the use of physical pressure in the investigation of terrorist activity; and challenged the status of 'security considerations'. His rulings on the so-called 'separation fence' with Palestine obliged the state to change the barrier's route due to the harm it would cause residents in various communities and terminated the so-called 'neighbour procedure' by which the army warned Palestinians of the imminent demolition of their homes by sending a neighbour as messenger. Barak encouraged the state prosecution to apply criminal law in situations of conflict of interest involving senior officials.[4]

1 Judicial corruption has been the subject of very few studies in Israel.
2 *Ha'aretz* (Israel), 20 November 2005.
3 For elaboration and examples see Rivka Amado, 'Checks, Balances and Appointments in the Public Service: Israeli Experience in Comparative Perspective', *Public Administration Review*, vol. 61 (5) (2001); and Daphne Barak-Erez , 'Judicial Review of Politics: the Case of Israel', *Journal of Law and Society*, vol. 29 (4) (2002).
4 For a brief summary of Barak's judicial innovations and most important verdicts, see *Ha'aretz* (Israel), 1 September 2006; and *Yediot Acharonot* (Israel), 1 September 2006.

This independent stance had its opponents. Unlike the government's attempts in the last 20 years to politicise the other justice institutions – most famously when former president Binyamin Netanyahu sought to appoint Roni Bar-On as attorney general[5] – executive attempts to interfere with judicial autonomy have been subtler, including efforts to discredit the Supreme Court by referring to instances of misconduct. The Court responded by adopting a stricter ethical policy.

Tightening up the judiciary

It is difficult to find evidence of corruption to alter judicial decisions, but critics point to a number of practices that amount to abuse of entrusted power for personal gain. Nepotism is one charge, with critics pointing to the practice by some judges of nominating their colleagues' offspring as assistants; family ties between high court judges and advocates; married couples working in the courts system; and members of government legal councils who have relatives at the bar.[6]

Other allegations relate to misconduct. In August 2005 the disciplinary tribunal of judges convicted magistrate Hila Cohen of falsifying the minutes of court sessions and destroying court documents. Two of the three Supreme Court justices sitting on the case settled for a reprimand, rather than dismissal. Cohen received enormous public criticism after defying a recommendation by Chief Justice Aharon Barak that she resign.[7] In December 2005 the judges' selection committee voted unanimously to dismiss her.[8] Also in August 2005 the attorney general decided to bring to trial Judge Osnat Alon-Laufer, who confessed to hiring a private investigator to check on her husband's fidelity. Alon-Laufer was subsequently charged with using illegal telephone-record printouts.[9]

Alon-Laufer may have broken the law, but there was no evidence that she abused entrusted power to acquire the printouts. Nevertheless, the incidents jeopardised trust in the court system, and judges agreed that the judiciary needed more regulation if it were to maintain public confidence. The Supreme Court responded in late 2004 with an ethical code for judges. As the Chief Justice explained, the rules of behaviour in the past had been conventional wisdom, common sense, tradition and experience, and were neither formal nor written. The time had come, he said, to write down those conventions and create a binding code of ethics.

Tougher rules on disqualification

On 24 November 2005, the Supreme Court announced the introduction of a more robust policy for disqualifying judges from hearing a case, specifically when one of the parties is represented by a law firm with which the judge has had a close relationship.[10] The case that drove the decision was a dispute between Slomo Narkis and Isaiah Waldhorn over a debt of more than US $500,000 that the district court ordered the latter to pay. The court delayed implementation of its decision, however, and Narkis appealed. In June 2005 Waldhorn requested that the court ruling be thrown out on grounds of partiality. Waldhorn's attorney claimed that Judge Sara Dotan displayed bias when she had said in a previous discussion that the debt was not

5 For further information, see Amado, op. cit.
6 *Ha'aretz* (Israel), 10 October 2005.
7 *Ha'aretz* (Israel), 12 September 2005.
8 *Jerusalem Post* (Israel), 2 December 2005.
9 *Ha'aretz* (Israel), 30 August 2005.
10 *Isaiah Waldhorn v. Slomo Narkis*, CP 6332/05, 24 November 2005 (unpublished).

controversial (suggesting the judge had already accepted Narkis' side of the story). Waldhorn further claimed that there was a substantive kinship relationship between Dotan and Narkis' attorney, Ishai Bet-On; Bet-On had represented Dotan's son in various cases.

The Supreme Court ruled that substantive grounds for a conflict of interests had been sufficient for disqualification. Although Bet-On did not appear in court, his involvement in the case was crucial. He had represented Narkis in the procedures that led to the appeal, and would have to evaluate an appeal written by Bet-On. As senior partner in the law firm representing Narkis, Bet-On also had an interest in professional fees of more than US $100,000. Under those circumstances the Supreme Court determined there was a substantive apprehension for partiality and disqualified Judge Dotan. The Supreme Court stressed that the decision did not reflect on the judge's partiality, but that the substantive conflict of interest was enough for her to be disqualified.[11]

Written code of ethics for judges

In July 2006 the Knesset approved an amendment to the Courts Law that authorised the Chief Justice to determine a set of ethical rules for judges, to give those rules an obligatory status and enhance public trust in the judiciary.[12] The draft code, drawn up by a special committee appointed by Chief Justice Barak, is intended to guide judges in their professional and daily life. The third chapter lays out guidelines for disqualification in cases of conflict of interest. Clause 15 states that a judge should not participate in a trial if:

- One of the parties, their representatives or a prominent witness is a member of the judge's family
- Any other kinship relationship exists between them
- The judge or a family member has a financial or personal interest in the procedure or its result
- Before appointment to the bench, the judge had been in any way involved in the case as representative, arbitrator, facilitator, witness, counsel or expert
- One of the sides or a prominent witness had been the judge's client before appointment to the bench
- Less than five years had passed since the judge's involvement in the case
- A lawyer representing one of the sides was the judge's partner within the previous five years
- A lawyer representing one of the sides also represents the judge's affairs, or those of anyone in the judge's family
- A relative of the judge is a lawyer, employee or partner in the legal firms involved in the case.

The code is specific about relations between judges and the media, advising judges to confine their opinions to their verdicts, rather than interviews with the media, and requiring judges to obtain permission from the president of the Supreme Court before appearing in the media.

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11 Ibid.
12 news.walla.co.il/?w=//942842

'Radical surgery' in Kenya's judiciary

Legal system: Common law, adversarial, plural (with elements of Islamic law)
Judges per 100,000 people: 0.2[1]
Judge's salary at start of career: Not obtained *Supreme Court judge's salary:* Not obtained
GNI per capita: US $530[2] *Annual budget of judiciary:* US $26.8 million[3]
Total annual budget: US $7.0 billion[4] *Percentage of annual budget:* 0.4
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* Yes

1 *Kenya Times* (Kenya), 29 August 2006 2 World Bank Development Indicators (2005) 3 Budget estimates for 2005–06 4 Ibid.

The National Rainbow Coalition (NARC), led by President Mwai Kibaki, came to power in 2002 when the judiciary was afflicted by corruption and executive interference. Kenya needed judicial reform as part of a wider process of strengthening democracy and the government won office on the strength of promises made to that end. There were discernible gaps between rhetoric and the implementation of policy, however. Although the public generally views the judiciary as less corrupt than it was, many in the legal fraternity believe that corruption is still a problem.[1]

Surveys and polls have mapped what seems to be widespread loss of public trust in the justice system. According to such soundings, bribery is rampant in the judiciary, which is ranked sixth among the country's 10 most corrupt institutions. A brush with the police provides the most fertile ground for bribery.[2]

'Radical surgery' harms judicial independence

In 1998 a judicial committee, known as the Kwach committee,[3] proposed various radical measures, including enforcement of a judicial code of ethics. Many of its proposals were not implemented. In 2002, the International Commission of Jurists (ICJ) (Kenya) commissioned an investigation of the independence of the judiciary involving a team of Commonwealth jurists whose report recommended an effective interim mechanism to investigate allegations of judicial misconduct.[4]

The NARC initiated a reform programme, known as 'radical surgery', which saw the removal of former chief justice Bernard Chunga, and the suspension of 23 judges and 82 magistrates on grounds of corruption. The move won immediate public approval and was hailed as evidence of a

1 Surveys by ICJ (Kenya) point to the prevalence of this perception. See 'Strengthening Judicial Reforms Performance Indicators: Public Perceptions of the Kenya Judiciary' (Nairobi: ICJ (Kenya), 2001).
2 www.tikenya.org/documents/Kenya%20Bribery%20Index%202006.pdf
3 The Committee on Administration of Justice was headed by appellate judge (now retired) Richard Kwach.
4 The report is available at www.icj.org

commitment to tackle corruption in the judiciary. But 'radical surgery' attracted criticism for other reasons.

First, it ignored constitutional guarantees of security of tenure for judges and international principles on the independence of the judiciary that state that the examination of the matter at the initial stage shall be kept confidential unless otherwise requested by the judge.[5] Some judges were not informed of the action that was to be taken against them. Suspended high court judge Daniel Anganyaya told the tribunal that he only learned that his name was on the list from his daughter, who heard it in a news bulletin.[6]

The process of suspending the judges was carried out hurriedly and without proper consultation. It failed to adhere to international best practice on the removal of judicial officers. Secondly, acting or contract judges were appointed to replace those suspended, further undermining the judiciary's independence. Thirdly, the policy ignored substantive reforms of the judiciary, such as improved working conditions for judicial officers and enhanced independence for the judicial service commission.

Judicial appointments

The constitution vests the power to appoint judges in the president, although he is required to consult the judicial service commission in making them. The commission, however, comprises presidential appointees, including the chief justice, attorney general, an appeal judge and the chair of the public service commission. Since both judges and members of the commission are presidential appointees, there is room for executive interference.

The Kwach Committee proposed rigorous vetting procedures to ensure appointments were made strictly on merit. The government attempted to gloss over the appointment process by giving it the semblance of a consultative process involving external participation and scrutiny by the Law Society of Kenya (LSK). This involvement, however, was built around the personal rapport between the Chief Justice and the chair of the LSK. Consultations between them were neither formal nor structured, and the meetings and their outcomes were not publicised. The Advocates Complaints Commission[7] reportedly vetted the nominees, though how this was done was not made public. Some viewed the appointments as 'well done, in a more open manner than previously'.[8] Others criticised the process for its failure to involve parliament, which would have made it more open to scrutiny.

The appointment process seems to have been part of the radical reforms. Political pressure for judiciary reform was intense after the 2002 elections and the suspensions were born out of the immediate need for the government to be seen to be cleaning up the judiciary quickly. The process ignored the need to safeguard the independence of the judiciary and ensure executive interference was kept at bay. Since the new judges have been appointed in an acting capacity, it gave rise to questions about the security of tenure and independence of the judiciary as a whole.

Control and disciplinary mechanisms

A key disciplinary mechanism falls under the judicial service commission, which is mandated

5 UN Basic Principles on the Independence of the Judiciary, available at www.unhchr.ch/html/menu3/b/h_comp50.htm
6 *Daily Nation* (Kenya), 18 August 2006.
7 The Advocates Complaints Commission is a government agency responsible for investigating complaints against advocates before they are referred to the disciplinary committee.
8 Muciimi Mbaka, 'Judicial Appointments in Kenya', *Judicial Reform in Kenya 1998–2003* (Nairobi: ICJ Judiciary Watch series, 2004).

to enforce discipline and ethical conduct among magistrates though it has no disciplinary jurisdiction over judges. The constitution states that where questions arise as to the ability of a judge to carry out his or her duties, the president shall appoint a tribunal to look into the matter. Such ad hoc tribunals were appointed in the wake of the 'radical surgery' reforms to investigate allegations of corruption and impropriety against high court and court of appeal judges.

The draft constitution, rejected in a November 2005 referendum, sought to expand the jurisdiction of the judicial service commission to include judges, a proposal that was generally well received. However, the commission has failed to be effective due, firstly, to its lack of independence since a majority of its members are judicial officers;[9] and secondly, because it does not have a permanent secretariat to facilitate its work.

The judicial service commission needs to be made independent[10] of both the executive and the Chief Justice,[11] and should be headed by an independent person. It also needs powers to supervise judges' adherence to a code of conduct. Other measures proposed by lawyers include allowing it to receive public complaints about judicial misconduct; to deliberate on complaints against judges; and to make recommendations on, and enforce terms of service of, judges.[12]

The creation of the Kenya Anti Corruption Commission (KACC) marked a step forward in the evolution of external control mechanisms not only for the judiciary, but other public institutions as well. The KACC was given wide powers to investigate corruption, though the power of prosecution lies with the attorney general under the constitution. The KACC's strategy in addressing corruption in the judiciary is unclear. This was evidenced in recent disclosures of corruption in court registries. There are concerns that the anti-corruption court set up by the government to provide speedy adjudication of corruption cases is being presented with few cases, despite the government's acknowledgement that corruption is rife within its institutions.

A code of conduct for judges exists, a product of the Public Officer Ethics Act 2003 that requires public officers to declare their wealth. There is no public report yet as to whether judges have filed asset declarations, as has been the case with ministers, MPs and other officials.

Tribunals to investigate judges

In February 2003, President Kibaki appointed a tribunal to investigate Chief Justice Bernard Chunga on charges of corruption. Chunga resigned and the president appointed Evans Gicheru to replace him. The following month the new Chief Justice launched a committee with a mandate to address administrative problems within the judiciary, at the same time appointing a sub-committee, headed by Justice Aaron Ringera, which was instructed to investigate and report on the magnitude of corruption; consider the causes of corruption in the judiciary; consider strategies to detect and prevent corruption; and propose disciplinary action.

The committee's findings, known as the Ringera report, implicated five of the nine court of appeal justices, 18 of 36 high court judges and 82 of 254

9 The Chief Justice heads the judicial service commission.

10 In its submission to the Constitution of Kenya Review Commission, ICJ (Kenya) proposed that the independence of the judicial service commission and its members be expressly articulated in the new constitution and that its members enjoy a five-year tenure, renewable only once.

11 This argument is well expounded in Albert Kamunde, 'Restructuring and Strengthening Kenya's Judicial Service Commission', *Judicial Reform in Kenya 1998–2003*, op. cit. See also Mbaka (2004) op. cit.

12 See Kamunde (2004), op. cit. This position is also articulated in ICJ (Kenya) 'Judicial Independence, Corruption and Reform' (Geneva: ICJ, 2005).

magistrates in corrupt activities.[13] Many of the judges and magistrates resigned or 'retired'. For the rest, President Kibaki appointed two tribunals, one for the high court and the other for court of appeal, to investigate allegations against them. The government has been criticised for the way the tribunal mechanism was implemented, in particular having single tribunals investigating multiple judges, and allowing for the department of public prosecutions, a key player in the executive, to play a substantial role in the tribunals, considering they were intended to be a 'peer-review exercise'.

Political context of reforms in the judiciary

Reports of graft in court registries are a pointer to the resurgence of corruption in the judiciary. Of particular concern was the government's failure to act where graft had been reported. In October 2003, the LSK appointed a committee to investigate judicial corruption and submitted to the Chief Justice a report containing the names of judges who faced further investigation.

In a move to address concerns on corruption, the Chief Justice in 2005 appointed a special committee on ethics and governance, headed by Appellate Judge Walter Onyango Otieno, to *inter alia* investigate cases of alleged corruption in the judiciary. The committee received complaints from the public and completed its work in September 2005, but has yet to make its findings public.

The tribunal process has proved inefficient. After four years, it has completed only one case, which resulted in exonerating the judge concerned. Political support has evaporated and no individual in government seems responsible for the tribunals' existence. Although conceived as vehicles to determine quickly the removal of judges, they have dragged on for years without finishing their work. Some tribunal members are serving judges and initially they gave their full attention to the task. They have since been re-deployed to ordinary duties. This sends the message that there is no longer any commitment to the tribunals process.

Recommendations on the way ahead

- A study is needed on the impact of 'radical surgery' on judicial reform since 2003. Some argue that the policy has actually had a negative impact on the judiciary by violating safeguards on security of tenure. It is not enough to remove judicial officers; they must be removed in a way that is constitutionally just and proper. In addition, the hearings must be expedited so that justice is not delayed against the judges before them.
- A code of conduct constitutes an effective, internal control mechanism against corruption and unethical behaviour. The failure to put one in place and enforce it has been a major factor in fuelling misconduct among judicial officers. The judiciary needs to keep the public abreast of enforcement of the code, particularly on the issue of wealth declaration.
- The constitutional review process must be accelerated since the failure to conclude it has held back critical reforms in the judiciary. The process is currently in abeyance following rejection of the draft in last year's referendum. ICJ (Kenya) has recommended that in case of further delays, chapter 13 of the draft covering the Judicial and Legal System (which was non-contentious among all stakeholders) be introduced as a separate parliamentary bill and enacted into law as soon as possible.
- The judicial service commission must be restructured to give it a greater role in vetting appointments to the judiciary. The bar has recommended useful measures, including

13 See, for example, news.bbc.co.uk/1/hi/world/africa/3195702.stm

allowing the commission to receive complaints from the public about misconduct by judicial officials; to deliberate on complaints against judges; and to make recommendations on, and enforce, terms of service for judges.[14] There is clearly a need to expand the commission's jurisdiction to include disciplinary supervision over judges.

- The terms of service of the magistracy and other low-ranking judicial officers must be improved as a matter of priority. Salary increases, better housing and security (especially for senior magistrates) are the most urgent concerns.

TI Kenya, Nairobi

14 Ibid.

Judicial corruption and impunity in Mexico

Legal system: Civil law, inquisitorial, federal *Judges per 100,000 people:* 0.9 (federal courts only)[1]
Judge's salary at start of career: US $62,818[2] *Supreme Court judge's salary:* US $317,709[3]
GNI per capita: US $7,310[4] *Annual budget of the judiciary:* US $1.5 billion[5]
Total annual budget: US $150 billion[6] *Percentage of annual budget:* 1.0
Are all court decisions open to appeal up to the highest level? No
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges:* Yes, for federal judges only

1 Justice Studies Center of the Americas (2004–5) 2 www.tsjdf.gob.mx (2006) 3 www.scjn.gob.mx and www.trife.org.mx (2006) 4 World Bank Development Indicators (2005) 5 World Bank Group (2000) 6 Diario Oficial de la Federación (2002)

The worst consequence of judicial corruption in Mexico is the high level of impunity, largely generated and supported by the various actors in the judicial system: police, prosecutors, judges and prison officials. There are no exact statistics by which to measure the different manifestations in Mexico's justice system but there are statistics that make it possible to venture an analysis.

Negotiations between criminals and police

According to a survey of the prison population, the majority of detentions occur at the moment the crime is committed or during the next three hours. Some 48 per cent of detainees surveyed said they had been detained less than 60 minutes after committing the crime and 22 per cent said they were detained within 24 hours.[1] That means 70 per cent of detentions are made less than 24 hours after the commission of the crime. As well as providing evidence of the lack of investigative capacity of the police, these figures suggest that if detentions are not carried out at the moment the crime is committed it is probable the perpetrators will never be detained. One reason for this may be that 'negotiations' are made between criminals and corrupt police officers.

1 Marcelo Bergman, *Crime, Marginalisation and Institutional Performance: Results of a Survey of the Prison Population in Three States of the Mexican Republic* (Mexico City: Centro de Investigación y Docencia Economica, 2003).

Once the alleged criminal comes before a judicial authority, violations of fundamental human rights frequently occur that in many cases are linked to corruption. For example, 71 per cent of people detained in Mexico City did not receive advice from a lawyer while in the custody of the public prosecutor's office; and of the 29 per cent who did have legal assistance, the majority (70 per cent) were not allowed to speak in private with him or her. Once brought before the judge, who is responsible for determining whether to proceed to trial or release the suspect, 60 per cent of detainees were not told that they had the right to refuse to make a statement. When giving a preparatory statement before the judicial authority, one in four detainees was not assisted by a lawyer.[2] When a detained person does not have access to a lawyer, it is easy to succumb to pressure to offer money to the police. Some 80 per cent of detainees never spoke to the judge who condemned them and a judge was not present during the detainee's statement at the judicial offices in 71 per cent of cases.[3] If a judge is not present when the detainee is interrogated, it is probable that these pressures will be repeated or increased, either to coerce the witness into a confession or to 'resolve' the issue by extra-official means.

'The most severe lack of credibility in its history'

These figures justify the low level of trust that society has in the institutions responsible for justice. Recent research, both household surveys and surveys targeted at people who work in the sphere of justice, reflect the low level of confidence in judges and courts. According to the National Survey on Political Culture and Citizen Practices, carried out by the Interior Ministry in November and December 2001, only 10.2 per cent of people said they had 'much trust' in the Supreme Court, which placed trust in the highest court at a lower level than in local or municipal authorities, the media, big business and citizens' associations.[4] A nationwide survey of 60,000 people conducted a year later indicated that two thirds of respondents had 'little' or 'no' trust in the Supreme Court, compared with 6 per cent who had 'much trust'.[5]

Legal scholar Héctor Fix Fierro may be right when he says: 'The image of justice in the press, public opinion or even in the judicial profession has been, in general, unfavourable and seems to reflect a persistent and widespread crisis.'[6] Within the judicial ranks there has been talk of a bleak future for the justice system; a former president of the Supreme Court described the federal judicial police as facing 'the most severe lack of credibility in the face of public opinion in [its] history'.[7] In the main, the response by the judiciary to criticism of corruption has been hostile. When the UN Special Rapporteur on Independence of Judges and Lawyers visited Mexico in May 2001 he observed that, according to the people he spoke to, between 50 and 70 per cent of federal judges were corrupt.[8] 'Impunity and corruption appear to prevail within the Mexican justice system,' he concluded, adding: 'It is

2 Guillermo Zepeda Lecuona, *Crime without Punishment: Justice and the Public Prosecutor's Office in Mexico* (Mexico City: Centro de Investigación para el Desarrollo and Fondo de Cultura Económica, 2004).
3 Marcelo Bergman, op. cit. The code of criminal procedures requires a judge to be present immediately after arrest, which means during the preparatory statement at the start of the hearing to determine probable cause.
4 *Este País* (Mexico), August 2002.
5 *Milenio* (Mexico), 16 December 2002.
6 Instituto de Investigaciones Jurídicas (IIJ-UNAM), *The Efficiency of Justice (an Approximation and a Proposal)* (Mexico City: IIJ-UNAM, 1995).
7 Genaro Góngora Pimentel, *Meetings with the Media* (Mexico City: Poder Judicial de la Federación, 1999).
8 UN Special Rapporteur on Independence of Judges and Lawyers, 'Report on the Mission to Mexico', E/CN. 4/2002/72/Add. 1. (New York: UN Commission on Human Rights, 2002). Available at www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c0120deaf3b91dd2c1256b76003fe19d?Opendocument

necessary to investigate and be publicly accountable for all the human rights violations committed, including complaints of generalised corruption.' His statements so upset the judiciary the Supreme Court published a book to disprove them.[9]

A more recent report highlighting the lack of judicial independence is the World Economic Forum's *Global Competitiveness Report 2005–2006*, which ranked Mexico 55th out of 117 countries evaluated. This lack of independence generates corrupt practices in the judicial processes that are manifested in two ways: externally, in relation to the main social and political actors; and internally, as lower-ranking judges are pressured to follow 'instructions' and protect the interests of their seniors.

Public prosecutor's office requires independence

Part of the reason that corruption exists in the judiciary is the lack of public ethics that would otherwise prevent public officials from engaging in dishonest acts. But there are also acts of corruption based on poor legislative policy; in other words, the laws generate or induce corruption.

For example, the constitution grants the public prosecutor's office a monopoly over initiating criminal legal action. This confers enormous decision-making power on agents in the public prosecutor's office, who have a wide margin of discretion in deciding whether to submit a preliminary investigation before a judge. It is not uncommon for the lawyers of people presumed responsible for committing a crime to 'fix it' with the public prosecutor's office before it takes the investigation before a judicial authority. They have a high chance of success when the strategy is backed by money.

Corrupt acts occur in the prosecutor's office as a result of its dependence on government. The constitution indicates that the public prosecutor's office is dependent on the president at the federal level or on state governors at local level. This has a multiplier effect on corruption. It makes it difficult to conduct independent investigations against officials who belong to the same political party as the government in power. Furthermore, it extends the dynamic of party politics into the judicial arena, which means that the investigation of crimes is often conducted according to a political agenda.

The only solution is to grant organisational and functional independence to the public prosecutor's office. This means appointments and removals would be the responsibility of legislative chambers at federal and local levels. While several constitutional reform initiatives have been tabled to this effect, none has been approved to date.

Mexico moving slowly to oral hearings

Once the judicial process has been initiated, strict guidelines are required if corruption is to be avoided. For example, any judicial act where a person is not assisted by a lawyer should be grounds for declaring the entire trial and investigation void. The same should apply if a judge was absent either from a hearing or when the prosecutor presents evidence against the accused.

Another important issue is the implementation of oral hearings, particularly in criminal matters. Oral hearings introduce a clear disincentive to corruption since the process is carried out before the eyes of all interested parties. There have been some successful, though limited, experiences at the local level in this regard. Oral hearings were introduced in Nuevo León in 2004 and other states are considering similar reforms. These

9 Supreme Court of Mexico, *Response to the Report of the UN Rapporteur on the Independence of Judges and Lawyers* (Mexico City: Poder Judicial de la Federación, 2002).

initiatives need to be accelerated and implemented particularly at the federal level where the most traditional judges strongly resist changes in procedure.

The mechanisms for supervising and disciplining judges also need reform. The disciplinary mechanisms are opaque and the body responsible for carrying out investigations is not fully independent. Following a 1999 reform, the council of the federal judiciary, created in 1994 to monitor and discipline judges, depends to a great extent on the Supreme Court. The majority of its members also belong to the judiciary, which raises suspicions about conflict of interests – that its members may have motives to protect their colleagues from punishment or prosecution for wrongdoing. Complaints against judges and the reasons behind them should be published so that the public has the information necessary to evaluate the current system of supervision.

Another area ripe for reform is the disparity in conditions between federal and local courts. Local courts lack decent budgets and the means to carry out their work with dignity, while federal courts have good resources and their members enjoy high salaries. A national system for training and appointments needs to be established to narrow the gap between salaries at different levels of the judicial system.

A policy to improve regulations needs to be implemented with the aim of establishing the rights and responsibilities of the different elements of the judicial system. Each state has its own criminal code and code of criminal procedure, making for a total of 66 separate codes when federal regulations are included. This excess obscures understanding of how the justice system should function, and permits corruption to go unnoticed. It would be better to adopt a single, unified code in order to increase public knowledge of the law.

As a complementary measure, lawyers and judges need more training in ethics. The education system must take some of the blame; universities and law schools pay little attention to ethical issues, and this neglect is reinforced by the fact that there are no obligatory colleges for lawyers. There is also a lack of procedures to prevent lawyers who have been found responsible for corruption from promptly resuming their practice.

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Corruption within Mongolia's legal profession

Legal system: Civil law, inquisitorial, adversarial *Judges per 100,000 people*: 13.3[1]
Judge's salary at start of career: US $2,412[2] *Supreme Court judge's salary:* not obtained
GNI per capita: US $690[3] *Annual budget of judiciary:* US $3.7 million[4]
Total annual budget: US $1.1 billion[5] *Percentage of annual budget:* 0.3
Court decisions open to appeal to highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes *Code of conduct for judges?* Yes

1 General Council of the Courts (2006) 2 Ibid. 3 World Bank Development Indicators (2005) 4 General Council of the Courts (2006) 5 Ibid. 6 Ibid.

Many of Mongolia's judicial problems are the legacy of an era when the state tightly controlled the courts. Since the democratic transition 15 years ago, judges and lawyers have had to be trained from scratch in the ethics and meaning of an independent judiciary.

A number of surveys have tried to measure public perceptions of corruption. According to a 2006 opinion poll of 1,030 Mongolians, people perceive corruption to be the second most important problem facing the country, and identify courts as the fourth most corrupt sector after customs, land rights and mine licensing.[1] Another poll suggested some aspects of the problem may be improving: the percentage of those who perceived corruption in the courts fell from 39 per cent in 2001 to 18 per cent in 2005. In 2005, however, 93 per cent of those surveyed believed that politically influential people received better treatment in the courts and 90 per cent said the rich were treated better.[2]

According to a third survey[3] the factors contributing to corruption in the judiciary range from 'mundane factors such as pay and weak transparency, to such multifaceted aspects as endemic corruption in the legal sector'. Other contributing elements are:

- A blurring of lines between the public and private sectors
- Lack of transparency and access to government information
- Inadequate civil service
- Lack of political will
- Weak control institutions.

Scale of corruption

There were 456 criminal investigations of abuse of authority by judges and police in the two years prior to 2002, of which 250 were taken to court and the rest dismissed.[4] A special investigation unit established in 2002 to prosecute criminal offences by judges, prosecutors and police has brought corruption charges against four judges since its foundation, but all proceedings were dismissed at a later stage.[5] The head of the unit reportedly approached the judicial disciplinary committee in the prosecutor's office in an attempt to restart the cases, but was informed there had been pressure from higher up to suspend the inquiries.[6] According to another member of the unit, judges routinely alter charges of corruption against police officers or judges to charges of minor embezzlement, which are treated less harshly under the law.[7]

Within the court system, disciplinary action has been taken against judges for 'unethical misconduct' and 'professional mistakes' for decisions so contrary to law that they may well be the outcome of corruption.[8] In 2000–01, disciplinary

1 USAID, Asia Foundation, National Center for State Courts, *Corruption Benchmarking: Understanding the Scope and Incidence of Corruption in Mongolia*, April 2006, www.asiafoundation.org/pdf/MG_Benchmarking.pdf
2 Sant Maral/National Center for State Courts, 'Mongolia Judicial Reform Project's Public Perception of the Judicial System in Mongolia 2001, 2003 and 2005', at www.owc.org.mn/santmaral/page3.html
3 USAID, 'Assessment of Corruption in Mongolia', August 2005. See www.usaid.gov/mn/library/documents/MongoliaCorruptionAssessmentFinalReport.pdf
4 Robert La Mont, *Some Means of Addressing Judicial Corruption in Mongolia*, 1 August 2002. See pdc.ceu.hu/archive/00002274/01/Judicial_Corruption_in_Mongolia.pdf
5 Interview with Ms Batchimeg, state prosecutor, National Prosecutor's Office, 15 May 2006. According to another source, the unit investigated six cases related to corruption by judges, prosecutors and police in 2004. See www.olloo.mn/modules.php?name=News&file=article&sid=25715
6 T. Batbold, deputy chief of investigative unit, National Prosecutor's Office. See *Terguun* (Mongolia), 8 May 2006.
7 T. Jargalbaatar, senior investigator with investigative unit, National Prosecutor Office. See *Ardiin Erh* (Mongolia), 3 May 2006.
8 Robert La Mont (2002), op. cit.

cases were filed against 37 judges: nine had their salaries reduced, 20 received formal warnings and eight were dismissed.[9] In 2003, the judicial disciplinary committee heard 25 cases against judges, compared to 21 in 2004, 19 in 2005 and six up to May 2006.[10]

At US $200 per month, judges' salaries are higher than most senior civil servants, but only half the average in the private legal sector. Low pay and living standards are cited as threats to judicial independence and integrity. According to Chief Justice S. Batdelger of the Supreme Court, over 70 per cent of judges have no apartment of their own and have to rent.[11]

Government maintains hold over judiciary

Although enshrined in Mongolia's constitution, judicial independence is in its infancy. Until four years ago the Justice Minister chaired the general council of courts, a 12-member body with the mandate to ensure the independence of the judiciary. Under the constitution the president appoints judges for life upon recommendations from the general council of courts.

When criminal allegations involve members of government, a judge relying on the president for his or her job finds it difficult to rule independently. A recent example involved President Nambaryn Enkhbayar, a controversial figure whose election campaign was tarnished by demonstrators demanding an investigation into allegations that he had diverted US $2.9 million from public funds. Reports recently emerged that President Enkhbayar allegedly arranged the reversal of an appeals court decision in a slander case involving an independent researcher who had accused him of graft. The first-instance court had dismissed the charge.[12]

Weak disciplinary mechanisms

Rules of ethical conduct and disciplinary bodies exist for each of the legal professions – judges, state prosecutors and private lawyers. Though the rules are generally adequate, they fail to prohibit *ex parte* meetings with parties and witnesses in a case. The disciplinary bodies need better financial and human resources if they are to combat misconduct, but their weakness is also due to the fact that the president directly appoints judges. The lack of transparency in the justice sector, in which court decisions are made in secret, potentially allows judges to hide the lack of evidence supporting their decisions.

In 2002 a special unit was created within the prosecutor's office to investigate allegations of criminality against members of the justice sector. Most charges against legal professionals are eventually thrown out or settled out of court, either due to political manipulation or lack of proper evidence-gathering skills.[13]

Lawyers channel bribes

Corrupt activities by lawyers include the direct bribery of a judge, nominating an amenable judge to hear a case and influencing the prosecution. Some lawyers reportedly take up a case depending on whether they are familiar or on good terms with the assigned judge or investigator. Similarly, they may assess whether the case promises a large payoff,[14] and sometimes advise clients

9 Ibid.
10 Interview with Ms Batchimeg, state prosecutor, 15 May 2006.
11 *Odriin Sonin* (Mongolia), 8 December 2005.
12 *Deedsiin Hureelen* (Mongolia), 1 April 2006.
13 USAID (2005), op. cit.
14 *Ardiin Erh* (Mongolia), 10 May 2006.

to pay 'gifts' to judges to secure a favourable outcome.[15]

There are reported situations in which lawyers bribe the opposing council to deliberately lose the case. Conspiracy is difficult to prove, but the damage is impossible to repair because the corrupt 'team' of defendant and plaintiff lawyers drives the case to the point where further legal appeals are futile.

The defendant, a single mother, lived with her grandfather and three children in an apartment that he owned. After he passed away in 1999, his granddaughter, as occupant, had the legal right to obtain title to the apartment. The woman's uncle, a son of the deceased and a wealthy person with his own house, also claimed title to the apartment.

In the ensuing litigation, several lawyers advised the woman to find someone with access to the court. 'By law you should win, but anything can happen. Most likely your uncle will bribe the judge. So you must secure a fair decision by talking to someone who knows the presiding judge, and paying him.' With no other choice but to lose the apartment, the woman took no chances. Her lawyer found someone with a friend in the Supreme Court who called the judge. The woman and her family were awarded title.[16]

Blood ties

One characteristic specific to Mongolia's justice sector – and the corruption within it – is that many lawyers previously served on the bench or in law enforcement before moving to the private bar. Furthermore, in a society of large extended families it is not uncommon to find professionals from the various legal disciplines related by blood. In Mongolia's tightly knit legal community, such blood ties can be a major drawback to transparency, impartiality and independence.

Complicating matters, Mongolian laws are often ambiguous, allowing different, even conflicting, interpretations by judges and lawyers often to their financial advantage. Coupled with low standards of public legal education, this vagueness provides a ripe environment for abuse of legal office.

Reform efforts

In 2000 Mongolia passed the Strategic Plan for the Justice System of Mongolia and the following year USAID designed a five-year Judicial Reform Project (JPR) to implement it, in collaboration with GTZ, Mercy Corps and PACT. Now nearing closure, the JPR focused on five specific areas:

- Court administration and case-flow management
- Continuing legal education
- Creation of a qualification examination for lawyers
- Improved ethical education for law professionals
- Public education about justice processes.

Among the project's main achievements are: full automation of all of Mongolia's 61 courts; automated random assignment of cases; public terminals in courts that allow lawyers and the public to access case files; and the creation of a central database of case information that has been online since 2005. In education, the JRP developed a group of trainers to work in a new national legal centre with a mandate to retrain all legal professionals; provided ethics and other training to

15 The Centre for Human Rights and Development, 'National Human Rights Record 2000: Mongolia', available at www.chrd.org.mn
16 Ibid.

judges in the countryside; developed with the Ministry of Justice Mongolia's first formal qualification exam for legal professionals; and produced posters, books, articles and radio and television programmes to explain changes in the legal system to the general public. The JPR also provided advice on drafting a new judicial ethics code, and strengthened the two main monitoring agencies, the judicial disciplinary committee and the prosecutor's special investigative unit, by providing computer equipment and training in investigative techniques.

In an indication of how far the Mongolian judiciary still needs to travel to meet the minimum requirements of a transparent and even-handed system of justice delivery, USAID extended the JRP by three years till 2008. Among the 18 new objectives listed in late 2005,[17] the majority addressed the judicial body: its administration, management, budget, performance, 'behavioural standards' and legal specialisation (securities, taxation, international commerce, etc.). While the purely mechanical aspects of improving a justice system – the electronic and case-management processes – appear only to need reinforcing, the human element still defies reform. Five years after the JRP was launched by Mongolia's staunchest donor in a difficult part of the world, USAID had still not managed to elicit legislative approval for a strengthened judicial code of ethics, restrictions on judges' *ex parte* conversations, declarations of public assets or a 'definition of professional mistakes'.[18] A domestic anti-corruption law adopted in July 2006 provides for the creation of an independent anti-corruption agency and requires public officials, including judges and prosecutors, to declare their incomes and assets.

TI Mongolia,
Ulan Bator

17 The new objectives were listed in a speech by the JRP's chief officer, Robert La Mont: see www.ncsc.mn/news.php?newsid=110
18 Ibid.

Royal power and judicial independence in Morocco

Legal system: Civil law, both inquisitorial and adversarial, plural, prosecution part of the judiciary
Judges per 100,000 people: 20.7[1] *Judge's salary at start of career:* Not obtained
Supreme Court judge's salary: Not obtained *GNI per capita:* US $1,730[2]
Annual budget of judiciary: US $290.7 million[3] *Total annual budget:* US $16.8 billion[4]
Percentage of annual budget: 1.7
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges?* No

1 World Bank (2000) 2 World Bank Development Indicators (2005) 3 Budget law 2006, Official Bulletin no. 5,382 bis (25 December 2005) 4 CIA World Factbook (2005)

The Crédit Immobilier et Hôtelier (CIH) affair illustrates the limits of the judicial system in fighting corruption in Morocco where the means of investigation, prosecution and suppression are all subject to the government.

The constitution states that the judicial system is independent of the executive and legislature.[1] This principle is confirmed by civil and criminal law, and made concrete through a legal statute on judges' careers supervised by the supreme council of the magistracy (CSM). The CSM is composed of the country's most senior judges, many of them elected by their peers, and it determines nominations, promotions, transfers and sanctions. In this process the security of tenure that judges enjoy is strengthened, while the position of the prosecutor's office is relatively lower. These limits are sometimes expressed by the adage, '*si la plume est serve, la parole est libre*', broadly meaning the prosecutor enjoys greater freedom in his spoken than his written words.

The king commands and the law disposes

But it is the King of Morocco, Mohammed VI, who presides over the CSM and who has the last word in making decisions.[2] He appoints all judges, prosecutors, senior civil servants and members of government. The practical work is done by the Minister of Justice in his capacity as vice-chairman. He heads the permanent secretariat of the CSM, prepares the agenda, organises sessions and sends the council's deliberations to the King for approval. This minister has primary responsibility for the general administration of justice, judicial budgeting and the management of human resources, including the careers of judges with administrative functions at the ministry and in the wider bureaucracy. The minister has the power to nominate or transfer judges, pending the approval of the CSM.

The impact of the executive's authority over the administration of justice is not always obvious in daily life. When the justice system has to deal with an affair involving the illegal fortunes of leading members of society, however, it rapidly becomes visible. The CIH affair was just such a case. The matter came under the immediate jurisdiction of the special court of justice, which is responsible for the prosecution of corruption and other crimes involving public funds or public officials. The law instituting the court, however, stipulates that prosecutions can only be initiated by a written order signed by the Minister of Justice.[3]

CIH: a cash-cow for decades

The CIH was originally established to finance land colonisation. Soon after Morocco became independent in 1956, it became a credit institution serving the housing and tourism sectors. It was controlled by the state and managed by a chairman appointed by the King. The CIH has appeared repeatedly in the press since the 1970s in connection with dubious investments. It was a source of accessible financing for prominent people and, above all, an obliging backer for the kind of precarious financial arrangements that led to the current affair. Both the internal and external oversight mechanisms that were put in place to prevent this eventuality were in practice neutralised. The subsequent scandal illustrated how the executive used its influence over the judiciary to protect its controversial decisions and prevent the prosecution of those who took them – or profited from them.

1 Article 82.
2 Article 32. King Mohammed Ben Al-Hassan, the current king, ascended the throne in July 1999.
3 The *dahir* (decree) introducing Law no. 1-72-157 of 6 October 1972 created a special court charged with the prosecution of misappropriation by a public officer, corruption, influence trading and embezzlement by public officials.

After decades of bad management and exaggerated largesse – evident in the non-repayment of loans – investigators began looking at the CIH's possible bankruptcy in 1998. They determined that DH9 billion (US $1 billion) in debts still needed to be recovered.[4] In spite of these revelations, neither the prosecutor's office nor the judiciary took any further action. It was not until new credits were proposed to parliament to bail out the CIH that a formal inquiry was launched in 2000.[5] Under the constitution, parliamentary commissions of inquiry are responsible for 'gathering information on facts and submitting their conclusions to the chamber'. They cannot be set up 'when the facts have given rise to judicial proceedings and while said proceedings are underway'. In the CIH case it was because the matter had not been referred to the courts (in spite of the head of state acknowledging the emerging scandal) that a parliamentary inquiry came into being.

Though the inquiry seemed to be a government decision, it actually arose due to the failure of certain ministers, particularly the Minister of Justice, to order an investigation. Legally, the parliamentary investigation could only lead to the preparation of a report for submission to deputies in the chamber. The power to initiate and direct legal action remained entirely in the hands of the executive.

The judicial police[6] began an investigation in January 2001, indicating the government was finally willing to commence criminal proceedings before the special court of justice. The press, especially *Le Journal Hebdomadaire*, the daily *L'Economiste* and *Al Ahdath Al Maghribia*, played a key role in mobilising public opinion. Their work was supported by civil society, particularly Transparency Maroc and the Network for the Defence of Public Property, which organised seminars, asked questions and issued press releases.

Lost opportunity to investigate corruption

In October 2002 the Ministry of Justice ordered proceedings to begin before the special court of justice, meaning the judicial system would finally tackle a case whose criminality had been public knowledge for years. Dozens of people were targeted in the proceedings and some were remanded pending trial. Although the law[7] states that trials before the special court 'must be conducted speedily and be concluded within a maximum of six weeks unless they require checks or expert verifications which take longer', the investigation lasted until January 2004. Ultimately fewer than 20 people were accused of embezzling public funds, biasing trading decisions and misusing corporate or social security assets, either as principal offenders or accomplices. The hearing was set for 19 January 2004, but adjourned until March after some of the accused failed to appear. Other adjournments followed for various reasons. With the lapse of the maximum period allowed by law to hold the accused on remand, they were released pending trial.

In April 2004 the CIH's provisional balance sheet for 2003 was published, showing that nearly DH5 billion (US $550 million) had been injected into unsuccessful efforts to rectify the situation. Questionable credits had reached DH9.5 billion (over US $1 billion). The special court of justice was abolished that same year, and the CIH file was transferred to the criminal division of the court of appeal in Casablanca for further investigation. The silence in this period was only broken by two spectacular interviews in the press with the former

4 This information, as well as that on the progress of the parliamentary investigation, was reported by the daily *L'Economiste* and the weeklies *Journal Hebdomadaire* and *Maroc Hebdo*.
5 See, for example, *Al Sharq Al Awsat* (UK), 2 February 2001.
6 The Brigade Nationale de la Police Judiciaire is a judicial police force with investigative powers.
7 *Dahir* no. 1-72-157, 6 October 1972.

chairman of CIH, Moulay Zine Zahidi,[8] who had fled abroad. He had been made the subject of a wanted notice and was due to be tried in his absence. The message from Zahidi, who had held several ministerial positions including the privatisation portfolio, had a breathtaking clarity. Neither the parliamentary investigation nor the documents on which the proceedings were based gave a true picture of the facts. The most dubious credits and unfair transactions that he had had to authorise were at the request or instruction of well-placed individuals in the state. His attempts to address the late Hassan II and King Mohammed VI about these matters were met with signals that he should 'wipe the slate clean'.

As of September 2006, no political or administrative responsibility has been recognised beyond that of CIH's senior management. The judicial process is expected to ensnare only lower-level staff who may have acted out of greed, but certainly also out of fear in a public service where principles of order and secrecy guide personal conduct and career advancement.

Has this affair contributed to judicial reform? It is difficult to be certain. Among specific reforms intended to combat corruption, the special court of justice was abolished. This means a written order from the Minister of Justice will no longer be needed to initiate criminal proceedings, something Transparency Maroc and other NGOs have long been seeking. The minister's power to obstruct inquiries has not been reduced, however. He still heads the prosecuting authorities, which follow his instruction on when to commence proceedings, and he exercises extensive power through the judicial service commission. This prevents the system from assuming its real responsibilities in the fight against corruption.

Lack of transparency in trials like the CIH affair and flagrant interference by the government in their handling leave the independence of the judicial system in question. This is why judicial reform is a priority for civil society. More support is needed, especially for the notion of judicial security of tenure, which would shield judges from government pressure. At present, this prospect remains remote.

Transparency Maroc,
Casablanca

8 The first interview was published in *Nouvel Hebdomadaire*, 19 October 2003; a second appeared in *Le Journal Hebdomadaire* on 20 May 2006.

Opportunity knocks for Nepal's flawed judiciary

Legal system: Civil law, inquisitorial, plural *Judges per 100,000 people:* 1.0[1]
Judge's salary at start of career: US $3,300[2] *Supreme Court judge's salary:* US $4,800[3]
GNI per capita: US $270[4] *Annual budget of judiciary:* US $13.0 million[5]
Total annual budget: US $2.0 billion[6] *Percentage of annual budget:* 0.7
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No *Code of conduct for judges:*? Yes

1 Registrar of the Supreme Court (2006) 2 Ibid. 3 Ibid. 4 World Bank Development Indicators (2005)
5 Registrar of the Supreme Court (2006) 7 Ministry of Finance

Nepal's judiciary is perceived to be one of the most corruption-afflicted sectors in the country.[1] Although corruption affects every sector of governance, corruption in the judiciary poses an immediate threat to ordinary people[2] because it directly affects their lives, property and liberty. It is a major hindrance in securing the rule of law.

Under the 1990 constitution the Nepalese judiciary is an independent organ of the state with powers to review executive and legislative decisions. It has not, however, been able to initiate serious measures to control corruption, or to take action against allegedly corrupt judges and court officials.[3]

Supreme Court finds its voice again

In the past 15 years, a 10-year insurrection by Maoist rebels, the self-interested activities of political parties and King Gyanendra's political ambitions all conspired to produce an instability that encouraged impunity and corruption. Though constitutional and legal provisions clearly prohibit corruption, poor enforcement, lack of political will and the King's seizure of power on 1 February 2005 helped the corrupt to go unpunished. King Gyanendra's dissolution of Parliament and the creation of the Royal Commission for Corruption Control (RCCC) breached the authority of the constitutionally appointed anti-graft body, the Commission for the Investigation of Abuse of Authority (CIAA), paralysing its work and leaving the anti-corruption movement in limbo.

Just over a year later, on 13 February 2006, the Supreme Court ruled the RCCC unconstitutional and ordered its immediate scrapping. This paved the way for the release of ousted prime minister Sher Bahadur Deuba, who had been detained on corruption charges. During April weeks of popular

1 Baburam Dhakal, *Adalatma Bhastachar* (Corruption in Courts), self-published (2006); and TI South Asia Household Survey on Corruption (2002).
2 'Corruption Control Recommendation Committee Report', 1999, submitted to the government of Nepal.
3 Ananta Raj Luitel, 'Judges' Appointment Process and Controversies', in *Good Governance* bulletin of Research and Media Centre against Corruption (ReMAC) Nepal, February–March 2006.

protests forced the monarch to restore parliament and eventually surrender his autocratic power. The Supreme Court's decision has been portrayed as a step towards ensuring the reality of an independent judiciary in Nepal, though in the previous year it was widely accused of bending to demands for the appointment of judges with pro-royal views.[4] The active Nepal Bar Association frequently castigated the court for its supine verdicts during the period of direct rule and it was only latterly that it passed positive judgements on the many *habeas corpus* petitions presented on behalf of activists detained by the Royal Nepalese Army and the police.

Judges protect their colleagues and their pensions

Under the 1990 constitution, parliament can impeach and remove a Supreme Court justice if found to be engaged in corruption, but this power has not been exercised for 15 years. The constitution requires a two-thirds majority for impeachment to proceed, which means it is a difficult provision to implement in a divided assembly – and impossible when parliament is dissolved. The otherwise independent anti-corruption agency, the CIAA, has no authority to take action against judges. Hence, senior judges have enjoyed immunity due to the rigid provisions of the constitution.

In the case of irregularities by judges in the appellate and district courts, the judicial council of the Supreme Court can take all necessary actions. Headed by the Chief Justice, it is composed of the two most senior Supreme Court judges, the Minister of Law and a representative of the King. Despite having the authority, however, the judicial council has failed to act decisively against many lower court judges, thereby providing them with protection from exposure. Many complaints against lower court judges are still pending at the judicial council.

Two Supreme Court judges, Krishna Kumar Verma and Bali Ram Kumar, did step down in 2004 after media criticism following their acquittal of an international drug smuggler, Gordon William Robinson, who was on Interpol's most-wanted list. Robinson was arrested at Katmandu airport with 2.3 kg of heroin in his baggage. Though sentenced to 17 years in prison and a Rs.1.7 million (US $24,125) fine, the Supreme Court acquitted him on grounds of insufficient evidence.[5] Again, the judicial council failed to investigate or prosecute, allowing the judges quietly to withdraw into retirement.

Former chief justice Biswa Nath Upadhayay has publicly said that irregularities mostly occur within a nexus of corrupt judges and lawyers.[6] Upadhayay, who chaired the 1990 constitution drafting commission, accused the judicial council of failing to stem corruption in the judiciary, and appointing and promoting subordinate judges according to a system of 'quotas'.[7]

This forms part of a long tradition of politicising the judiciary. After the restoration of democracy in 1990, most new appointees to judgeships had close personal links with the ruling Nepali Congress party and its leaders, and the same occurred when the Communist Party of Nepal and Rastriya Prajatantra Party shared power. During King Gyanendra's direct rule, royalist lawyers were appointed as judges and the King promoted his then attorney general, Pawan Kumar Ojha, to the Supreme Court in the face of strong opposition from the Nepal Bar Association.

4 Asian Human Rights Commission, press release, 15 February 2006.
5 See article from nepalnews.com, 4 January 2005, available at: www.nepalnews.com.np/contents/nepaliweekly/nispakshya/2005/jan/jan04/thisweek.htm
6 *Space Time* (Nepal), 13 December 2003.
7 Interview in Golden Jubilee Souvenir of Nepal Bar Association 2006.

Honest legal practitioners with no links to partisan politics have tended to be sidelined in the appointment process.

Formal justice is too costly for most

The courts are riddled with irregularities in which court employees are the main actors, often in collusion with lawyers. A 2002 TI survey on corruption found that many Nepalis believe court officials and lawyers often collude to frustrate formal judicial processes.[8] The well-respected former prime minister Krishna Prasad Bhattarai, who initiated work on the 1990 constitution, once said on national television that officials who receive a meagre salary are compelled to look for alternatives to compensate their costs. This official tolerance of *ex gratia* fees for services is reflected by a public that expects to pay them if required.[9]

Bribery seems more prevalent in criminal cases, notably in murder, theft, drug dealing and corruption charges. The lower courts are the most corruption-prone.[10] A 2003 TI study measuring corruption in the Rupandehi district, for example, found that court staff, lawyers, judges and defendants' intermediaries all work towards the release of defendants through negotiations on the appropriate level of payment.[11] The Nepal Bar Association, civil society and the media have strongly criticised court decisions to acquit criminals in cases like the Robinson affair. Political considerations, inconsistency in interpreting the constitution and laws, conservative attitudes in the handling of public interest litigation and delayed delivery of decisions promote corruption. Critics call the justice system inefficient, biased and expensive.[12]

The public's perception of the preponderance of graft has caused it to lose faith in the official justice system. Partly as a consequence, poorer citizens have taken their litigation to the Maoist courts. These tribunals, which the government scorns as 'kangaroo' courts, reportedly deliver prompt justice on petty cases, ranging from crimes to the theft of livestock, without the involvement of qualified lawyers. 'In a criminal justice system that is brazenly pro-rich, for the poor chasing justice is like chasing a mirage,' said a female schoolteacher in a rebel-held village.[13] The courts, which gained a reputation for meting out rough justice for violent crimes, including rape, were also effective in controlling polygamy. The operation of Maoist courts was suspended in July 2006 as reconciliation talks got underway with the new government.

Golden opportunity for reform

The proposed draft of the Nepalese interim constitution in 2006 has for the first time adopted plans to appoint district court judges after examinations. Higher court judges are to be appointed either directly or by promoting lower court judges. These measures are expected to limit favouritism in the appointment process, and build competence and credibility in the judiciary. Also proposed is the appointment of a senior advocate as a member of the judicial council on the recommendation of the Nepal Bar Association. It is hoped that this will encourage lawyers to act as civil society watchdogs within the judiciary.

In a bid to restore its image, the Supreme Court recently launched a series of programmes targeted at encouraging out-of-court settlements,

8 TI Household Survey on Corruption (2002) op. cit.
9 Nepal Law Society, 'The Judiciary in Nepal: A National Survey of Public Opinion', November 2002.
10 Corruption Control Recommendation Committee Report (1999) op. cit.
11 TI-Nepal 'Corruption Measurement In Rupandehi District' (2003).
12 TI-Nepal, 'Nepal: National Integrity System' (2004).
13 Inter Press Service (Italy) 29 July 2004, available at southasia.oneworld.net/article/view/90875/1/

capacity building for judges and accelerating case processing, with assistance from UNDP and USAID. But the real need of the hour is a judicial integrity programme to raise the reputation of the justice sector by improving its skills and ethics base. Parliament and the new government must quickly establish a high-level independent body with authority to investigate, arrest and seize the property of any judge found to have been engaged in corruption. This could begin with a reorganisation of the judicial council that would extend its powers and competences. The seven-party alliance, which still enjoys the support of the People's Movement, must show sufficient strength to promulgate new policies that truly curb corruption and irregularities in the judiciary. There is no doubt that the existing justice system has failed, but the public still desires an independent, efficient and fair judiciary.

Krishna Prasad Bhandar
(senior advocate, Supreme Court of Nepal, Kathmandu)

Separation of powers in Niger

Legal system: Civil law, adversarial, plural (with elements of Islamic law), prosecution part of the judiciary
Judges per 100,000 people: 1.3[1] ***Judge's salary at start of career:*** US $6,096[2]
Supreme Court judge's salary: US $13,188[3] ***GNI per capita:*** US $240[4]
Annual budget of judiciary: US $5.4 milllion[5] ***Total annual budget:*** US $415.4 million[6]
Percentage of annual budget: 1.3
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not obtained
Are all rulings publicised? Yes ***Code of conduct for judges:*** In drafting process

1 Rapport final du programme d'appui aux réformes judiciaires (2003) 2 Pay slips of two newly appointed judges (appointed January 2006) 3 Ministry of Justice (2006) 4 World Bank Development Indicators (2005) 5 Journal officiel de la République du Niger, 6 December 2005

Niger's current constitution (1999), the sixth in its history, states in article 98 that 'the judiciary is independent of the legislature and the executive.' Article 100 affirms: 'Judges act independently in the exercise of their duties and are subject only to the authority of the law. The president of the republic guarantees the independence of judges.' But this protection is contradicted by article 4 of order N°88-01 of 7 January 1988, which defines the status of judges and law officers (mainly state prosecutors and other court officials) by stating that 'public prosecutors are placed under the management and supervision of their official superiors and under the authority of the

Minister of Justice.' Article 5 of the same statute affirms: 'Nominations to the many and various jobs within the judiciary are made by the head of state at the suggestion of the Minister of Justice and, additionally, as far as judges are concerned, following advice from the judicial service commission.'

Judicial power is exercised by the constitutional court, the *cour de cassation* (highest court of appeal), the council of state,[1] the audit office, and the higher and lower courts.

Prosecutors: 'armed wing of the executive'?

The fact that public prosecutors are subject to the Ministry of Justice encourages the executive to interfere in the judiciary either through spoken orders or written directives; hence the saying 'the public prosecutor's department is the armed wing of the executive inside the judiciary'. The subordination of the public prosecutor's department to the Ministry of Justice is a general principle in all judicial systems based on the Roman model, such as Niger's, but the weakness of Niger's other institutions has further undesirable effects.

Although guaranteed under the constitution, judges' security of tenure is far from respected. The president can appoint judges without specific safeguards and assign them to the public prosecutor's department so their independence is at stake in a very real sense. Under article 5, the head of state appoints public prosecutors without the advice of the judicial service commission.

The commission, theoretically the guarantor of judges' independence, is chaired by the head of state and always endorses plans submitted by the Minister of Justice. As a consequence the principle of putting 'the right man in the right place' is rarely followed. For example, at the regional court in the capital, Niamey, sensitive files (such as cases involving the prosecution of journalists and opposition leaders, mutiny in the armed forces, opposition demonstrations and the arrest of civil society leaders) are always referred to the same investigating judge by order of the Justice Minister. This means that, even at the level of the judicial service commission, ethics and good conduct are not considered prerequisites in the appointment of judges. Indeed, it was on his initiative that an alternative union of judges and law officers was set up, bringing together those who were ready to play ball with the authorities.[2]

Public lack of confidence in the justice system is directly linked to the failure to uphold the principles of independence laid down in the constitution. Of 61 cases brought before the lower courts and calling into question the management of senior civil servants appointed with the support of the ruling party, only 2 per cent gave rise to judicial proceedings.[3]

The impunity that is often the rule in corruption scandals is not only caused by the behaviour of judges. No court can adjudicate on a matter unless a complaint or accusation has been referred to it. Proceedings are triggered by an application from the public prosecutor's department, or a complaint accompanied by a claim for damages. In cases involving the misappropriation of public funds, it is the authorities that must refer any complaint to the courts. If there has been no referral, the judge cannot assume jurisdiction in the case.

A recent scandal over the alleged embezzlement of funds in the Ministry for Literacy and Basic Education was an example of corruption by senior

1 The state council (*conseil d'état*) is the highest administrative court and government adviser on matters arising from legislation.
2 *Le Sahel* (Niger), 4 July 2005.
3 *Le Sahel* (Niger), 2 September 2006.

civil servants gradually coming to light. Since the press made the affair public,[4] it has been handled by the police conducting the preliminary investigation. Given the courts' lack of independence, fears abound that proceedings may be dropped in spite of the alleged theft of millions of dollars of public funds, and the dismissal of both the Ministers of Education and Health. Although the affair is far from over, the way it has developed provides an indication of the role that civil society can play in the fight against corruption.

Anatomy of corruption

As in every country, justice in Niger is delivered with the assistance of other branches of the state (police and prison officers). When an offence has been committed, the police launch an immediate inquiry. They then hand the file to a judge who commences legal proceedings and tries the case. Lawyers defend those prosecuted in the lower courts, while bailiffs (qualified lawyers known as *huissiers de justice*) enforce court decisions in civil proceedings. Corruption may occur anywhere in this chain.

- **At the level of the police**
  The accused's next of kin may approach the officer leading the investigation and come to an agreement in return for payment, or see to it (by intimidation or otherwise) that the complainant withdraws his complaint. This practice is common in spite of articles 12 and 13 of the code of criminal procedure, which place the police under the supervision of the public prosecutor and the principal state prosecutor in their judicial district. Corrupt payments can help to prevent legal proceedings, help an accused escape from custody or prevent the truth from otherwise emerging.

- **At the level of lawyers**
  The desire to establish a reputation or make money fast can drive lawyers to seek a favourable outcome for a client in exchange for payment. In one case, a note was found in a lawyer's file asking his client, a bank, to make provision for the judge's share of the fees it was to pay to the lawyer.[5] Conversely, a lawyer may be bought by his opponent to ensure that he loses his client's case.[6]

- **At the level of judges and law officers**
  Niger has fewer than 200 judges and law officers for 11 million inhabitants. The excessive workload of the lower courts slows down proceedings, allowing corruption and influence peddling to flourish.[7] Influence peddling and gifts of cash or in kind are common.

In relations between judges and the accused, links are established through clerks of courts, secretaries or orderlies. There are two possible scenarios.

Firstly, the accused takes the initiative of approaching a law officer with the aim of having the proceedings dropped; winning a release on bail; having proceedings terminated; being granted an acquittal; or having the proceedings speeded up. Negotiating with the law officer can also be the job of the lawyer, as exemplified by the well-known saying: 'There are lawyers who know the law and lawyers who know the judges.'[8] A lawyer whose fee depends on the compensation awarded to the client may come to a preliminary agreement with the judge.

4 *Le Républicain* (Niger), 22 June 2006 and 13 July 2006.
5 Preparatory pre-trial hearing before the civil chamber of the court of appeal at Niamey in 1998.
6 Mahaman Tidjani Alou, *La corruption dans la justice au Bénin, Niger et Sénégal* (Corruption in the judicial system in Benin, Niger and Senegal), Laboratoire d'études et de recherches sur les dynamiques sociales et le développement local, *Etudes et Travaux* no. 39 (2005).
7 *Programme d'appui à la réforme judiciaire* (Judicial Reform Support Programme) final report, February 2003.
8 Ibid.

Secondly, the law officer himself may solicit from the defendant. In spite of enjoying a high status and a relatively high salary, law officers in Niger have little job security compared with counterparts in Senegal, Côte d'Ivoire and Burkina Faso. Many seek to make as much money as they can while they are in the job.

At the start of career a law officer in Niger is paid a monthly salary of CFA75,000 (about US $138). Allowances vary according to the posting. Practising in Niamey, a law officer will receive an average pre-tax salary of CFA205,000 (about US $375). After monthly rent and related charges, there will remain only CFA140,000 (US $260) to cover food and transportation, and to support a family in the broadest sense (father, mother, wife, brothers, sisters and children). Salaries in Niger have not increased for nearly 20 years.[9] This gives rise to 'meal-ticket corruption'. Judges, lawyers, clerks, secretaries and go-betweens[10] may all be involved in petty corruption.

Recommendations

Because of political meddling and the appalling consequences that a weak and corrupt system has on the whole of society, these problems must be taken seriously. It is widely believed that several million dollars that should have been allocated to improving access to core services have been embezzled for political or personal benefit. The lack of independence of the judiciary has economic costs, infringes human rights and limits equality of access to justice for all. The contempt politicians show for the principle of the separation of powers, as well as the culture of impunity, means that legal and judicial insecurity take root.

Niger has only recently become a democracy. A culture of independence and transparency will only emerge when judges, law officers and civil society understand the importance of a reliable, impartial and non-corrupt judiciary. The development of civil society and of unions of judges and law officers are both signs of a demand for more independence, but lack of resources and an unstable political history make this difficult to achieve. The following measures can be recommended:

- Sufficient resources should be granted to the judicial system (since Niger became independent in 1960, the Ministry of Justice budget has never exceeded 1 per cent of the total budget)
- Judges, law officers and government officials should be required to declare their assets. This should be accompanied by effective monitoring and the imposition of penalties when fraud has been confirmed by a credible authority
- Salaries of judges and law officers should be raised
- Transparent rules should be introduced on the appointment of judges and law officers
- Recruitment examinations should be made more rigorous
- Penalties should be applied systematically on any judge or law officer found guilty of dishonesty
- Appellate court judges should sit as a bench of three, rather than one alone.

The authorities are aware of the problems in the judiciary, as evidenced by a circular in 2002. 'The people do not seem to have complete confidence in the system, even holding it up to public contempt, so disappointed are they with its procedures and the conduct of some of those involved. They have the impression that trials are not decided by the strict enforcement of the laws of the republic, but rather reflect power struggles between forces such as money or political

9 Statement of trade unions during the 1 May 2006 celebrations.

10 Go-betweens act as intermediaries between law officers and litigants, guiding the latter as they proceed. Some, passing themselves off as a friend of the judge, take bribes in his name, allowing the payer to think that the money will be passed on. See Tidjani Alou, op. cit.

connections, or are simply decided by judges and law officers doing deals with their pals.'[11]

In 2005 the authorities set up a National Commission for the Elaboration of Anti-corruption Strategies, created by a decree of 17 October 2003.[12] The Minister of Justice is thinking of establishing a committee with responsibility for monitoring the ethics of judges and law officers. Between 1974 and 1999, successive governments have resorted to different methods to combat corruption, including a national inspectorate, a finance inspectorate, a special court responsible for trying those accused of misappropriating public funds, a crime and injustice commission, a moralstandards commission after the coup d'état of 1996, and so forth.

Since the legal armoury already exists (the Law on Illicit Enrichment, anti-corruption articles in the criminal code, the Law on Public Procurement contracts), it is high time to apply these laws when corruption is detected, and to give free rein to the bodies responsible for enforcing them.

Judge Djibo Abdoulaye (Association Nigérienne de lutte contre la Corruption, Niamey)

11 Circular 1165/MJ/GS/CRP of 4 September 2002, quoted by Maître Couliba Moussa, lawyer of Maman Abou and Oumarou Keita, in an interview in *Le Républicain* (Niger), 24 August 2006. The two journalists are being tried for propagation of false news and defamation.

12 Decree 2003-256/PRN/PM of 17/10/2003 establishing the Commission, and defining its composition and remit.

Pakistan: a tradition of judicial subservience

Legal system: Common law, adversarial, plural (with elements of Islamic law), federal
Judges per 100,000 people: 1.1[1] ***Judge's salary at start of career:*** US $1,195[2]
Supreme Court judge's salary: US $12,432[3] ***GNI per capita:*** US $690[4]
Annual budget of judiciary: Not obtained ***Total annual budget:*** US $21.8 billion[5]
Percentage of annual budget: Not obtained
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No ***Code of conduct for judges?*** Yes

1 World Bank (2000) 2 TI National Integrity System Report (2003) 3 *Dawn* (Pakistan) 23 December 2003
4 World Bank Development Indicators (2005) 5 www.finance.gov.pk/budget/

The problem of corruption in Pakistan's judiciary cannot be understood without looking at the history of the institution. The justice system was inherited in its entirety from the British colonial rulers. Even today, the official language of justice is English, which 98 per cent of people do not understand. The courts were – and continue to be – perceived as a battleground for the moneyed and powerful. The majority uses informal dispute-resolution mechanisms such as the *jirga* or *panchayat*, particularly in rural areas.

The National Corruption Perception Survey, conducted by TI Pakistan and published in August 2006, indicates that the judiciary's ranking in corruption deteriorated from fourth in 2002 to third place in 2006.[1] The average bribe paid by 3,568 of 4,000 respondents across all public sectors was US $38, compared to an average of US $93 in the justice system. The specific findings are as follows.

Types of corruption	Actors directly or indirectly involved in the transaction							
	Judge	Court employee	Public prosecutor	Opponent's lawyer	Witness	Others	Total	Per cent
	1	2	3	4	5	6		
Extra money had to be paid to the court official	2	117	3	5	21	3	**151**	**41.71**
Extra money had to be paid to the public prosecutor	23	9	19	4			**55**	**15.19**
Extra money had to be paid to the witness	17	9	13		8		**47**	**12.98**
Extra money had to be paid to the opponent's lawyer	3	15	2	18			**38**	**10.50**
Extra money had to be paid to the magistrate	3	27				2	**32**	**8.84**
Extra money had to be paid to the judge	11		5				**16**	**4.42**
Others (specify)	2	11	1			9	**23**	**6.35**
	61	**188**	**43**	**27**	**29**	**14**	**362**	**100.00**

Nature of interaction	Total	Per cent
Money demanded directly by the actor (service provider)	224	61.88
Money demanded by the actor through third party	107	29.56
Money offered directly by the actor (service provider)	23	6.35
Money offered by the service recipient through third party	8	2.21
TOTAL	**362**	**100.00**

Judiciary swears 'loyalty' to executive

At independence in 1947 a constituent assembly was summoned to draft a constitution for the new Pakistan. The members deliberated for seven years and just as they were finishing Governor General Ghulam Mohammad dissolved the body for challenging his power to dismiss ministers.

1 www.transparency.org.pk

The speaker of the original assembly, Maulvi Tamizuddin, contested this act. To his dismay the apex court ruled in favour of the governor general in an act that many regard as the start of judicial subservience to the ruling power.

Since the 1950s Pakistani history has been divided into periods of authoritarian military rule, alternating with brief bursts of civilian government. Almost every regime has altered the constitution in terms of the relationship between the judiciary and the executive, the provisions of emergency rule and the extension of presidential authority. Each also forced the judiciary to 're-swear' its loyalty to the ruling junta, rather than the constitution. This has destroyed the institution, demoralised the judges and made them prone to improper influence. The civilian governments of Benazir Bhutto (1988–90 and 1993–96) and Nawaz Sharif (1990–93 and 1997–99) were unable to break the links between the military, religious leaders and military-backed politicians since their own power also depended on army support.

On seizing power the current head of state, General Pervez Musharraf, purged the judiciary by forcing judges to swear an Oath of Judges' Order to the Provisional Constitutional Order of 1999, barring courts from challenging the 'Chief Executive, or any person exercising powers or jurisdiction under his authority'. In January 2000, Chief Justice Saiduzzaman Siddiqui and five other Supreme Court judges refused to obey and were dismissed from their posts. In 2003 President Musharraf negotiated the Legal Framework Order, formally known as Constitutional 17th Amendment Act 2003, which allowed him to retain the power to dismiss a prime minister, dissolve the national assembly, and appoint the heads of the armed forces and provincial governors. It also permitted Musharraf to hold his military post through 2004 and serve his presidential term until 2007.

The government exerts tight control over judicial appointments, transfers and dismissals, particularly at the level of the superior judiciary.[2] The fact that judges lack security of tenure can make them particularly susceptible to political influence. The Chief Justice recommends prospective judges to the Ministry of Justice, parliament and ultimately the president. Their names are also screened by the influential Inter Services Intelligence agency. Lists of candidates frequently change in this process, delaying the appointment of judges beyond the 30 days given to fill a vacancy after a judge's retirement, resignation or death.

With pliant judges at senior levels, the executive ensures control further down the hierarchy since the high courts wield administrative power over the allocation of cases to judges and the assignment of judges to courts across the provinces. The executive also has improper influence over the electoral process through certain Chief Justices because they appoint electoral returning officers from among the subordinate judiciary.[3]

Following the military coup in October 1999, accountability courts (lapsed since 1994) were revived to adjudicate cases under the amended

2 A distinction is commonly drawn between the four high courts, located in the provincial capitals, and the 17-judge Supreme Court, which together make up the 'superior judiciary'; and the remaining courts, which are collectively known as the 'subordinate judiciary'. There is also a federal *shariat* court consisting of eight Muslim judges, including a Chief Justice, appointed by the president. This court, which has original and appellate jurisdiction, decides whether any law is repugnant to Islam. It also hears appeals from criminal courts on decisions relating to the enforcement of *hudood* laws, which pertain to offences such as intoxication, theft and sexual relations. The office of Wafaqi Mohtasib, or ombudsman, is empowered to investigate and award compensation to those who have suffered loss or damage as a result of maladministration by a federal agency or official. The ombudsman is also appointed by the president.

3 International Crisis Group, 'Building Judicial Independence in Pakistan', Asia Report no. 86 (2004). Available at www.crisisgroup.org/home/index.cfm?l=1&id=3100

National Accountability Bureau (NAB) Ordinance. These courts were established for the speedy disposal of cases involving corruption and corrupt practices, misappropriation of property, kickbacks, commissions and other abuses of power. The NAB has successfully prosecuted hundreds of cases of high-level corruption against politicians, civil servants and businessmen, though judges and military officers have largely been exempt. The ordinance requires that the burden of proof lie with the accused.

Judicial corruption today

Relatively few allegations of financial corruption involving senior judiciary have emerged but this does not mean it does not exist. According to the Pakistan Bar Council's first-ever white paper on the judiciary in 2003, the military regime might tolerate corruption because judges with 'compromised integrity' will be less likely to challenge the government.[4] Another possible reason for the small number of accusations of judicial corruption is a draconian Contempt of Court Ordinance, issued in July 2003, which makes the offence punishable by imprisonment for six months or a fine up to US $1,700, or both. Criticism in parliament of the conduct of a judge has also been declared a punishable crime.[5]

Corruption is more acute in the subordinate courts where the bulk of judicial business is transacted and where money has to be paid at virtually every step of the process.[6] A TI-Pakistan survey conducted in 2002 with a sample of 3,000 from all regions found 96 per cent of respondents who interacted with the subordinate judiciary had encountered corrupt practices, mainly by court officials but often by judges.[7]

Although most proceedings in lower courts are conducted in local languages, the fact that statutes are in English introduces potential for corruption. Lawyers can exploit litigants, as the NAB's 2002 National Anti-Corruption Strategy attests: 'The citizen's first experience of corruption in the judicial process is likely to be on encountering the legal profession. When a client approaches a lawyer he seldom receives sound professional advice and is frequently given false hopes concerning his claim. He may well be asked to pay substantial fees for preparing a case that he does not understand is not legally sound.'[8] Those who suffer worst are women and children, who cannot afford lawyers, pay bribes or afford bail. At this writing, some 4,000 women are in jail under the *Hudood* Ordinance.[9]

Weak accountability and low status

The highest disciplinary body for the judiciary is the supreme judicial council, composed of three or more Supreme Court judges and the Chief Justice. It assembled in November 2005 to approve a procedure for investigating and following up on complaints against judges, though no judge has yet been disciplined.[10] While the council will accept 'information' about the corruption of judges from the police and media, it reserves the right to take 'direct action' against the originator of any complaint it finds 'false, frivolous, concocted or untrue'.

4 *Daily Times* (Pakistan), 25 November 2003.
5 See unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN016204.pdf
6 TI-Pakistan, 'National Integrity Systems Study' (Karachi: Transparency International, 2003). See www.transparency.org.pk
7 'Corruption in South Asia: Insights and Benchmarks from Citizen Feedback Surveys in Five South Asian Countries' (Berlin: TI, 2003).
8 Also available on www.transparency.org.pk
9 The *Hudood* Ordinance was the brainchild of General Ziaul Haq who introduced it as part of *shariat* law. Among other things it stipulates that women who press charges of rape are themselves guilty of the crime of fornication and cannot successfully prosecute unless they can provide four witnesses.
10 *The Nation* (Pakistan), 20 November 2005.

Corruption in the justice sector is symptomatic of a deeper malaise arising from low standards of professionalism, competence and civic duty. Senior officials are presumed to be the tools of 'big wigs' associated with government. In the subordinate judiciary, poor salaries reinforce the low status and low expectations of judges and other court officials, while the legal profession is easy to enter through a myriad of private law colleges.

Adding to problems is a backlog of civil and criminal cases in all lower courts. In the Punjab alone, the number pending at this writing was 111,839 session cases, 343,732 criminal cases and 439,460 civil cases. Part of the reason for such chronic delay is that litigants bribe clerks to delay resolution.

Justice in the countryside

A 2003 UNDP study of rural justice[11] found that people in poor villages were reluctant to engage with the formal legal system because they viewed the police and courts as a luxury for the rich. The dividend received did not outweigh the cost of involvement in a legal dispute. They took their disputes instead to the local *panchayat*.[12]

The UNDP survey consisted of 207 respondents and a control group of 64 others. Of 56 who had taken a complaint to the police, 54 per cent thought it was difficult to file the First Information Report (FIR) necessary for a case to be investigated. The majority said police required a bribe to file the FIR. Eighty-four respondents said they had made an average of 19 visits (with the maximum cited as 300). Given that the average distance of the police station was nine miles, this represented an exorbitant waste of time. Other expenses, including fees, documents, transportation and bribes, were also high. Sixty-four respondents claimed to have spent an average of R95,000 (US $1,577) and 10 claimed to have spent an average of over R40,000, significant amounts for relatively poor households.

The patron-client system is relied upon for dispute resolution and about two-thirds of respondents indicated that they depended upon an influential friend or tribal leader to help them with their legal or police problems. The system of relying on a patron will continue – as will the feudal system – until fair and speedy justice is made available to the poor.

The failure of reform

Recognising the impediment that bad justice presents to economic development, the Asian Development Bank lent Pakistan US $350 million in 1998 for an Access to Justice Programme (ASP). Implemented from 2001 to 2004, the programme devoted most of its resources to upgrading the administration of justice through on-the-job training and study tours for judges and court officials; the construction or renovation of hundreds of courthouses; the computerisation of caseload management systems; a delay-reduction programme in 100 courts across the country; the creation of a pilot legal-aid system; and the strengthening of related institutions, including police, prosecution, bar and the 'member inspection team', a unit designed to improve high courts' capacity to monitor judges' performances and investigate complaints against them. In addition, the loan allowed substantive drafting of laws of contempt, defamation, freedom of information, the Law Commission Ordinance and Rules and the Law Reports Act. By the end

11 Foqia Sadiq Khan and Shahrukh Rafi Khan, 'A Benchmark Study on Law and Order, and the Dispensation of Justice in the Context of Power Devolution' (New York: UNDP, 2003).

12 The *panchayat* is used as a secondary institution to reach a compromise due to delays in the courts. However, the *panchayat* is often used as the primary institution in land and family disputes and, if not resolved, the disputers will engage the formal justice system. In reality, both the formal and informal justice systems complement one another.

of 2003, it was clear that the programme would require a five-year extension to reach some of its goals.[13]

One reason for the programme's poor results was the failure – or inability – to address the opaque appointment and promotion system for judges, and government's unwillingness to provide increased resources to improve salaries and infrastructure.[14] Accountability mechanisms also need to be stepped up. The supreme judicial council is weak and lacking in independence from the executive and the judges it is supposed to police. New administrative mechanisms are required if venality and incompetence are not to diminish Pakistanis' confidence in the law even further. This is unlikely to occur without a genuine political will to address the failure of the courts to deliver timely, fair and enforced judgments.

'Put bluntly,' concludes one of the ASP's programme managers, 'the reasons why the "executing agency" of the government of Pakistan may want the programme – which doubtless included retirement of relatively expensive foreign debt – do not flow on to the "implementing agency", the judiciary, and result in quite bifurcated engagement strategies. Put even more bluntly, the executive may manipulate the development process to subjugate rather than consolidate its judiciary. Given Pakistan's history of martial administrations, each insisting on new oaths of allegiance being sworn by the judiciary, this is not a matter for idle speculation.'[15]

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13 Livingston Armytage, 'Pakistan's Law and Justice Sector Reform Experience: Some Lessons', *Law, Social Justice & Global Development Journal* 2 (2003). Available at www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_2/armytage/
14 Ibid.
15 Ibid.

War of attrition weakens Palestinian judiciary

Legal system: Civil law, plural (with elements of Islamic law) ***Judges per 100,000 people:*** 4.0[1]
Judge's salary at start of career: US $18,000[2] ***Supreme Court judge's salary:*** US $33,600[3]
GNI per capita: Not obtained ***Annual budget of judiciary:*** US $ 8.6 million[4]
Total annual budget: US $2.0 billion[5] ***Percentage of annual budget:*** 0.4
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes ***Code of conduct for judges?*** No

1 Palestinian Judicial Authority Law (2002) 2 Ibid. 3 Ibid. 4 Ibid. 5 Annual Budget Law 2005

The Palestinian judiciary operates in a highly politicised environment. The almost daily security and military operations conducted by the Israeli occupation forces affect the status of Palestine's judiciary and its capacity to carry out its functions. The conflict places structural limitations on the judiciary's realm of influence, which contributes to a climate of impunity for crimes, including corruption, and increases the scope for political interference with judicial decisions. Citizens go to courts after all other attempts to resolve disputes fail, such as settling conflicts through traditional dispute-resolution systems[1] or even taking the law into their own hands.

The conflict-related conditions that weaken the judiciary are:

- Police are unable to pursue defendants found guilty of grave criminal offences by Palestinian courts in areas that fall under the control of Israeli occupation forces[2]
- Failure to carry out Palestinian court decisions against Israeli citizens
- Travel restrictions on Palestinians that prevent judges, litigants and lawyers from travelling to courts on time
- Shortage of prisons in West Bank, which means custodial decisions are frequently not executed.

Another factor that weakens the judiciary's authority is that the institutions of the Palestinian National Authority (PNA) compete with the power of armed Palestinian factions. The latter on occasion circumvent the judiciary by carrying out vigilante justice against individuals suspected of collaborating with Israel, or by settling scores for private advantage. Armed groups have made threats and kidnapping attempts against judges and lawyers in recent months. In May 2006, a group affiliated with the Al Aqsa Martyrs' Brigades broke into the court in Nablus, forced staff out of the building and closed it for several hours.

Finally, the limited budget allotted to the judiciary has curtailed the process of developing and restructuring Palestinian justice. The legal/judicial system received large amounts of assistance from bilateral and multilateral donors, placing it in a difficult position when funding decisions changed; donors dramatically cut funding to the judiciary after the victory of Hamas in the legislative elections in January 2006.

Favouritism more common than outright corruption

These conditions do not absolve the judiciary of responsibility for corruption. The main cause of judicial corruption in Palestine is interference from the executive and legislature, which has resulted in compromised decisions and executive-centred judicial policies. The bribery of court officials by litigants is also common in Middle Eastern countries that are not under military occupation.

Any assessment of corruption among judges is complicated by the lack of public information about judicial processes. Recent circulars by the chairman of the higher judicial council – the body created under the 1998 Palestinian Legislative Council Law to oversee the judiciary, review policies regarding its structure and function, and to appoint, promote and transfer judges – indicate a trend toward withholding information and banning judges from participation in activities on the judiciary organised by civil society. This has reduced the latter's ability to mount an alternative monitoring role.

1 Alongside the judicial system for civil and criminal matters, a system of *sharia* and other religious courts exists for personal matters.

2 The Occupied Territories are divided into three areas: Area A, where security is completely in the hands of the Palestinian National Authority; and Areas B and C, where Israel maintains full responsibility for security.

There are few documented cases of bribery involving judges or judicial officers, but the problem is often referred to in discussions on judicial reform. The more commonly documented problems are favouritism and nepotism by judges, and pressure from the executive for judges to rule in their favour. Lawyers point to the existence of bribery in the agencies assigned to deliver verdicts, and serve court documents and orders.[3] They claim some attorneys and their clients pay large amounts either to accelerate the process of serving, to stall it or to have servers claim that the relevant individual was not present to receive the court papers.

Political favouritism is evident in the hiring and promotions process of the appeals and Supreme Courts. The higher judicial council withheld all information on the hiring procedures that took place in March and April 2006. The criteria used to select lawyers as high court judges were not published; nor the results of the competition to select new judges for the reconciliation courts; nor the qualifications and names of the winning candidates. A number of lawyers said that the legal adviser to President Mahmoud Abbas had influenced the selection of judges to the Supreme Court, high court and election tribunal.[4]

Judicial power diminished by officialdom

In comments at a workshop organised by the NGO Musawa in Ramallah in March 2006, judges stated that the judiciary has been subsumed under the authority of the presidency. The higher judicial council was criticised for endorsing the 'whims' of the president in return for promotion, or support to candidacies to the council's membership. One example of the council's submissiveness was its failure to protest when the president amended the law regulating the judiciary in early 2006, despite the fact that the amendment undermined judicial independence (see below).

Political interference is also reflected in the encroachment by executive institutions on matters nominally under the judiciary's competence. Employees of legal departments in all West Bank governorates, in addition to employees of legal departments within the security agencies, have assumed responsibility for examining legal or criminal claims and litigation between individuals. These departments, which are part of the executive, do not hold tribunals but resolve claims either through conciliation between parties or by imposing a settlement by force.

Another form of interference is that some ministries and security institutions refrain from implementing the verdicts of courts when they contradict the interests of senior officials. When asked about this, Judge Sami Sarsour, vice-chairman of the higher judicial council and Vice Chief Justice of the high court, confirmed that executive institutions often failed to respond to summonses against them or their senior officials to attend court. Some senior political and military officials also refuse to respond to summonses or claims against their institutions, themselves and members of their families. This undermines the dignity of the judiciary, and increases opportunities for corruption and misuse of power within influential circles.

Struggle over wording of reforms further weakens judiciary

On his election in early 2005 President Abbas convened a steering committee to develop a strategy for streamlining the justice system, including the revision of the 2002 Judicial Authority Law. The widely respected Dr Kameel Mansour was named secretary general of the committee, which in

3 Author interviews in 2006.
4 Author interviews in 2006.

April 2005 produced a draft for a new judiciary law that was then submitted to the legislative council.

Parliament altered the committee's original proposals concerning the independence of the judiciary, however. The original proposal carefully sought to balance the interests of the higher judiciary council, the Justice Ministry and other stakeholders, namely civil society and government. The version adopted by parliament tilted the balance back in favour of the Ministry of Justice. It was declared unconstitutional by the Gaza high court in November 2005, however, on the grounds that it violated Basic Law.[5]

In February 2006 President Abbas issued a decree that amended the 2002 Judiciary Law before the new legislative assembly, now dominated by Hamas, could convene. The new version altered the balance in favour of the higher judiciary council though it was deprived of the balanced membership proposed by Dr Mansour's committee. The amendment revoked judges' right of appeal against disciplinary measures and granted the council the power to punish any judge with provisional retirement on half pay. No mechanisms were introduced to limit the potential misuse of these powers against judges who might oppose the interests of the council's membership.

The amended law also granted the president the power to appoint the head of the judicial inspection department. Being subject to two opposing authorities, the higher judiciary council and the Justice Ministry, both of which could curtail the judiciary's independence, has weakened this department. Moreover, it lacks authority to investigate Supreme Court decisions, which cannot be appealed under the current law. The consequent immunity to inspection of Supreme Court judges could create an environment in which arbitrary actions by high court judges and a disregard of the principles of integrity and transparency could flourish.

In its first session since being sworn in, the new parliament voted in March 2006 to repeal the amended Judicial Authority Law, leaving the status of the reforms unclear.

At this writing no clear criteria have been established with regard to appointment by the council to judicial positions, with the exception of those related to judges in reconciliation courts. No code of ethics regulating the conduct and duties of judges has been issued; the technical office has not been established; and the work of the judicial inspection department has not been activated. There remains a genuine willingness by some political blocs within the new legislative council to discuss judicial corruption and the need for reform. The priority requirements are:

- Transparent appointments and promotions processes, following clear criteria
- The creation of a system of inspections and disciplinary measures
- A requirement for a system of periodic, rather than one-off, submissions of declarations of assets
- A code of conduct for judges.

AMAN
(Palestine Coalition for Accountability and Integrity), Jerusalem

5 Article 100 states: 'A supreme judicial council shall be created. The law shall specify the method of its formation, jurisdiction and operating rules. The council shall be consulted about draft laws which regulate any affairs of the judiciary branch, to include public prosecution.'

Control of judiciary ensures impunity for Panama's elite

Legal system: Civil law, inquisitorial and plural *Judges per 100,000 people:* 8.4[1]
Judge's salary at start of career: US $1,130[2] *Supreme Court judge's salary:* US $6,000[3]
GNI per capita: US $4,630[4] *Annual budget of judiciary:* US $46 million[5]
Total annual budget: US $6.7 billion[6] *Percentage of annual budget:* 0.7
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges?* Yes

1 Justice Studies Center of the Americas (2004–5) 2 www.organojudicial.gob.pa/contenido/planilla/planilla.html
3 Ibid. 4 World Bank Development Indicators (2005) 5 www.asamblea.gob.pa/25434_2005.pdf 6 Ibid.

The two major public concerns in Panama are impunity and lack of judicial ethics, as reflected in TI's Global Corruption Barometer 2005. In that survey the judiciary scored 4.5 on a scale of 1 to 5 (where 5 is very corrupt). Only political parties and parliament scored worse. One reason why the judiciary is so vulnerable to corruption is the lack of robust accountability mechanisms. A second is political interference in the selection of judges.

Political interference

A favourable Supreme Court is an asset to senior politicians when they or their allies face allegations of corruption. Of the current Supreme Court, two judges were appointed by former president Ernesto Pérez Balladares (1994–99) and four by former president Mireya Moscoso (1999–2004), both members of the Arnulfista party. The latter were Supreme Court President Adán Arnulfo Arjona, two members of her cabinet, Winston Spadafora and Aníbal Salas, and a close friend and congressman, Alberto Cigarruista. Current President Martín Torrijos selected a further three: Esmeralda Arosemena de Troitiño, a former judge of the high court for children and adolescents; Harley Mitchell, a former congressional adviser; and Víctor Benavides, who worked for many years in the prosecutor's office.

In a recent case the Court voted by five to four to release US $28.4 million confiscated from businessman and Arnulfista party member, Augusto Onassis García, and José Pérez Salamero, former president of the national bank. The same judges suspended the seizure of assets belonging to Héctor Ortega, then under investigation for corruption relating to the state contractor, Ports Engineering and Consults Corp.[1] Both cases relied on the argument that the plaintiffs had not been notified that the case was being brought against them and due process guarantees had therefore

1 The former comptroller, Alvin Weeden, had ordered the assets to be seized in connection with a criminal investigation of alleged 'misuse of national treasures' relating to the concession granted to Ports Engineering & Consultants Corporation (PECC) by the national port authority during the administration of Pérez Balladares.

been violated. The four judges who voted against the ruling said the plaintiffs had indeed been notified and that the sentences 'affected the principles of transparency and accountability that should prevail in the acts of public administration'.[2]

Tolerance of corruption

The main consequence of judicial corruption in Panama is impunity for clients linked to the main political parties, former officials and other people of influence. This type of corruption has high economic costs since the state rarely claws back the stolen funds.

Another scandal erupted in November 2005 when the US government revoked Judge Winston Spadafora's visa on grounds of corruption.[3] A spokesperson for the US embassy said it was willing to provide evidence of the corrupt act if the government requested it. A number of civil society organisations, including the Panama chapter of TI, asked the authorities to apply for the proof that led to such a ban and use it to evaluate what action should be taken against Spadafora. To date neither congress nor the judiciary have taken steps to secure the evidence.[4]

In August 2005, Judge Spadafora sued *Editora Panamá América* and journalists Gustavo Aparicio and Jean Marcel Chéry 'for damages and mental harm'. They had published an article in March 2001 referring to the construction of a 4.5 km highway in Mateo Iturralde, funded by the Social Investment Fund but used almost exclusively to access a property owned by the Spadafora family.[5] The president of the national college of journalists, Luis Polo Roa, condemned Spadafora's action and exhorted journalists to fight his attack on press freedom.[6]

Other controversial rulings, criticised by Adán Arnulfo Arjona (who is in the minority group in the Supreme Court), relate to drug trafficking. He told a press conference in March 2005: 'Judges Hoyos and Salas in a sentence on 30 April 2004 backed – with my sole opposition – the release of Lorena Henao Montoya on the grounds that there was no proof to demonstrate her participation in drugs trafficking and money laundering despite the 28 volumes of case evidence that, in my opinion, supported her detention.' Henao Montoya was subsequently found guilty in her native Colombia for the same crime of which she was acquitted in Panama.[7]

This case, along with five others that Arnulfo Arjona outlined at the same press conference, motivated the Citizens' Alliance for Justice – a group of 15 NGOs, academics, trade unions and journalists – to hire lawyers to analyse the case evidence. They concluded: 'In the [six] cases related to drugs crimes, the rulings were questionable as they demonstrate not only selectivity but grave indications that the actions of the judges in question suggest favouritism at the heart of the high court, motivated by reasons that should be investigated.'[8]

2 *El Panamá América* (Panama), 15 June 2006.
3 See *La Prensa* (Panama), 1 December 2005. The Patriot Act permits suspension of entry to the United States if the person has 'committed, participated or benefited from corruption in the carrying out of public functions, when said corruption results in grave, damaging consequences for the international activity of US businesses, the objectives of US foreign aid, security of the US in the face of transitional crimes and terrorism, or the stability of institutions and nations'.
4 The executive secretary of the National Council of Transparency against Corruption, Alma Montenegro de Fletcher, criticised the offer of evidence on the grounds that it was 'tantamount to interference in Panama's internal politics'.
5 See *Panama News*, vol. 12, no. 6, 19 March–8 April 2006.
6 *El Panamá América* (Panama), 18 August 2005.
7 *La Prensa* (Panama), 6 March 2006.
8 Alianza Ciudadana Pro Justicia, 'Citizens'Audit of Criminal Justice 2005'. Availiable at www.alianzaprojusticia.org.pa/resumen_ejecutivo_seis_casos.doc

Purge of the public prosecutor's office

The public prosecutor's office contributed to the deterioration of the image of the justice system, as evidenced by a national survey published in the daily *La Prensa* in February 2002. Respondents were asked: 'What image does the general attorney's office have?' According to one in two people the image was 'bad' or 'very bad'. These ratings remained constant while José A. Sossa (1994–2004) held the position of general attorney.

Commentators suggested that one reason for the low opinion of the prosecutor's office was its reluctance to prosecute. The founder of *La Prensa*, I. Roberto Eisenmann Jr., was sued for defamation by Sossa for writing in his weekly column: 'The prosecutor, whose obligation is to fight against crime, is dedicated to protecting criminals and suing journalists and complainants.'[9] When Eisenmann was taken into custody and interrogated by prosecutors over the defamation charge, international organisations rallied to his defence. Journalists against Corruption called the prosecutors' action 'an attack on freedom of expression' and Journalists without Borders said that 'in Panama the principal threat to freedom of the press is judicial harassment'.[10]

In January 2005 Ana Matilde Gómez took over from Sossa and carried out a series of investigations that led to the dismissal of a number of prosecutors. The best known case concerned Arquímedes Saéz Castillo, a former circuit prosecutor from La Chorrera, who was caught *in flagrante* in July 2005 while accepting a bribe in exchange for temporary protection measures (*medida cautelar*).[11] More than 13 prosecutors and junior officials have been removed in an attempt to counter the perception of corruption in the office.[12]

Pact for Justice is inconclusive

The above cases show how political influence, business or family ties and control of the Supreme Court undermine the independence of the judiciary. Judicial officials are seldom disciplined. One of the rare occasions when this did occur was in May 2006 when Superior Court Judge Dulio Arrocha was dismissed over a disciplinary complaint lodged in 2005. The judge was accused of soliciting money from a party in a case and forcing his staff to ask for loans on his behalf.

Hardly a new phenomenon, this was described in detail by Enriqueta Davis[13] who reported that 70 per cent of judges, public defenders, public prosecutors, local ombudsmen and lawyers surveyed said there is 'rarely' or 'never' independence in sentencing in Panama. At a conference on judicial reform organised by the Citizens' Alliance for Justice, lawyers Damaris Caballero de Almengor and Aida Jurado identified as reasons for judicial corruption and lack of judicial independence:[14]

- Ties between judges and political parties
- Nomination of the judiciary is controlled by the executive
- Supreme Court judges are excluded from judicial career regulation
- Political and social cultures of disrespect for the concept of judicial independence.

As a consequence of the crisis in Panama's judicial system, President Torrijos invited representatives of the judiciary, the national prosecutor's offices, congress, the ombudsman, the Citizens' Alliance for Justice[15] and the Ecumenical Committee to

9 *La Prensa* (Panama), 11 February 2004.
10 *Panama News*, vol.10, no. 7, 17 April 2004.
11 *La Prensa* (Panama), 7 December 2005.
12 *El Panamá América* (Panama), 2 January 2006.
13 Enriqueta Davis, *Situación Actual del Sistema de Administración de Justicia en Panamá,* Centro de Investigación Jurídica, Facultad de Derecho y Ciencias Políticas (Universidad de Panamá: Panama City, 1993).
14 *Diario Panamá América* (Panama), 14 August 2000.
15 Alianza Ciudadana Pro Justicia. See www.alianzaprojusticia.org.pa/

subscribe to a State Pact for Justice in March 2005. A series of 27 proposals were agreed.[16]

There have been a few advances since then. One was the creation of a commission to evaluate candidates for the post of Supreme Court judge. However, it lacks the power to disqualify candidates and merely checks that the constitutional requirements have been met. Only two judges have been named using this process.

This is far less than was hoped. The Pact established proposals in every sphere of judicial reform, including: strengthening the internal judicial auditing system and creating a similar body in the prosecutor's office; implementing mechanisms to improve investigation in corruption cases; and generating new communication tools to increase transparency in the judiciary and public prosecution. At the time of writing, members of the Pact will meet to evaluate results eight months after issuing their 27 recommendations, each of which has an assigned coordinator and an implementation timeframe.[17]

The Citizens' Alliance for Justice has recommended that the current disciplinary procedures for judges and prosecutors be changed so they can be applied more effectively and with greater guarantees of investigative impartiality. It also proposed that the results of inquiries should henceforth be made public. Another recommendation was to reform the judicial career and training structure so that evaluations of candidates for admission or promotion are entirely merit-based.

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16 See *Global Corruption Report 2006*.
17 www.alianzaprojusticia.org.pa/

Politics and nepotism plague Paraguay's courts

Legal system: Civil law, adversarial *Judges per 100,000 population:* 10.5[1]
Judge's salary at start of career: US $15,600[2] *Supreme Court judge's salary:* US $33,600[3]
GNI per capita: US $1,280[4] *Annual budget of judiciary:* US $68.2 million[5]
Total annual budget: US $1.4 billion[6] *Percentage of annual budget:* 4.9
Are all court decisions open to appeal up to the highest level? No
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* Yes

1 Justice Studies Center of the Americas (2001) 2 Poder Judicial (2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Poder Judicial 6 CIA World Factbook (2005)

For years anti-corruption activists have pointed to judicial corruption as a priority area for reform. Sluggish performance by magistrates adds to inefficiencies in the administration of justice with the result that bribes are offered to speed up or slow down processes. Transferring judicial processes online has made it easier to consult a case file, but it has had little impact on the speed of judicial decisions.

Even when the government acknowledged in 1989 the need for an independent judiciary to reverse the practices of the previous military regime, its efforts failed precisely because of the absence of an independent judiciary. The 1992 constitution provides for the division of powers and an independent judiciary is enshrined in article 248. Under the constitution, a council of magistrates was created with the aim of boosting the independence of the judiciary, but its performance has been far from impressive (see below).

Party affiliation determines who judges

Due to disagreements between the ruling Colorado Party and Liberal Party opposition, a judicial commission in the national assembly has largely paralysed the council of magistrates. The scale of this paralysis, created by the intimate ties that existed between some members of the judiciary and the Colorado Party, was highlighted by General Lino Oviedo's application in 1996 for a writ against an order for his detention after his alleged involvement in a coup attempt in April that year. Judges Blanca Florentín and Antonio Roux Vargas approved the general's petition with such haste that observers felt that they had merely rubber-stamped a document furnished by the so-called *oviedistas*.[1] Despite its supposed independence, the judiciary is subject to a multiplicity of political influences. For example, when a Supreme Court judge's position falls vacant, his or her party affiliation becomes the requirement for the fresh appointee.

The judiciary is composed of the Supreme Court, appeals courts, first-instance criminal, civil, labour and children's courts, and justices of the peace. With the exception of the Supreme Court, each has a regional jurisdiction. The judiciary's budget is set at 3 per cent of the central budget, as prescribed by the constitution.

A judicial school was created under the auspices of the council of magistrates to improve the quality of future magistrates. Specialisation is not obligatory for candidates, however, and studying in the school counts for less than the personal interview process. In the most recent competitions, magistrates who reapplied for positions were automatically short-listed and ultimately confirmed in their posts. Magistrates are designated for a period of five years and achieve tenure to the age of 65 after serving two terms. They may be removed only if they have committed a crime or turned in a consistently poor performance.

Requirements for admission as a member of the Supreme Court are more rigorous. Candidates must possess a doctoral degree in law and have served 10 years as a lawyer, magistrate or professor of law.

President Nicanor Duarte Frutos came to power in 2003 on a commitment to fight corruption. In his first year in office, six Supreme Court judges were removed in a senate impeachment process[2] and the previous president, Luis Gonzalez Macchi, was convicted for the illegal transfer of around

1 For further background, see www.coha.org/Press%20Release%20Archives/1998/98.10_Paraguay's_Endemic_Corruption.htm

2 For more background on this see www.usaid.gov/policy/budget/cbj2006/lac/py.html

US $16 million from Paraguay's Central Bank to Citibank in New York.[3]

Corruption and *padrinazgo*

Judges and magistrates are expected to perform impartially and independently. However, politicisation of the selection process for magistrates has led to a judiciary predisposed to the executive and vulnerable to corruption.

Autonomous in principle, the council of magistrates is made up of a member of the Supreme Court, a representative of the executive, a congressman, a senator, two lawyers and two academics. While the composition looks pluralist, political criteria influence the selection of its members. Representatives from congress and the senate, for example, are determined by the political influence of the sectors they represent.

The executive intervenes directly in proposing candidates for the post of attorney general or Supreme Court judge, who are ultimately ratified by the senate. In recent years the appointment of the attorney general, members of the Supreme Court and the general comptroller have all resulted from political negotiation.

The council of magistrates draws up the shortlist of candidates in a process that is equally influenced along party lines. The designation of magistrates, prosecutors and members of the courts falls to other powers of government: a decision by the senate, the president or members of the Supreme Court. This is an improvement on the previous system in which the executive appointed judges for five-year periods – which happened to coincide with presidential elections. The body supposedly responsible for supervising magistrates, the jury for judicial disciplinary proceedings, is composed of two members of the Supreme Court, two members of the council of magistrates, two senators and two congressmen – all of whom are again nominated through party wrangling. The jury has rarely removed a magistrate.

Political interference in the selection of judges at all levels underpins the current malaise in which members of the judiciary are beholden to one of the political parties, usually the one in power. Even when a judge is denounced before the jury for judicial disciplinary proceedings, it too will be influenced by party politics. This degree of interference makes it unlikely that any judge would risk his or her occupation by ruling against political interests, particularly those involving members of the government.

Court bribery is widespread

According to a national corruption perception survey published by TI Paraguay in 2005, 18.7 per cent of respondents said bribes had to be paid to receive a court service, with an average value of GS680,000 (US $130). Some 62 per cent said there were many ways to bribe a judge to provide a favourable outcome, and only 7 per cent said it would be difficult or impossible.

This lack of trust across is one reason why many prefer not to access the justice system when their rights have been violated. If their opponent has any political or personal link to a magistrate or judge – and is wealthier – the prospects for justice recede. In one case reported to TI Paraguay, a former employee of a state bank who reported corruption and wrongly offered loans had been unfairly dismissed. He took the case to court and, even though it ruled in his favour, it took seven years before his former employer paid the compensation. Indeed, he had to pay a bribe to have the sum released.

3 An appeals court overturned the conviction against González Macchi in September 2006, but the former president is now being charged for another alleged corruption case relating to a secret Swiss bank account containing more than US $1 million that was discovered in 2004. See edition.cnn.com/2006/WORLD/americas/11/09/ paraguay.trial.ap/index.html

Nepotism and *padrinazgo* (patronage) are broad avenues for corruption. When cases are 'recommended' by relatives or the political associates of magistrates, the speed of the case inevitably picks up. One example was an action brought by Mundy Recepciones against the electricity company Itaipu, ordering it to pay an 'adjustment' of over US $5 million after a catering contract worth US $500,000 for a two-year period was extended by a further year.[4] Lawyer Antonio Fernández Gadea, a brother of a Supreme Court judge with a faultless record of winning cases, represented Mundy Recepciones.

The most recent legal event to affect the judiciary was the Act of Unconstitutionality, promoted by President Duarte Frutos against a resolution by the electoral tribunal that he could not be president of the Colorado Party and president of Paraguay simultaneously. President Frutos appealed to the Supreme Court. Five Supreme Court judges with ties to the Colorado Party voted to suspend the tribunal's ruling while the decision was studied. This was long enough for the president to hand over the leadership to the party's vice-president.

Opposition leaders, media and civil society organisations protested, demanding that the judges step down or face impeachment. Instead, an impeachment proceeding was launched against one of the four Supreme Court judges who had voted against the tribunal's decision on the grounds that he had 'incited people to protest'.

This and similar decisions show how the judiciary has been reduced to nodding through political decisions. The flawed design of the council of magistrates has turned it into a political trading floor. An overhaul is needed to rid it of political influence, but that will require a change of will that is currently absent from Paraguay's governance ethos.

Transparencia Paraguay, Asunción

4 www.abc.com.py/inventario/articulos.php?pid=62345&sec=30

The Philippines: Towards significant judicial reform

Legal system: Civil law, inquisitorial, plural (with elements of Islamic law)
Judges per 100,000 population: 2.7[1]
Judge's salary at start of career: US $5,996[2] *Supreme Court judge's salary:* US $32,545[3]
GNI per capita: US $1,300[4] *Annual budget of judiciary:* US $146 million[5]
Total annual budget: US $24.5 billion[6] *Percentage of annual budget:* 0.6
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* Yes

1 at jbc.supremecourt.gov.ph/news/best_brightest.php 2 Supreme Court Finance Department (2005) 3 Ibid.
4 World Bank Development Indicators (2005) 5 General Appropriations Act 2005 6 Ibid.

There are severe hindrances to the smooth delivery of justice in the Philippines: lack of transparency in the judiciary; the backlog of cases; delays in resolving complaints against members of the judiciary, court officers and lawyers; and inadequate salaries and facilities.

In a 2003 survey by the research institute Social Weather Stations (SWS),[1] 30 per cent of respondents agreed that corruption existed in second-level courts and 35 per cent said it existed in other courts as well. In 2005, Justice Reynato S. Puno of the Supreme Court told an international conference that the court in 2004 had admonished two second-level judges, censured four, dismissed 45 and issued fines to five more for misconduct. In 2005, the court dismissed 27 second-level judges and otherwise disciplined 15 others.[2] There are scattered data on corruption in the prosecutor's office, but 58 per cent of SWS respondents in the provinces of Pangasinan, Cebu and Davao reported corruption in the prosecution branch and 81 per cent identified corruption involving police.

Nature and extent of judicial corruption

No formal study has been made of corruption in the judiciary, though the following are contributing factors:

- Political interference
- Low budget and salaries
- Reform dependent on donors' budgetary support
- Inconsistent application of procedural rules
- Lack of monitoring framework
- Lack of emphasis on moral values in the educational system
- Backlog and delays in resolving cases.

Supreme Court guards the constitution

Judicial power is vested in a Supreme Court composed of a Chief Justice and 14 associate justices. The judiciary consists of four hierarchical layers: first-level courts, second-level courts, court of appeals and the s*andiganbayan*, a court that handles corruption cases against prominent officials.

Several cases illustrate political interference at the highest levels (on occasion resulting in clashes between the judiciary and the Justice Ministry), which sets a tone for the behaviour of the lower courts. Events in 2004–06 displayed evidence of executive encroachment on the judiciary for political reasons, rather than monetary gain. Hard on the heels of an investigation of military officials involved in alleged ballot rigging in the 2004 elections, President Gloria Macapagal-Arroyo issued an executive order forbidding officials to testify before a senate committee about telephone calls allegedly made by the president to one of the election commissioners, Virgilio Garcillano. The president reportedly instructed him to ensure that over a million votes be fraudulently credited to her in order to win the election.

A second executive order, known as the 'calibrated, pre-emptive response' (CPR), imposed in September 2004 as President Macapagal-Arroyo faced mounting opposition rallies, limited fundamental freedom of speech, freedom of assembly, and the freedom to seek redress and air dissent against abuses by the government. In April 2006, the Supreme Court unanimously

1 Social Weather Stations, 'Monitoring the State of the Judiciary and the Legal Profession', April 2003. Available at www.sws.org.ph/

2 'The New Philippine Code of Judicial Conduct', delivered at the International Judicial Reforms Conference and Showcase, Manila, 28–30 November 2005.

declared the CPR unconstitutional, but it upheld the Public Assembly Act, which requires organisers to secure a permit for rallies in public places.[3]

A third executive order, known as proclamation 1017, empowered the military and police to arrest people suspected of holding anti-government views and to close businesses and industries deemed to advocate destabilisation of the regime.[4] In all three cases, the Supreme Court asserted its independence by declaring the orders unconstitutional.

Chronic underfunding

The judiciary has historically received a minute share of the annual budget, equivalent to 0.6 per cent. Second-level judges earn US $8,987 per year, less than a quarter of the pay of their US counterparts. Measures passed in October 2003[5] will nearly double judges' remuneration and significantly increase allowances for court employees, but they are being implemented incrementally over four years because of limited funds. The intention was to begin only paying the full amounts in November 2006. Even with the increase, the judicial salary scale remains unattractive. The most competent lawyers tend not to apply for vacancies in the judiciary, while many sitting judges abandon the institution for the private sector. Vacancies in the judiciary in 2005 were in the range of 17–52 per cent at regional and municipal levels.[6]

Lack of sufficient judicial personnel contributes to long delays in resolving cases. On average it takes five to six years to resolve an ordinary case in a trial court. If it goes to appeal, a further six years could elapse before a final verdict is received. In late 2005 the Supreme Court revealed that some 800,000 cases of all kinds were pending trial, resolution or decision in the courts of the Philippines.[7]

Inconsistent application of procedural rules

There is an acute lack of interaction between members of the professions that work with the judiciary. As a result there are many instances of incongruous procedural rules that abet corruption. These include:

- Arrests without warrant
- Absence of public prosecutors during criminal cases even when private prosecutors are available
- Lack of public assistance lawyers to represent poor litigants, resulting in unreasonable postponements
- Lack of knowledge of law, rules and procedures by law enforcement officials, resulting in trumped-up charges
- Distorted trial reporting by media for ulterior motives, including bribery.

Under the rules of criminal procedure only the prosecution is authorised to conduct preliminary investigation of cases. This monopoly has been abused. Some prosecutors use their authority to dismiss cases irregularly and litigants have no recourse even when there are clear indications of corruption. In some instances, first-level judges conspire with prosecutors and police officers to file trumped-up cases for purposes of extortion.

3 Supreme Court en banc decision, promulgated on 25 April 2006.
4 Supreme Court en banc decision, promulgated 3 May 2006. Sun Star Network Online, 24 February 2006. See www.sunstar.com.ph/static/net/2006/02/24/.state.of.emergency.allows.arroyo.to.tap.military.html
5 Republic Act no. 9227.
6 'Nominating the Best and the Brightest', address by Chief Justice Artemio Panganiban on 23 February 2006. Available at jbc.supremecourt.gov.ph/news/best_brightest.php
7 Supreme Court report, presented during the International Judicial Reforms Conference and Showcase, Manila, 28–30 November 2005.

Another source of illicit revenue lies in the granting of bail – even when the law prohibits it – in exchange for a fee or other considerations. In August 2005 the Supreme Court promulgated amendments clarifying the rule on preliminary investigation and bail.[8] With these amendments, first-level judges' authority to conduct preliminary investigation was discontinued. Bail bonds are to be filed before the court where the case is pending and, in the absence of the judge, other judges within the same jurisdiction are authorised to approve posted bail bonds.

Efforts to reform the judicial system

In November 2000, the government released an Action Programme for Judicial Reform (APJR) 2001–06.[9] The driving force behind its implementation was Chief Justice Hilario Davide Jr., who has since retired. The APJR aims to address key issues in the justice sector, including access to justice, corruption, incompetence and delays in the resolution of cases. One aspect of the reform aimed at minimising fiscal drain by introducing an electronic system whereby fees would no longer be paid to clerks of court, but directly into Supreme Court coffers. An electronic case-administration information system was introduced along with a computer literacy course for all 28,000 judges and court employees across the country. It included the creation of an e-library and a bench book to assist judges in research and the imposition of penalties. One obstacle to automation of court records and other processes is the shortage of telephone lines. This problem exists even in Cavite, only 17 km from Manila and seat of the Supreme Court.

The APJR also raised the bar on admission to the practice of law in an effort to improve the calibre of candidates to the judiciary. An education board was established in May 2004 to oversee the operation of law colleges and reformulate the curricula in order to make them more responsive to the needs of the 21st century. The judicial apprenticeship programme aims to familiarise third- and fourth-year law students with court proceedings and to train them in legal research and decision writing. A Mandatory Continuing Legal Education (MCLE) programme was introduced to ensure that members of the bar are continuously updated on current laws and jurisprudence, and to strictly enforce the lawyer's oath.[10] The Supreme Court also adopted a code of conduct for judges in 2004 modelled after the Bangalore Principles, as well as a code of conduct for court personnel. Extensive training on the new codes has been facilitated through donor technical assistance.

There remains a need to reform the system of appointments and promotion in the judiciary so that it is based on merit rather than patronage. One of the APJR's goals is to introduce a more proactive and rigid nomination process for screening and selecting applicants to judicial posts, as well as stricter disciplinary mechanisms for erring judges. In this process, the judicial and bar council screens applicants for judgeships and then interviews a short list of candidates. Those that pass have their names published and the public is invited to submit comments or character evaluations. Those who have poor records are dropped. From the remaining qualified applicants, three are chosen for each territorial vacancy and their names are submitted to the president who makes the final selection. Direct citizens' participation in the appointment process is through four regular members of the judicial and bar council: a representative of the bar, a professor of law, a retired member of the Supreme Court and a representative of the private sector. There

8 Supreme Court en banc administrative matter no. 05-8-26, promulgated on 26 August 2005.
9 See www.apjr_sc_phil.org
10 Supreme Court en banc decision, available at www.supremecourt.gov.ph/rulesofcourt/2003/administer_113_03.htm

is no significant civil society involvement in the appointment of the Chief Justice and the Supreme Court justices.[11]

Despite the many activities undertaken over the six-year reform period, there has been little evaluation of their success or failure, nor of the problems encountered during their implementation. As of this writing, many reforms have not been implemented. The limited funds available mean that many of the electronic systems to manage caseloads and track payments are still not in place, leading to congestion and delays in prosecution. Training programmes for prosecutors and insufficient access to research materials to develop cases have also contributed to the delays. Poor coordination and collaboration with regard to information sharing remain causes for concern.[12]

Civil society's contribution to fighting judicial corruption

Some 30 NGOs are engaged in the fight against corruption in the Philippines and many have joined the Transparency and Accountability Network (TAN), including TI Philippines. Several watchdog groups were formed to monitor the selection of the Chief Justice, ombudsman and election commissioners. TAN also created a committee to observe proceedings in the judicial and bar council, and to disseminate the short list of qualified applicants for character evaluation by members of the public.

Non-profit media agencies and alliances, such as the Philippine Center for Investigative Journalism (PCIJ) and the Center for Media Freedom and Responsibility, play a crucial role in scrutinising and enhancing judicial accountability. In April 2001 the PCIJ investigated how the government gave final approval to a controversial power plant contract run by the Argentine firm IMPSA. The report raised questions about the propriety of the ruling and was used in a senate investigation of the case in January 2003.[13]

Judge Dolores Español
(TI Philippines, Manila)

11 For further information, see the Transparency and Accountability Network at www.tan.org.ph/files/proj_scaw.asp#project
12 See pdf.ph/downloads/governance/Judicial%20reform%2019%20July%20Presentation.pdf
13 See www.pcij.org

Judicial reform in PNG in need of political will

Legal system: Common law, adversarial, plural system *Judges per 100,000 people:* 2.6[1]
Judge's salary at start of career: US $9,945[2] *Supreme Court judge's salary:* US $111,082[3]
GNI per capita: US $660[4] *Annual budget of judiciary:* US $11.6 million[5]
Total annual budget: US $1.5 billion[6] *Percentage of annual budget:* 0.7
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not obtained
Are all rulings publicised? Yes *Code of conduct for judges?* In drafting process

1 World Bank (2000) 2 Magisterial Services (2006) 3 PNG Salary and Remuneration Commission. 4 World Bank Development Indicators (2005) 5 www.treasury.gov.pg/files/budget2006/detail.223.2006.1.pdf 6 Ibid.

There is a general consensus that governance in Papua New Guinea (PNG) has deteriorated in the past 20 years.[1] Most law-and-order institutions no longer function as intended, though some work better than others. Research on the subject represents the judiciary as one pillar that does still function despite enormous odds.[2] However, the pressure brought to bear on the court system has pushed it to the tipping point of dysfunction. It is unclear whether problems of corruption in the courts are aberrations, or symptomatic of the failure of an imported legal system to take root in PNG's deeply traditional society.

The largest donor to the sector is the Australian Agency for International Development's (AusAID) Law and Justice Sector Programme, which provides support to reform efforts. Despite many years of support and extensive use of expatriate advisers in the justice system, capacity transfer has not improved sectoral performance significantly. AusAID has recorded recent improvements in overall performance, but further improvement is needed before these gains can be locked in.

Australia's Enhanced Cooperation Programme (ECP) focuses on corruption, placing Australian officials in the justice system, including the public prosecutor's office and the judiciary,[3] as employees and not as advisers. Much of the ECP is still under negotiation, however, and there are difficulties with the requirement that Australian appointees be granted immunity from PNG law. The governor of Morobe province launched a successful Supreme Court appeal against the ECP, which led to frontline personnel (mainly police) being withdrawn. ECP prosecutors are allowed to appear in court.

The primary reason for the deterioration of PNG's judicial and court system is political neglect. Good intentions by donors can piggyback on the political will to reform, but they cannot sustain reform in the face of apathy or outright opposition. Bire

1 Report to the Justice Advisory Group, 'Fighting Corruption and Promoting Integrity in Public Life in PNG', 20 February 2005.
2 See PNG National Integrity System Report 2003 at www.transparency.org/policy_research/nis/regional/asia_pacific
3 *The National* (PNG), 19 January 2006.

Kimisopa, who was appointed Justice Minister in May 2006, has pledged to reform the justice system and tackle corruption. His department has drafted a White Paper outlining strategic priorities for the law and justice sector, focusing on the prevention of fraud and corruption.

Justice as a 'beacon of hope'

The national justice system consists of four levels of courts: a Supreme Court with a panel of five; national courts that also function as an appellate court; district courts; and village courts. The main law officers are a minister responsible for administration, the attorney general (appointed only if the Minister of Justice is not a lawyer fully admitted to the practice of law under the 1986 Lawyers Act), the public prosecutor and the public solicitor. The judicial system is fully independent in the exercise of its powers and functions.

A ministerial law and justice sector committee, chaired by the deputy prime minister, was formed after a cabinet decision in 2003 and tasked with overseeing a comprehensive review of the law and justice sector, a priority election promise of the government of Sir Michael Somare in 2002. At this writing, the committee has yet to meet.

The judiciary has always been considered a beacon of hope in PNG. The integrity of decision making is perceived to be intact at the highest level, but observers fear that the lower levels of the judiciary have been tainted. Performance management has not been effective and in most instances does not occur.[4]

The village court system performs a valuable role in providing accessible justice in remoter parts of PNG. This is due to the commitment and goodwill of village court officials rather than efficient administration. As responsibility for village justice has been devolved to provincial governments, courts have become increasingly fractured due to different methods of funding and oversight.[5] The government announced in the 2006 budget the disbursement of delayed allowances to magistrates and an improved system of quarterly payments to the provinces. Until then many local magistrates had stopped receiving pay and were presumed to be living off the fines they collected. These monies are generally not accounted for or audited, providing opportunities for corruption.

There are exceptions to poorly functioning village courts. In East New Britain province the local administration functions effectively and in Eastern Highlands village courts are reasonably well managed; provincial and local governments continue to provide magistrate services. Donor assistance, mainly through AusAID, is aimed at strengthening village court administration by reinforcing provincial and national oversight systems.

Politics paralyse attorney general's office

Judges are only one of many actors within the justice system. PNG judges still complain that even when they perform effectively and with integrity, corruption is still introduced to the courtroom by other branches, such as the police, prosecution or lawyers.[6]

4 Report to Justice Advisory Group, op. cit.
5 'Village Court System of Papua New Guinea', PNG Justice Advisory Group, 21 March 2004. See www.lawandjustice.gov.pg/www/html/7-home-page.asp
6 See, for example, *The National* (PNG), 14 June and 26 July 2006.

One element of the justice system that has been subject to allegations of corruption is the attorney general's office. The appointment of this post is a matter of intense jockeying since it is seen as a means to capture legal outcomes for private interests. At the time of writing, the job has been vacant for more than two years due to the inability of competing political interests to install their own candidate, or to agree on a compromise appointee. Within the attorney general's office, pay is far below equivalent jobs in the private sector, and there is little training in ethics.

Weak controls result in cases dropping out of the system and proceedings being struck out, either because a prosecution was not forthcoming or because of deliberate inactivity by government lawyers. Commitments have been made to address the poor case-management record and there is some evidence they may be bearing fruit. An Indictable Case Stream database is now used by agencies in the criminal justice process to ensure that all case information is managed in the same system. This and improved case management have resulted in a 30 per cent reduction of delays caused by lost files, which in the past have been a major cause of slow progress and suspected corruption in civil and criminal cases.

The out-of-court settlement 'scheme' is a potentially lucrative business that has also been subject to the whiff of corruption. Officials in the finance department allegedly colluded with officials in courts, private law firms and others to defraud the state.[7] Claims against the state since 1995 now exceed K500 million (US $175 million). The solicitor general's office of 11 lawyers currently manages 8,905 live files and claimants apply considerable pressure to have their claims settled. This pressure was taken to a new level recently with death threats against senior lawyers within the office who have delayed the settlement of claims.[8] As reported in *Global Corruption Report 2006*, most claims are against the police but this is changing with more malpractice claims against public health professionals.

Part privatisation of prosecution work

Legal changes in 2005 mean that out-of-court settlements now require secretary-level approval. Such safeguards have been openly abused in the past, but the parliamentary public accounts committee has recently shown an interest in addressing the problem. In August 2006 the government launched an enquiry into allegations of grand corruption within the finance department over the past decade. Jamie Maxtone-Graham MP brought the allegations before parliament early in 2006, though they had been circulating among law enforcement agencies for at least six months previously.

In addition, the public accounts committee is examining the payment of K28 million (US $10 million) to one private law firm to litigate on the state's behalf.[9] This is more than the entire attorney general's department budget of K20.8 million (US $7.3 million) in 2006, which includes K2.24 million for the state solicitor and solicitor general, and K5.3 million for the public prosecutor and public solicitor.[10] The procurement of these services by the finance department by-passed a number of fundamental safeguards, including those at the central supply and tenders board. The firm claims that the money saved by having professionals represent the state amounts to more than K1.3 billion (US $454.5 million).[11]

7 *The National* (PNG), 14 June 2006.
8 From a speech by Minister of Justice, Bire Kimisopa, to the Australia/Papua New Guinea 22nd Business Forum in Cairns, Australia, 14–16 May 2006.
9 *The National* (PNG), 19 January 2006.
10 From 2006 budget papers, available at www.treasury.gov.pg/html/budget_2006.html
11 *The National* (PNG), 25 July 2006.

Another element of the justice system presenting symptoms of corruption is the police. A comprehensive administrative review carried out in 2005 found widespread reports of misuse of funds and a disciplinary mechanism in almost complete collapse (see *Global Corruption Report 2006*). The report was endorsed by the then minister for internal security (now Minister for Justice), who one year on believes that there has been slow progress. Civil society groups are more critical and say that even the easiest safeguards, such as wearing identification tags at all times, have not yet been implemented.

Lawyers, too, participate in judicial corruption, but the paucity of data makes it difficult to assess the scale of the problem. The complaints system administered by the Law Society barely functions. There are long delays in dealing with complaints, and lawyers who are the subject of serious complaints are able to practise for years before the case is resolved.

Court user forums reduce case backlog

The ombudsman commission is an important feature of the judicial system and has a mandate to investigate infractions of the PNG leadership code. Though praised by the anti-corruption movement, it came under intense criticism in 2006 because of the increasing number of referrals of MPs and ministers to the leadership tribunal. A parliamentary select committee was formed in 2005 to review the powers and functions of the ombudsman commission, and its final report is due in late 2006. In its supplementary budget in mid-2006, the government approved an extra K2.8 million (US $980,000) for the leadership tribunal's extra workload.

Finally, under a suite of proceeds-of-crime bills passed in 2005 – which go some way towards enacting the provisions of the UN Convention Against Corruption – a finance intelligence unit has been set up within the PNG fraud squad. It is expected to become the focus of the state's fight against white-collar crime. If the unit is to make inroads into the deep-seated corruption in the public sector, however, it will attract opposition of the highest order.

Several initiatives have been introduced that look at the justice system as a whole and, while not focused primarily on corruption, they could engender an environment in which judicial corruption is more difficult to effect. A Criminal Justice System Task Force, chaired by Justice Mogish and involving agency heads, is working to reform the criminal case track from arrest through to trial. Areas identified as requiring reform include the committal system, which causes a lot of delay.

Court user forums chaired by national court judges are now active in seven of the country's 20 provinces, and are aimed at bringing the courts and key stakeholders together to identify simple changes to improve efficiency. There has been a 67 per cent reduction in the case backlog from 2003 and 2004 in Waigani national court in Port Moresby as a direct result of efficiencies identified through court user forums supported by the AusAID Law and Justice Sector Programme.

It is clear that PNG's legal system performs at a sub-optimal level. Urgent measures are needed to ensure that a non-corrupt and properly functioning legal system is maintained. Some argue that the PNG legal system suffers because of flaws in its design; others that further work will offer only an incomplete solution to what is a general dysfunction. What the legal system needs most desperately, however, is political will. When ministers, MPs, public servants, lawyers, police and the public are united in their will to see a functioning legal system put before the vested interests of the few, reform and change may become possible.

TI Papua New Guinea,
Port Moresby

Corruption and deficiencies in the Romanian justice system

Legal system: Civil law, adversarial, prosecution part of the judiciary.
Judges per 100,000 people: 18.0[1]
Judge's salary at start of career: US $7,861[2] *Supreme Court judge's salary:* US $25,828[3]
GNI per capita: US $3,830[4] *Annual budget of judiciary:* US $651.7 million[5]
Total annual budget: US $15.6 billion[6] *Percentage of annual budget:* 4.2
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes *Code of conduct for judges?* Yes

1 Consiliu Superior de Magistratura (2006) and Institutul National de Statistica (2003) 2 Ordonanta de Urgenta no. 27/2006 (March 2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Law 379/2005 6 Ibid.

According to the Romanian Study on National Integrity System,[1] the judicial system has been a weak pillar of integrity throughout the transition from communism. It is a three-tiered court system, with a Supreme Court and a body of public prosecutors. The superior council of magistracy represents judicial authority in relations with other state authorities and is guarantor of its independence. This body also safeguards the integrity of members of the judiciary and manages judicial infrastructure.

Alignment with EU justice standards

Reforms have been rare and difficult throughout most of the transition. In recent years, upcoming accession to the EU has been a catalyst to improving the pace and effectiveness of judiciary reforms. These have paid off in certain areas, as noted by the EU's monitoring report on Romania in May 2006,[2] which recognised 'good progress' in the overall reform of the justice sector, but it also noted the need for vigilance regarding continuing unethical behaviour. Many reforms exist only as well-articulated legal frameworks that have not yet been put into practice. In 2004–05 in particular, important judicial reforms were made, primarily modifying or adopting new laws, including three that concerned the Magistrates' Statute, judicial organisation and the attributes of the superior council of magistracy.

TI Romania has monitored implementation of these measures and from October 2005 to October 2006 hosted a counselling centre to help citizens complain about corruption in the judiciary. During that period, the centre received over 1,600 complaints of which it directly assisted almost

1 Launched after Transparency International accreditation in December 2005. For more information see www.transparency.org.ro
2 See May 2006 Monitoring Report on Romania at ec.europa.eu/enlargement/key_documents/pdf/2006/monitoring_report_ro_en.pdf

600. However, only 40 per cent fell within the centre's remit. Of these, the centre referred 30 per cent to the superior council of magistracy to determine whether the magistrate in question could be held responsible. After analysis, TI Romania concluded that implementation of reforms was deficient due to poor administrative skills and lack of will by heads of courts and prosecutors' offices.

The summary report[3] for the centre's first phase of operation revealed that courts, registries, archives and clerks' offices suffer from poor integrity and bad administration in the quality and promptness of service. This led to the conclusion that the reforms have had little impact thus far on citizens' relationship with the justice system.

Pressure on judgement

Legal reforms in the past three years have sought to address the issue of judicial independence, which has been critical since the 1989 revolution. For example, legislation in 2005 transferred management of the judiciary budget from the Ministry of Justice to the superior council of magistracy, effective from 2008, to ensure proper operational and staffing procedures are in place. Until then, it remains under ministerial control.

The council is composed of nine judges and five prosecutors, elected by their peers, but also by law includes the Minister of Justice, the Supreme Court president, the general prosecutor and two civil society representatives elected by the senate. This structure ensures judicial independence, contingent on the application of subsequent reforms.[4] According to a TI Romania survey in September 2005,[5] 78 per cent of magistrates view the justice system as independent, though not 'absolutely independent'. Judges indicated that they felt pressure on their decisions from media, members of parliament, government officials and economic interests while prosecutors said they experienced pressure from within the hierarchy, notably from chief prosecutors.

Though judiciary management will pass to the supreme council, this development will be accompanied by continuing structural weaknesses, such as inadequate court staffing and magistrates' low professional standards. With regard to integrity, Romania has had a judicial code of ethics since 2001 and in 2005 became one of the first countries in the region to adopt a code of ethics for court personnel. Training in both needs improvement, as do mechanisms for monitoring and enforcing them.

Accountability in the judiciary

Corruption and lack of transparency in relations between court users and court personnel are also systemic. Existing legislation on judicial standards is sufficient to penalise corruption by judges and prosecutors, but implementation suffers from delay. TI Romania's analysis of citizens' complaints indicates that in some situations the council does not retain cases until resolution, transferring them instead to courts or prosecutors' offices to resolve. This occurs even if the allegation represents a potential disciplinary misconduct, rather than a legal infraction. If the complaint is not well founded, the council responds with a *pro forma* rejection letter that fails to explain precisely why the magistrate in question was not held responsible for a particular action.

3 See 'Results of Monitoring Cases at the Anti-corruption Legal Resource Centre in the Period of January–June 2006', at www.transparency.org.ro

4 TI Romania, National Integrity System Study 2005, at www.transparency.org.ro/doc/NCR%202006%20eng.pdf

5 TI Romania's 'Perception of Justice Independence Study' is relevant for the period August 2004 to September 2005. A representative sample of 418 magistrates from all over Romania answered the questionnaire, the limit of error at perception level being 4.8 per cent. For more information see www.transparency.org.ro

The judicial system has been slow in regard to the jurisprudential interpretation of article 20 (3) of the constitution and article 6 (1) of the European Convention on Human Rights. Both refer to a reasonable term for resolving cases, as a function of the complexity of the case, which is not always respected in the Romanian legal system. Visitors at TI Romania's centre cited multiple examples of appeals and disciplinary complaints that are still navigating the justice system after many years. Another cause for delay is the rapid change in laws, a problem exacerbated by courts' delayed access to recent legislative texts, leading to the pronouncing of decisions that do not conform to the new law in force and which consequently favour repeated appeal.

Despite several attempts to standardise the system of jurisprudential interpretation, Romanian justice is inconsistent, with many unpredictable decisions and differing legal interpretations in different courts – and sometimes in the same court. A law is under consideration that will outline mechanisms to foster unitary jurisprudence, and ensure a proper balance between judges' decision-making independence and the increased predictability of their decisions.

Visitors to the counselling centre complained that magistrates, court staff or auxiliary personnel refused to speak to them, provide information or receive their requests. Court registers and archives refuse citizens' access to their own files. In Bucharest, TI Romania observed a significant improvement in citizen–court relations, but the problem is still widely prevalent in local courts. This state of affairs is worsened by people's ignorance of their own rights (i.e. the right to be informed, the right to fair process and the right to have cases resolved within reasonable timeframes) under the constitution.

Conflicts of interest

Since 2003 a stricter set of conflict of interest provisions has prohibited magistrates from numerous compromising situations, including the hearing of cases that involve relatives up to the fourth degree. Where conflicts of interest remain, visitors to the centre cited instances of acts of a criminal nature, such as trafficking of influence, through which family or non-family relationships were used to twist rulings or motivate magistrates to make particular judgements. Of the 600 cases adopted by the counselling centre, 190 were serious enough to pursue through legal channels. The two most frequent charges were 'failure to consider evidence' and 'violation of court procedures', and many clients attributed these actions to conflicts of interest.

Conflicts of interest and other lapses are made more common by the lack of adequate numbers of magistrates in courts and prosecutors' offices. According to figures issued by the superior council for magistracy in June 2006, there should be 7,253 magistrates in the judicial system. Only 89 per cent of judicial posts and 78 per cent of prosecutors' posts are currently filled, while the number of parties waiting for cases to be resolved is 22,408,393.

Disciplinary procedure for judges

The system for ensuring the integrity of magistrates is another issue in the fight against corruption. In 2004, the competence for disciplinary measures officially switched from a cooperative system between the Ministry of Justice and the superior council to the exclusive domain of the latter. The capacity to monitor performance and enforce discipline, however, needs to be consolidated and integrity issues remain problematic.

The council is composed of two committees that investigate infractions and abuses, one for judges and the other for prosecutors. It must promptly exercise these powers to enforce integrity in the magistracy if the judiciary is to regain any esteem in society. When the state loses appeals in the European Court of Human Rights, it is forced to pay damages to citizens harmed by magistrates' errors. This punishment is often softened,

however, because the cost is borne by the Ministry of Finance, causing taxpayers financial loss, and this in turn blunts the council's ability to prevent magistrates from abusing their power.

The Magistrates Statute[6] established magistrates' civil, penal and disciplinary responsibility for damages resulting from improper or unjust rulings. As to holding magistrates financially responsible, the law merely *permits* the pursuit of monetary compensation against magistrates found guilty of improper rulings. Similarly, the former Criminal Procedures Code *allowed* the Finance Ministry to initiate action against a magistrate responsible for state losses. A new law,[7] adopted in July 2006, amended the provisions of the Criminal Procedures Code and makes action against magistrates mandatory for errors in criminal trials. This is a step towards holding magistrates truly accountable for the decisions they make and could improve the integrity of the entire judicial system.

The prospect of Romania's accession to the EU and the need to create a legislative framework corresponding to European standards of justice prompted an extensive and rapid overhaul of judicial and legal legislation. In 2004, when Romania was expected to complete the requirements of the Justice and Internal Affairs chapter of the EU accession protocol, the pace of reform accelerated, but EU monitoring reports, increasingly frequent and more detailed, reflected the difficulties facing the justice sector.

For most of the measures adopted, the Justice Ministry benefited from EU technical advice on the legislation most likely to reduce corruption. What remains to be done is for these measures to be applied more effectively. If Romania is to become a full EU member, pressure must be maintained on the government to strengthen its efforts to fight corruption and increase public integrity.

Victor Alistar (TI Romania, Bucharest)

6 Law no. 303/2004.
7 Law no. 356/2006.

Misappropriations mar South Africa's courts

Legal system: Common law, adversarial, prosecution part of the judiciary
Judges per 100,000 people: 1.1[1]
Judge's salary at start of career: US $38,454[2] ***Supreme Court judge's salary:*** US $89,134[3]
GNI per capita: US $4,960[4] ***Annual budget of judiciary:*** US $881.7 million[5]
Total annual budget: US $66.5 billion[6] ***Percentage of annual budget:*** 1.3
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? Yes ***Code of conduct for judges?*** No

1 World Bank (2000) 2 Linda Van Der Vijver, *The Judicial Institution in Southern Africa. A Comparative Study of Common Law Jurisdictions* (Cape Town: Siber Ink, 2006) 3 Ibid. 4 World Bank Development Indicators (2005) 5 Budget Review 2006 6 Ibid.

For the past decade South Africa has been engaged in the task of transforming the country's institutions in line with the requirements of the new constitution. For the courts and the entity responsible for judicial administration, the Department of Justice and Constitutional Development (DoJCD), this has meant extensive restructuring and rationalisation to realise concepts of independence, integrity and accountability. These elements are part of the constitutional principle of separation of powers.

The South Africa court system consists of the constitutional court, the Superior Court of Appeal, the high courts, and the regional and district magistrates' courts. The constitution states that the courts must be independent 'subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice'.[1] Section 165 stipulates that 'no person or organ of state' shall interfere with the courts; that organs of state must assist and protect the courts; and that 'an order or decision issued by a court binds all persons to whom, and organs of state to which, it applies'. Section 173 affirms that superior courts have the 'inherent power to protect and regulate their own processes'.

Reforms have included both legislative and administrative measures. A number of acts have been passed governing the judicial appointments process, security of tenure and remuneration, and establishing a judicial services commission. These have improved the functioning of the courts and facilitated judicial independence. Some observers have criticised the reform process as piecemeal and slow, however. In a review of the justice sector by the Open Society, the DoJCD justified delays by arguing that consensus building is important before instituting more fundamental changes.[2]

Another project, the Court Integrity Project, launched with the UN Office on Drugs and Crime, aims to enhance the credibility and capacity of the courts. Expected outputs include the development and implementation of a National Anti-Corruption Plan for the judiciary. Although this plan was initially due in early 2006, time constraints have resulted in a considerable delay.[3]

In part all these measures have served to promote and protect the separation of powers. Former chief justice Arthur Chaskalson is on record as saying that 'government had not once in the past decade of our democracy interfered with or undermined the independence of our judiciary'.[4] Despite such affirmations, debates in parliament and the public discourse highlighted the challenges confronting the judiciary, including perceptions of impropriety, concerns over institutional independence and a perceived lack of accountability, all of which have weakened the image of the justice system.

Poor hit hardest by court corruption

One component of the Court Integrity Project includes national surveys of justice professionals. A survey of the lower courts found that of 400 people servicing and using the courts, 52 per cent felt that corruption was one of the main reasons for their lack of confidence in the justice system, with 7 per cent of prosecutors and 11 per cent of court personnel indicating they knew of bribes paid to expedite cases. The survey emphasised factors commonly regarded as weakening the image

1 Chapter VIII, Section 165.
2 See *South Africa Justice Sector and the Rule of Law, A Review* (2005), by AfriMAP and the Open Society Institute of South Africa. Available at www.soros.org/resources/articles_publications/publications/sajustice_20060223/afrimapreport_20060223.pdf; DoJCD Annual Report 2003–04, at www.doj.gov.za/
3 *Sunday Times* (South Africa), 21 May 2006.
4 *Business Day* (South Africa), 11 May 2005.

of the court system, including lack of resources and capacity, weak management and low motivation.[5] The survey suggested that some 70 per cent of magistrates were unhappy with their working conditions.

A dispute between magistrates and government over increased vehicle allowances is indicative of this dissatisfaction. In early 2006 the president awarded magistrates increased vehicle allowances but the finance division was unable to pay for them, leading magistrates to go on strike. They are now being investigated for bringing the profession into disrepute.[6] Heavy caseloads and the mounting backlog frustrate judicial officers and court users alike. Briefing documents submitted to the Justice Portfolio Committee in March 2006 indicated that 157,932 and 47,112 cases were outstanding in the district and regional courts, respectively.[7]

Shortcomings in financial management are recognised as an ongoing challenge in combating corruption. At one point the chairperson of the Portfolio Committee on Justice and Constitutional Development, J. de Lange (promoted to deputy minister of justice after the 2004 elections), commented: 'The DoJCD has not reconciled its books since 1959 . . . Of the 518 courts under the department's jurisdiction, only 30 are computerised and many transactions are not properly recorded.'[8]

In response, the DoJCD requested the auditor general to audit selected magistrates' and masters' offices in 2001–02, one of the largest audits in South African history. The DoJCD's finance officer, Alan Mackenzie, suggested that the real tragedy of such corruption 'is that it is largely the poorer sectors of the population who are the victims – people who post cash to courts to pay maintenance orders'.[9] The Minister of Justice, in response to a parliamentary question on the subject, indicated that the audit had uncovered significant misappropriation of funds with regard to maintenance, bail money, estates and deposits in some of the targeted offices. As a result, over 2,000 disciplinary and 162 criminal proceedings were initiated.

The DoJCD has since belatedly implemented the Public Finance Management Act of 1999, which sets out procedures and reporting requirements, including the development of departmental risk assessment and fraud-prevention strategies. Although financial management has improved – the DoJCD received unqualified audits over the past two years – the auditor general's latest performance audit revealed serious financial and administrative inefficiencies in monitoring and managing monies in trust. The auditor general found that such inefficiencies resulted in R134 million (US $19.4 million) in unreconciled balances, R44 million (US $6.4 million) in shortfalls, the accounts of 108 courts not balancing, 41 courts with missing or no records, and 120 courts without bank accounts.[10]

Conflicts of interest emerged in relation to judges who, unlike other government officials, are not required to disclose their financial interests annually. Although judicial officers are considered impartial and independent, with 62 per cent of citizens regarding 'most' or 'all' court officers as

5 *Sunday Times* (South Africa), 21 May 2006.
6 *The Star* (South Africa), 19 June 2006.
7 Parliamentary Monitoring Group, 'Records for the Portfolio Committee on Justice and Constitutional Development: Briefing the Department of Justice and Constitutional Development', 1 February 2006.
8 Transparency International, *National Integrity Systems Country Report 2005*, at www.transparency.org/policy_research/nis/regional/africa_middle_east
9 *Business Day* (South Africa), 21 July 2003.
10 Auditor General 2005–06 Audit Report for the DoJCD. Available at www.doj.gov.za

trustworthy,[11] public confidence could easily be undermined without a mechanism of disclosure. Recently Judge President John Hlophe of Western Cape is alleged to have received R10,000 a month from April 2002 to March 2003 from a private asset management company. The judge is currently on extended leave of absence while the matter is investigated.[12] In a further incident, Judge Fikile Bam of the land claims court is reported to have used his office to solicit business.[13]

At present judges adhere to an honour-based system and an informal code that discourages them from holding outside interests. Judges are not permitted to receive outside remuneration without the permission of the minister – which is granted only in exceptional circumstances and mainly to judges who have reached retirement age. Judges are also expected to recuse themselves in the event of a *prima facie* bias, as was recently displayed when two judges stepped down in the rape trial of former deputy president Jacob Zuma: Judge Ngoepe, because he had issued warrants against Zuma,[14] and Judge Shongwe, because Zuma had fathered the child of his cousin.[15]

Thin line divides accountability from the separation of powers

One issue weakening the judiciary is a perceived lack of accountability. To address this the government drafted a package of new bills[16] that would institute a formal code of conduct, new complaints and disciplinary mechanisms, and requirements to register financial interests. The functions would be carried out through a substructure of the judicial services commission (JSC).[17] Proponents of the legislation say the judiciary must be more accountable since it is constitutionally empowered to overturn the decisions of elected representatives. By establishing clear standards of conduct for judges and disciplinary procedures to deter corruption, the bills would bolster the dignity of the courts and judges in the eyes of the public. But others saw some of the provisions as damaging to the separation of powers and judicial independence, and the bills' passage was hindered. Critics assert that the threat of disciplinary action could give politicians or dissatisfied litigants an opportunity to influence judicial decisions.[18]

Questions have also been raised about judicial appointments and independence. The constitution specifically stipulates that the president must appoint all judicial officers in consultation with the JSC, although the amount of discretion he or she exercises depends upon the position. For example, the president appoints the Chief and Deputy Chief Justice and the president and deputy president of the Supreme Court of Appeal, after consulting the JSC and leaders of parties in the national assembly. For vacancies in the high court among others, the JSC interviews and nominates candidates whom the president either accepts or rejects: if the president rejects – which has yet to occur – the JSC starts over again. For vacancies in the constitutional court, which has

11 Afrobarometer, *Working Paper 61* (East Lansing: University of Michigan, 2006). According to the study, which covers 18 countries, the status and reputation of South Africa's judicial officers are considerably above the regional average. Available at www.afrobarometer.org
12 *Business Day* (South Africa), 19 April 2006.
13 *Sunday Times* (South Africa), 21 May 2006.
14 *Mail and Guardian* (South Africa), 21 March 2006.
15 *Cape Times* (South Africa), 15 February 2006.
16 The package includes the Judicial Services Amendment Bill, the Judicial Conduct Tribunal Bill, the Superior Courts Bill and the National Justice Training College Bill.
17 The body was established under the Constitution and Judicial Service Commission Act of 1994 to advise the government on any matter relating to the judiciary and the administration of justice.
18 See Shameela Seedat and Jonathan Faull, *Debating the Transformation of the Judiciary: Rhetoric and Substance* (Cape Town: Idasa, 2005).

11 judges, the JSC must offer four names from which the president may choose after consulting the leaders of political parties. Other judicial officers are appointed in accordance with specific acts of parliament. For example, the Magistrates Act establishes the magistrates' commission, a body that considers all applications for vacant posts, transfers and promotions, as well as matters relating to misconduct and dismissal.[19]

Composition of the JSC and magistrates' commission are subjects of continuing discussion. According to a review of judicial institutions in Southern Africa by the University of Cape Town,[20] the high number of politicians on the JSC – at least 11 of its 23–25 members – is a growing concern. There is also some question of the independence of the magistrates' commission. The case of *Van Rooyen*[21] is important because the courts, controversially – but after detailed consideration – decided that the magistrates' commission was sufficiently independent mainly on the basis of its composition.[22]

The role of South Africa's courts in defining human rights and good governance is widely acknowledged. Despite this, the need to develop and maintain the integrity of the courts by fostering independence and combating corruption remains a pressing issue that must be prioritised and debated. Improving the amount and depth of information available to stakeholders in the sector is an important aspect of this. The DoJCD has introduced measures such as the Integrated Justice Project and e-justice programmes to improve information management, yet the lack of effective monitoring and availability of data continue to hamper efforts to strengthen the judiciary and the rule of law.

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19 For example, magistrates are appointed according to the Magistrates Act of 1993 and Regulations, read with the Magistrates' Court Act of 1944.

20 Linda Van Der Vijver, *The Judicial Institution in Southern Africa. A Comparative Study of Common Law Jurisdictions* (Cape Town: Siber Ink, 2006).

21 For more on *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), see www.supremecourtofappeal.gov.za/judgments/sca_judg/sca_2004/64002.pdf

22 *South Africa Justice Sector* (2005) op. cit.

Corruption in Sri Lanka's judiciary

Legal system: Common law, adversarial, plural (with elements of Islamic law)
Judges per 100,000 people: 1.4[1]
Judge's salary at start of career: US $4,038[2] *Supreme Court judge's salary:* US $7,644[3]
GNI per capita: US $1,160[4] *Annual budget of judiciary:* US $21.0 million[5]
Total annual budget: US $8.2 billion[6] *Percentage of annual budget:* 2.6
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* No

1 Author's estimate 2 Information obtained from judicial officers (2007) 3 Informal data 4 World Bank Development Indicators (2005) 5 Budget 2005–06 6 Ibid.

Sri Lanka has reasonable legal provisions to guard against executive and legislative intrusions on the independence of the judiciary. However, experience shows that constitutional provisions alone cannot protect judicial independence without critical oversight by the media, professionals and academics, as well as public recognition of the need to protect the integrity of the institution. Corruption is one outcome of Sri Lanka's cowed judiciary. The situation has worsened since 1999 when Sarath De Silva was appointed Chief Justice over protests from national and international judiciary bodies, and attempts by two successive parliaments to impeach him for abuse of power and corruption.

Judicial structure

The Supreme Court is the highest court of the country, comprising between six and ten judges and headed by a chief justice. Among the Supreme Court's major jurisdictions are constitutional, final appellate and fundamental rights. Below the Supreme Court are the court of appeal, provincial high courts, district courts, magistrates' courts and primary courts. The Supreme Court has supervisory jurisdiction over all others. Judges have fixed retirement ages of 65, 63 and 61 years in the Supreme Court, the court of appeal and high courts, respectively. Salaries are increased periodically and, although they earn less than lawyers in private practice, wages are adequate. Judges can only be removed by order of the president after an address in parliament based on proven misbehaviour or incapacity. Lower court judges, like other civil servants, retire at 55, subject to annual extensions to a maximum age of 60.

Until 2001 the president appointed the Chief Justice and other high court judges, and the judicial services commission, composed of the Chief Justice and two Supreme Court judges, exercised power of appointment, promotion and discipline over judges in lower courts. A constitutional amendment was introduced in 2001 to prevent political manipulation in appointments to important judicial positions, stimulated by the furore over the Chief Justice's appointment (see below). The amendment established the constitutional council to screen and ratify presidential nominations to positions in higher courts. The appointment procedure of members of the judicial services commission was also changed, requiring

ratification by the constitutional council before confirmation of their appointment. The effects of these reforms have been less impressive than was hoped due to the lack of political will to implement them.

Integrity of chief justice an issue since 2001

In September 1999 the then attorney general Sarath De Silva was appointed Chief Justice by former president Chandrika Kumaratunga. This was an unusual promotion. The usual convention was to appoint the most senior judge on the Supreme Court, in this case Justice M. D. H. Fernando who was well regarded internationally and noted for delivering judgements that fettered executive and legislative power – to the chagrin of Kumaratunga.

De Silva's reputation was questioned at the time of his appointment. Two motions pending before the Supreme Court sought to strike him off the roll of attorneys at law on grounds of misconduct and abuse of authority. One of the petitions was lodged by Victor Ivan, editor of *Ravaya*, a Sinhala weekly newspaper. He accused De Silva of covering up a rape and embezzlement of funds by Lenin Ratnayake, a magistrate and relative, by suppressing documents and providing false information.[1] Experts also expressed concern at his appointment, including the UN Rapporteur on the Independence of Judges and Lawyers, who advised the government not to proceed until enquiries into De Silva's alleged misconduct had been concluded. Kumaratunga disregarded the advice.

A number of other measures were taken to block the appointment. Two parliamentary motions to impeach the new Chief Justice were submitted in 2001 and 2003 on charges of abuse of official power, case fixing for political interests, and shielding subordinate judges and officials engaged in corruption. In both instances, Kumaratunga dissolved parliament before the motions could be examined. The allegations against the head of the judiciary led to great public dissatisfaction with the integrity of the institution.

Subsequent breaches of the new rules on the appointment of senior judges compounded this situation. According to the 1999 amendment, presidential nominations to the court of appeal and the Supreme Court need to be ratified by the constitutional council, a body comprised of six members appointed by parliament and four *ex officio* members. Since November 2005 the council has been defunct due to the refusal by Kumaratunga's successor, President Mahinda Rajapakse, to activate the body on the grounds that smaller political parties had not yet nominated the last remaining member. In June 2006, the president appointed a new judge to the Supreme Court and two others to the court of appeal on the recommendation of the Chief Justice, by-passing the council altogether.

Control of case listing sidelines experienced judges

The Chief Justice also controls which Supreme Court judge hears which case. The Court sits in benches of three for each case. It is the Chief Justice who approves the bench list, nominates judges for benches and appoints a fuller bench for matters warranting a divisional bench.

The counsel appearing in petitions challenging the Chief Justice's appointment sought a fuller bench in order of seniority, the normal course of action when constituting a divisional bench. Notwithstanding protests by lawyers and the public, De Silva appointed a bench of seven judges in ascending order of seniority, which excluded the four most senior judges.

1 International Commission of Jurists, at www.icj.org/news.php3?id_article=2591&lang=en

The decision set a precedent and De Silva has controlled the listing of cases ever since. Prior to his appointment, the convention had been for the court registrar to list cases and the Chief Justice formally to approve it. From 1999 to 2003 the senior Supreme Court judge, Justice Fernando, was excluded from almost all important constitutional cases. This led to his retirement in early 2004, two and half years before the end of his tenure.

There does not presently seem to be a clear policy on conflict of interest in the listing of cases in the Supreme Court. Lay litigant Michael Fernando, who had made the Chief Justice a party in a case, was sentenced to one year's hard labour for criminal contempt by a bench consisting of the Chief Justice himself and two other judges. Fernando had raised his voice in court and 'filed applications'.[2] Sri Lanka does not have an act on contempt of court despite an ongoing campaign to codify the contempt laws. Instead, judge-made law has laid down strict principles that tilt the balance toward shielding judges from criticism, even when serious questions of integrity and independence are at issue. These laws have been invoked to silence journalists and other critics since 2002 when a media campaign led to the abolition of criminal defamation provisions in the Penal Code.

A corruptible judicial system

The judicial services commission consists of the Chief Justice and two other Supreme Court judges, generally the most senior. At the time of the People's Alliance government, which came into power in 1994, the two most senior judges were Justices Fernando and Dr. A. R. B. Amarasinghe. De Silva replaced them with two of the least experienced judges from the Court.

The judicial services commission manages the large workforce employed in courts and its purpose is to ensure integrity in judicial administration, the independence of judges in the lower judiciary and the prevention of corruption. Though the commission exercises the powers of appointment, promotion, dismissal and disciplinary control in lower courts, there are no disclosed criteria. Judges who do not toe the political line are warned and, if incorrigible, are dismissed on one pretext or another. Conversely, judges who are politically in line with the administration are shielded from disciplinary action despite evidence of corrupt practices, including bribe taking and the procurement of sexual favours from litigants and junior court staff.[3]

Survey data from the Marga Institute[4] is helpful in displaying the breadth and depth of corruption in the lower judiciary. An in-depth survey in 2002 of 441 legal professionals and litigants, all with experience with the judiciary, revealed that 84 per cent did not think that the judicial system was 'always' fair and impartial, and one in five thought it was 'never' fair and impartial. Among judges, lawyers and court staff, 80 per cent considered the judicial system was 'not always' fair and impartial. Among respondents as a whole, 83 per cent held that the judicial system was corruptible with a mere 17 per cent holding that it was never corruptible.

The same survey showed that of 226 incidents of bribes reported by judges, the largest single bloc of officials who benefited were court clerks (32 per cent). Bribes were typically offered to influence the issuance of a summons and choice of the trial date. Other beneficiaries were public prosecutors, police and lawyers. The lowest incidence of bribe taking was among judges. It is worth

2 See brcslproject.gn.apc.org/slmonitor/March2003/chief.html

3 International Bar Association, *Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary* (London: IBA, 2001), available at www.ibanet.org/humanrights/Sri_Lanka.cfm; and Victor Ivan, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* (Colombo: Ravaya, 2003).

4 www.margasrilanka.org

noting, however, that it was judges who identified at least five of their colleagues as bribe takers.

Recommendations

- Random listing of cases in higher courts plays a key role in protecting judicial integrity and prevents abuse by judges or officers for private gain. No judge should be able to access a case record except in the exercise of judicial duties. Rules guiding listing of cases must be published.
- An effective system should be designed to review the functions of the judiciary and hold judges accountable for their actions. The absence of a process for reviewing judgements and other judicial orders is unhelpful, as is judges' excessive involvement with administrative matters.
- The impeachment of judges cannot be fairly and effectively achieved by parliament because a judge with political affiliations can prevent such a move. An independent panel of Commonwealth judges should be convened to probe allegations against Sri Lankan judges.
- The behaviour of the Chief Justice is crucial to the integrity of a judiciary. The government should take the longstanding allegations of impropriety against the current incumbent before an independent panel of inquiry.
- The lower judiciary should be protected from the arbitrary and *mala fide* decisions of the judicial services commission.
- A code of judicial ethics, covering conflict of interest, general social comportment and pending cases against judges, must be adopted and published.
- Judges' associations should be free to function without direct or indirect interference from the judicial services commission or the Chief Justice.
- Any aid or financial assistance to the judicial branch must be transparent and any personal benefit that accrues to a judge should be based on disclosed criteria.

Kishali Pinto Jayawardana and J. C. Weliamuna (TI Sri Lanka, Colombo)

Judiciary in Turkey: rooting out corruption

Legal system: Civil law, inquisitorial, prosecution part of the judiciary
Judges per 100,000 people: 7.0[1]
Judge's salary at start of career: US $16,505[2] ***Supreme Court judge's salary:*** US $34,660[3]
GNI per capita: US $4,710[4] ***Annual budget of judiciary:*** US $1.2 billion[5]
Total annual public budget: US $115.3 billion[6]
Percentage of total annual public budget: 1.0
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? No ***Code of conduct for judges:*** No

1 Ministry of Justice (2006) 2 Ibid. 3 Ibid. 4 World Bank Development Indicators (2005) 5 Ministry of Finance (2006) 6 CIA World Factbook (2005)

The relatively low level of recognised corruption in the judiciary in the first 60 years of the Turkish Republic has increased in the past 20 years to the point where opinion surveys signal a growing lack of public trust in the institution. According to TI's Global Corruption Barometer 2005, respondents gave the judiciary a score of 4 on a scale of 1 to 5 (where 5 is highly corrupt).

The increasing number of scandals in the media that involve judges and prosecutors informs this perception. This may reflect increased corruption rather than the increased ability of the press to report corruption, since press freedom has not significantly increased in recent years.

Judicial corruption exists in spite of the fact that Turkey's constitution specifically identifies 'equality under the law' and 'independence of the court and justice for all' as the governing principles of the rule of law. The increased level of perceived corruption has prompted the public to view the judicial system as the second most corrupt sector in Turkey after the tax department.[1]

Some evidence exists to back up these perceptions. In a 1999 survey by Professor Hayrettin Ökçesiz of Akdeniz Universtity in cooperation with the Istanbul Bar, 631 out of 666 lawyers surveyed (95 per cent) said that there was corruption in the judiciary.[2] Professor Ökçesiz was later subjected to investigation and no one has dared do further research.

The increase in judicial corruption does not mean that the entire system is corrupt. Indeed, the strongest criticism about its spread has been voiced by senior officials who are campaigning to root out corruption and place the judiciary in its rightful place as a cornerstone of integrity in society. These individuals, who quote as their motto Socrates' rubric, 'Nothing is to be preferred above justice', received the 2005 TI Turkey Integrity and Anti-Corruption Award for their battle to reverse the corruption trend in the judiciary.[3]

Political interference in judicial appointments

A key structural organ in the judicial system is the high council of judges and prosecutors, to which all judges and public prosecutors are attached and which has responsibility for ensuring the integrity of the judicial system. But it is also a source of the system's vulnerability.[4] The high council is composed of seven members: the Minister of Justice and his undersecretary, three judges from the judicial appellate court (*Yargitay*) and two from the appellate court of government administrative affairs (*Danişţay*).

The high council meets in the Ministry of Justice, which serves as its secretariat. President Ahmet Necdet Sezer emphasised this divergence from the principle of judicial independence in a speech at the opening of the 2005 parliamentary year[5] and it was criticised in the European Commission's 2005 Progress Report on Turkey's negotiations to join the EU.[6]

One cause for decay in the judiciary is political interference in the filling of judicial posts and the

1 See TI's annual Global Corruption Barometer survey results at www.transparency.org
2 *Zaman* (Turkey), 8 February 2001; and *Hurriyet* (Turkey), 9 February 2000 for an interview with Professor Ökçesiz.
3 In May 2005 TI Turkey's Annual Integrity and Anti-Corruption Award for 2004 was presented to Chief Prosecutor Nuri Ok, with a plaque to former prosecutor Ömer Süha Aldan, for uncovering a gang influencing judicial decisions in Operation Scalpel. Another plaque was given to football player Sefer Hakan Olgun for exposing corruption in the sport. For further information, see www.saydamlik.org
4 *Milliyet* (Turkey), 14 January 1997; and *Hurriyet* (Turkey), 20 August 2004.
5 Speech by President Ahmet Necdet Sezer on 1 October 2005.
6 European Commission, 'Turkey – 2005 Progress Report', Brussels, 9 November 2005.

Ministry of Justice's influence on appointments to the high council.[7] The latter finalises all key personnel decisions; appoints judges and prosecutors at all levels, including to the appeal court; and is in charge of promotions, transfers and the lifting of immunity. Appointment and transfer lists, however, are first vetted by the Ministry of Justice, which exerts critical influence on the removal of judges and prosecutors from cases.

To take one example, Ömer Süha Aldan, the prosecutor responsible for uncovering a gang that used its contacts to influence high court decisions in the Operation Scalpel case in 2003, was transferred. One member of the gang was Cenk Güryel, a lawyer and son of a former head of the high council.[8] Güryel was sentenced to six months in jail, later reduced to a fine and a three-month suspension of his licence to practise.

Abuse of judges' immunity

To protect their independence judges and prosecutors are entitled to immunity from investigation and trial for crimes, even bribery. This leads to serious abuse and the high council rarely lifts this immunity. Judicial immunity also sets a bad example to politicians and bureaucrats who often cite it as a pretext for their own claims to it.

In the case of Operation Scalpel, for example, the high council refused to lift the immunity of the chief defendant's father, Ergül Güryel, so no case could be brought against him. He was disciplined and forced into retirement. This shook public trust in the justice system, and demonstrated just how close relations between officials in the judiciary and those in the cells can influence court outcomes.[9] To make matters worse, Ergül Güryel received the highest number of votes in May 2004 to fill the vacant post of chief prosecutor in the judicial appellate court. President Sezer, who chooses the chief prosecutor out of five candidates, appointed Nuri Ok, who came second in the ballot.

There have been many other criticisms of the highest levels of the judicial system. In August 2004 the media accused Eraslan Özkaya, presiding judge of the judiciary appeals court, of links with the Mafia.[10] He subsequently opened a libel case against the publishers, but the verdict went against him. Nevertheless, because of his immunity, the police could not open a case against him.

Some mechanisms aimed at enhancing the independence and accountability of courts do exist. Cases are generally distributed to judges on a random basis, except for complex or high-profile trials that may require greater experience. But there is a general lack of information about court proceedings, including disciplinary processes for judges and prosecutors, which makes it difficult to assess the effectiveness of such mechanisms.

Misuse of expert witnesses

Minister of Justice Cemil Çiçekis is just one of many who have criticised the use of 'experts' (*bilirkişi*) in the legal system. 'You can't fight against corruption if you have this "expert report" system', he said.[11] Because judges don't have the expertise to decide technical issues or the time to go to the scene of a crime and there is no pool of professionals to do it for them, judges accept the reports of private experts. Though many of their reports are patently false, judges rarely discount their testimony.

7 USAID Justice Reform Report, January 2004.
8 *Hurriyet* (Turkey), 15 January 2004.
9 As reported in *Milliyet* on 16 February 2006, a chief prosecutor in Istanbul is under investigation for releasing a friend, his son and his son-in-law despite their convictions in three courts for a shooting and a murder. The chief prosecutor was close enough to the family to serve as witness at the wedding of this friend's daughter.
10 *Radikal* (Turkey), 22 August 2004.
11 *Milliyet* (Turkey), 7 January 2004.

False expert reports are common in both ordinary and prominent cases due to bribery by the guilty party. For example, an expert report in the 'White Energy' case on corruption in energy bidding claimed that the provision of prostitutes, watches, diamond necklaces and cars to interested parties was not bribery, as alleged in the charges.[12] Similarly, an expert report that led to the acquittal of the builders of a primary school dormitory that collapsed killing 84 children said it was not because there was insufficient steel and cement in the construction, but because of the poor quality of local materials.[13]

Efforts to reverse corruption

Over the past two years, a number of judges and public prosecutors have been imprisoned for accepting bribes and trying to influence courts. Others forced to step down have included the head of the high council, members of the appellate court and the court of appeals' deputy secretary general.

Nuri Ok and other anti-corruption activists are trying to clean up the system by pushing for further investigations of judicial corruption. They were successful with Operation Scalpel (Neşter I) and are continuing with Neşter II. An increasing number of judges and prosecutors are under investigation.[14]

This has not come without costs. The prosecutor in Operation Scalpel was removed. Elsewhere there is little political or institutional support for efforts to clean up the justice sector. For example, the prosecutor in a pharmaceutical fraud involving millions of dollars in taxpayers' money later claimed that the relevant ministries were simply not interested, despite a high level of press coverage.[15]

In an effort to increase transparency Turkey is establishing a system in which court decisions and related documents are posted on the internet. Representatives of the judiciary are being sent to international conferences in a bid to familiarise themselves with international anti-corruption standards, such as the Bangalore Principles and the Budapest Principles.

But other changes are urgently needed. The politicisation of the judiciary must be reduced and the judiciary allowed the independence guaranteed to it by the constitution. This can best be achieved by altering the composition of the high council and making it easier to lift the immunity of judges.

The Minister of Justice and his undersecretary must be persuaded to abdicate their membership of the high council, which should be expanded through the inclusion of the chief prosecutor, other public prosecutors and, possibly, a lawyer. Government interference in appointments, transfers and other judicial decisions is to be avoided and the Ministry of Justice given a reduced say in drawing up candidate lists. The high council must have its own budget, secretariat and offices in a location separate from the Justice Ministry.

It is further recommended that the private expert system be abolished and a regulated pool of public officials be assigned to assist judges with the technical information needed to determine case outcomes. There is also a need to improve the education of judges, prosecutors and lawyers. The High University Board decided in April 2006 to increase law school from four to five years.

A code of ethics is required for judges and prosecutors, defining the limits of their relationships with politicians and business interests. This should be written into an oath sworn upon first

12 *Hurriyet* (Turkey), 17 February 2006.
13 *Milliyet* (Turkey), 25 June 2004.
14 Personal interviews in May 2006 with Chief Prosecutor Nuri Ok and public prosecutor Süha Aldan.
15 *Sabah* (Turkey), 30 May 2006.

entering their judicial careers and then be renewed annually.

Finally, judges' working conditions are hampered by loads of up to 60 cases a day, partly explaining why judges cannot dedicate adequate time to each. While salaries for judges and prosecutors compare favourably with those of other civil servants, they are low relative to the cost of living in big cities and judges find it difficult to manage.[16]

TI-Turkey, Istanbul

16 *Nokta* (Turkey), 5 July 2004.

Refining accountability and transparency in UK judicial systems

Legal system: Common law, adversarial
Judges per 100,000 population: 2.5 (England and Wales); 3.6 (Northern Ireland); 4.5 (Scotland)[1]
Judge's salary at start of career: US $183,848[2]
Supreme Court judge's salary: US $369,601[3]
GNI per capita: US $37,600[4] *Annual budget of judiciary:* US $6.28 billion[5]
Total annual budget: US $354.6 billion[6] *Percentage of annual budget:* 1.8
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent[7]
Are all rulings publicised? Yes *Code of conduct for judges:* Yes

1 European Commission for the Efficiency of Justice (CEPEJ) 2 ww.dca.gov.uk/judicial/2004salfr.htm 3 Ibid. 4 World Bank Development Indicators (2005) 5 England and Wales, and Scotland, including prosecution and legal aid, CEPEJ (2006) 6 Ibid 7 The executive and the judiciary are involved in independent, transparent processes in all jurisdictions. In some cases in Northern Ireland and Scotland a recommendation must be made to Parliament before a judge can be removed.

Judges in the United Kingdom have an international reputation for being independent, impartial and highly ethical, and judicial corruption is extremely rare.[1] As Lord Woolf, former Lord Chief Justice of England and Wales, put it: 'We are justifiably proud of our existing standards of judicial conduct.'[2] Yet the judicial system has not been immune to criticism, and public

1 See 'Evaluation Report on the United Kingdom', adopted by GRECO at its 6th Plenary Meeting, Strasbourg, 10–14 September 2001.
2 *Guide to Judicial Conduct*, first supplement published June 2006, available at www.judiciary.gov.uk/docs/judges_council/ published_guide0606.pdf

perceptions that the structure of the judicial system was outdated and opaque provided impetus for the extensive constitutional reforms that were recently introduced.

The UK comprises three jurisdictions: England and Wales, Northern Ireland and Scotland. Since 1999 many executive powers (and, in Scotland, legislative powers) have been devolved to new regional authorities. Each region also has its own court system. For now, the Appellate Committee of the House of Lords is the final court of appeal for all jurisdictions, except for criminal cases in Scotland. In 2009 a new Supreme Court of the UK is due to sit for the first time. It will be a fully independent court that hears all appeals from England and Wales, and Northern Ireland, as well as civil appeals from Scotland.[3]

The scale of judicial corruption

Instances of judicial corruption are exceptional in the UK, but when allegations are made they are carefully considered. For example, Geoffrey Scriven, a man unhappy about the outcome of his divorce proceedings in 1983, initiated no fewer than 11 actions between 1995 and 2000 against public officials for, among other things, permitting 'a legal mafia to corrupt the judiciary', 'conspiracy to cover up judicial corruption', 'conspiracy to defraud' and 'denial of a fair hearing by an independent and impartial tribunal'. Scriven's allegations of corruption were considered meticulously before being dismissed and the case demonstrates how much judges value the fundamental principle that citizens must be able to assert their rights in court. In England and Wales a litigant may be restrained from commencing or continuing legal proceedings when there are reasonable grounds to declare the litigant vexatious. In Scriven's case, it took five years, 11 appearances in court and a careful assessment of the facts before such an order was made against him.[4]

While there is little doubt that UK courts are founded on integrity and fairness, and are now becoming ever more transparent, the police, the Crown Prosecution Service and other agencies within the broader justice system often come under heavy criticism. The Serious Organised Crime Agency, which was set up in April 2006, recently carried out a threat assessment of organised crime in the UK. It found that criminals use corruption to further their activities, and that 'there have been a number of instances where UK law enforcement officers have acted corruptly and colluded with criminals'.[5] For example, the police services have been battling internal corruption for years.[6] Recent allegations by a BBC correspondent that the police officers who investigated the murder of Stephen Lawrence were corrupt did not improve their image.[7] Nor did the arrest in November 2006 of five metropolitan police officers for money laundering.[8]

Current perceptions about corruption in the justice system in the UK are generally rather poor, according to the TI Global Barometer on Judicial Corruption 2007. Over the summer of 2006, 1,025 people were asked whether they thought there was corruption in the 'judiciary/legal system'. Thirty-nine per cent responded that the system was corrupt, placing the UK below Italy and

3 See www.judiciary.gov.uk
4 *HM Attorney-General v Scriven*, Queen's Bench Division (Crown Office List) CO/1632/99, CO/3563/98, 4 February 2000; in another example, two judges in Liverpool were investigated for and cleared of corruption in May 2002. See *The Times* (UK), 18 May 2002.
5 See www.soca.gov.org
6 'Evaluation Report on the United Kingdom' (2001), op. cit.
7 BBC 1, *The Boys Who Killed Stephen Lawrence*, 26 July 2006.
8 *Guardian* (UK), 10 November 2006.

France. This was a surprising result, which has perhaps been influenced by concerns about the wider justice system rather than judges specifically. While allegations of corruption are seldom made against judges, allegations of and convictions for corruption, particularly in the enforcement agencies, have been more common.[9] The difference now, perhaps, is that these cases are being publicly reported on by the media and government agencies, so these findings may in part be due to a growing public awareness of the issues.

Political interference

Historically, there was no complete separation of powers in the UK. The fact that the Lord Chancellor was simultaneously speaker of the House of Lords, head of the judiciary and a member of the executive contradicted this principle. Yet a delicate balance of power was nurtured and maintained through a combination of the carefully guarded independence of the legal profession (from which judges are drawn) and 'the generous liberal temper of British politics'.[10]

Balancing power in this way was not always easy and the government has on occasion been criticised for infringing on judicial independence. In 1996 the UN Special Rapporteur on the Independence of Judges and Lawyers noted his 'grave concern' over comments that had been made by ministers in relation to the review by the courts of decisions by the Home Secretary.[11] Several Home Secretaries have publicly criticised judges and their decisions. For example, in 2003 David Blunkett wrote in a national newspaper about his 'war on the judges',[12] an attack that sparked an unprecedented House of Lords debate. The practice continues today with the current Home Secretary, John Reid, criticising a judge for issuing a 'soft' sentence in a particular case in June 2006,[13] and in September announcing that he would ignore pending legal challenges to his decision to deport a number of Iraqi citizens unless they were granted full injunctions against deportation.[14]

Radical constitutional change and a formal separation of powers

In June 2003 the government announced that it intended to make radical changes to the constitutional make-up of the country. In April 2006 the Constitutional Reform Act (CRA) 2005 came into force. It makes changes in relation to four main issues: judicial independence; the office of the Lord Chancellor; the creation of a Supreme Court; and the creation of the Judicial Appointments Commission for England and Wales. These changes do not, however, address the role of the Attorney General, which remains anomalous. The Attorney General is simultaneously the chief legal adviser to the government and a cabinet member; has final responsibility for enforcing the criminal law; and is answerable to Parliament for the actions of the Director of Public Prosecutions and the Director of the Serious Fraud Office, as well as having various other public interest functions.[15]

In England and Wales, under the CRA 2005 the Lord Chancellor is no longer head of the judiciary, nor is he a judge. The Lord Chief Justice now heads the judiciary of England and Wales,

9 In January 2006 a Crown Prosecution Service case worker was convicted of misconduct in public office. See www.bbc.co.uk, 10 January 2006.
10 R. Stevens, 'Loss of Innocence? Judicial Independence and the Separation of Powers', *Oxford Journal of Legal Studies* 19 (3) (1999).
11 Economic and Social Council, E/CN.4/1996/37, 1 March 1996.
12 *Evening Standard* (UK), 12 May 2003; *Daily Mail* (UK), 20 February 2003.
13 *The Times* (UK), 14 June 2006.
14 *Guardian* (UK), 4 September 2006.
15 For further information see www.islo.gov.uk

and assumes about 400 or so duties that the Lord Chancellor previously discharged. Further, the Lord Chancellor and 'other ministers of the crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice' now have a statutory duty to uphold the independence of the judiciary.[16] This includes not influencing particular decisions through 'special access to the judiciary', and seeing that judges have 'the support necessary to enable them to exercise their functions.'[17]

The Scottish Executive issued proposals in February 2006 to 'modernise the organisation and leadership of Scotland's judiciary, reduce the involvement of the executive in the day-to-day administration of the system and introduce a scheme for dealing with judicial misconduct'. The document was not well received in its first round of consultations. The Sheriffs' Association (judges' association), and the Commonwealth Magistrates' and Judges' Association were concerned that the proposed appointments procedures put security of tenure in question and created a risk of undue influence by the executive.[18] In Northern Ireland the Justice (Northern Ireland) Act 2002 requires those with 'responsibility for the administration of justice' to uphold 'the continued independence of the judiciary'.

Transparency in the judiciary

Appointments procedures in all UK jurisdictions have also been reformed, beginning with Scotland in 2002. In England and Wales the Judicial Appointments Commission, established by the CRA 2005, began work in April 2006. This independent body, comprising both lay and legal members, and chaired by a lay professional, performs an advisory role: selecting nominees for appointment to the bench based on merit. One candidate per vacancy is selected and recommended for appointment by the Lord Chancellor.[19] Magistrates are not at present chosen in the same way, but will be in the future. For now, the Department of Constitutional Affairs (DCA) runs the selection process. A separate appointments body will be created to appoint members of the new Supreme Court. All appointment commissions must provide detailed reports of appointment processes, which can include commenting on their work before the House of Commons Select Committee on Constitutional Reform, as happened earlier this year.[20] In England and Wales, a new Judicial Appointments and Conduct Ombudsman is now responsible for investigating complaints relating to the appointment of judges.[21]

The UK's new Supreme Court will begin to operate from 2009

The CRA 2005 provides for a new Supreme Court of the UK. Judges of the final court of appeal will no longer be members of the House of Lords, but will instead be institutionally and geographically independent. The Supreme Court will be in Middlesex Guildhall, opposite parliament.[22] There has been considerable debate as to how the new Supreme Court should work, and indeed

16 Constitutional Reform Act 2005, s 3 (1).
17 Ibid, s 3 (5) and 3 (6) (b).
18 CMJA, 'Response to the Scottish Executive's Consultation Paper "Strengthening Judicial Independence in a Modern Scotland" ', available at www.scotland.gov.uk/Resource/Doc/925/0034075.pdf#search=%22CMJA% 20response% 20to%20strengthening%20judicial%20independence%20scotland%22
19 See www.judicialappointments.gov.uk
20 Constitutional Affairs Select Committee, 'The operation of the Judicial Appointments Commission', uncorrected transcript of oral evidence by Baroness Usha Prashar CBE, chair, Rt Honourable Lord Justice Auld, vice chair, and Sara Nathan, lay member, Judicial Appointments Commission, 18 July 2006. To be published as HC 1554-i
21 See www.judicialombudsman.gov.uk
22 For further information see www.dca.gov.uk/supreme/index.htm

why it is necessary at all.[23] Two reasons that the DCA gave are: first that the current situation raises questions about whether there is any longer sufficient appearance of independence from the executive for people to be assured of the independence of the judiciary; and second, to provide better facilities for the most senior judges, who at present work in cramped conditions.[24] In April 2003 the Council of Europe issued a report in which it called for the abolition of the judicial function of the Lord Chancellor and for the establishment of a separate Supreme Court.[25] These changes therefore mean that the UK will conform to accepted practice in Europe.

Judicial conduct and accountability

Judges in the UK must give written reasons for their decisions, which may be challenged through a well-developed appeals system. It is also now standard practice to require court divisions to account for their activities in annual reports, readily available online. Additionally, judges have in the past appeared before select committees to comment on particular issues. They will continue to do so where necessary and, under the CRA 2005, a Chief Justice in any part of the UK may make a written representation to parliament on 'matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice in that part of the UK'.[26]

Disciplinary procedures in England and Wales have been clarified and made public: the *Guide to Judicial Conduct* is available online[27] and a new Office for Judicial Complaints will consider complaints about the personal conduct of judges. The first case it is likely to consider is that of two relatively junior judges, Judge Khan and Judge 'J', who allegedly had an affair and both hired an illegal immigrant as their cleaner.[28] The Judicial Communications Office issued a statement in October 2006 saying that the Lord Chancellor and Lord Chief Justice had 'concluded that there are sufficient grounds to ask the Office for Judicial Complaints to carry out a preliminary investigation' into the conduct of the two judges in order to determine 'whether there is any cause for them to exercise their disciplinary powers'. While the investigations are ongoing, the two judges will not be sitting in their judicial capacity.[29]

Conclusion

Recent reforms in the judicial systems of the UK, and particularly England and Wales, go a long way towards meeting concerns about openness and transparency in the system. Transparency in processes such as judicial selection and appointments has improved considerably, and the judiciary has done much to improve access to information and to demystify the way that it functions. However, across the wider justice

23 See, for example, Andrew Le Sueur, ed., *Building the UK's New Supreme Court* (Oxford: Oxford University Press, 2003); news.bbc.co.uk/1/hi/uk_politics/3532197.stm

24 Department of Constitutional Affairs (DCA), *Constitutional Reform: A Supreme Court for the United Kingdom* (London: DCA, 2003). According to the DCA, one law lord didn't even have a room to work in.

25 Council of Europe, 'Office of the Lord Chancellor in the Constitutional System of the UK', document 9798, 1 April 2003.

26 Constitutional Reform Act 2005, s 5(1)

27 *Guide to Judicial Conduct*, first supplement published June 2006, available at www.judiciary.gov.uk/docs/judges_council/published_guide0606.pdf

28 *Guardian* (UK), 20 October 2006; www.cps.gov.uk/news/pressreleases/158_06.html

29 See www.judiciary.gov.uk

system there remain concerns about deep institutional problems, and in some criminal justice agencies, corruption. While increasing reports of these issues are troubling, they nevertheless show that, through a combination of a culture of self-scrutiny and an active free press, these problems are being identified and addressed.

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Zambian judiciary struggles to modernise

Legal system: Common law, adversarial, plural *Judges per 100,000 people:* 0.4[1]
Judge's salary at start of career: US $26,340[2] *Supreme Court judge's salary:* US $27,340[3]
GNI per capita: US $490[4] *Annual budget of judiciary:* US $16.0 million[5]
Total annual budget: US $2.6 billion[6] *Percentage of annual budget:* 0.6
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Effectively independent
Are all rulings publicised? No *Code of conduct for judges?* Yes

1 Registrar of the Judiciary (2006) 2 Statutory instrument no. 55 (2005). 3 Ibid. 4 World Bank Development Indicators (2005) 5 Republic of Zambia budget (2005) 6 Ibid.

The Supreme Court is at the apex of the Zambian court system presiding over 453 local courts. Between them are 53 subordinate courts, one per district, and four permanent high courts serving the country's nine provinces. Zambia has a dual legal system, comprising the customary law of its 73 ethnic groups and constitutional law, based on English common law. Common law is administered by the high courts, which have authority to hear criminal and civil cases, and appeals from the lower courts. The local courts administer customary law. It is common for the two laws to clash; some judgements based on common law are unpopular because they contradict tradition, mainly in cases related to marriage, property and inheritance. Local justices receive no formal training, relying instead on experience, common sense and custom.[1]

In the lower formal courts there are three types of magistrates, all of whom must hold law degrees: resident magistrates, senior resident magistrates and principal resident magistrates. The president appoints high court and Supreme Court judges from among the principal resident magistrates, based on experience and competence, but subject to ratification by the national assembly.

Higher courts not free from corruption

Corruption affects a number of Zambia's institutions and the judiciary has not been spared.[2]

1 US State Department, *Republic of Zambia Profile* (Washington D.C.: 2005).
2 World Bank, *Zambia National Governance Baseline Survey* (Washington D.C.: 2003).

In 2004 the World Bank carried out a series of in-depth, countrywide surveys of corruption, assessing the views of three groups: households, public officials and business enterprises.[3] About 40 per cent of households and 25 per cent of business managers reported that bribes were paid to speed up legal proceedings. This has led to a notable erosion of confidence in the justice system. For example, over 80 per cent of the households surveyed reported that they needed to use the court system, but decided not to, and just over 60 per cent of businesses said the same.[4]

Local courts are quickest to resolve disputes because they have simpler procedures. However, some justices take advantage of this to extort money from service users. For example, a 70-year-old former local justice alleged to have solicited K50,000 (US $12.95) as an inducement to find in favour of a litigant in his court was convicted of corruption in 2002.[5]

While there is evidence to suggest that the lower courts and local courts are most prone to corruption, this does not mean that the higher courts are free of it. In 2002 *The Post* newspaper revealed details of the alleged systematic plunder of US $40 million in public funds by former president Frederick Chiluba, his intelligence chief, Xavier Chungu, and several ministers, including the alleged payment of bribes of US $168,000 to Chief Justice Matthew Ngulube.[6] The latter did not deny receiving the payment and went on leave pending permanent retirement.[7]

Under the previous government the judiciary was criticised for being overly deferential to the authorities. The most notable example was the first election petition of former president Chiluba in which the Supreme Court was widely presumed to have bowed to executive pressure.[8] Unsurprisingly, the chief justice of the time, Matthew Ngulube, was seen as 'soft' when it came to matters involving the executive due to the vast sums of money he had secretly been receiving. But there have been occasions when the courts stood up to the government to prevent unconstitutional laws and abuse of power.

The World Bank survey in 2004 revealed that 52 per cent of business managers believed the courts were not independent from government or economic pressures, and that justice was not administered fairly or transparently.[9] While some commentators have suggested that judges are independent from the executive,[10] the survey findings indicate that court users feel that in reality they are not. One reason for this is that the system of appointments allows the president great discretion in decision making, thereby negating selection criteria based on integrity, merit and political impartiality. To expect judicial officers, who may have been deeply involved in corruption when they served in lower courts, to undergo a transformation on the assumption of higher office is a lot to ask.[11]

Lack of human and financial resources

The salaries of judges, magistrates and justices remain unsatisfactory, particularly in lower courts. In July 1997, judges' salaries were more than

3 Ibid.
4 Ibid.
5 *Anti-Corruption News* (Zambia) April–June 2000.
6 *The Post* (Zambia), 7 August 2002.
7 Zamnet (Zambia), 9 July 2002.
8 For example, the case of *Christine Mulundika and Others v The People*, Supreme Court of Zambia SCZ/25/1995.
9 World Bank (2003), op. cit.
10 See the International Commission of Jurists (ICJ), 'Attacks on Justice – Zambia 2002' (Geneva: ICJ, 2002). Available at www.icj.org
11 *Nchekeleko: An Afronet Reader on Corruption in Zambia* (Lusaka: Afronet, 2002).

doubled, but magistrates and justices did not benefit.[12] Inadequate human resources beset the dispensation of justice. According to the Ministry of Justice, there were 65 districts with 150 magistrates and 453 local courts with around 900 justices in 2002. The chief administrator of courts at the time said there were only 23 magistrates to cover 72 magistrate positions. Under the Local Courts Act Chapter 54, the judicial service commission appoints as many local justices, local court advisers and local courts officers as it sees fit.[13] Lack of training and shortages of magistrates mean that poorly trained individuals (some of whom may simply be retired civil servants recommended by traditional leaders)[14] are applying complex laws to difficult facts and have to rely on the competence of lawyers to guide them. In this way, judges are open to manipulation by lawyers seeking the best deal for their clients.

For example, a Lusaka magistrate fined Sydney Chileshe K5.1 million (US $1,322) for offences related to his cultivation and distribution of marijuana. The magistrate wrongly accepted an argument by the defence counsel that she had the discretion to impose a fine when the law did not explicitly give her this power. The appeal judge was shocked by this clear misapplication of the law and instead imposed five years imprisonment with hard labour.[15] Lack of information and basic resources is a further problem: justices rely on their knowledge of customary law in judgments because no legal literature is provided to local courts.[16]

The government is responsible for providing equipment and maintaining courthouses, offices and lodges for judges, but the buildings are in shocking condition. Magistrates have no libraries or access to electronic case processing, unlike colleagues in higher courts. This hampers their efficiency, creating an inevitable backlog of cases. These problems were acknowledged by President Levy Mwanawasa in a speech at the opening of the Magistrates' Court Complex in Lusaka in March 2006.[17] The deterioration reduces public confidence in the system and the morale of those struggling to work within it. A lawyer before turning politician, the president pointed out that he knew that in some areas 'local court justices sit under a tree to transact judicial business'. He pledged his support to programmes that upgraded court facilities, enhanced the skills of judicial officers and support staff through training, and pledged to modernise existing courts and build new ones.

'New Deal' includes judicial reform

President Mwanawasa launched his presidential career in 2002 on a strong anti-corruption platform. His 'New Deal' vision seeks to develop a prosperous Zambia free of corruption.[18] The current focus of judicial reform is to build court buildings and properly equip them. The government recently allocated funds to courts in Luapula and the southern provinces as a demonstration of this commitment to reform and it has received considerable assistance from donors.

12 Zambia News Online (Zambia), 7 July 1997.
13 ICJ (2002), op. cit.
14 GTZ, 'Improvement of the Legal Status of Women and Girls in Zambia', available at www.gtz.de/de/dokumente/en-accrareport.pdf
15 *Sydney Chileshe vs. The People* HPR/05/2004, available at www.zamlii.ac.zm
16 German Development Service (DED), 'Zambia: Legal Reform – the Key to Social Change', available at www.zambia.ded.de
17 Presidential speech on 28 March 2006, available at www.statehouse.gov.zm/index.php?option=com_content&task=view&id=69&Itemid=5
18 Introduction to the New Deal Vision available at www.statehouse.gov.zm/index.php?option=com_content&task=view&id=87&Itemid=55

Norway provided nearly US $3 million to build the new Magistrates' Court Complex in Lusaka. Sweden furnished the buildings, spending approximately US $650,000, and China supplied judicial staff with electric typewriters.[19] More broadly, USAID began the Court Annexed Mediation programme in 2000, and as of March 2005 90 US-trained Zambians had mediated 1,800 cases and taken a certain amount of congestion out of the system.[20] The German development agency, GTZ, is working with the judiciary, the Zambian Law Development Commission and rural NGOs to improve the legal status of the female population, alongside training local court personnel in law, procedure and social issues. The project is designed to equip local justices with the skills necessary to handle cases and reduce corruption.[21]

The Zambia Anti-Corruption Commission recognises the need for a holistic approach to fighting corruption, and has developed a National Corruption Prevention Policy and Strategy that seeks to implement prevention initiatives in key institutions that are expected to meet specific anti-corruption targets.[22] The conduct of judges is regulated by the Judicial Code of Conduct (Amendment) Act of 2006, which established a specific authority to investigate complaints against judges.[23]

But perceptions of corruption on the rise

Given that President Mwanawasa has pledged to do all he can to rid public institutions of corruption, it is disturbing that a 2005 survey of Lusaka residents suggests that the courts are not improving: in a ranking of institutions in order of the perceived magnitude of corruption, the courts have significantly worsened. Yet 60 per cent of respondents believe that this government is taking corruption more seriously than its predecessor.[24] It remains to be seen whether the promise to update courthouses and provide staff with training will be met. Meanwhile, attention needs also to be paid to the following:

- There is a need to recruit more court officials, for more continuous professional training and improved salaries to facilitate quicker disposal of cases
- A policy on further training and capacity building of judicial personnel is required
- The method of appointing judges, magistrates and court justices requires reform
- Benefactors should consult the judiciary in needy areas before designing programmes.

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19 www.statehouse.gov.zm/index.php?option=com_content&task=view&id=69&Itemid=5
20 USAID press release, 30 March 2005, at zambia.usembassy.gov/zambia/pr033005.html
21 GTZ, op. cit.
22 A brief introduction to the Commission is at www.icac.org.hk/newsl/issue26eng/button4.htm
23 The full text of the law can be found at the Zambia Legal Information Institute at www.zamlii.ac.zm
24 Musonda Lemba, *Opinion Poll in Lusaka: Residents' Perceptions of Corruption* (Lusaka: TI Zambia, 2006). See www.tizambia.org.zm