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TRANSPARENCY INTERNATIONAL
the global coalition against corruption

GLOBAL CORRUPTION REPORT 2007

Corruption in Judicial Systems

CAMBRIDGE

Transparency International's *Global Corruption Report 2007* brings together scholars, legal professionals and civil society activists from around the world to examine how, why and where corruption mars judicial processes, and to reflect on remedies for corruption-tainted systems. It focuses on judges and courts, situating them within the broader justice system and exploring the impact of judicial corruption on human rights, economic development and governance.

Two problems are analysed: political interference to pressure judges for rulings in favour of political or economic interests, including in corruption cases; and petty bribery involving court personnel. The result is a thorough analysis of how judicial independence and judicial accountability, two concepts key to the promotion of judicial integrity, can be bolstered to tackle corruption in judicial systems.

Included are thirty-seven country case studies; recommendations for judges, political powers, prosecutors, lawyers and civil society; and sixteen empirical studies of corruption in various sectors, including the judiciary.

Transparency International (TI) is the civil society organisation leading the global fight against corruption. Through more than ninety chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption, and works with partners in government, business and civil society to develop and implement effective measures to tackle it. For more information go to: www.transparency.org

Global Corruption Report 2007

TRANSPARENCY INTERNATIONAL

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Diana Rodriguez
Editor, Global Corruption Report

Preface

Huguette Labelle, Chair of Transparency International

Transparency International's *Global Corruption Report* focuses on the judicial system this year for one simple reason: the fight against corruption depends upon it. The expanding arsenal of anti-corruption weapons includes new national and international laws against corruption that rely on fair and impartial judicial systems for enforcement. Where judicial corruption occurs, the damage can be pervasive and extremely difficult to reverse. Judicial corruption undermines citizens' morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance. A government that functions on behalf of all its citizens requires not only the rule of law, but an independent and effective judiciary to enforce it to the satisfaction of all parties.

The professionals that make up the judicial system can use their skills, knowledge and influence to privilege truth and benefit the general public, and the vast majority do. But they can also abuse these qualities, using them to enrich themselves or to improve their careers and influence. For whatever reason and whether petty or gross, corruption in the judiciary ensures that corruption remains beyond the law in every other field of government and economic activity in which it may have taken root. Indeed, without an independent judiciary, graft effectively becomes the new 'rule of law'.

Transparency International has been tackling judicial corruption in many countries and on a number of levels for several years now. Its work has included analysing the phenomenon through research and surveys; scrutinising the judicial appointments processes in courts; promoting standards of ethical conduct in the justice sector; and lobbying through national chapters and civil society organisations for laws to block the most blatant avenues for manipulating the judiciary.

Transparency International would have achieved nothing in this field on its own. This volume brings together the testimony of dozens of the organisations and individuals who have dedicated their skills and efforts to ridding the justice institutions of corruption's scourge. Many authors are from the human rights field. This is only fitting since the fight against corruption and the fight for human rights can only be mutually reinforcing.

As this volume attests, many factors mitigate corruption and many steps can be taken to ensure that judicial professionals avoid engaging in it. These include accountability mechanisms that increase the chances that judicial corruption will be detected and penalised; safeguards against interference from the spheres of politics, business and organised crime; processes of transparency that allow the media, civil society and the public to scrutinise their own judicial systems; and decent conditions of employment that convince judicial staff to remain on the straight and narrow. A judge working in a jurisdiction where the profession is

respected and well compensated is less likely to exact a bribe from a litigant in a land or family dispute than one working in less favourable conditions.

Many inspiring individuals buck the graft trend, even in jurisdictions plagued by mediocrity, petty corruption and fear of intimidation. While this book was in production, members of Transparency International's global movement gathered to pay tribute to Dr Ana Cecilia Magallanes Cortez, winner of the TI 2006 Integrity Award and the leading force in the prosecution of some 1,500 members of the criminal organisation headed by Vladimiro Montesinos, ex-head of intelligence and intimate associate of former Peruvian president Alberto Fujimori, who is currently fighting extradition on charges of gross corruption.

Dr Magallanes' work led to the arrest of some of the most respected figures in the Peruvian judiciary, including her own boss, the former federal public prosecutor, several Supreme Court justices, and judges and prosecutors at various levels. She has become the inspiration for a new generation of judges and prosecutors in Latin America. This book is dedicated to her and to the many other individuals in the justice sector who refuse to be cowed or compromised in their pursuit of justice. We must learn from them how the judiciary, and all those who engage with it, can contribute to a society that honours integrity and refuses to tolerate corruption in any form.

Foreword

By Dr Kamal Hossain

A major component of anti-corruption work has been to push for laws that criminalise different aspects of corruption. A decade or so ago international corporate bribery enjoyed tax benefits and corrupt politicians could rest easy in the knowledge that their loot would remain safe in unnamed accounts in the world's banking centres. Careful law-making at the national and international level since then has better defined and proscribed corrupt behaviour in many countries.

Nevertheless, an enormous challenge for the anti-corruption movement is to ensure that anti-corruption laws are enforced and that legal redress for injustice can be secured through a functioning judicial system. The failure of judges and the broader judiciary to meet these legitimate expectations provides a fertile breeding ground for corruption. In such environments even the best anti-corruption laws become meaningless.

The decision to focus the *Global Corruption Report 2007 (GCR 2007)* on the judiciary comes from its centrality to anti-corruption work. It was also informed by the work of many of the 100 national chapters that make up the Transparency International global movement. National chapter work on judicial issues takes many forms: some are working to tackle judicial corruption by monitoring judges' court attendances and the quality of their judgements; others are offering free legal advice to people embroiled in Kafkaesque processes in which bribes are demanded at every turn; and still more are commenting publicly on the calibre of candidates nominated for judgeships. In previous editions of the *GCR*, many of our national chapters have written about judicial corruption as a core problem in their country, arguing that pliant judges and judiciaries undermine the very anti-corruption efforts they are expected to enforce, and thereby erode the rule of law.

Part of this book is devoted to examining how judges and court staff become corrupted by external pressures. It scans the territory of jurists who for centuries have questioned how to separate the powers of government and resolve the tension between the accountability and independence of judges, viewing these issues through the lens of corruption. The report also revisits a number of cases analysed in *GCR 2004*, which focused on political corruption, but provides the mirror view – the corruption within a nation's legal system that allows politicians, as the perpetrators of malfeasance, to remain at large.

A second strand running through the book is the judicial corruption that ordinary people suffer around the world. This resonates particularly strongly for me, coming from Bangladesh where the executive controls the appointment, promotion, posting, transfer and discipline of all judges in the lower tiers of the judiciary. This defies both the constitution and public demands that these powers should be the sole prerogative of the Supreme Court, thereby ensuring the separation of political power from the impartial delivery of justice. Without

formal separation of the executive and judicial branches of government, systemic corruption threatens to swamp the court house. A household survey conducted by TI Bangladesh in 2005 found that two thirds of respondents who had used the lower tiers of courts in the preceding year paid average bribes of around US $108 per case. That amounts to about a quarter of the average annual income in one of the world's poorest countries. Such courts have been reduced to the status of bartering shops, with the lowest bidder risking his or her rights to property, status, or worse, liberty.

The *GCR 2007* focuses largely on the judges and court staff involved in the adjudication of the law. But the justice system is much broader than that: police, lawyers and prosecutors are all involved in cases before they reach the doors of the court house; and bailiffs or similar agencies within the court system are often responsible for enforcing judicial decisions after the case is closed. Corruption at any point along that potentially lengthy line of encounters with legal officialdom can wholly distort the course of justice. The justice system is also embedded within society: the reality is that general levels of corruption in society correlate closely with levels of judicial corruption. This appears to support the contention that a clean judiciary is central to the anti-corruption fight; but might also suggest that the quality of the judiciary and the propensity of its members to use their office for private gain reflect attitudes to corruption in society more broadly.

Hence the *GCR 2007* is structured as a series of concentric circles, beginning with the judiciary, and the causes and remedies of judicial corruption; then extending to the broader justice system; and finally to wider society in which the justice system is situated.

The scope of this book, which encompasses scholarly articles, reviews by TI national chapters of judicial corruption in 32 countries and empirical research on this and related topics, allows us to set up a few objectives for it. We expect that law students, trainee judges and judiciary professionals will take note of how costly judicial corruption is for its victims, but also take comfort from the fact that international standards exist to help them navigate through this sometimes difficult terrain: it is no longer the case, for example, that a conflict of interest is difficult to determine. For those activists and professionals working more broadly to stop corruption, the book can be read as a guide for analysing judicial corruption at national level and as a source of inspiration for specific in-country reforms.

We also hope this book will find its way into the hands of many people who might never visit a law library: the journalists, human rights activists and development NGOs, whose concerns overlap with ours; and the long-suffering court users, whose demands for clean judicial systems resound throughout this volume.

Dr Kamal Hossain, former Minister of Law and Minister of Foreign Affairs in governments in Bangladesh, is an international jurist, co-founder and former Vice Chairman of Transparency International.

Executive summary: key judicial corruption problems

Transparency International

Corruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial. This is the critical conclusion of TI's *Global Corruption Report 2007*.

It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities. When the latter occurs, corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.

Defining judicial corruption

TI defines corruption as 'the abuse of entrusted power for private gain'. This means both financial or material gain and non-material gain, such as the furtherance of political or professional ambitions. Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party or another. In countries where there are no verbatim transcripts, judges may inaccurately summarise court proceedings or distort witness testimony before delivering a verdict that has been purchased by one of the parties in the case. Junior court personnel may 'lose' a file – for a price.

Other parts of the justice system may influence judicial corruption. Criminal cases can be corrupted before they reach the courts if police tamper with evidence that supports a criminal indictment, or prosecutors fail to apply uniform criteria to evidence generated by the police. In countries where the prosecution has a monopoly on bringing prosecutions before the courts, a corrupt prosecutor can effectively block off any avenue for legal redress.

Judicial corruption includes the misuse of the scarce public funds that most governments are willing to allocate to justice, which is rarely a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption extends from pre-trial activities through the trial proceedings and settlement to the ultimate enforcement of decisions by court bailiffs.

The appeals process, ostensibly an important avenue for redress in cases of faulty verdicts, presents further opportunities for judicial corruption. When dominant political forces control the appointment of senior judges, the concept of appealing to a less partial authority may be no more than a mirage. Even when appointments are appropriate, the effectiveness of the appeals process is dented if the screening of requests for hearings is not transparent, or when the backlog of cases means years spent waiting to be heard. Appeals tend to favour the party with the deepest pockets, meaning that a party with limited resources, but a legitimate complaint, may not be able to pursue their case beyond the first instance.

The scope of judicial corruption

An important distinction exists between judicial systems that are relatively free of corruption and those that suffer from systemic manipulation. Indicators of judicial corruption map neatly onto broader measures of corruption: judiciaries that suffer from systemic corruption are generally found in societies where corruption is rampant across the public sector. There is also a correlation between levels of judicial corruption and levels of economic growth since the expectation that contracts will be honoured and disputes resolved fairly is vital to investors, and underpins sound business development and growth. An independent and impartial judiciary has important consequences for trade, investment and financial markets, as countries as diverse as China and Nigeria have learned.

The goals of corrupt behaviour in the judicial sector vary. Some corruption distorts the judicial process to produce an unjust outcome. But there are many more people who bribe to navigate or hasten the judicial process towards what may well be a just outcome. Ultimately neither is acceptable since the victim in each case is the court user. In the worst judicial environments, however, both are tolerated activities, and are even encouraged by those who work around the courthouse. TI's *Global Corruption Barometer 2006* polled 59,661 people in 62 countries[1] and found that in one third of these countries more than 10 per cent of respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a 'fair' outcome in a judicial case.

Types of judicial corruption

There are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery.

A. Political interference in judicial processes

A dispiriting finding of this volume is that despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around

1 For more on this survey, including a list of countries included in it, please see the research article on page 11.

the world continue to face pressure to rule in favour of powerful political or economic entities, rather than according to the law. Backsliding on international standards is evident in some countries. Political powers have increased their influence over the judiciary, for instance, in Russia and Argentina.

A pliable judiciary provides 'legal' protection to those in power for dubious or illegal strategies such as embezzlement, nepotism, crony privatisations or political decisions that might otherwise encounter resistance in the legislature or from the media. In November 2006, for example, an Argentine judge appointed by former president Carlos Menem ruled that excess campaign expenditures by the ruling party had not violated the 2002 campaign financing law because parties were not responsible for financing of which 'they were unaware'.

Political interference comes about by threat, intimidation and simple bribery of judges, but also by the manipulation of judicial appointments, salaries and conditions of service. In Algeria judges who are thought 'too' independent are penalised and transferred to distant locations. In Kenya judges were pressured to step down without being informed of the allegations against them in an anti-corruption campaign that was widely seen as politically expedient. Judges perceived as problematic by the powerful can be reassigned from sensitive positions or have control of sensitive cases transferred to more pliable judges. This was a tactic used in Peru by former president Alberto Fujimori and which also occurs in Sri Lanka.

The key to preventing this type of corruption is constitutional and legal mechanisms that shield judges from sudden dismissal or transfer without the benefit of an impartial inquiry. This protection goes much of the way toward ensuring that courts, judges and their judgements are independent of outside influences.

But it can be equally problematic if judges are permitted to shelter behind outdated immunity provisions, draconian contempt laws or notions of collegiality, as in Turkey, Pakistan and Nepal respectively. What is required is a careful balance of independence and accountability, and much more transparency than most governments or judiciaries have been willing to introduce.

Judicial independence is founded on public confidence. The perceived integrity of the institution is of particular importance, since it underpins trust in the institution. Until recently, the head of the British judiciary was simultaneously speaker of the UK upper house of parliament and a member of the executive, which presented problems of conflict of interest. In the United States, judicial elections are marred by concerns that donations to judges' election campaigns will inevitably influence judicial decision making.

Judicial and political corruption are mutually reinforcing. Where the justice system is corrupt, sanctions on people who use bribes and threats to suborn politicians are unlikely to be enforced. The ramifications of this dynamic are deep as they deter more honest and unfettered candidates from entering or succeeding in politics or public service.

B. Bribery

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional 'fees' to expedite or delay

cases, or to direct clients to judges known to take bribes for favourable decisions. For their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply decide a case in a certain way. Studies in this volume from India and Bangladesh detail how lengthy adjournments force people to pay bribes to speed up their cases.

When defendants or litigants already have a low opinion of the honesty of judges and the judicial process, they are far more likely to resort to bribing court officials, lawyers and judges to achieve their ends.

It is important to remember that formal judiciaries handle only a fraction of disputes in the developing world; traditional legal systems or state-run administrative justice processes account for an estimated 90 per cent of non-legal cases in many parts of the globe. Most research on customary systems has emphasised their importance as the only alternative to the sluggish, costly and graft-ridden government processes, but they also contain elements of corruption and other forms of bias.[2] For instance in Bangladesh fees are extorted from complainants by 'touts' who claim to be able to sway the decisions of a *shalish* panel of local figures called to resolve community disputes and impose sanctions on them. Furthermore, women are unlikely to have equal access to justice in a customary context that downplays their human and economic rights.

Tackling judicial corruption

Our review of 32 countries illustrates that judicial corruption takes many forms and is influenced by many factors, whether legal, social, cultural, economic or political. Beneath these apparent complexities lie commonalities that point the way forward to reform. The problems most commonly identified in the country studies are:

1. **Judicial appointments** Failure to appoint judges on merit can lead to the selection of pliant, corruptible judges
2. **Terms and conditions** Poor salaries and insecure working conditions, including unfair processes for promotion and transfer, as well as a lack of continuous training for judges, lead to judges and other court personnel being vulnerable to bribery
3. **Accountability and discipline** Unfair or ineffective processes for the discipline and removal of corrupt judges can often lead to the removal of independent judges for reasons of political expediency
4. **Transparency** Opaque court processes that prevent the media and civil society from monitoring court activity and exposing judicial corruption.

These points have been conspicuously absent from many judicial reform programmes over the past two decades, which have tended to focus on court administration and capacity building, ignoring problems related to judicial independence and accountability. Much money has

2 OECD/DAC Network on Conflict, Peace and Development Co-operation, *Enhancing the Delivery of Justice and Security in Fragile States*, August 2006, 4.

been spent training judges without addressing expectations and incentives for judges to act with integrity. Money has also been spent automating the courts or otherwise trying to reduce court workloads and streamline case management, which, if unaccompanied by increased accountability, risks making corrupt courts more efficiently corrupt. In Central and Eastern Europe, failure to take full account of the societal context, particularly in countries where informal networks allow people to circumvent formal judicial processes, has rendered virtually meaningless some very sophisticated changes to formal institutions.

Recommendations

The following recommendations reflect best practice in preventing corruption in judicial systems and encapsulate the conclusions drawn from the analysis made throughout this volume. They address the four key problem areas identified above: judicial appointments, terms and conditions, accountability and discipline, and transparency.[3]

Judicial appointments

1. **Independent judicial appointments body** An objective and transparent process for the appointment of judges ensures that only the highest quality candidates are selected, and that they do not feel indebted to the particular politician or senior judge who appointed them. At the heart of the process is an appointments body acting independently of the executive and the legislature, whose members have been appointed in an objective and transparent process. Representatives from the executive and legislative branches should not form a majority on the appointments body.
2. **Merit-based judicial appointments** Election criteria should be clear and well publicised, allowing candidates, selectors and others to have a clear understanding of where the bar for selection lies; candidates should be required to demonstrate a record of competence and integrity.
3. **Civil society participation** Civil society groups, including professional associations linked to judicial activities, should be consulted on the merits of candidates.

Terms and conditions

4. **Judicial salaries** Salaries must be commensurate with judges' position, experience, performance and professional development for the entirety of their tenure; fair pensions should be provided on retirement.
5. **Judicial protections** Laws should safeguard judicial salaries and working conditions so that they cannot be manipulated by the executive or by the legislature punishing independent judges and/or rewarding those who rule in favour of government.

3 These recommendations draw on a more extensive list, the 'TI Checklist for Maintaining Integrity and Preventing Corruption in Judicial Systems', which was drafted by Kyela Leakey with input from a number of senior judges and other experts from around the world. These are available from TI.

6. **Judicial transfers** Objective criteria that determine the assignment of judges to particular court locations ensure that independent or non-corrupted judges are not punished by being dispatched to remote jurisdictions. Judges should not be assigned to a court in an area where they have close ties or loyalties with local politicians.
7. **Case assignment and judicial management** Case assignment that is based on clear and objective criteria, administered by judges and regularly assessed protects against the allocation of cases to pro-government or pro-business judges.
8. **Access to information and training** Judges must have easy access to legislation, cases and court procedures, and receive initial training prior to or upon appointment, as well as continuing training throughout their careers. This includes training in legal analysis, the explanation of decisions, judgement writing and case management; as well as ethical and anti-corruption training.
9. **Security of tenure** Security of tenure for judges should be guaranteed for about 10 years, not subject to renewal, since judges tend to tailor their judgements and conduct towards the end of the term in anticipation of renewal.

Accountability and discipline

10. **Immunity** Limited immunity for actions relating to judicial duties allows judges to make decisions free from fear of civil suit; immunity does not apply in corruption or other criminal cases.
11. **Disciplinary procedures** Disciplinary rules ensure that the judiciary carries out initial rigorous investigation of all allegations. An independent body must investigate complaints against judges and give reasons for its decisions.
12. **Transparent and fair removal process** Strict and exacting standards apply to the removal of a judge. Removal mechanisms for judges must be clear, transparent and fair, and reasons need to be given for decisions. If there is a finding of corruption, a judge is liable to prosecution.
13. **Due process and appellate reviews** A judge has the right to a fair hearing, legal representation and an appeal in any disciplinary matter.
14. **Code of conduct** A code of judicial conduct provides a guide and measure of judicial conduct, and should be developed and implemented by the judiciary. Breaches must be investigated and sanctioned by a judicial body.
15. **Whistleblower policy** A confidential and rigorous formal complaints procedures is vital so that lawyers, court users, prosecutors, police, media and civil society can report suspected or actual breaches of the code of conduct, or corruption by judges, court administrators or lawyers.
16. **Strong and independent judges' association** An independent judges' association should represent its members in all interactions with the state and its offices. It should be an elected body; accessible to all judges; support individual judges on ethical matters; and provide a safe point of reference for judges who fear they may have been compromised.

Transparency

17. **Transparent organisation** The judiciary must publish annual reports of its activities and spending, and provide the public with reliable information about its governance and organisation.
18. **Transparent work** The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgements, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.
19. **Transparent prosecution service** The prosecution must conduct judicial proceedings in public (with limited exceptions, for example concerning children); publish reasons for decisions; and produce publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions.
20. **Judicial asset disclosure** Judges should make periodic asset disclosures, especially where other public officials are required to do so.
21. **Judicial conflicts of interest disclosure** Judges must declare conflicts of interest as soon as they become apparent and disqualify themselves when they are (or might appear to be) biased or prejudiced towards a party to a case; when they have previously served as lawyers or material witnesses in the case; or if they have an economic interest in the outcome.
22. **Widely publicised due process rights** Formal judicial institutional mechanisms ensure that parties using the courts are legally advised on the nature, scale and scope of their rights and procedures before, during and after court proceedings.
23. **Freedom of expression** Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed.
24. **Quality of commentary** Journalists and editors should be better trained in reporting what happens in courts and in presenting legal issues to the general public in an understandable form. Academics should be encouraged to comment on court judgements in legal journals, if not in the media.
25. **Civil society engagement, research, monitoring and reporting** Civil society organisations can contribute to understanding the issues related to judicial corruption by monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.
26. **Donor integrity and transparency** Judicial reform programmes should address the problem of judicial corruption. Donors should share knowledge of diagnostics, evaluation of court processes and efficiency; and engage openly with partner countries.

These recommendations complement a number of international standards on judicial integrity and independence, as well as various monitoring and reporting models that have been developed by NGOs and governmental entities. They highlight a gap in the international legal framework on judicial accountability mechanisms. TI draws particular attention to the Bangalore

Principles of Judicial Conduct, a code for judges that has been adopted by a number of national judiciaries and was endorsed by the UN Economic and Social Council in 2006. The Bangalore Principles go some way towards filling this gap, though they remain voluntary. In addition, the UN Basic Principles on the Independence of the Judiciary should be reviewed in the light of widespread concern that has emerged in the last decade over the need for greater judicial accountability.

There is no magic set of structures and practices that will reduce corruption in all situations. The country reports in part two of this volume highlight the wide variety of recommendations for judicial reform that are context-specific and therefore not applicable in a general way. Differing situations may require measures that would not be helpful elsewhere. Nevertheless, the recommendations serve as a guide for reform efforts to promote judicial independence and accountability, and encourage more effective, efficient and fair enforcement. As this volume demonstrates, multi-faceted, holistic reform of the judiciary is a crucial step toward enhancing justice and curbing the corruption that degrades legal systems and ruins lives the world over.

Transparency International's *Global Corruption Report 2007* brings together scholars, legal professionals and civil society activists from around the world to examine how, why and where corruption mars judicial processes, and to reflect on remedies for corruption-tainted systems. It focuses on judges and courts, situating them within the broader justice system and exploring the impact of judicial corruption on human rights, economic development and governance.

Two problems are analysed: political interference to pressure judges for rulings in favour of political or economic interests, including in corruption cases; and petty bribery involving court personnel. The result is a thorough analysis of how judicial independence and judicial accountability, two concepts key to the promotion of judicial integrity, can be bolstered to tackle corruption in judicial systems.

Included are thirty-seven country case studies; recommendations for judges, political powers, prosecutors, lawyers and civil society; and sixteen empirical studies of corruption in various sectors, including the judiciary.

Transparency International (TI) is the civil society organisation leading the global fight against corruption. Through more than ninety chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption, and works with partners in government, business and civil society to develop and implement effective measures to tackle it. For more information go to: www.transparency.org

Part one

Comparative analysis of judicial corruption

1 Introducing the problem

Corruption within the judiciary: causes and remedies

Mary Noel Pepys[1]

Corruption in a justice system distorts the proper role of the judge, which is to protect the civil liberties and rights of the citizen, and to ensure a fair trial by a competent and impartial court. It enables public officials and special interest groups engaged in corrupt practice to function with the confidence that their illicit acts will go unpunished, if exposed. In broad terms, corruption is the misuse of entrusted power for private gain. In the context of judicial corruption, it relates to acts or omissions that constitute the use of public authority for the private benefit of court personnel, and results in the improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain.

In corrupt judiciaries, citizens are not afforded their democratic right of equal access to the courts, nor are they treated equally by the courts. The merits of the case and applicable law are not paramount in corrupt judiciaries, but rather the status of the parties and the benefit judges and court personnel derive from their decisions. A citizen's economic level, political status and social background play a decisive role in the judicial decision-making process. In corrupt judiciaries, rich and well-connected citizens triumph over ordinary citizens, and governmental entities and business enterprises prevail over citizens.

While it would be foolhardy to assert that corruption is non-existent in certain judicial systems, it is fair to say that in some countries corruption is minimal, sporadic and the result of individual, unethical behaviour. In such countries, the system in place supports the professionalism of the judiciary and protects the judge from untoward influence. Procedures make the justice system transparent and hold police, prosecutors and judges accountable.

In many other countries, judicial corruption is a systemic problem and addressing ethics alone is not sufficient to tackle the problem. The judicial system may be structured to foster corruption. The external pressures on a judge to act unethically are greater, and the risks of being caught and punished are lower.

1 Mary Noel Pepys is a US-based senior attorney, with a specialisation in the rule of law, specifically international legal and judicial reform.

The different causes of corruption must be carefully diagnosed and identified, otherwise the remedies employed to eliminate corruption will be misdirected and will fail. What follows are seven factors that contribute to judicial corruption and that can be remedied regardless of the type of legal system that exists.

Undue influence by the executive and legislative branches

Despite constitutional guarantees of equality between the three government branches (the legislature, which makes the laws; the executive agencies, which administer the laws and manage the business of government; and the judiciary, which resolves disputes and applies the law), the executive and legislature have significant control over the judiciary in many countries. Where the rule of law has been historically weak, the judiciary is frequently viewed as an acquiescent branch of government. Judges in weak judiciaries are deferential to politically connected individuals in the executive and legislative branches.

Often the president of the country or a politically motivated body (such as the Ministry of Justice or Parliament) has the power to appoint and promote judges without the restraints of transparent and objective selection procedures, or eligibility requirements may be vague, allowing for arbitrary compliance. Unless compelled by law, officials in the executive and legislative branches are averse to relinquishing their influence over the judiciary. This was true in Thailand where the judiciary was a part of the Ministry of Justice until 1997 when the courts became independent and subject to the control of the Supreme Court (see also 'Judicial independence and corruption', page 15).

Once appointed, judges may feel compelled to respond positively to the demands of the powerful in order to maintain their own status. Rather than act as a check on government in protecting civil liberties and human rights, judges in corrupt judiciaries often promote state interests over the rights of the individual. In many countries, the president has the power to reward judges who abide by his wishes with modern office equipment, higher quality housing and newer cars.

Social tolerance of corruption

In many countries social interactions are governed less by law than customary or familial codes of conduct. To regard as corrupt judges who support the interests of their relatives overlooks the notion that it may be more dishonourable for a judge to ignore the wishes of a family member than to abide strictly by the law. Nor is the rule of law as important in such countries as individual relationships. Government decisions may be based more on personal influence than merit. The strength of personal relationships is so great in some countries that all judicial decisions are suspected of being a product of influence.

In some countries, paying a bribe is considered an essential prerequisite for judicial services and, indeed, the only avenue for accomplishing results. In Kenya, the saying 'Why hire a lawyer, if you can buy a judge?' is common. In countries where court processes are laborious, court users prefer to pay bribes as a cheaper means of receiving quicker service. Court staff also demand bribes for services to which citizens are legally entitled. In some countries, the payment of fees for judicial services is so engrained that complaints arise not if a bribe is sought, but if

the requested bribe is greater than usual (see 'Judicial corruption in the context of legal culture', page 99, and 'Informality, legal institutions and social norms', page 306).

Fear of retribution

One influence that can lead judges to make decisions based on factors other than the facts and applicable law is fear of retribution by political leaders, appellate judges, powerful individuals, the public and the media.

Rather than risk disciplinary action, demotion or transfer, judges will apply a politically acceptable decision. It is interesting to note that recently in Egypt two senior judges, under the threat of disciplinary action, publicly determined that the 2005 multi-party election results were manipulated (see 'Egypt's judiciary flexes its muscles', page 201).

Death threats and other threats of harm against judges are powerful incentives to sidestepping the law in deciding the outcome of a case. Fear for one's safety, as with Kosovar judges immediately after the Kosovo war, caused many to rule in favour of Kosovar defendants even though the law supported the Serb plaintiffs. While international judges in Kosovo worked under UN protection, Kosovar judges had no such insurance.

In some countries, including Bulgaria, judges who correctly apply the law in controversial criminal cases can be vilified by the press even though the evidence failed to justify a conviction. Fearful of applying the correct, but unpopular, decision, inexperienced or insecure judges will modify their judgement in order to avoid public scorn. A member of a special court appointed to investigate Italian football managers and referees involved in rigging top league matches openly told a newspaper that its decision had taken into account Italy's victory in the 2006 World Cup, a spate of popular demonstrations and the support of some mayors of the cities whose teams were most implicated (see 'Culture and impunity in Italy', page 107).

Low judicial and court staff salaries

Judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable judges and court staff to support their families in a secure environment, prompt judges and court staff to supplement their incomes with bribes. (See 'When are judges likely to be corrupt?' page 296 for an empirical analysis of possible determinants of judicial corruption, including salary levels.)

Although judges' salaries are not as attractive as those of legal professionals in the private sector, the security of the judicial position and the respect afforded to the profession should compensate for loss of earnings. In relation to other government employees judges should receive among the highest salaries. While the salary of a federal judge of a district court in the United States is not commensurate with what a judge might have earned in private practice, it is higher than most government employees and the prestige of the post makes it a sought-after position. The salary differential between different branches of government can be galling in some countries. Not so long ago, police in Uzbekistan received higher salaries than judges.

In addition to low salaries, judges often assume their positions with a significant financial burden. Judgeships in some countries are for sale and the cost can be many times the official

annual salary of a judge.[2] Judges who purchased their position have to recoup their investment by seeking bribes. Some Azerbaijani judges reportedly tolerate their court staff demanding bribes as they recognise that illicit payments are the only way they can achieve a moderate standard of living.

Countries such as Ecuador, Georgia, Nigeria and Peru have significantly raised judicial salaries in recent years in a bid to reduce the incentives for corruption. It is difficult to prove that an increase in salary is a causal factor in reducing corruption. Even where incidents of illicit payments to judges have clearly been reduced, the public continues to believe that corruption persists at the same level. In Georgia, judges' salaries have increased by as much as 400 per cent in the past two years, but perceptions of judicial corruption remain high and the prevailing view is that the nature of corruption has simply changed. Instead of selling decisions for bribes, judges are now perceived as succumbing to executive pressure. At the least, a respectable salary for judges and court staff enhances the public perception of the judiciary as an equal branch of government.

Poor training and lack of rewards for ethical behaviour

In some countries, judges who make decisions based solely on the facts and applicable law have no assurance they will receive a positive evaluation. Ethical behaviour is punished, rather than rewarded. In corrupt judiciaries, judges who make correct decisions can see their judgements routinely overturned by corrupt appellate judges, thereby giving the impression that the lower court judge is incompetent.

Court presidents, who have the power to assign cases, can punish an ethical judge by assigning a disproportionately heavy caseload, causing a major case delay that can be grounds for reprimand. In Sri Lanka, judges who have the courage to rule against the government's interests are allegedly ignored by the Chief Justice who has broad discretion concerning the composition of Supreme Court panels. Those judges who are resolute in their independence can be the subject of bogus charges or can face early retirement.

Collusion among judges

In countries where judicial corruption is rife, judges conspire to support judicial decisions from which they will personally benefit. In Zimbabwe the government allocated farms expropriated under the fast-track land reform programme to judges at all levels, from lower court magistrates to the Chief Justice, to ensure that court decisions favour political interests. In a criminal case where the stakes are high, judges from the first instance court to the highest appellate court will collude to exonerate the guilty or reduce the defendant's sentence in return for a payoff.

Inadequately monitored administrative court procedures

Where procedural codes are ambiguous, perplexing or frequently amended, as in transitional countries, judges and court staff can exploit the confusion. Without modern office systems and

2 Author interviews with justice sector professionals in Azerbaijan.

computerised case processing, detection of the inappropriate use of case documents and files is difficult. Poorly trained and low paid court staff are enticed to use their discretionary powers to engage in administrative corruption since there is little accountability for their decisions. In Guatemala, for example, the disappearance of case files is a common source of extortion.

Remedies to corruption in the judiciary

It is possible to mitigate the factors that contribute to judicial corruption, but solutions must be tailored to national, or even sub-national, realities, and are successful when part of an integrated reform plan. Increasing judicial salaries will not, in isolation, stop judges and court staff from taking bribes, though coupled with additional accountability mechanisms it may lead to improvements. Also important to note is that while judges have an important role as the decision maker in a judicial process, they are but one part of a long chain of people with influence over a law suit; anti-corruption efforts need to encompass lawyers, police, prosecutors and the agencies responsible for enforcing judicial decisions.

Enhancing the independence of the judiciary

One of the major remedies to corruption is to improve the governance structure of the judiciary so that it has significant authority, if not control, over the administration and budget of the courts, and over the appointment and promotion process of judges. In corrupt countries, judges are often beholden to the president, Ministry of Justice and other governmental officials whose undue influence can detrimentally affect the quality of services.

Judicial councils can advance the independence of the judiciary by assuming responsibility for *selecting and promoting judges*. If composed of a majority of judges elected by their peers, rather than by individuals within the other branches of government, and if the appointment procedures are transparent and based on criteria that are not compromised by political considerations, judicial councils can enhance the integrity of the judicial appointment process (see 'Corruption, accountability and the discipline of judges in Latin America', page 44).

Assuming *control over the budgetary process* of the courts insulates judges from the deleterious influence that other branches of government have on the operations of the courts. According to international standards on judicial independence, a judiciary should be able to influence the amount of money the government allocates it and control its own budget and expenditures.

A related remedy is to ensure that *disciplinary procedures* for judges are rigorous, but fair and transparent. Judges cannot be removed from office for anything other than misconduct or incapacity to carry out their functions, including removal and prosecution for corrupt acts. Because security of tenure is so important the process for removing judges must carry exacting standards, and a decision to remove a judge must be based on a rigorous and fair investigation. Kenya, where the names of judges identified in an anti-corruption drive by the executive were published in the national media before they were even informed of the allegations against

them, provides a recent example of the risk of overzealous anti-corruption purges (see '"Radical surgery" in Kenya's judiciary').

Another important set of remedies that increase the independence of judges and court staff, making it easier for them to resist external pressures, aims to *professionalise the judicial career*. A key step is to extend the term of a judgeship since judges who are appointed for a term of limited duration and who are not eligible for tenure have little defence against political pressure or societal expectations. Although life appointments are not essential, judges' terms should be sufficiently long to reassure them that ignoring external influence will not impede their professional advancement. A number of experts on the independence of judges and lawyers recommend a term of 10 to 12 years, which should not be made subject to renewal, since towards the end of the term judges tend to tailor their judgements and conduct in anticipation of renewal.

In countries where judicial corruption exists, abuse of the *case-assignment system* is a major cause of improper influence. Where case assignment is not random, a court president who seeks to control the outcome of a case can readily assign a case to a compliant judge. If not randomly assigned, cases should be delegated according to criteria that take account of the subject and complexity of the case, the judge's expertise and workload.

Also important is to *increase the salary* of court staff. Salaries should be commensurate with the responsibilities of judges and court personnel and the country's cost of living. Salaries should be published to allow the public to monitor the lifestyle of judicial employees.

Finally, one of the best defences against improper influence is *full knowledge of applicable law*. Judges are often in no position to counter arguments presented by individuals seeking improperly to influence the outcome because, in many countries, they do not have ready access to current laws and their amendments. If they do, they may not fully understand them, particularly in transition countries where market-based principles are relatively recent. Systematic distribution of laws and amendments on a timely basis to all judges is essential to combating corruption. Training programmes for new judges and continuing education for sitting judges are essential to ensure that they understand their laws and applicable international treaties so that their rulings are legally unassailable.

Introducing accountability mechanisms

With independence comes responsibility, and a second set of remedies aim to increase accountability of the judiciary – the only non-elected branch of government in most democracies – to court users and the public. There are many aspects of accountability. Judges must be legally accountable by providing reasoned decisions and judgements that are open to appeal. Financial accountability ensures that the judiciary accounts for both the intended and actual use of resources allocated to it. The judiciary must also be accountable for the way it is run: structures and standards should be regularly evaluated and improved, and the judiciary should comply with codes of ethics and professional standards. Cutting across accountability mechanisms is the need for transparency: judges need to be and *appear to be* impartial, independent and beyond reproach.

Judges who live lifestyles in notable contrast to the size of their salaries generate perceptions of a corrupt judiciary. In many countries, laws require judges and other public servants to file a personal *declaration of assets* and one for their close relatives. Typically, asset declarations are filed prior to taking office, periodically throughout a judge's tenure and on retirement. Critics contend that asset declaration is a meaningless requirement since assets can be hidden under the names of distant family members or friends. An essential component of effective assets laws are procedures that allow for thorough verification, monitored on a regular basis.

Many judges believe that *a code of conduct* is unnecessary, not because they are trying to shield themselves from prosecution but because they believe judges are sufficiently well versed in ethical conduct. But codes of conduct strengthen the integrity of judges and improve public perception of the courts by clarifying the behaviour expected of judges. A code of conduct must cover not only aspects of impropriety but also its semblances, and must be vigorously enforced. Unless judges begin to prosecute their own for disregarding the laws they are expected to enforce, citizens will continue to view the courts with scepticism (see 'Judicial integrity: the accountability gap' on page 40).

An effective means in reducing corruption is the *publication of judicial decisions*. Although not a requirement in many countries where precedent does not prevail, the publication of judicial decisions can expose corrupt judges who are unable to justify their rulings by reasoned opinions, while protecting judges whose reasoning demonstrates that they have properly applied the law to the facts in a case. Published judicial opinions help the public to determine whether improper influence played a role in the decision reached. Where resources exist, verbatim transcripts of a trial assist the public and civil society to verify the accuracy of a decision.

It is not only individual judges that need to be accountable, but also the administration of the judiciary. To reduce opportunities for corruption in administrative processes, *court procedures must be simplified* and made comprehensible to the court user. They must be precise in order to minimise court staff discretion, and must clearly delineate responsibilities to enhance the accountability of each staff member. Developing a hierarchal structure, headed by a court administrator, and professionalising court staff will improve the quality of judicial service. They also reduce the administrative responsibilities of judges, allowing them to focus on their decisions. As a means of increasing the transparency of court administration, courthouses in Bulgaria were extensively reconstructed so that each staff member could be observed by other staff members and the public. This significantly reduced the ability of court staff to engage in the mishandling of case files.

A case-management system that allows for transparent tracking of case files enhances the effectiveness of court proceedings and ensures that cases are heard in a reasonably efficient manner. *Computerised case-management systems* with tamper-proof software allow attorneys and litigants to track cases, trace files and monitor the time requirements.

Finally, in many countries, the provision of an *alternative dispute-resolution* (ADR) mechanism, whereby the plaintiff and defendant attempt to reach a settlement outside the courtroom, can reduce the backlog of cases in the court. There is another compelling reason for instituting ADR mechanisms in countries with corrupt judiciaries. Citizens in such countries should have the opportunity to bypass the courts by engaging in a parallel structure for arbitration,

mediation and civil settlement, provided the process has the respect of both parties and mechanisms to ensure implementation of the resolution. ADR relies on more traditional leaders, who are often perceived as less corrupt, less expensive and more familiar than the formal justice system (see 'The "other 90 per cent": how NGOs combat corruption in non-judicial justice systems', page 129).

Enhancing competency of external controls

Many groups outside the judiciary work to curb judicial corruption by supporting the judiciary's demands for independence; by continuously monitoring judicial performance and uncovering incidents of corruption; and by providing judges with a platform to air concerns. Strengthening these groups and ensuring they have access to the information necessary to perform their monitoring role can contribute to the reduction of judicial corruption.

Judges in many countries have found a powerful voice by joining in an *association of judges* to represent the interests of all judges, particularly lower court and district judges, whose opinions are rarely heard. According to the Council of Europe's Recommendation on the Independence, Efficiency and Role of Judges,[3] it is essential for judges to have a vital and effective voluntary association that will safeguard the independence of judges and protect their interests.

Bar associations, made up of lawyers, can also be catalysts for change. One role of a national bar association is to defend the independence of judges and lobby government to provide the support necessary to ensure their effectiveness. Bar associations are also supposed to enhance the ethics of their members. They should impose sanctions on members who engage in corruption and bring the profession into disrepute.

Journalists also have a role to play. Public perception of judicial corruption is often worse than the reality (see 'How prevalent is bribery in the judicial sector?' page 11) and part of the reason for this is inaccurate reporting. Intentionally or not, press reports often distort the truth about certain cases, in particular high-profile cases involving a serious crime by a well-known defendant, which often receive sensational coverage. To assist in more accurate reporting of cases of public interest, courts should provide briefings to the media. Allowing public access to courtroom proceedings can improve journalists' often shaky grasp on the legal ramifications of a case, improving public perceptions of the judiciary. In many jurisdictions the problem is not sensationalist reporting by journalists, but rather the obstacles that make it difficult for the media to report allegations of corruption (see 'The media and judicial corruption', page 108).

Finally, for public perception of the judiciary to improve, citizens must be encouraged to develop a better understanding of their legal rights and obligations, as well as the responsibility of courts to provide fair, effective and speedy justice. *Civil society organisations* can play a role in enhancing public awareness of legal rights and court procedures by devising and distributing legal

3 Council of Europe's Recommendation No. R (94) 12.

pamphlets. With such basic information, citizens can learn how to participate more directly in the judicial process, particularly in the areas that affect them most, such as tenant/landlord and employer/employee relationships. By monitoring the judicial process, civil society organisations can expose unethical judges and create pressure on the government for judicial reform (see 'Civil society's role in combating judicial corruption in Central America', page 115).

How prevalent is bribery in the judicial sector?

Transparency International[1]

The judiciary is facing a crisis of confidence in many parts of the world, as reflected in a specially commissioned edition of TI's Global Corruption Barometer.[2] But is this level of mistrust

Table 1: Percentage of respondents who had interacted with the judiciary in the past year and had paid bribes

Region[3]	Percentage of people who have had contact with the judiciary in past year	Percentage of those having contact who paid a bribe
Africa	20%	21%
Latin America	20%	18%
Newly Independent States	8%	15%
South East Europe	9%	9%
Asia–Pacific	5%	15%
EU / other Western European countries	19%	1%
North America	23%	2%

1 Kathie Barrett of Georgia State University, United States, helped with the analysis of the Global Corruption Barometer data.

2 TI's Global Corruption Barometer, conducted annually since 2003, is part of Gallup's Voice of the People Survey. A summary of the 2006 Global Corruption Barometer is reproduced in chapter 13, page 314.

3 The regional groupings used here are: Africa: Cameroon, Congo (DRC), Gabon, Kenya, Morocco, Nigeria, Senegal and South Africa; Latin America: Argentina, Bolivia, Chile, Colombia, Dominican Republic, Mexico, Panama, Paraguay, Peru and Venezuela; Asia–Pacific: Fiji, Hong Kong, India, Indonesia, Japan, Korea (South), Malaysia, Pakistan, the Philippines, Singapore, Taiwan and Thailand; North America: Canada and the United States; EU and other Western European Countries: Austria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and United Kingdom; South East Europe: Albania, Bulgaria, Croatia, Kosovo, Macedonia, Romania, Serbia and Turkey; Newly Independent States (NIS): Moldova, Russia and Ukraine.

warranted? Is it based on experience of petty bribery in run-of-the-mill legal cases, or on tales of grand corruption in the media? Between June and September 2006, 59,661 people in 62 countries were asked what they thought of the judicial system in their country, whether they or another member of their household had interacted with it in the past year and, if so, had they paid a bribe.

Of the 8,263 people who had been in contact with the judicial system recently, 991, more than one in 10, had paid a bribe. In Africa and Latin America, about one in five of people who had interacted with the judicial system had paid a bribe. In Bolivia, Cameroon, Gabon, India, Mexico, Morocco, Pakistan and Paraguay the figure was more than one in three court users.

How does this compare with perceptions?

In 55 out of the 62 countries polled, a higher percentage of people perceived extreme judicial corruption than had paid a bribe. In 33 of the 62 countries polled, a majority of respondents described the judiciary/ legal system of their country as corrupt.

There are major differences in popular perceptions of judicial corruption among regions of the world, as table 2 shows. Africa and Latin America are the regions with the bleakest perceptions of judicial corruption. A majority of people in all but one African country polled (South Africa) and one Latin American country (Colombia) perceive the legal system/judiciary to be corrupt. Trailing the table are Bolivia, Cameroon, Mexico, Paraguay and Peru, where 80 per cent or more of respondents described the judicial system as corrupt. The United States falls halfway down the table, with a majority of respondents describing the justice system as corrupt. In Canada one in three described the justice system as corrupt.

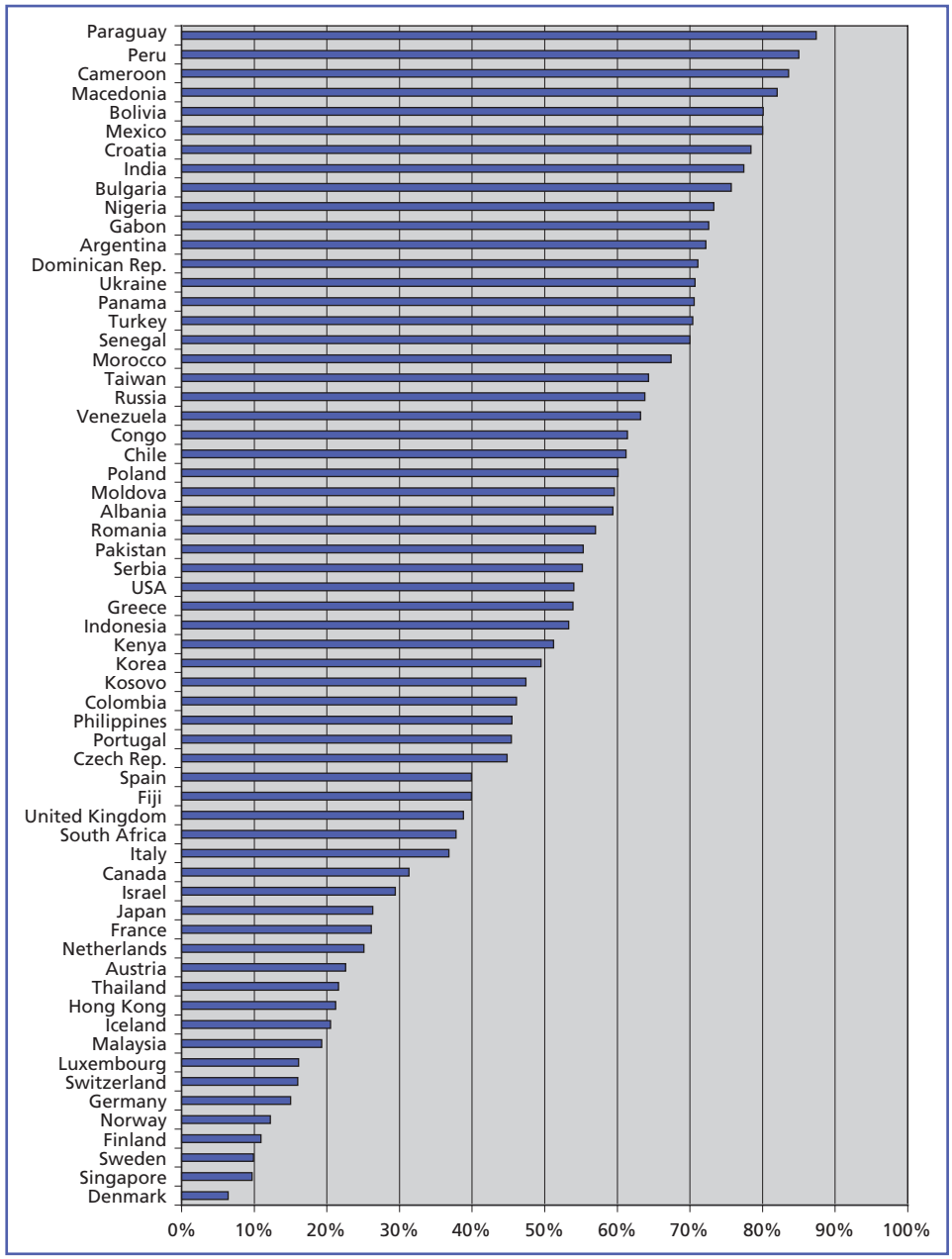
Within the Asia-Pacific region Singapore, Malaysia, Hong Kong and Thailand have relatively low levels of perceived judicial corruption. The judiciaries of India and Pakistan fare badly, with 77 per cent and 55 per cent of respondents in the two countries, respectively, describing the judicial system as corrupt.

There is a high degree of divergence among the 29 European countries polled. Eight of the 10 countries with the lowest levels of judicial corruption are European, led by Denmark, where 81 per cent of respondents perceive little or no corruption in the legal system/judiciary. In all former communist countries, 45 per cent or more of the people polled described the legal-judicial system as corrupt.

Are people talking about judges, the police or court staff?

Can judges and court staff take comfort from the hypothesis that respondents often think of lawyers and police when asked about judicial corruption, and not the actual arbiters of justice? According to this special edition of the Global Corruption Barometer, the answer is ‘no’. In 35 countries, respondents singled out judges (from a list that also included: judge, police, prosecutor, lawyer, court staff, witness/jury and ‘other’) as the actors they most needed to bribe to obtain a ‘fair’ judgement. Judges were followed by lawyers (top of the list in 10 countries), police, and prosecutors.

Table 2: Percentage of respondents who described their judiciary/legal system as corrupt (i.e. gave it a score of 4 or 5 out of 5, when 1 = not at all corrupt and 5 = extremely corrupt).



The main variance by region arises in the group second most likely to be bribed. Overall, lawyers (42 per cent) were more likely to be bribed, but in Latin America and Africa police were most frequently identified as the second most likely to be bribed. In the Balkans, respondents said prosecutors were the second most likely to be bribed.

Conclusion

Levels of bribe paying are high in some countries that suffer systemic judicial corruption. But the public often views its judiciary as more corrupt than it actually is: more people around the world described their judiciary as 'extremely corrupt' than have personally been part of judicial corruption. The perception of corruption in the judiciary can be as insidious as actual corruption since both have the same effect of undermining public trust in the justice system. Judiciaries have much to gain by increasing transparency of their operations.

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Editor, Global Corruption Report

Preface

Huguette Labelle, Chair of Transparency International

Transparency International's *Global Corruption Report* focuses on the judicial system this year for one simple reason: the fight against corruption depends upon it. The expanding arsenal of anti-corruption weapons includes new national and international laws against corruption that rely on fair and impartial judicial systems for enforcement. Where judicial corruption occurs, the damage can be pervasive and extremely difficult to reverse. Judicial corruption undermines citizens' morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance. A government that functions on behalf of all its citizens requires not only the rule of law, but an independent and effective judiciary to enforce it to the satisfaction of all parties.

The professionals that make up the judicial system can use their skills, knowledge and influence to privilege truth and benefit the general public, and the vast majority do. But they can also abuse these qualities, using them to enrich themselves or to improve their careers and influence. For whatever reason and whether petty or gross, corruption in the judiciary ensures that corruption remains beyond the law in every other field of government and economic activity in which it may have taken root. Indeed, without an independent judiciary, graft effectively becomes the new 'rule of law'.

Transparency International has been tackling judicial corruption in many countries and on a number of levels for several years now. Its work has included analysing the phenomenon through research and surveys; scrutinising the judicial appointments processes in courts; promoting standards of ethical conduct in the justice sector; and lobbying through national chapters and civil society organisations for laws to block the most blatant avenues for manipulating the judiciary.

Transparency International would have achieved nothing in this field on its own. This volume brings together the testimony of dozens of the organisations and individuals who have dedicated their skills and efforts to ridding the justice institutions of corruption's scourge. Many authors are from the human rights field. This is only fitting since the fight against corruption and the fight for human rights can only be mutually reinforcing.

As this volume attests, many factors mitigate corruption and many steps can be taken to ensure that judicial professionals avoid engaging in it. These include accountability mechanisms that increase the chances that judicial corruption will be detected and penalised; safeguards against interference from the spheres of politics, business and organised crime; processes of transparency that allow the media, civil society and the public to scrutinise their own judicial systems; and decent conditions of employment that convince judicial staff to remain on the straight and narrow. A judge working in a jurisdiction where the profession is

respected and well compensated is less likely to exact a bribe from a litigant in a land or family dispute than one working in less favourable conditions.

Many inspiring individuals buck the graft trend, even in jurisdictions plagued by mediocrity, petty corruption and fear of intimidation. While this book was in production, members of Transparency International's global movement gathered to pay tribute to Dr Ana Cecilia Magallanes Cortez, winner of the TI 2006 Integrity Award and the leading force in the prosecution of some 1,500 members of the criminal organisation headed by Vladimiro Montesinos, ex-head of intelligence and intimate associate of former Peruvian president Alberto Fujimori, who is currently fighting extradition on charges of gross corruption.

Dr Magallanes' work led to the arrest of some of the most respected figures in the Peruvian judiciary, including her own boss, the former federal public prosecutor, several Supreme Court justices, and judges and prosecutors at various levels. She has become the inspiration for a new generation of judges and prosecutors in Latin America. This book is dedicated to her and to the many other individuals in the justice sector who refuse to be cowed or compromised in their pursuit of justice. We must learn from them how the judiciary, and all those who engage with it, can contribute to a society that honours integrity and refuses to tolerate corruption in any form.

Foreword

By Dr Kamal Hossain

A major component of anti-corruption work has been to push for laws that criminalise different aspects of corruption. A decade or so ago international corporate bribery enjoyed tax benefits and corrupt politicians could rest easy in the knowledge that their loot would remain safe in unnamed accounts in the world's banking centres. Careful law-making at the national and international level since then has better defined and proscribed corrupt behaviour in many countries.

Nevertheless, an enormous challenge for the anti-corruption movement is to ensure that anti-corruption laws are enforced and that legal redress for injustice can be secured through a functioning judicial system. The failure of judges and the broader judiciary to meet these legitimate expectations provides a fertile breeding ground for corruption. In such environments even the best anti-corruption laws become meaningless.

The decision to focus the *Global Corruption Report 2007 (GCR 2007)* on the judiciary comes from its centrality to anti-corruption work. It was also informed by the work of many of the 100 national chapters that make up the Transparency International global movement. National chapter work on judicial issues takes many forms: some are working to tackle judicial corruption by monitoring judges' court attendances and the quality of their judgements; others are offering free legal advice to people embroiled in Kafkaesque processes in which bribes are demanded at every turn; and still more are commenting publicly on the calibre of candidates nominated for judgeships. In previous editions of the *GCR*, many of our national chapters have written about judicial corruption as a core problem in their country, arguing that pliant judges and judiciaries undermine the very anti-corruption efforts they are expected to enforce, and thereby erode the rule of law.

Part of this book is devoted to examining how judges and court staff become corrupted by external pressures. It scans the territory of jurists who for centuries have questioned how to separate the powers of government and resolve the tension between the accountability and independence of judges, viewing these issues through the lens of corruption. The report also revisits a number of cases analysed in *GCR 2004*, which focused on political corruption, but provides the mirror view – the corruption within a nation's legal system that allows politicians, as the perpetrators of malfeasance, to remain at large.

A second strand running through the book is the judicial corruption that ordinary people suffer around the world. This resonates particularly strongly for me, coming from Bangladesh where the executive controls the appointment, promotion, posting, transfer and discipline of all judges in the lower tiers of the judiciary. This defies both the constitution and public demands that these powers should be the sole prerogative of the Supreme Court, thereby ensuring the separation of political power from the impartial delivery of justice. Without

formal separation of the executive and judicial branches of government, systemic corruption threatens to swamp the court house. A household survey conducted by TI Bangladesh in 2005 found that two thirds of respondents who had used the lower tiers of courts in the preceding year paid average bribes of around US $108 per case. That amounts to about a quarter of the average annual income in one of the world's poorest countries. Such courts have been reduced to the status of bartering shops, with the lowest bidder risking his or her rights to property, status, or worse, liberty.

The *GCR 2007* focuses largely on the judges and court staff involved in the adjudication of the law. But the justice system is much broader than that: police, lawyers and prosecutors are all involved in cases before they reach the doors of the court house; and bailiffs or similar agencies within the court system are often responsible for enforcing judicial decisions after the case is closed. Corruption at any point along that potentially lengthy line of encounters with legal officialdom can wholly distort the course of justice. The justice system is also embedded within society: the reality is that general levels of corruption in society correlate closely with levels of judicial corruption. This appears to support the contention that a clean judiciary is central to the anti-corruption fight; but might also suggest that the quality of the judiciary and the propensity of its members to use their office for private gain reflect attitudes to corruption in society more broadly.

Hence the *GCR 2007* is structured as a series of concentric circles, beginning with the judiciary, and the causes and remedies of judicial corruption; then extending to the broader justice system; and finally to wider society in which the justice system is situated.

The scope of this book, which encompasses scholarly articles, reviews by TI national chapters of judicial corruption in 32 countries and empirical research on this and related topics, allows us to set up a few objectives for it. We expect that law students, trainee judges and judiciary professionals will take note of how costly judicial corruption is for its victims, but also take comfort from the fact that international standards exist to help them navigate through this sometimes difficult terrain: it is no longer the case, for example, that a conflict of interest is difficult to determine. For those activists and professionals working more broadly to stop corruption, the book can be read as a guide for analysing judicial corruption at national level and as a source of inspiration for specific in-country reforms.

We also hope this book will find its way into the hands of many people who might never visit a law library: the journalists, human rights activists and development NGOs, whose concerns overlap with ours; and the long-suffering court users, whose demands for clean judicial systems resound throughout this volume.

Dr Kamal Hossain, former Minister of Law and Minister of Foreign Affairs in governments in Bangladesh, is an international jurist, co-founder and former Vice Chairman of Transparency International.

Executive summary: key judicial corruption problems

Transparency International

Corruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial. This is the critical conclusion of TI's *Global Corruption Report 2007*.

It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities. When the latter occurs, corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.

Defining judicial corruption

TI defines corruption as 'the abuse of entrusted power for private gain'. This means both financial or material gain and non-material gain, such as the furtherance of political or professional ambitions. Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party or another. In countries where there are no verbatim transcripts, judges may inaccurately summarise court proceedings or distort witness testimony before delivering a verdict that has been purchased by one of the parties in the case. Junior court personnel may 'lose' a file – for a price.

Other parts of the justice system may influence judicial corruption. Criminal cases can be corrupted before they reach the courts if police tamper with evidence that supports a criminal indictment, or prosecutors fail to apply uniform criteria to evidence generated by the police. In countries where the prosecution has a monopoly on bringing prosecutions before the courts, a corrupt prosecutor can effectively block off any avenue for legal redress.

Judicial corruption includes the misuse of the scarce public funds that most governments are willing to allocate to justice, which is rarely a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption extends from pre-trial activities through the trial proceedings and settlement to the ultimate enforcement of decisions by court bailiffs.

The appeals process, ostensibly an important avenue for redress in cases of faulty verdicts, presents further opportunities for judicial corruption. When dominant political forces control the appointment of senior judges, the concept of appealing to a less partial authority may be no more than a mirage. Even when appointments are appropriate, the effectiveness of the appeals process is dented if the screening of requests for hearings is not transparent, or when the backlog of cases means years spent waiting to be heard. Appeals tend to favour the party with the deepest pockets, meaning that a party with limited resources, but a legitimate complaint, may not be able to pursue their case beyond the first instance.

The scope of judicial corruption

An important distinction exists between judicial systems that are relatively free of corruption and those that suffer from systemic manipulation. Indicators of judicial corruption map neatly onto broader measures of corruption: judiciaries that suffer from systemic corruption are generally found in societies where corruption is rampant across the public sector. There is also a correlation between levels of judicial corruption and levels of economic growth since the expectation that contracts will be honoured and disputes resolved fairly is vital to investors, and underpins sound business development and growth. An independent and impartial judiciary has important consequences for trade, investment and financial markets, as countries as diverse as China and Nigeria have learned.

The goals of corrupt behaviour in the judicial sector vary. Some corruption distorts the judicial process to produce an unjust outcome. But there are many more people who bribe to navigate or hasten the judicial process towards what may well be a just outcome. Ultimately neither is acceptable since the victim in each case is the court user. In the worst judicial environments, however, both are tolerated activities, and are even encouraged by those who work around the courthouse. TI's *Global Corruption Barometer 2006* polled 59,661 people in 62 countries[1] and found that in one third of these countries more than 10 per cent of respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a 'fair' outcome in a judicial case.

Types of judicial corruption

There are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery.

A. Political interference in judicial processes

A dispiriting finding of this volume is that despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around

1 For more on this survey, including a list of countries included in it, please see the research article on page 11.

the world continue to face pressure to rule in favour of powerful political or economic entities, rather than according to the law. Backsliding on international standards is evident in some countries. Political powers have increased their influence over the judiciary, for instance, in Russia and Argentina.

A pliable judiciary provides 'legal' protection to those in power for dubious or illegal strategies such as embezzlement, nepotism, crony privatisations or political decisions that might otherwise encounter resistance in the legislature or from the media. In November 2006, for example, an Argentine judge appointed by former president Carlos Menem ruled that excess campaign expenditures by the ruling party had not violated the 2002 campaign financing law because parties were not responsible for financing of which 'they were unaware'.

Political interference comes about by threat, intimidation and simple bribery of judges, but also by the manipulation of judicial appointments, salaries and conditions of service. In Algeria judges who are thought 'too' independent are penalised and transferred to distant locations. In Kenya judges were pressured to step down without being informed of the allegations against them in an anti-corruption campaign that was widely seen as politically expedient. Judges perceived as problematic by the powerful can be reassigned from sensitive positions or have control of sensitive cases transferred to more pliable judges. This was a tactic used in Peru by former president Alberto Fujimori and which also occurs in Sri Lanka.

The key to preventing this type of corruption is constitutional and legal mechanisms that shield judges from sudden dismissal or transfer without the benefit of an impartial inquiry. This protection goes much of the way toward ensuring that courts, judges and their judgements are independent of outside influences.

But it can be equally problematic if judges are permitted to shelter behind outdated immunity provisions, draconian contempt laws or notions of collegiality, as in Turkey, Pakistan and Nepal respectively. What is required is a careful balance of independence and accountability, and much more transparency than most governments or judiciaries have been willing to introduce.

Judicial independence is founded on public confidence. The perceived integrity of the institution is of particular importance, since it underpins trust in the institution. Until recently, the head of the British judiciary was simultaneously speaker of the UK upper house of parliament and a member of the executive, which presented problems of conflict of interest. In the United States, judicial elections are marred by concerns that donations to judges' election campaigns will inevitably influence judicial decision making.

Judicial and political corruption are mutually reinforcing. Where the justice system is corrupt, sanctions on people who use bribes and threats to suborn politicians are unlikely to be enforced. The ramifications of this dynamic are deep as they deter more honest and unfettered candidates from entering or succeeding in politics or public service.

B. Bribery

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional 'fees' to expedite or delay

cases, or to direct clients to judges known to take bribes for favourable decisions. For their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply decide a case in a certain way. Studies in this volume from India and Bangladesh detail how lengthy adjournments force people to pay bribes to speed up their cases.

When defendants or litigants already have a low opinion of the honesty of judges and the judicial process, they are far more likely to resort to bribing court officials, lawyers and judges to achieve their ends.

It is important to remember that formal judiciaries handle only a fraction of disputes in the developing world; traditional legal systems or state-run administrative justice processes account for an estimated 90 per cent of non-legal cases in many parts of the globe. Most research on customary systems has emphasised their importance as the only alternative to the sluggish, costly and graft-ridden government processes, but they also contain elements of corruption and other forms of bias.[2] For instance in Bangladesh fees are extorted from complainants by 'touts' who claim to be able to sway the decisions of a *shalish* panel of local figures called to resolve community disputes and impose sanctions on them. Furthermore, women are unlikely to have equal access to justice in a customary context that downplays their human and economic rights.

Tackling judicial corruption

Our review of 32 countries illustrates that judicial corruption takes many forms and is influenced by many factors, whether legal, social, cultural, economic or political. Beneath these apparent complexities lie commonalities that point the way forward to reform. The problems most commonly identified in the country studies are:

1. **Judicial appointments** Failure to appoint judges on merit can lead to the selection of pliant, corruptible judges
2. **Terms and conditions** Poor salaries and insecure working conditions, including unfair processes for promotion and transfer, as well as a lack of continuous training for judges, lead to judges and other court personnel being vulnerable to bribery
3. **Accountability and discipline** Unfair or ineffective processes for the discipline and removal of corrupt judges can often lead to the removal of independent judges for reasons of political expediency
4. **Transparency** Opaque court processes that prevent the media and civil society from monitoring court activity and exposing judicial corruption.

These points have been conspicuously absent from many judicial reform programmes over the past two decades, which have tended to focus on court administration and capacity building, ignoring problems related to judicial independence and accountability. Much money has

2 OECD/DAC Network on Conflict, Peace and Development Co-operation, *Enhancing the Delivery of Justice and Security in Fragile States*, August 2006, 4.

been spent training judges without addressing expectations and incentives for judges to act with integrity. Money has also been spent automating the courts or otherwise trying to reduce court workloads and streamline case management, which, if unaccompanied by increased accountability, risks making corrupt courts more efficiently corrupt. In Central and Eastern Europe, failure to take full account of the societal context, particularly in countries where informal networks allow people to circumvent formal judicial processes, has rendered virtually meaningless some very sophisticated changes to formal institutions.

Recommendations

The following recommendations reflect best practice in preventing corruption in judicial systems and encapsulate the conclusions drawn from the analysis made throughout this volume. They address the four key problem areas identified above: judicial appointments, terms and conditions, accountability and discipline, and transparency.[3]

Judicial appointments

1. **Independent judicial appointments body** An objective and transparent process for the appointment of judges ensures that only the highest quality candidates are selected, and that they do not feel indebted to the particular politician or senior judge who appointed them. At the heart of the process is an appointments body acting independently of the executive and the legislature, whose members have been appointed in an objective and transparent process. Representatives from the executive and legislative branches should not form a majority on the appointments body.
2. **Merit-based judicial appointments** Election criteria should be clear and well publicised, allowing candidates, selectors and others to have a clear understanding of where the bar for selection lies; candidates should be required to demonstrate a record of competence and integrity.
3. **Civil society participation** Civil society groups, including professional associations linked to judicial activities, should be consulted on the merits of candidates.

Terms and conditions

4. **Judicial salaries** Salaries must be commensurate with judges' position, experience, performance and professional development for the entirety of their tenure; fair pensions should be provided on retirement.
5. **Judicial protections** Laws should safeguard judicial salaries and working conditions so that they cannot be manipulated by the executive or by the legislature punishing independent judges and/or rewarding those who rule in favour of government.

3 These recommendations draw on a more extensive list, the 'TI Checklist for Maintaining Integrity and Preventing Corruption in Judicial Systems', which was drafted by Kyela Leakey with input from a number of senior judges and other experts from around the world. These are available from TI.

6. **Judicial transfers** Objective criteria that determine the assignment of judges to particular court locations ensure that independent or non-corrupted judges are not punished by being dispatched to remote jurisdictions. Judges should not be assigned to a court in an area where they have close ties or loyalties with local politicians.
7. **Case assignment and judicial management** Case assignment that is based on clear and objective criteria, administered by judges and regularly assessed protects against the allocation of cases to pro-government or pro-business judges.
8. **Access to information and training** Judges must have easy access to legislation, cases and court procedures, and receive initial training prior to or upon appointment, as well as continuing training throughout their careers. This includes training in legal analysis, the explanation of decisions, judgement writing and case management; as well as ethical and anti-corruption training.
9. **Security of tenure** Security of tenure for judges should be guaranteed for about 10 years, not subject to renewal, since judges tend to tailor their judgements and conduct towards the end of the term in anticipation of renewal.

Accountability and discipline

10. **Immunity** Limited immunity for actions relating to judicial duties allows judges to make decisions free from fear of civil suit; immunity does not apply in corruption or other criminal cases.
11. **Disciplinary procedures** Disciplinary rules ensure that the judiciary carries out initial rigorous investigation of all allegations. An independent body must investigate complaints against judges and give reasons for its decisions.
12. **Transparent and fair removal process** Strict and exacting standards apply to the removal of a judge. Removal mechanisms for judges must be clear, transparent and fair, and reasons need to be given for decisions. If there is a finding of corruption, a judge is liable to prosecution.
13. **Due process and appellate reviews** A judge has the right to a fair hearing, legal representation and an appeal in any disciplinary matter.
14. **Code of conduct** A code of judicial conduct provides a guide and measure of judicial conduct, and should be developed and implemented by the judiciary. Breaches must be investigated and sanctioned by a judicial body.
15. **Whistleblower policy** A confidential and rigorous formal complaints procedures is vital so that lawyers, court users, prosecutors, police, media and civil society can report suspected or actual breaches of the code of conduct, or corruption by judges, court administrators or lawyers.
16. **Strong and independent judges' association** An independent judges' association should represent its members in all interactions with the state and its offices. It should be an elected body; accessible to all judges; support individual judges on ethical matters; and provide a safe point of reference for judges who fear they may have been compromised.

Transparency

17. **Transparent organisation** The judiciary must publish annual reports of its activities and spending, and provide the public with reliable information about its governance and organisation.
18. **Transparent work** The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgements, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.
19. **Transparent prosecution service** The prosecution must conduct judicial proceedings in public (with limited exceptions, for example concerning children); publish reasons for decisions; and produce publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions.
20. **Judicial asset disclosure** Judges should make periodic asset disclosures, especially where other public officials are required to do so.
21. **Judicial conflicts of interest disclosure** Judges must declare conflicts of interest as soon as they become apparent and disqualify themselves when they are (or might appear to be) biased or prejudiced towards a party to a case; when they have previously served as lawyers or material witnesses in the case; or if they have an economic interest in the outcome.
22. **Widely publicised due process rights** Formal judicial institutional mechanisms ensure that parties using the courts are legally advised on the nature, scale and scope of their rights and procedures before, during and after court proceedings.
23. **Freedom of expression** Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed.
24. **Quality of commentary** Journalists and editors should be better trained in reporting what happens in courts and in presenting legal issues to the general public in an understandable form. Academics should be encouraged to comment on court judgements in legal journals, if not in the media.
25. **Civil society engagement, research, monitoring and reporting** Civil society organisations can contribute to understanding the issues related to judicial corruption by monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.
26. **Donor integrity and transparency** Judicial reform programmes should address the problem of judicial corruption. Donors should share knowledge of diagnostics, evaluation of court processes and efficiency; and engage openly with partner countries.

These recommendations complement a number of international standards on judicial integrity and independence, as well as various monitoring and reporting models that have been developed by NGOs and governmental entities. They highlight a gap in the international legal framework on judicial accountability mechanisms. TI draws particular attention to the Bangalore

Principles of Judicial Conduct, a code for judges that has been adopted by a number of national judiciaries and was endorsed by the UN Economic and Social Council in 2006. The Bangalore Principles go some way towards filling this gap, though they remain voluntary. In addition, the UN Basic Principles on the Independence of the Judiciary should be reviewed in the light of widespread concern that has emerged in the last decade over the need for greater judicial accountability.

There is no magic set of structures and practices that will reduce corruption in all situations. The country reports in part two of this volume highlight the wide variety of recommendations for judicial reform that are context-specific and therefore not applicable in a general way. Differing situations may require measures that would not be helpful elsewhere. Nevertheless, the recommendations serve as a guide for reform efforts to promote judicial independence and accountability, and encourage more effective, efficient and fair enforcement. As this volume demonstrates, multi-faceted, holistic reform of the judiciary is a crucial step toward enhancing justice and curbing the corruption that degrades legal systems and ruins lives the world over.

2 Independence, political interference and corruption

Judges and other court personnel need to be able to make decisions free from interference from the state and the private sector. If they are motivated to ingratiate themselves with an authority with influence over their careers, or to top up their earnings with money from one of the parties to a case, the judicial process will have been corrupted. The independence of the judiciary is therefore crucial to its effectiveness. But independence is not enough. A fair judiciary must also be subject to mechanisms that hold it accountable to the people. The challenge is to design appropriate institutional structures and legal culture that uphold the independence, impartiality and integrity of the judiciary, while rendering it answerable for its decisions. Susan Rose-Ackerman explores how different judicial models grapple with this challenge and sketches out the typical vulnerabilities in civil and common law systems. Stefan Voigt shows that in designing institutional structures it is not sufficient to write judicial independence into statute books – judges and court staff need to be independent in practice. Roy Schotland considers the widespread US system of electing judges to office, and asks whether they are unduly influenced by the knowledge that a particular company or individual donated money to their campaigns. Tom Blass discusses President Putin's reform of the Russian court system and looks at the pressure to which judicial appointees are subjected, as well as the nature of corruption in Russia's judiciary. Gugulethu Moyo ends by describing executive assaults on the independence of the Zimbabwean judiciary, especially in regard to the country's controversial land reform programme.

Judicial independence and corruption

Susan Rose-Ackerman[1]

Law enforcement cannot be an effective anti-corruption tool unless the judiciary is independent both of the rest of the state and the private sector. In cross-country research, measures of judicial independence are related to other positive outcomes such as higher levels of growth, and of political and economic freedom.[2]

1 Susan Rose-Ackerman is Henry R. Luce Professor of Law and Political Science at Yale Law School, New Haven, Connecticut, United States.

2 Judicial independence is associated with higher political and economic freedom according to Rafael La Porta, Florencio Lopez-de-Silanes, Christian Pop-Eleches and Andrei Shleifer, 'Judicial Checks and Balances', *Journal of Political Economy* 112 (2) (2004). Their measure, however, is limited to the tenure of high court judges and the role of precedent.

Independence implies that judges' careers do not depend on pleasing those with political and economic power. Such separation of powers is necessary both to prevent politicians from interfering with judicial decision-making and to stop incumbent politicians from targeting their political opponents by using the power of civil and criminal courts as a way of sidelining potential challengers. The judiciary needs to be able to distinguish strong, legitimate cases from those that are weak or politically motivated. Otherwise, the public and users of the court system will lose confidence in the credibility and reliability of the court system to punish and pass judgement on crimes and civil disputes, and judicial sanctions will have little deterrent effect. Individuals may conclude that the likelihood of arrest and conviction is random or, even worse, tied to one's political predilections. In such cases, the legal process does not deter corruption and it may undermine the competitiveness of democratic politics.

Independence is necessary but not sufficient. An independent judiciary might itself be irresponsible or corrupt. If judges operate with inadequate outside checks, they may become slothful, arbitrary or venal. Thus, the state must insulate judicial institutions from improper influence at the same time as it maintains checks for competence and honesty. Judges must be impartial as well as independent. On the one hand, an independent judiciary can be a check both on the state and on irresponsible or fraudulent private actors – whether these are the close associates of political rulers or profit-seeking businesses acting outside the law. On the other hand, independent courts may themselves engage in active rent seeking.[3] States need to find a way to balance the goals of independence and competence. In practice, a number of solutions have been tried; none seems obviously superior, but this overview suggests some common themes and some promising avenues for the reform of malfunctioning judiciaries.

Independence is often opposed by political actors. Resistance may arise from a president or a legislature wishing to avoid checks on their power and from influential vested interests. Given such resistance, governments may limit the impact of the courts by keeping overall budgets low so that salaries and working conditions are poor. They may make judicial appointments on the basis of clientelist ties, not legal qualifications. Country reports in Part Two document political influence over the selection of judges in a number of Latin American countries and also the Czech Republic, Georgia, Pakistan, Russia, Sri Lanka and Turkey. In sub-Saharan Africa the problem is especially serious. However, some African nations have moved in the direction of judicial independence at the initiative of the judges themselves, who have negotiated with political leaders and appealed to public opinion.[4]

Those with political power sometimes support independence, however. A free-standing judiciary may act as a guarantor of special-interest deals enacted by past governments.[5] In addition,

3 On the positive side see La Porta et al. (2004), op. cit.; and F. Andrew Hanssen, 'Independent Courts and Administrative Agencies: An Empirical Analysis of the States', *Journal of Law, Economics and Organization* 16 (2) (2000).

4 Jennifer Widner, *Building the Rule of Law: Francis Nyalai and the Road to Judicial Independence in Africa* (New York: W.W. Norton, 2000).

5 William M. Landes and Richard A. Posner, 'The Independent Judiciary in an Interest-Group Perspective', *Journal of Law and Economics* 18 (3) (1975). Mark Ramseyer argues that the judiciary is less independent in single-party states than in competitive political systems. See Mark Ramseyer, 'The Puzzling (In)Dependence of the Courts: A Comparative Approach', *Journal of Legal Studies* 23 (1994).

a nation's leaders may want to reassure foreign investors by establishing courts that act independently of domestic power structures. Such courts, however, may create tensions especially in authoritarian governments. If they become too independent, they may threaten those in power. Egypt, for example, created a supreme constitutional court and an administrative court system in the 1970s. Their existence led to a showdown in 2005 as judges asserted an independent role in politically sensitive areas, such as election monitoring (see country report on Egypt, page 201). States with corrupt court systems and a desire for foreign investments often consider the creation of 'boutique' courts to satisfy that need but they may be difficult to insulate from a corrupt environment. Indonesia, for instance, created a commercial court under the guidance of the IMF that was intended to enable foreigners to avoid the corrupt regular court system. Unfortunately, it could not be insulated and its judges made rulings apparently from corrupt motives that favoured well-connected local debtors. A recent IMF report recognises the need for more widespread judicial reform and suggests that recent reforms may improve matters.[6]

Aspects of judicial independence

Judicial independence, championed by the UN and the International Commission of Jurists,[7] is associated with positive outcomes in scholarly work, but the term has no precise definition. At the level of institutional detail, the phrase does not translate into a particular set of recommendations. Furthermore, it is not enough to get the formal rules right; independence must also operate in practice (see Stefan Voigt's 'Economic growth, certainty in the law and judicial independence', page 24) and independent judges must carry out their duties responsibly. Of course, no set of institutional rules can overcome the handicap of a judiciary that has no personal integrity or respect for legal argument. Judges must operate with impartiality, integrity and propriety.[8] Nevertheless, one can isolate a number of issues that must be resolved in the process of creating a functioning judicial system. The focus here is on structural conditions that influence who is selected for the judiciary and constrain them once in office. They fall into two broad categories: some primarily promote independence; others seek to limit corruption inside the

6 Daniel S. Lev, 'Comments on the Judicial Reform Program in Indonesia', in *Current Developments in Monetary and Financial Law*, vol. 4 (Washington D.C.: IMF, 2005); and Ceda Ogada, 'Out-of-Court Corporate Debt Restructuring: The Jakarta Initiative Task Force', in the same volume. *Indonesia Selected Issues*, IMF country report no. 04/189 (July 2004) is at www.imf.org/external/pubs/ft/scr/2004/cr04189.pdf
The report points out that, although up to 70 per cent of commercial courts' decisions are based on sound legal reasoning, 30 per cent, including many controversial decisions, continue 'to tarnish the court's reputation'.

7 The International Commission of Jurists (www.icj.org) has a Center for the Independence of Judges and Lawyers and was instrumental in drafting the UN's Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in 1985. See 193.194.138.190/html/menu3/b/h_comp50.htm

8 These are the principles in the Bangalore International Principles of Judicial Conduct: see chapter 3, page 40. See also the American Bar Association's Model Code for Judicial Conduct (2004). Jessica Conser, 'Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Analysis', *North Carolina Journal of International Law and Commercial Regulation* 31: 255–332 (2005), discusses these codes along with the North Carolina Code of Judicial Conduct, which makes the courts completely independent of the other branches and subject to little regulation.

judiciary. Of course, these categories sometimes overlap, but it will aid the discussion to list them separately.

Conditions related to the independence of the judiciary from the rest of government

Judges:

- Qualifications and method of selection of individual judges, including the role of political bodies and judicial councils
- Judicial tenure and career path
- Determination of budget levels and allocations, including pay scales
- Impeachment criteria and criminal statutes governing corruption of the judiciary and their enforcement; existence of immunity for judges
- Level of protection from threats and intimidation.

Court organisation and staffing:

- Presence or absence of juries or lay judges
- Position of prosecutors in the structure of government
- Organisation of the judicial system – existence of a separate constitutional court, specialised courts and courts at several government levels.

Conditions primarily related to the control of corruption for a given level of political independence

Judges:

- Caseloads (overall and per judge) and associated delays
- Judges sit in panels or decide alone; composition of panels (i.e. all judges or also include lay assessors)
- Pay and working conditions, especially *vis à vis* private lawyers
- Conflict-of-interest and asset disclosure rules
- Rules on *ex parte* communication with judges in particular cases.

Court organisation and staffing:

- Case-management systems, including assignment of cases to judges
- Role of clerks and other court staff, and checks on their behaviour
- Openness of court proceedings to public and press
- Prevalence of written opinions and dissents.

Legal framework:

- Rules for getting into court, for joining similar cases, dealing with frivolous cases, etc.
- Rules of civil and criminal procedure

- Role of precedent, law codes, constitution, statutes and agency rules
- Rules for the payment of legal fees.

Legal profession:

- Respect for, and competence of, the legal profession
- The nature of legal education, and its relevance to modern legal disputes.

This is a long list, which admits of many variations. However, one can identify two stylised models that seek independence through different routes. The first isolates the institution from political influence through such devices as professional training, oversight and career path. The second achieves independence from the regime in power through political balance, and through publicity and public participation. In practice, these models are not mutually exclusive, but it will help focus our thinking to concentrate on the strengths and weaknesses of these alternatives. The former is a stylised model of the system in most of continental Europe, and the latter tracks important aspects of the judicial branch in the United States and the British Commonwealth. In application each includes some elements of the other, and the pressures for greater transparency and participation are felt worldwide. Nevertheless, analysis of these contrasting ideal types highlights the alternatives that reforming states face.

Some researchers characterise common law systems, such as those in the United States and the United Kingdom, as having more independent judiciaries than those in continental Europe and as being more investor-friendly.[9] Others argue that the civil law model produces more independent courts and is more appropriate for emerging legal systems.[10] The systems are indeed different, but one judicial system cannot be unambiguously characterised as better than the other. I describe a well-functioning version of each and then demonstrate how each can be vulnerable to corruption and capture.[11]

In the civil law model, the role of the court is to arrive at a judgement based on the body of law codes and statutes. Legal decisions themselves do not have formal value as precedent although they may, in fact, influence subsequent cases. Public written opinions state the legal result and, in the ordinary courts, do not include dissents. Judging is a professional apolitical task,[12] and judges are career civil servants who have passed a competitive exam soon after completing their legal training. Their first positions are at the lowest level of the judicial hierarchy, and they are

9 For example, La Porta et al. (2004), op. cit., find a statistical association between their measure of judicial independence and legal origin, but this, in part, reflects their restricted measure of independence. La Porta, Lopez-de-Silenes, Shleifer, and Vishney, 'Law and Finance', *Journal of Political Economy* 106 (6) (1998) find that common law systems protect investors the best, French-civil-law systems the worst, and German and Scandinavian systems in between. However, they do not develop measures of judical independence. Daniel Berkowitz, Katharina Pistor and Jean-François Richard, 'Economic Development, Legality, and the Transplant Effect', *European Economic Review* 47 (2003) show that, except for the French civil code, these results are not robust once one accounts for the means of transplantation.

10 Charles H. Koch Jr., 'The Advantage of the Civil Law Judicial Design as the Model for Emerging Legal Systems', *Indiana Journal of Global Legal Studies* 11(1) (2004).

11 The ideal types have been most clearly articulated by Mirjam Damaska in *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986).

12 In practice judges sometime leave their judicial posts to run for public office in Germany. Nevertheless, the norm is a career judiciary.

evaluated by those higher in the pecking order or by special judicial councils that determine promotions, disciplinary penalties and transfers.[13] Judges typically remain in the judiciary until retirement. Although the judiciary's budget must be approved by the legislature, it is prepared by the judicial branch with the legislature approving the total, but not determining how it will be spent.[14] However, the pay and benefits of judges are set by civil service rules. Specialised courts may exist in areas such as administrative law or taxation, but within a particular court, cases are assigned randomly to judges or panels of judges. Jury trials are uncommon; mixed panels consisting of judges and civilians are sometimes used, but the judges usually dominate. A judgeship is a full time, life-time position, a factor that limits problems with conflicts of interest, but formal rules also limit acceptance of outside remuneration. The number of judges and their staffs is large enough to assure reasonably prompt resolution of cases. This result is facilitated by fee-shifting rules that require the loser in a civil suit to pay the winner's legal fees, and by civil and criminal procedures that expedite court proceedings (for example, limited discovery, limited use of oral argument, no juries).[15]

If the country has a written constitution, the one exception to this pattern is the constitutional court. This is a free-standing court with a mandate to evaluate laws, rules and other government actions for conformity with the constitution. Because it is an integral part of the democratic political system, its members are usually chosen by the legislature from the pool of distinguished senior lawyers, judges and academics. The selection process assures partisan balance although the aim is to select justices with a strong commitment to the norms of the legal profession and the preservation of the constitutional order. Constitutional issues are referred to this court by other courts and, if requested, it can review newly passed laws for conformity with the constitution. In keeping with its more explicitly political role, constitutional courts in many countries permit dissents, which are a common occurrence in Germany and Argentina.[16]

In the common law model, courts build on precedent in their effort to interpret the law and apply it to new situations. Political/policy concerns are a straightforward part of courts' decisions. Thus, independence does not imply isolation from policy, although judges must use

13 Systems with judicial councils differ. Some simply confirm the role of senior judges; others, as in Italy, are a device for limiting the role of senior judges. John O. Haley, 'Judicial Reform: Conflicting Aims and Imperfect Models', *Washington University Global Studies Law Review* 5 (2006). In some countries they are a route for political influence; see TI reports on Georgia, Pakistan and Turkey and 'Corruption, accountability and the discipline of judges in Latin America' in chapter 3, page 44.

14 Most courts charge fees to litigants. When these constitute a large share of the courts' budget, the courts are independent of the rest of government but extremely vulnerable to corrupt inducements from litigants.

15 In addition to Damaska, *supra,* see Carlo Guarnieri, 'Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe', in José María Maravell and Adam Przeworski, eds., *Democracy and the Rule of Law* (Cambridge, UK: Cambridge University Press, 2003) pp. 223–41.

16 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000). See also Herman Schwartz, 'Eastern Europe's Constitutional Courts', *Journal of Democracy* 9 (4): 100–14 (1998), and Wojciech Sadurski, *Rights Before Courts; A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht, the Netherlands: Springer, 2005). The special status of constitutional courts complicates efforts to measure judicial independence. Both La Porta et al. (2004), op. cit, and Feld and Voigt (2003), op. cit., use data on constitutional tribunals as a component of their measures of judicial independence – a potentially misleading measure.

legal arguments to justify their decisions. Trials are public, and judicial power is checked by lay juries who decide the facts in many criminal and civil cases. Civil and criminal procedures protect litigants' rights but lead to delays that create incentives not only for corruption but also for the litigants to settle before trial – through plea bargains in criminal cases and monetary settlements in civil cases.

The judicial selection process is intertwined with politics. Even if judges to higher courts are selected from those already serving on lower courts, those making the selection frequently have clear political allegiances, often serving in the cabinet of the sitting government, as in the United Kingdom (see the UK report on page 282 for description of recent changes). In the United States there are two variants. At the state and local level, many judges are elected in partisan contests to fixed terms and, even if initially appointed, may face recall elections (see the US case study in this chapter, page 26). At the federal level judges are nominated by the president and approved by a majority of the Senate. Once approved, they have life tenure and their salaries cannot be reduced. Thus, politics can influence who is nominated, but once confirmed, federal judges or justices are out of the control of the political bodies unless their behaviour is so egregious as to lead to impeachment and removal from office. Federal judges' lifetime appointments and their insulation from politics once on the bench are important factors to study to isolate their impact on judicial behaviour. Studies at the US state level show that elected judges, especially those chosen in competitive elections, tend to sentence convicted criminals to longer terms as the date of the election approaches.[17] This result suggests that judicial independence is harmed by the election of judges, especially if incumbents are subject to re-election.

In the United States and the United Kingdom judges are often chosen from lawyers with long careers in private practice. Hence, avoiding conflicts of interest between former legal practice interest and the current position as a judge is particularly important. US law has stringent requirements for disclosure of assets and restrictive limits on permitted activities while in office. The norms of the legal profession act as a check on the behaviour of judges, and the American Bar Association has an informal role in vetting nominees. In the United Kingdom, higher court judges are selected from among sitting judges, so financial conflicts of interest are less important at the time of promotion, but can still be a problem at the time of a judge's initial appointment. Furthermore, in both countries sitting judges seeking promotion have an incentive to please the government in power.

Corruption and self-dealing in civil and common law systems

Now consider how corruption and self-dealing can arise in these systems if they depart from their respective ideals.

17 The results are reported in Sanford C. Gordon and Gregory A. Huber, 'Accountability and Coercion: Is Justice Blind when It Runs for Office?', *American Journal of Political Science* 48 (2)(2004); and Sanford C. Gordon and Gregory A. Huber, 'The Effect of Electoral Competitiveness on Incumbent Behavior', draft NYU and Yale, 2006. Their studies use data from Pennsylvania and Kansas, respectively.

In states that follow the civil law model, serious problems arise if the supposedly apolitical, civil service nature of judicial selection and promotion is undermined by the use of political selection criteria. A patronage-based appointment process will be particularly harmful here because the checks that exist in most common law systems are largely absent.

Even if access to the judiciary is merit-based, corruption inside the judicial hierarchy can be particularly harmful. If top judges are corrupt or dependent on political leaders, they can use promotions and transfers of judges to discipline those unwilling to play the corruption game.[18] Lower-level judges might then collect bribes and pass on a share to those above. Top judges may also be able to manipulate the assignment of cases to those willing to rule in favour of powerful clients. The lack of dissents and the low level of lay participation will make corruption relatively easy to hide.

To the extent that trial procedures are under the control of judges rather than lawyers, this will give litigants incentives to corrupt lower-level trial judges who can manipulate procedures in their favour. However, the use of panels of judges and the presence of lay judges sitting with professionals help to limit corruption by increasing the chance that it will be uncovered. The use of lay judges, common in parts of Europe, is being tried in Indonesia, Japan and elsewhere as an option between a professional judiciary and jury system.[19]

If the judiciary suffers from a lack of resources and staff, this can produce delays that litigants may pay to avoid. In the extreme, judges and their staff can create delays in order to generate payoffs. An overly bureaucratised system can become dysfunctional with litigants finding it difficult to discover how the system operates and being tempted to use bribes to cut through the red tape.[20] Furthermore, where judges are career civil servants with salaries fixed by the state and little independent wealth, they may be vulnerable to financial inducements offered by wealthy litigants and their lawyers.[21]

The common law model presents a different set of corrupt incentives. The political nature of the appointment process may lead candidates to pay politicians for the privilege of being appointed, or they may be beholden to wealthy contributors if they must win contested elections. Even if appointed, judges may be biased toward the political party or coalition that appointed them. If judges are independently wealthy from a prior career as a private lawyer, they may be subject to conflicts of interest. These may surface, not as outright bribery, but as an incentive to favour litigants associated with organisations in which the judge has a financial interest. Dereliction of duty may arise in forms that do not fit conveniently under the legal definition of corruption, but that nevertheless distort the operation of the judicial system.

18 One reviewer noted that in interviews in some Latin American countries, judges said they would never be promoted because they lacked a 'political godfather'.

19 *The Economist* (UK), 4 March 2004.

20 See, for example, the description of the situation in an Albanian court and efforts of a USAID project to introduce reforms. One problem was the diffusion of responsibility for individual cases across several judges, each of which could blame the others in case of problems. See www.usaidalbania.org/(xtozlhzfgi0sef45xuyela45)/en/Story.aspx?id=39

21 Of course, this can also be a problem in common law systems for judges without accumulated assets.

Some corrupt incentives are common to both systems. First, if pay and working conditions are poor, judges and their staffs may be relatively easy to corrupt. Judges may be more vulnerable to these inducements in continental Europe-like systems where they have few accumulated assets. Poor working conditions may also translate into hassles and delays for litigants, providing incentives to pay as well as receive bribes.

Second, if important aspects of case management, such as the assignment of judges, trial dates and meetings with judges, are under the control of staff, this creates opportunities for payoffs. Bribes to staff can speed up (or slow down) cases, avoid random assignment of judges and otherwise smooth the path of a case. If having one's case accepted for resolution by the courts is a discretionary matter for the judiciary, corruption can help make the choice. In practice, however, it may be difficult to distinguish between the corruption of judges and that of court staff. Corrupt staff can give the appearance of a corrupt judge, or a corrupt judge can claim that the staff is at fault.

Third, the rules governing relations between judges, lawyers and litigants can ease or facilitate corruption. If a judge makes a practice of meeting with the lawyer for one side without the presence of the other, this can be an invitation to corruption. Fourth, if the caseload facing judges raises novel and complex issues not included in their legal training, there may be a temptation to use bribe payments to resolve them. The corrupt judge is then not violating an accepted legal interpretation because no such standard exists. Fifth, judges may be threatened and intimidated by wealthy defendants, particularly those associated with organised crime or those accused of 'grand' corruption at the top of government. Judges may be offered bribes with the implication that if the offer is refused, the judge and his or her family may suffer physical harm.

Sixth, corruption is facilitated by an opaque judicial system where both litigants and the public have trouble finding out what is going on. There are several aspects to transparency. One involves the courts' own efforts to publicise their operation and decision processes, and includes the requirement that judges disclose their assets and any conflicts of interest. As noted above, such disclosure is especially crucial when judges are appointed or elected in mid-career, rather than being part of a civil service system. The second concerns the ability of outsiders to find out what is happening. Here a free media with access to judicial proceedings and documents is key, along with an active civil society able to publicise lapses and work for reform.

Finally, the location of the prosecutors can influence the incidence of corruption in both types of legal systems. In the United States the prosecutor is within the executive branch. This means that certain types of corrupt activities may be overlooked if they are too closely associated with the regime in power. Similar problems may arise in Commonwealth systems if the judges are beholden to incumbent politicians. In civil law systems the prosecutor may be located inside the executive branch, as in France and Italy, in the judiciary, or in an independent agency more or less isolated from both courts and the regime in power, as in Brazil or Hungary (see 'Judicial corruption from the prosecutor's perspective' on page 79). Further analysis of the prosecutors is beyond the scope of this essay, but clearly the same tensions between independence and oversight exist for them as do for judges.

Conclusions

I have outlined two contrasting ways of organising the judiciary, each of which has its strengths and weaknesses. Corruption in the judiciary can occur even when the courts are independent of the rest of the state. In fact, their very independence may facilitate corruption because no one has the authority to oversee them. If the judiciary is to be an effective watchdog over the government, it must be both independent of the legislature and the executive, and of high integrity. It must not be subject to pressure from powerful politicians or others in the public and private sectors who benefit from a corrupt status quo. Thus a fundamental paradox exists. If courts are independent, judges may be biased toward those who make payoffs. If they are not independent, they may be biased in favour of politicians who have power over them. Both are troubling outcomes, and suggest that favourable institutional design is necessary, but not sufficient. Some of the inter-state variation in corruption depends upon the honesty and competence of sitting judges and their norms of behaviour. Nevertheless, emerging democracies also need to evaluate the contrasting models outlined above. Each model can function well under some circumstances. The task for reformers is to locate their system's particular vulnerabilities and to design a programme that deals with the multiple facets of independence in a way that limits corrupt incentives and provides prompt and impartial justice.

Economic growth, certainty in the law and judicial independence

Stefan Voigt[1]

Thriving market economies depend on strong states that secure private property rights and their voluntary transfer. Yet the strength of a state can be its greatest weakness: if it is strong enough to secure private property rights, it is also strong enough to attenuate them or to expropriate property from its citizens. A simple promise to honour private property rights in the future will not be credible: citizens know that after they have invested, the state may have an incentive to renege on its promises and attenuate the investor's property rights.

In such a setting judicial independence is important because it serves as a mechanism for the government to turn its 'simple promise' into a credible commitment. If the government reneges on its promise, the investor can take the case to court and, given the court is independent, the government would lose. An independent judiciary therefore has the potential to make all actors better off. If it increases the predictability of state action by making representatives of the state stick to their promises, the planning horizon of many actors is likely to increase. A longer planning horizon goes hand in hand with higher levels of investment in machinery and human capital. This empowers higher degrees of specialisation, which in turn lead to higher growth. Independent judiciaries, therefore, are conducive to high income levels and growth, and are similarly associated with higher tax receipts for the state.

It would seem rational that politicians should strive to introduce judicial independence as a founding condition of prosperity. However, promising an independent judiciary is not sufficient to induce additional investment: so long as investors are not convinced that a judiciary will truly be impartial, they will not change their investment behaviour. It therefore makes sense to distinguish between

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two types of judicial independence: *de jure* and *de facto*. Whereas *de jure* judicial independence can be derived from the letter of the law, *de facto* judicial independence lies in the independence actually enjoyed by judges, which can be measured by their effective term lengths, the degree to which their judgements have an impact on government behaviour, and so on.

The study (details at the end of this report) analyses whether judicial independence is associated with economic growth by introducing two indicators:

- A *de jure* indicator focusing on the legal foundations of judicial independence (taking into account variables such as the method of nominating or appointing highest judges, their term lengths, their possibility of reappointment, etc.)
- A *de facto* indicator focusing on countries' actual experiences (taking into account variables such as the effective average term length of judges, the number of times judges have been removed from office, and the real income of judges).

If we were to compare the ranking of countries according to the *de jure* and the *de facto* indices, a notable divergence can be observed: not a single country in the top 10 of the *de jure* judicial independence index is in the top 10 of the *de facto* judicial independence index.[2]

For a sample of 66 countries an econometric model was estimated according to which real GDP growth per capita from 1980 to 1998 was explained by judicial independence (using the two indicators detailed above) and standard controls. It is found that while *de jure* judicial independence does not have any impact on economic growth, *de facto* judicial independence positively influences GDP growth. Not only is this positive influence on GDP growth statistically significant, it is also *economically* significant. Further analysis found that a switch from a totally dependent to a totally independent judiciary would, other things being equal, lead to an increase in GDP growth rates of 1.5 to 2.1 percentage points. This amounts to a large increase in economic growth; real per capita GDP in a country with such an extreme constitutional transformation would double in 33–47 years.

This distinction between *de jure* and *de facto* judicial independence indicates that it is not sufficient to enshrine judicial independence in legal documents. It is also necessary to shape judicial independence through additional informal procedures that may be accompanied and enforced by informal social sanctions. Analysis of the data indicates that issues such as the average term of judges, deviations from the term lengths expected based on legal documents, effective removals of judges before the end of their terms, as well as secure incomes for judges, are more important for economic growth than *de jure* judicial independence. Only the constitutional specification of court procedures as one aspect of *de jure* judicial independence proves to be significant and positive. The impact of *de facto* judicial independence on economic growth is robust to outliers, to the inclusion of several additional economic, legal and political control variables and the construction of the index. It can therefore be concluded that judicial independence, especially *de facto* judicial independence, does matter for economic growth.

For the full study see Lars Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators', European Journal of Political Economy, 19 (3) (2003). See also Lars Feld and Stefan Voigt, 'Making Judges Independent – Some Proposals Regarding the Judiciary', in R. Congleton, ed., Democratic Constitutional Design and Public Policy: Analysis and Evidence (Cambridge: MIT Press, 2006).

2 The top 10 in the *de jure* judicial independence index are Colombia (most independent), Philippines, Brazil, Georgia, Slovenia, Singapore, Russia, Botswana, Ecuador and Greece. The top 10 in the *de facto* judicial independence are Armenia, Kuwait, Switzerland, Turkey, Costa Rica, Austria, Japan, South Africa, Taiwan and Israel.

Judicial elections in the United States: is corruption an issue?

Roy A. Schotland[1]

> There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.[2]

However campaign funds are raised, do they amount to corruption? Campaign contributions, unless severely abused, need not constitute corruption, but can create the appearance of a conflict of interest unless appropriate controls are applied.[3]As an official, a judge is obligated to decide impartially, and every judge and the public have an interest in that obligation being carried out. At the same time, once the public chooses to have judges face election, the judges and the public have an interest in incumbents and other candidates being able to conduct appropriate campaigns. A conflict of interest is abused – and transformed into true corruption – when the judge puts personal interest ahead of his or her obligation to the public. In the campaign contribution setting, abuse would occur if the judge's performance on the bench were affected by contributions received, or hoped for. The challenge is, then, to satisfy the interest in appropriate campaigns while at the same time minimising the risk of abuse.

US federal courts get much more attention than state courts, but in terms of caseload, the latter handle almost 20 times as many cases. There are 867 federal judges (Article III, life-tenured), compared to 10,886 state appellate and general-jurisdiction trial judges. The states have a striking variety of methods for selecting judges: in 11 states, all judges are appointed, but most other states

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2 *Stretton v. Disciplinary Board,* 944 F. 2d 137, 145 (1991) (upholding a limit that barred judicial candidates from personally soliciting campaign funds and required that soliciting be done by their campaign committees).

3 As the exemplary California Supreme Court Justice Otto Kaus said, not about campaign contributions but about the dilemma of deciding controversial cases while facing a retention election: 'You cannot forget the fact that you have a crocodile in your bathtub. You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well.' See Roy A. Schotland, 'The Crocodile in the Bathtub', *California Courts Review* (fall 2005). On the line between campaign contributions and bribes, see Hon. John T. Noonan, *Bribes* (Berkeley: University of California Press, 1984).

Sadly but inevitably, a handful of US judges have been caught accepting bribes. The most significant was the Second Circuit's Senior Judge Martin Manton, a leading candidate for appointment to the Supreme Court in the late 1930s until it came out that he had sold his vote in several cases. Prosecuted by Thomas E. Dewey (later twice the Republican candidate for president), Manton was convicted and jailed. Subsequently all decisions in which he had participated were reviewed by the Second Circuit. In 1991, a federal district judge in Mississippi was convicted of taking bribes, impeached by the House of Representatives and convicted by the Senate. Of course there have been other corrupt judges, almost always involving amazingly small sums. See *U.S. v. Sutherland*, 656 F. 2d 1181 (5th Cir. 1981) and *U.S. v. Shenberg*, 89 F. 3d 1461 (11th Cir. 1996).

have different methods for different courts or different jurisdictions: in 19, some or all judges are appointed but then face 'retention' elections in which voters decide whether the judge continues on the bench or leaves; in 19 (some of the 'retention' states, plus some others), some or all judges face contestable non-partisan elections, and in 16 (again some overlap with the ones already noted), they face partisan elections. In all, 60 per cent of appellate judges and 80 per cent of trial judges at state level face contested elections and only 11 per cent face no elections. Especially in contested elections, but sometimes in retention elections, judges raise campaign funds.

Judicial elections began in 1789 in Georgia, and Mississippi adopted them for all state judges in 1832. Between 1846 and 1860, 21 states had constitutional conventions, with all but Massachusetts and New Hampshire choosing elections. The choice of elections was not (as myth holds) 'an unthinking "emotional response" rooted in . . . Jacksonian democracy'.[4] On the contrary, the history of constitutional conventions shows that the move to elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary 'free from the corrosive effects of politics and able to restrain legislative power'.[5]

Moderate reformers built consensus among delegates by adopting constitutional devices designed to limit the potentially disruptive consequences of popular election. Provisions rendering judges ineligible to run for other offices while serving on the bench were intended to prevent the political use of judicial office to win other offices. And they gave judges terms longer than any other elective officials, and later adopted non-partisan or retention elections to restrict the 'impact of party and majority rule'.[6]

How is this system performing today? Consider recent problems in two states. In Illinois, campaign contributions to candidates – judicial or otherwise – are not limited as to amounts or sources, though there are disclosure requirements. Illinois elects its high court justices in partisan contests by geographic district. In a 2004 contest to fill an open seat in the southern third of the state, the two candidates raised (in almost equal amounts) a total of US $9.4 million, making this the second most expensive judicial campaign ever.[7] At the time, a class action by State Farm Insurance policyholders against the insurer's standard treatment of an important aspect of auto-accident claims was pending in the Illinois Supreme Court. Plaintiffs had won more than US $1 billion and then prevailed at the intermediate appellate court. Other insurers faced similar litigation and the case was an issue in the election campaign.

The election winner, Judge Lloyd Karmeier, had raised US $4.8 million, including direct contributions of US $350,000 from State Farm employees and lawyers; in addition, a group funded by persons connected with State Farm had raised US $1.2 million, all but US $500 of which it

4 K. L. Hall, 'The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary 1846–1860', *44 Historian 337* (1983). By 1860, 21 of the 30 states elected judges.

5 Ibid.

6 Ibid.

7 The most expensive was in 1986 when California's Chief Justice Rose Bird and two of her colleagues were denied retention after a campaign that cost US $15.9 million, almost entirely from small, grassroots contributions. Note, however, that the Illinois campaign was in a district with a population of 1.3 million.

contributed to Karmeier. Others affiliated with State Farm, or directly interested in the outcome of the case, contributed substantial additional sums. The contributions to Karmeier's opponent's campaign, albeit from different sources, showed a similar pattern. After Karmeier was elected, the *St. Louis Post-Dispatch*, which had previously endorsed him, editorialised: 'Big business won a nice return on a US $4.3 million investment in Tuesday's election. It now has a friendly Justice . . . And anyone who believes in even-handed justice should be appalled at the spectacle.'[8]

When Karmeier did not withdraw from the pending State Farm case, plaintiffs filed a motion for his withdrawal. State Farm opposed, arguing that the facts shown did not require recusal. The full court denied the motion on the ground that it was up to Karmeier, who then declined to withdraw. In August 2005, with Karmeier participating, that court unanimously (one justice not participating for unrelated reasons) reversed US $600 million in punitive damages, and by a majority of 4–2 – with Karmeier in the majority – also reversed the award of a further US $457 million. The US Supreme Court denied the plaintiffs' petition for review of Karmeier's participation.[9]

Are the Illinois events an example of corruption? Or an example, however troubling, of what happens when campaign contributions are not limited by law?

Problems remain acute even where contributions are limited. Consider a tort suit against Conrail that reached the Ohio Supreme Court in 1999. The plaintiff's daughter had been killed by a train after she drove onto a grade crossing despite closed gates and flashing lights. The jury awarded punitive damages of US $25 million, reduced by the trial judge to US $15 million. Both sides appealed to the Ohio Supreme Court. The plaintiff was represented by Murray & Murray, a firm that included nine members of the Murray family. Before the Ohio high court agreed to hear the appeal on 18 February 1998, campaign contributions were made to two associate justices by that firm, the nine Murrays in the firm and seven Murray spouses. The contributions were made on 9 February to one justice and from 19–21 January to the other. All were within Ohio's US $5,000 limit on individual contributions and totalled US $25,000 to each justice, both of whom were up for re-election in November 1998. According to their post-election campaign finance reports, these contributions turned out to be 4.4 per cent of one justice's total and 4.7 per cent of the other's. For each justice, the contributions were among their largest. Both justices participated in the oral argument in November 1998, a month before their campaign finance reports were filed; in January 1999, Conrail filed a motion seeking the recusal of each justice. In October 1999, without the court or either justice addressing that motion, the court decided in favour of the plaintiffs. Conrail made these facts the basis for seeking review in the US Supreme Court, but the review was denied.[10]

The law can do better. Since 1995, Texas' Judicial Campaign Fairness Act has included a US $30,000 aggregate limit on how much any single law firm (i.e. the firm, partners, employees, etc.) can contribute to a judicial candidate. This figure, six times the state's US $5,000 cap

8 *St. Louis Post-Dispatch* (US), 5 November 2004.
9 *Avery v. State Farm Mutual Auto Ins. Co.,* 835 N.E. 2d 801 (Ill. 2005), 126 S. Ct. 1470 (2006).
10 *Consol. Rail Corp. v. Wightman,* 715 N.E. 2d 546 (Ohio 1999), cert. denied, 529 US 1012 (2000).

on any individual's contribution, was deemed a fair balance between, on the one hand, the large firms whose contributions may easily go above US $30,000 and, on the other hand, the small firms, particularly plaintiffs' firms, which have far fewer potential donors. In fact, while large firms often do produce large aggregate contributions, in many states we find that plaintiffs' firms, however small the number of partners, make contributions of more than US $200,000. Many observers of campaign finance express particular concern about fund-raising from single or concentrated sources. That is, many believe that contributions from many sources, whatever the total amount raised, are less problematic.[11]

Put these contributions in context. The peak year for judicial campaign spending was 2000 when candidates raised US $50.5 million,[12] a 61 per cent rise over the previous peak (1998) and nearly double the average-per-seat sums for 1990–99. In addition, non-candidates (mostly groups on the defence and plaintiff sides of tort battles) spent an estimated US $17.5 million; prior spending by such groups had probably never topped US $1 million. In 2002, candidates raised US $30.5 million and non-candidates spent US $2.3 million on television advertising alone. In 2004, candidates raised US $46.8 million and non-candidates spent US $12 million on television spots.

Whether this amounts to corruption or not, it unquestionably jeopardises confidence in the courts. A 2004 poll showed over 70 per cent of Americans believe that judicial campaign contributions have some influence on judges' decisions; among African-Americans, 51 per cent believe that contributions carry a 'great deal' of influence. The results of a 2001 poll were similar and, after the Karmeier election, an Illinois poll in 2005 showed that over 87 per cent of voters believed that contributions influence decisions to some degree at least; only 52 per cent think that judges are 'fair and impartial'.[13]

What is to be done? One step seems unarguable: all states should have realistically comprehensive limits on campaign contributions in judicial elections.[14] So far, no state requires disclosure of even *indirect* contributions (e.g. contributions to '527s' and similar organisations that are allowed to raise money for political activities including voter mobilisation efforts and issue advocacy and may not be required to disclose); without that, evasion of contribution

11 Contrary to widespread belief, lawyers are a relatively minor source of judicial campaigns' contributions. They accounted for 22 per cent of contributions in 2000, 37 per cent in 2002 and 22 per cent in 2004, or 26 per cent on average. Data sent to author by National Institute on Money in State Politics. See www.followthemoney.org/ As the 1998 ABA Task Force stressed: 'Often attorneys account for large proportions, often even over 75 per cent . . . but it is also true that often attorneys' contributions total only a minor fraction.' American Bar Association, 'Report and Recommendations of the Task Force on Lawyers' Political Contributions' (1998).

12 For ease of comparison, all the figures are in 2004 dollars. The original sums raised by candidates were US $46.1 million in 2000 and US $29 million in 2002.

13 For 2004, see Justice at Stake Campaign, March 2004, faircourts.org/files/ZogbyPollFactSheet.pdf; for 2001, see Greenberg Quilan Rosner Research & American Viewpoint, Justice At Stake Frequency Questionnaire 8 (2001) at www.gorr.com/articles/1617; on Illinois, see Center for State Policy and Leadership at the University of Illinois at Springfield, 'Illinois Statewide Survey on Judicial Selection Issues' 23 (winter 2004) at www.ilcampaign.org/issues/judicial/judicial_poll/index.asp.

14 The ABA Model Code of Judicial Conduct was amended in 1999 to provide that if counsel or a party in a pending case makes a contribution exceeding applicable limits in a pending case, the judge must withdraw. Canon 3 (E) (1) (e).

limits – and of potential recusal – is easy. For example, Ohio limits direct contributions but in 2000, companies with major stakes in Ohio high court decisions, including Wal-Mart, DaimlerChrysler, Home Depot and the American Council of Life Insurers, contributed at least US $1 million each to the Chamber of Commerce for its TV ads in three Ohio Supreme Court campaigns.[15] That they did so was only reported a year later in a front-page story, and full disclosure was not required until after several years of litigation.

What of public funding? Although 25 states provide public funding (that is, grants from government to candidates who qualify, as in the US presidential primary and general elections) for some elective offices, only two states have it for judicial campaigns: Wisconsin for high court races since 1979, and North Carolina for appellate court races since 2004. Even if one assumes counter-factually that getting public funding adopted is feasible (Ohio's Justice Pfeiffer said that he would 'not necessarily oppose' public funding, but conceded: 'I'd be surprised if we can get much traction for that in Ohio. You could probably get more interest in the General Assembly for legislation to keep cats on a leash'),[16] public funding faces two severe hurdles. First, the Wisconsin programme was effective in its early years, but funds have steadily shrunk so that in the last competitive election in 1999, where candidates spent US $1,325,000, the public funds available amounted to only US $27,005. North Carolina's new programme had substantial funds but already needs additional appropriations, and the campaign finance reform record generally shows that support does not stay strong.[17] Second, even if candidates accept little or nothing in private contributions, their supporters cannot be stopped, or limited, from taking the obvious route of spending large sums wholly independent of the candidate.

A key step, lengthening terms, is the top priority in Ohio where judicial elections have been among the nation's fiercest. Longer terms mean fewer elections, less need to campaign and raise funds, and of course less concern about decisions' vulnerability to distortion. Also, the length of terms certainly affects who wants to come on the bench and who will stay there. Clearly, more attention to the procedures and standards for recusal is also needed.

May non-legal steps help? 'Campaign conduct committees', sometimes appointed by a high court but usually unofficial, initiated by bar associations and composed of diverse, respected community representatives, have long been active in some jurisdictions, and are spreading. They focus on educating candidates about appropriate campaigning and also act, if necessary, to halt inappropriate campaigning. Clearly they can and should take steps to establish and encourage appropriately limited campaign fund-raising and spending. Other non-legal steps are among the most important of all, bringing benefits that go beyond the problems treated here. More education about what judges do, in schools but also by lawyers' and judges' outreach to the public, is particularly important.

15 *Wall Street Journal* (US), 11 September 2001.
16 *Central Ohio Source/Daily Reporter* (US), 24 July 2001.
17 See Michael J. Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (Albany: Rockefeller Institute Press, 1998).

Last, why not solve the problem by replacing elections with appointive systems? That was feasible in the mid-20th century, but has stalled for the past generation because voters (e.g. Ohio 1987, Florida 2000, South Dakota 2004) have overwhelmingly agreed with its opponents' war cry: 'Don't let them take away your vote'.[18] Appointive systems come with their own corruption-related problems; the judge might be picked to do the will of the appointer or might 'buy' his or her position by contributing to the state governor's or president's own election campaign.

If one views campaign contributions as corrupting, this scene is deeply disturbing. But if one views appropriately limited funding as necessary for democratic elections, then the above checks and balances need to be applied more widely.

Combating corruption and political influence in Russia's court system

Tom Blass[1]

Prior to the *perestroika* process, the judiciary was largely perceived as: 'Nothing more than a machine to process and express in legal form decisions which had been taken within the [Communist] Party.'[2] The independence of the judiciary was one aspect of the changes called for by Mikhail Gorbachev in his groundbreaking speech to the 27th Party Congress in 1986.

The reality – a supine, underpaid judiciary, ill-equipped to withstand corruptive practices and the influence of economic or political interests – has proven slow to change, despite a series of reforms by Boris Yeltsin and his successor, President Vladimir Putin.

A 1991 decree by the Supreme Soviet of the Russian Federation established the judiciary as a branch of government independent from the legislature and the state. The following year, a Law on the Status of Judges was introduced that granted judges life tenure after a three-year, probationary period; new powers to review decisions by prosecutors regarding pre-trial detention; and established the role of the judicial qualification collegia – self-governing bodies, composed by and responsible for the appointment and regulation of members of the judiciary. The Yeltsin regime transferred control over the financing of courts from the Ministry of Justice to a judicial department attached to the Supreme Court, further distancing the judiciary from the executive branch.[3]

18 See, e.g., G. Alan Tarr and Robert F. Williams, eds., *State Constitutions for the 21st Century, The Judicial Branch* (Albany: SUNY Press, 2006).

1 Tom Blass, freelance journalist and consultant with the Foreign Policy Centre, London, United Kingdom.

2 F. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (The Hague; Martinus Nijhoff, 1993).

3 International Bar Association, 'Striving for Judicial Independence: A Report into Proposed Changes to the Judiciary in Russia' (London: IBA, 2005). Available at www.ibanet.org/iba/article.cfm?article=51

After Putin was elected president in 2000, he made numerous assertions about the importance he attached to the judiciary. 'An independent and impartial court is the legal protectedness (sic) of citizens,' he said in 2001. 'It is a fundamental condition of the development of a sound, competitive economy. Finally, it is respect for the state itself, faith in the power of the law and in the power of justice.'[4]

President Putin's Programme for the Support of Courts 2002–06 was structured to increase funding for the court system as a whole, including judges' salaries. Top pay is now around US $1,100 per month for judges, although average judicial salaries are closer to US $300 per month.[5] More recent developments include a move toward publishing details of court judgements.

While elements of these reforms are positive, new threats to the independence of the judiciary have emerged, with the International Bar Association, the OECD, the International Commission of Jurists, and the US State Department all expressing concerns at practices they perceive as not conducive to the independence of the judiciary.

Judicial appointments

Not all judges welcomed Putin's attempts at reform. Among his initial targets were the qualification collegia, established in the early transition and responsible for appointing and dismissing judges. Originally these were constituted entirely by judges, but the 1996 Constitutional Law on the Judicial System was amended in 2001 so that one third of the membership would be constituted by legal scholars appointed by the federation council – which is appointed by the president. Under the Law on the Status on Judges 1992, judicial appointments were made by the president 'based on the conclusions of the collegia relative to the court in question'.[6] The same process applies to the appointment of court chairpersons, whose tasks include allocating cases and overseeing the running of courts. They wield substantial influence over the careers of their fellow judges.

In a 2005 report on proposed changes to the structure of the collegia, the International Bar Association (IBA) said it was 'particularly concerned by a number of cases of judicial dismissals where undue influence appears to have been wielded by Court chairpersons or other parties'. 'A system which could allow chairpersons to cow or eliminate independent-minded judges', it noted, 'is in practice the antithesis of recognised international standards for the judiciary'.

The IBA cited a number of instances in which it was alleged that undue influence had been brought to bear. In the case of Judge Alexander Melikov, dismissed by a qualification collegium in December 2004, it said it had studied the judge's allegation that his dismissal followed his refusal to follow the directive of the Moscow City Court chairperson 'to impose

4 Speech by President Vladimir Putin on 9 July 2001 at a meeting with the World Bank President James D. Wolfensohn and the participants of the Global Justice Conference, St Petersburg, 8–12 July 2001. Available at www.ln.mid.ru/bl.nsf/0/77628302b16249ee43256a86002b3d89?OpenDocument

5 IBA (2005), op. cit., and interviews with lawyers.

6 IBA (2005), op. cit.

stricter sentences and to refuse to release certain accused persons pending their trials'. The IBA said that it was 'impressed by his credibility' and was satisfied there was no legitimate ground for dismissal.

Another recent case further highlighted the role of chairpersons. Judge Olga Kudeshkina was dismissed from Moscow City Court in May 2003 for 'violating the rules of courtroom conduct and discrediting the judiciary' after she claimed to have been pressured by the public prosecutor and the chairperson of the court to decide in the prosecutor's favour in an Interior Ministry investigation.

In a widely publicised letter to President Putin in March 2005, Kudeshkina said the judicial system in Moscow was 'characterised by a gross violation of individual rights and freedoms, failure to comply with Russian legislation, as well as with the rules of international law' and that there is every reason to believe that the behaviour of the chairperson was possible because of patronage provided by certain officials in the Putin administration.[7]

Perceived extent of corruption

While it is difficult or impossible to quantify the validity of Kudeshkina's claims, her letter was in tune with the lack of public confidence in the judiciary. Research by the Russian think tank INDEM goes so far as to quantify the perceived average cost of obtaining justice in a Russian court. At 9,570 roubles (US $358), the figure is still less than the 2001 figure of 13,964 roubles.[8]

Another Russian survey found that over 70 per cent of respondents agreed that 'many people do not want to seek redress in the courts because the unofficial expenditures are too onerous', while 78.6 per cent agreed with the statement: 'Many people do not resort to the courts because they do not expect to find justice there.'[9] The same organisation estimated that some US $210 million worth of bribes is spent to obtain justice in law courts in a year, out of a total US $3.0 billion in bribe payments.[10]

Senior court officials also hint at corruption within the judiciary.[11] Veniamin Yakovlev, former chair of the Supreme *Arbitrazh* court, said that while mechanisms had been, and continue to be, put into place to root out corruption and the 'overwhelming majority' of judges conducted themselves lawfully, 'it would be wrong to maintain that the judiciary has been purged of all traces of bribery'. In an interview with *Izvestia*, Valery Zorkin, current chairman of the constitutional court, was more forthright when he said that 'bribe taking in the courts has become one of the biggest corruption markets in Russia'.[12]

7 See www.khodorkovskytrial.com/pdfs/Kudeshkina_3-17-2005.pdf
8 See www.indem.ru/en/publicat/2005diag_engV.htm
9 Cited in Mikhail Krasnov, 'Is the "Concept of Judicial Reform" Timely?' in *East European Constitutional Review* 94 (winter/spring 2002). See also www.indem.ru
10 See www.indem.ru
11 European Bank of Reconstruction and Development Law in Transition Report 2005, available at www.ebrd.com/country/sector/law/concess/assess/report.pdf
12 See www.ipsnews.net/interna.asp?idnews=26088

Anecdotal evidence (including from lawyers within Russia who would not wish to be named) suggests that the corruptibility of courts increases, moving down the judicial hierarchy[13] and further away from Moscow.

Legal scholar Ethan Burger points out that large financial stakes and asymmetry between the parties in a court proceeding increases the likelihood of corruption,[14] and that it is more likely to occur in trial courts than in the appeal courts since it is 'easier to bribe a single trial court judge than a panel of appellate judges or members of the Supreme *Arbitrazh* Court'. Due legal process is altered in one of two ways, according to Burger: a judge may decide a case on its merits, but ask for payment before making a judgement; or the judge may 'simply favour the highest bidder'.

Recommendations

The challenge now is for the Russian judiciary to build on the various reforms which have already taken place and to win the confidence of court users, regardless of the level of proceedings in which they become involved. But such a transformation will require more than structural or procedural reform.

Successive laws pertaining to the judiciary passed since the dawn of *glasnost* have reinforced or reiterated its independence. Despite some adjustment of their membership structure, the Judicial Qualification Collegia remain essentially self-governing. Salaries of judges and court officials, while low in comparison to those in Russia's private sector and the West, have been significantly raised in the past 15 years. Civil society groups in Russia and outside (including TI) have been vocal in calling for greater transparency and openness within the judicial system.

Russian courts already have what is required to be fair, open and transparent. These elements need to be encouraged and consolidated. What follows are six concrete recommendations that can assist in consolidating what is fair, open and transparent in the Russian court system:

- The government should resist any further dilution of the judicial composition of the Judicial Qualification Collegia.
- Judges' salaries should be regularly reviewed with a view to achieving near-parity with private sector salaries in order to reduce the incidence of bribe taking and to retain talent within the judiciary.
- The programme for publishing court decisions should be accelerated and expanded, with an emphasis on explaining the legal basis of judgements, the nature of disputes, the sums at stake and awards given.
- Local and national public awareness campaigns should be initiated to educate on the role of judges, the concept of judicial awareness and future expectations of the judiciary.
- The government should review existing penalties for corruption within the judiciary.
- Judges should be allocated cases on a randomised basis to minimise bias toward one party.

13 The *arbitrazh* court system is divided into courts of first instance, courts of appellate instance, federal *arbitrazh* circuit courts (cassation courts) and the Supreme *Arbitrazh* Court.

14 Ethan S. Burger, 'Corruption in the Russian *Arbitrazh* Courts: Will There Be Significant Progress in the Near Term?', *International Lawyer,* 38:1 (spring 2004).

Corrupt judges and land rights in Zimbabwe

Gugulethu Moyo[1]

The independence of Zimbabwe's judiciary has been the subject of many reports over the past five years and there is a general consensus that it is no longer independent and impartial.[2]

By the end of the 1990s, Zimbabwe's Supreme Court had established an international reputation as an independent court that vigorously upheld human rights, although its human rights jurisprudence was mainly focused on civil and political rights. The high court also previously played a positive role in upholding fundamental rights.

Beginning in 2000, the government began a purge that resulted in most independent judges being replaced by judges known to owe allegiance to the ruling party. This reconstituted judiciary has conspicuously failed to protect fundamental rights in the face of serious violation by legislative provisions and executive action. Corruption has also played a role in compromising judicial independence because the allocation of expropriated farms to several judges has made them more beholden to the executive. Most accounts of the trajectory of judicial independence in Zimbabwe inextricably link its decline to government policies adopted in 2000 aimed at accelerating the protracted land reform process.[3]

The need for more equitable land distribution has been one of Zimbabwe's most intractable problems. At the beginning of black majority rule in 1980 about 6,000 white commercial farmers controlled 40 per cent of the most fertile land while seven million blacks were crowded into largely dry 'communal areas'. In the first decade of majority rule the government was faced with legal constraints, entrenched in the constitution that required it to pay prompt and adequate compensation if it wanted to appropriate land and, if the original owner requested, to do so externally in foreign exchange. This prevented it from carrying out meaningful re-distribution. Even after these constitutional restraints were removed, however, the government failed to adopt policies that addressed the problem effectively or to cooperate with international offers to provide financial assistance to an orderly programme.

Towards the end of the 1990s, the economy was in decline and the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) party was in danger of losing support. A new party, the Movement for Democratic Change (MDC), had attracted a considerable following and posed a threat to the ruling party's hold on power. To counteract this, ZANU PF exploited the hunger for land felt by millions of black peasants to launch a populist, 'fast-track' land reform

1 Gugulethu Moyo, International Bar Association, London, United Kingdom.

2 See www.un.org/News/briefings/docs/2003/db021903.doc.htm. See also *Justice in Zimbabwe,* a report by the Legal Resources Foundation, Zimbabwe, September 2002, www.hrforumzim.com; and Karla Saller, *The Judicial Institution in Zimbabwe* (Cape Town: Siber Ink, 2004).

3 See Arnold Tsunga, 'The Legal Profession and the Judiciary as Human Rights Defenders in Zimbabwe: Separation or Consolidation of Powers on the Part of the State?', Zimbabwe Lawyers for Human Rights (unpublished, 2003); and *The Independent* (Zimbabwe), 7 April 2004.

programme. At the end of February 2000, ZANU PF militias, who identified themselves as veterans of Zimbabwe's liberation struggle, invaded and occupied white-owned farms.

There is a considerable body of evidence that indicates that the occupations were not spontaneous actions by land-hungry peasants, as claimed by the government,[4] but an orchestrated campaign by the ruling party, the security agencies and various government departments. The occupiers perpetrated widespread acts of violence against the commercial farmers and farm workers, who were seen as sympathetic to the MDC. Thousands of workers were driven off farms and left destitute. The occupiers used the farms as bases from which to hunt down and attack opposition supporters in rural areas. After white farmers were expelled, the government, which has been repeatedly criticised for corruption,[5] allocated the best land not to landless peasants, but to high-ranking party and government officials, with some acquiring several farms each.[6]

When the dispossessed farmers sought legal protection and the Supreme Court declared the farm invasions illegal, the executive portrayed the intervention as a racist attempt to protect the interests of the minority white farmers and mounted a vicious campaign against white judges. President Robert Mugabe and several ministers, prominent among them Justice Minister Patrick Chinamasa, took it in turns to condemn these judges as 'relics of the Rhodesian era', alleging they had obstructed implementation of the government's land reform programme. War veterans staged protests that culminated in the invasion of the main courtroom of the Supreme Court just as the court was due to sit. During this incident, the veterans shouted slogans such as 'kill the judges', and both Supreme Court and high court judges subsequently received death threats.[7] In early 2001 Chief Justice Roy Gubbay was forced to resign.[8] Heavy pressure was exerted on the other Supreme Court justices, two of whom also resigned. Relentless pressure against the remaining independent judges in the high court led first to the resignation in 2001 of the remaining white judges, followed later by a number of independent black judges, notably Justices Chatikobo, Chinhengo and Devittie. One high court judge, Judge Godfrey Chidyausiku, joined in the attacks, alleging that the chief justice and Supreme Court had pre-decided in their favour all the cases brought by commercial farmers.[9] This accusation was unfounded since the Supreme Court had decided against the commercial farmers in 1996.[10]

4 See 'Politically Motivated Violence in Zimbabwe 2000–2001: A Report on the Campaign of Political Repression Conducted by the Zimbabwean Government under the Guise of Carrying out Land Reform', Zimbabwe Human Rights NGO Forum, August 2001, www.hrforumzim.com

5 TI has consistently identified Zimbabwe as a country with high levels of corruption, ranking it 107 out of the 159 countries assessed in 2006. The governor of the Reserve Bank of Zimbabwe has said that endemic corruption was overtaking inflation as the country's number one enemy, which could further dampen prospects of economic recovery. See *News 24* (South Africa), 28 February 2006.

6 See 'Second Report of Parliament of Zimbabwe Portfolio Committee on Lands, Agriculture Water Development Rural Resources and Resettlement', December 2004, www.parlzim.gov.zw/Whats_new/Order_paper/december2004/20december2004.htm.

7 See *Justice in Zimbabwe* (2002), op. cit.

8 'Report Highlighting the Critical Situation Faced by Judges and Lawyers in Zimbabwe', International Bar Association, April 2001. Available at www.ibanet.org/humanrights/Zim.cfm.

9 *Justice in Zimbabwe* (2002), op. cit.

10 *Davies & Ors v Minister of Lands and Agriculture & Water Development* 1996 (1) ZLR 81 (S).

What led the government to declare war on the Supreme Court was a decision in 2000 that interdicted it from continuing with the acquisition and resettlement programme until a proper plan was in place and the rule of law had been restored on the farms. Two other black High Court judges had previously ruled that the land resettlement programme was being conducted in an illegal manner. In this earlier ruling, the government conceded the illegality of the farm invasions and consented to the order relating to them. In the 2000 ruling, despite adjudging the scheme unconstitutional, the Supreme Court gave the government considerable latitude to remedy the illegality by suspending the interdict for six months.[11] The Court said it fully accepted that a programme of land reform was essential for future peace and prosperity, but could not accept the unplanned, chaotic, politically biased and violent nature of the current policy.[12] Despite this conciliatory approach, the judgement incensed the government. It became determined to purge the bench and replace it with judges who would legitimise its land grab.

Soon after Gubbay was forced out, the government appointed Godfrey Chidyausiku as chief justice, passing over several other Supreme Court judges. Chidyausiku's suitability was publicly questioned.[13] When a fresh land case was brought before the Supreme Court in September 2001, the new chief justice dismissed an application by the Commercial Farmers Union (CFU) that he should recuse himself because of his close association with the ruling party and his previous statements endorsing the government's land policy. He and three newly appointed judges then determined that the government had fully complied with the Supreme Court order to put in place a lawful programme of land reform that was in conformity with the constitution.[14] This was despite detailed evidence from the CFU that the rule of law had not been restored and that farmers were still being prevented unlawfully from conducting their operations.

The only judge from the Gubbay-led bench on this case, Justice Ahmed Ebrahim, dissented, finding that the government had failed to produce a workable programme of land reform or to satisfy the Court that it had restored the rule of law in commercial farming areas.[15] The law that the government had passed was unconstitutional in that it deprived landowners of their rights or interests without compensation; allowed arbitrary entry into property and occupation; and denied landowners the protection of the law and the right to freedom of association. The judge expressed the opinion that the majority decision had been predicated not on issues of law, but issues of political expediency. The reconstituted Supreme Court has made several other questionable rulings upholding the legality of the land reform programme and the limits imposed on compensation for expropriated farms.[16]

Of the seven current justices in the Supreme Court, all but one were appointed in 2001, after the land acquisitions began. Reports have emerged that all the new appointees, including Chief Justice Chidyausiku, were allocated farms after the eviction of their former

11 *Commercial Farmers Union v Minister of Lands & Ors* 2000 (2) ZLR 469 (S).
12 Ibid.
13 *Financial Gazette* (Zimbabwe), 25 January 2001.
14 *Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers Union* 2001 (2) ZLR 457 (S)
15 Ibid.
16 See, for instance, *Quinnell v Minister of Lands and Rural Resettlement* S-47-2004.

owners.[17] There is no doubt that the possession of the farms, often violently taken from their owners, has seriously compromised the independence of judges, particularly in legal challenges to land requisition. Two judges, Benjamin Hlatshwayo and Tendai Chinembiri Bhunu, even invaded and took over commercial farms personally.[18] Reports of such cases have deepened the perception that judges have subordinated their obligations to justice to the desire to amass wealth. In 2006, Arnold Tsunga, executive director of the NGO Zimbabwe Lawyers for Human Rights, said: 'A number (of judicial officers) have accepted farms which are contested. These farms have not come as written perks (in their contracts of employment) but as discretionary perks by politicians. When judges and magistrates are given and accept discretion perks because of poverty, surely their personal independence is compromised as well.'[19]

According to several credible independent organisations, judges with the integrity to resist undue influence by the government and ZANU PF have been prevented from independently dispensing justice by intimidation and harassment.[20] Walter Chikwanha, the magistrate for Chipinge, was dragged from his courtroom in August 2002 by a group of veterans and assaulted after he dismissed an application by the state to remand five MDC officials in custody. The attack took place in full view of police who did not try to prevent it. Several court officials were also assaulted and one had to be hospitalised.[21] In December 2003, Judge President Michael Majuru of the administrative court resigned and fled the country after an altercation with Justice Minister Patrick Chinamasa over a controversial case involving a government agency and Associated Newspapers of Zimbabwe (ANZ), publishers of the *Daily News,* Zimbabwe's only independent newspaper. Majuru later claimed that Chinamasa offered him a farm as an inducement to rule in favour of the government.[22]

When dispossessed farmers continued to bring cases before the administrative court challenging technical aspects of the land acquisition programme, the government amended the constitution in 2005 making 'state land' all land acquired, or to be acquired for resettlement or whatever purpose, and barring any legal challenge to such acquisition, although legal challenges as to the amount of compensation payable for improvements are still allowed.

The failure of the courts to uphold the rule of law in land cases has created the impression that the security of property rights is no longer guaranteed, precipitating a general breakdown in the rule of law. Land grabs by government and party officials continue to occur with the new black occupiers of the first wave of possession now being forced off their property. Zimbabwe is said to have the fastest shrinking economy in the world and various economists

17 According to a list compiled by the Justice for Agriculture NGO, Chidyausiku was allocated a prime farm, Estes Park, in the rich Mazoe/Concession area. See www.zimbabwesituation.com/VIP_farm_allocations.pdf for further information. The list contains details of the new owners of more than 800 confiscated farms.

18 *Daily Telegraph* (UK), 17 June 2003.

19 Tsunga (2004), op. cit.

20 *The State of Justice in Zimbabwe,* report of the General Council of the Bar, December 2004. Available at www.barcouncil.co.uk

21 *Daily News* (Zimbabwe), 17 August 2002.

22 See www.zic.com.au/updates/2004/27july2004.htm

have attributed this primarily to the loss of property rights.[23] The government has tried to blame Zimbabwe's woes on the sanctions imposed by western states, although these are not economic but instead target government officials through travel restrictions and the freezing of their external accounts.

But it is not only in respect of land that courts have so conspicuously failed to uphold fundamental rights. Despite mounting criticism, the judiciary repeatedly demonstrates a tendency, especially in high-profile and electoral cases, to lend its process to the service of the state. In numerous cases challenging the constitutionality or legitimacy of measures that are palpably in violation of the law, the Supreme Court has departed from established legal principle in order to legitimate executive action. With few exceptions, judges are seen to have collaborated with a government that has violated many of the rights of its citizens, including freedom of expression, freedom of the press, freedom of assembly and the right to free and fair elections.[24]

23 Craig Richardson, *Property Rights, Land Reforms and the Architecture of Capitalism* (Washington D.C.: American Enterprise Institute, 2006); and *Zimbabwe Independent* (Zimbabwe) 5 August 2005.

24 For example in *Associated Newspapers of Zimbabwe Pvt Ltd v Minister of State in the President's Office and Ors* S-20-2003, the Supreme Court used the spurious 'dirty hands' doctrine to block a legitimate challenge by an independent newspaper to the legality of new legislation imposing undemocratic government controls over the operations of newspapers and journalists. This judgement directly led to the closure of the only independent daily newspaper in Zimbabwe. In *Tsvangirai v Registrar-General of Elections & Others* S-20-2002, Morgan Tsvangirai, the leader of the opposition, was standing in the presidential election against President Mugabe. Just prior to the election President Mugabe passed measures purporting to drastically alter the election laws and Tsvangirai sought to challenge the legality of these measures. The majority of the court ducked the issue by making a finding that Tsvangirai did not have any legal standing in the matter.

3 Accountability and competence of judges

The judiciary needs to be independent of outside influence, particularly from political and economic powers. But judicial independence does not mean that judges and court officials should have free rein to behave as they please. Indeed, judicial independence is founded on public trust, and to maintain it, judges must uphold the highest standards of integrity. This chapter focuses on the accountability mechanisms that safeguard judicial integrity. Greg Mayne looks at the failure of the international community to address judicial accountability, and maps out various national and international initiatives that seek to plug this gap, notably the Bangalore Principles of Judicial Conduct. Emilio Cárdenas and Héctor Chayer address the question of judicial discipline in Latin America, and ask who should sanction corrupt or incompetent judges. If the judiciary is accountable to an outside body, there is a danger that it could undermine judicial independence. If the judiciary develops internal accountability mechanisms, issues are raised as to the legitimacy of such self-regulation and its transparency.

A pair of essays looks at the professionalisation and training of judges and their influence on judicial integrity. Vincent Yang and Linda Ehrichs consider corruption in the judiciaries of Asia and explain how judges' education, salaries and career structures impact on their integrity. Carlo Guarnieri examines the judicial training and appointments regime in three European civil law systems (Germany, France and Italy) and compares their propensity for maintaining judicial integrity. Finally, Zora Ledergerber, Gretta Fenner and Mark Pieth look at the repercussions of weak national judicial accountability mechanisms for the international legal system, most notably for the effective implementation of the UNCAC provisions that deal with the recovery and repatriation of stolen assets.

Judicial integrity: the accountability gap and the Bangalore Principles

Greg Mayne[1]

Several international standards concentrate on securing judicial independence by insulating judicial processes from external influence (see chapter 2).[2] But how do they deal with

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2 For example, the UN Basic Principles on the Independence of the Judiciary; Commonwealth Latimer House Principles on the Three Branches of Government; African Union Principles on the Right to a Fair Trial and Legal

situations where judicial independence is undermined not because of external influence, but because of internal weakness? At the inter-governmental level, there has been a notable failure to deal with the latter issue in any systemic way, until recently.

A reason for this failure is that the majority of international standards on judicial independence were developed in the context of a significant divergence between support for the principle of judicial independence at the international level, and the reality of its non-observance. The undermining of judicial independence by the state, particularly in undemocratic countries, was commonplace and had obvious ramifications for the respect for the rule of law and the upholding of human rights. Safeguarding the independence of the judiciary *vis à vis* the state was considered more of a priority than judicial accountability, given its catalytic role in ensuring the protection of individual rights, upholding the rule of law and combating corruption.

Given this context, and the tension that exists between the principles of independence and accountability, efforts to address judicial accountability have been perceived as problematic. This tension derives from different conceptions of accountability. In everyday terms accountability is simply the ability to hold an individual or institution responsible for its actions. The question for the judiciary is accountability to whom and for what? Broadly speaking the judiciary, like other branches of government, must be accountable directly or indirectly to the general public it serves. But holding the judiciary accountable to an external body raises questions as to whether that same process could be used to undermine judicial independence. Accountability mechanisms, particularly those using external bodies, expose the judiciary to the risk that its processes will be used by aggrieved parties for the purposes of harassment or intimidation. Internal judicial accountability mechanisms, while they protect judicial independence, raise issues of legitimacy and transparency, apparent or otherwise.

While the focus on safeguarding the institutional independence of the judiciary was appropriate, it neglected the need to foster a culture of independence, impartiality and accountability among judges. This is a vital step towards ensuring the overall integrity of the judiciary. It is particularly the case in countries where there is a lack of accountability in other branches of government since the judiciary, through lack of institutional safeguards, the process of slow co-option or reflecting a broader societal culture or value system, would be susceptible to the repetition of similar behaviour patterns.

Despite this initial failure, a progression in more recently promulgated international standards of judicial independence has been a greater focus on issues of judicial accountability.[3] These generally address strategies that can be employed to help enhance judicial accountability. For

Assistance in Africa; Council of Europe recommendation no. R (94) on the independence, efficiency and role of judges; and the European Charter on the Statute for Judges. Various standards have also been produced by NGOs, including the IBA Minimum Standards of Judicial Independence, Draft Principles on the Independence of the Judiciary, the Siracusa Principles prepared by the International Commission of Jurists and the International Association of Penal Law Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence.

3 See Section A, parts 4 and 5, of the African Union Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa and Section VII (b) of the Latimer House Principles on the Three Branches of Government.

example, the Limassol Conclusions in 2002 were issued by Commonwealth Judicial Officers, who set out a number of recommendations including the promulgation of guidelines on judicial ethics, public education on judicial processes and the development of national strategies to combat corruption within the judiciary. Later that year the Commonwealth recommended the adoption of judicial codes of conduct and the holding of outreach programmes on the work of the judiciary.[4] In 2006, an Ibero-American Code of Ethics was adopted at the 13th Ibero-American Judicial Summit.[5] This reflects the growing awareness of the importance of a carefully constructed regime to ensure judicial accountability and appropriate standards of judicial conduct.

The Bangalore Principles

The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity, a group of senior judges from eight African and Asian common law countries. This group was formed in 2000 under the auspices of the Global Programme Against Corruption of the UN Office of Drug Control and Crime Prevention in Vienna. The principles were subsequently adopted by a roundtable of chief justices from all major legal traditions in November 2002. A group of judges preparing recommendations for action for other judges was perceived to have a legitimacy that more traditional, state-centred processes would not. The question of legitimacy is crucial to their effectiveness and future impact, and has been reflected in their quick adoption and acceptance by countries around the world.[6] The Bangalore Principles are primarily directed at judiciaries for implementation and enforcement, rather than the state.

The Bangalore Principles set out six core values that should guide the exercise of judicial office, namely: independence, impartiality, integrity, equality, propriety, and competence and diligence. Under each value the principles describe specific considerations and situations of which judges should be aware in order to ensure the maintenance of, and public confidence in, judicial integrity. In the case of propriety, for example, the principles highlight the fact that the position of judge is one that carries significant responsibility and weight, and so a judge must accept restrictions that would otherwise be considered burdensome. These restrictions include not fraternising with members of the legal profession who regularly appear before the judge in court, or not allowing family members to appear before the judge's court as parties or lawyers since both give rise to the perception of favouritism and lack of impartiality, and undermine confidence in the administration of justice. The focus on practical guidance and specificity, compared to other international standards, makes them of direct utility to members of the judiciary.

4 Plan of Action for Africa on the Commonwealth (Latimer House) Principles on the Accountability of, and the Relationship between the Three Branches of Government. Available at www.cmja.org

5 Available at www.cumbrejudicial.org

6 The Bangalore Principles are being used either as a basis for the development of a code or to revise existing codes in Mauritius, the Netherlands, England and Wales, Bulgaria, Uzbekistan, Serbia and Jordan and have been adopted in Belize and the Philippines. Report of Nihal Jayawickrama, Coordinator of the Judicial Group. On file with the author.

The chief weakness of the Bangalore Principles lies in their enforcement. There are two facets to the enforcement problem. First, the Bangalore Principles of Judicial Conduct, like other judicial independence standards, are not contained in a binding document under international law. States are not bound to comply with their provisions in the same manner that they are with regard to international treaties. Unlike other international standards on judicial independence, it would be difficult to argue that the principles reflect customary international law. They have been developed outside traditional UN processes for generating international standards, lowering their status and creating the theoretical risk that they might be inappropriately amended by states if their adoption is sought by the international community.[7] This fear may be unfounded as the UN Commission on Human Rights in resolution 2003/43 – adopted without a vote – noted the Bangalore Principles without amendment and brought them to the attention of member states for consideration. Furthermore, at the 2006 session of the UN Economic and Social Council, member states were invited to encourage their judiciaries to consider the principles in the process of developing or reviewing professional standards of conduct.[8] The resolution also envisages the creation of an open-ended intergovernmental expert group that would prepare a commentary on the principles in cooperation with the Judicial Group.

Second, the Bangalore Principles appear to offer guidance to members of the judiciary, rather than to set out directly enforceable standards of behaviour, and therefore may not have a direct impact on improving judicial conduct. The standards contained are not expressed in a manner that enables their direct application or incorporation into domestic law as enforceable rules of conduct. Nor do they specify the standard or burden of proof, or the types and scale of penalties that can be imposed for an infraction. In terms of implementation they simply call upon national judiciaries to adopt effective measures to provide implementation mechanisms if they are currently not in existence. They do not elaborate further on what an appropriate mechanism for the enforcement of the standards contained therein should look like, apart from the fact that it should be generated from within the judiciary, although other international standards on judicial independence may provide some guidance in that respect.

Despite these weaknesses, a key strength of the Bangalore Principles is their recognition that judiciaries are not passive players in terms of maintaining the independence, impartiality and effectiveness of a judicial system, and therefore its integrity, but must be active in maintaining appropriate standards of judicial conduct and performance. Other instruments elaborated by the international community have tended to dismiss the need for standards of conduct for the judiciary and the role of the judiciary in this regard, and emphasise the responsibilities of the state. The promulgation of the principles outside the traditional UN or inter-governmental processes indicates a growing awareness among judges that efforts to strengthen judicial independence need also to strengthen judicial accountability and that judges themselves must

7 In 2006, the UN Crime Commission invited member states to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when developing their own rules of ethical conduct.

8 ECOSOC Resolution 2006/23, available at www.unodc.org/unodc/corruption_judiciary.html

play an active role in upholding high standards of conduct in order to contribute to the strengthening and institutionalisation of judicial independence.

Recommendations

- International standards, while not directly enforceable, represent international consensus. Civil society and policy makers should utilise these standards as the basis of their engagement with governments and judiciaries on the issues of judicial independence and accountability.
- Bring to the attention of judiciaries the existence of the Bangalore Principles and encourage their adoption, or the adoption of a similar code, and the development of enforcement mechanisms consistent with judicial independence.
- Encourage discussions among judges at national level on issues of judicial conduct and accountability, and the need to uphold adequate standards, and begin a dialogue with the judiciary about these issues.
- Using the international standards as a basis, educate the broader population about the issues of judicial independence and accountability, and the role of the judiciary in society.
- Encourage the adoption of the Bangalore Principles of Judicial Conduct in their current form by the UN General Assembly.

Corruption, accountability and the discipline of judges in Latin America

Emilio J. Cárdenas and Héctor M. Chayer[1]

Judges are expected to take decisions about breaches of law by individuals, governments and companies, but what happens if it is the judge who breaks the law? What mechanisms need to be in place to ensure that corruption by judges or court personnel is detected, investigated and penalised?

It must be possible to discipline judges who are criminally corrupt, but disciplinary measures must not infringe the effective independence of the judiciary. In other words, since the independence of the judiciary is vital to its effectiveness, the executive and legislative branches cannot be allowed to use the criminal process as a weapon of coercion or for purposes of retaliation against the judiciary. An example of a worst case scenario is offered by the province of San Luis, Argentina where, until recently, it was standard practice for the provincial authorities to make novice judges sign an undated resignation letter on taking up their positions.[2] So should the judiciary be allowed to police itself rather than be subject to the ordinary processes of the system? Or would self-policing give rise to the risk that judges would be lenient with their peers?

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2 The practice was denounced by prosecutor Gretel Diamante in April 2005 before the federal attorney general, who described the practice as 'aggravated coercion', carrying a penalty of up to 10 years. See *Clarín* (Argentina), 14 April 2005.

There are different models for judicial discipline and little agreement about which works best. Whatever procedure is put in place it should be balanced to, on the one hand, protect judicial independence and, on the other, provide for accountability of judges' actions. Such a procedure will require sufficient transparency to command public confidence.

In Latin America, about half of the countries have vested disciplinary authority in judicial councils. These are Argentina (federal only), Bolivia, Peru, Ecuador, Colombia, El Salvador and Mexico (at the federal level). Internal disciplinary entities are found in Uruguay, Chile, Brazil, Panama, Costa Rica, Nicaragua, Guatemala and the Dominican Republic. Venezuela still has an external disciplinary body, but it no longer has a judicial council, while Paraguay has a judicial council, but the disciplinary body is separate.

In general, sanctions fall into two categories: a disciplinary system that can admonish, fine or suspend judges for misdemeanours such as failing to attend court, tardiness in case processing or mistreatment of staff; and a system of removal for serious misconduct, including corruption.

In Latin America these mechanisms are often the responsibility of more than one body. In Argentina, the chambers of appeal and the judicial council have disciplinary faculties, while removal is the prerogative of an impeachment jury. In Peru, the removal of Supreme Court judges is the responsibility of congress, while the process of removal for lower court judges falls to a judicial council. In other countries a single body is responsible for both functions. In Bolivia the judicial council is responsible for discipline and removal. In Chile the Supreme Court is responsible for discipline in all courts except the constitutional, electoral and regional electoral courts.

One point worth noting is that the judicial verdict itself should not be the subject of disciplinary proceedings (provided, of course there are no irregularities in sentencing, and that the sentence is timely and based on the facts submitted before the judge). If the facts in a case suggest that the law has been misapplied then the judicial decision may be appealed, but this is not tantamount to an accusation of misconduct. In other words, appealing a decision is not a mechanism for disciplining a judge – although it can be a means of identifying misconduct since the habitual overturning of decisions issued by a particular judge might indicate bribe-taking, or at the very least a poor understanding of the law.

A second point worth noting is that judicial corruption is not restricted to bribery or undue interference in the context of a court ruling. Manipulation of court funds, nepotism in hiring court staff and conflicts of interest in the handling of cases are also corruption problems. The Brazilian public was scandalised in the late 1990s when a judge of the Regional Labour Court of Paraíba, Severino Marcondes Meira, was discovered to have placed 63 relatives on his court payroll.[3] Accountability mechanisms in the judicial system can help prevent as well as uncover such cases, for example the publication of annual reports about the court's workings and financial audits. Accountability mechanisms specific to individual judges include requiring judges to write individual reasoned judgements; to explain personal views on the law and the constitution in lectures and to media; and to establish systems for judges to register pecuniary and other interests. Two important external sources of judicial accountability are the role of the media (see **page 108**) and the role of civil society organisations (see **page 115**).

3 Luiz Alberto dos Santos y Regina Luna dos Santos Cardoso, 'Corrupção, Nepotismo e Gestão Predatória: Um Estudo do Caso Brasileiro e Alternativas para seu Enfrentamento', www.clad.org.ve/fulltext/0052003.pdf

Argentina's politicians strengthen their grip on the judicial council

Judicial councils originated in post-war Europe and were initially designed to safeguard the independence of the judiciary from the executive and legislative branches of government. About half of the countries in Latin America have introduced judicial councils but in very different contexts. Beyond safeguarding judicial independence, a major concern was to improve the functioning of the judiciary by introducing independent oversight. Argentina provides a case study of the gradual politicisation of the judicial council.

Argentina's judicial council was created as part of the landmark 1994 constitutional reforms. It began operating in December 1998 and has responsibility for appointments (pre-selection for executive and legislative final choice), transfers, training and discipline of judges.

Since President Néstor Kirchner took office in 2003 the executive has shaken up the judiciary. It replaced most of the justices who were appointed when former president Carlos Menem expanded the Supreme Court and filled vacant seats with his supporters. More recently, in a far less popular move with long-term implications for judicial independence, Kirchner has tightened his grip on the judicial council, which was also instituted under Menem. He presaged this move in a message to the legislative assembly in 2006, where he described the judicial council's previous performance as 'shameful', without giving grounds for this assessment.[4]

Kirchner's subsequent reforms altered the composition of the council, which already had a high number of legislators as members compared to European models. The number of councillors was reduced from 20 to 13, but not proportionately to its original composition. Whereas political representatives previously held nine of the 20 seats on the council, they now hold seven out of 13, giving them the majority needed to veto candidates and block removals. The quorum now is seven, compared with 12 before, meaning that members of the executive and legislature combined can veto any action by simply not attending.

Argentina has a two-step disciplinary process for judges: the judicial council investigates and penalises administrative misdemeanours, but refers cases to an impeachment tribunal (*jurado de enjuiciamiento*) in the case of serious misconduct, which includes corruption. The *jurado* has also been politicised in the reform process. It was originally made up of nine members: three judges, three legislators and three federal lawyers. From March 2007, it will be composed of seven members: four legislators, two judges and one federal lawyer. Political representatives once again will constitute the majority. Jury members can be removed by a vote of three quarters of the total members of the body, meaning that legislators would have the whip-hand. Congressional representatives can only be removed by their respective chambers of Congress.

The impeachment procedure begins with a decision by the commission for discipline and accusations to pursue a complaint. The accusation is then formulated by the council in plenary. The accused judge is given 10 days to contest. After the evidence has been produced or the period for presenting evidence expired, both parties must produce a final oral statement. The jury then deliberates and is given 20 days to resolve the issue. The jury's decision cannot be overturned although a request for clarification can be made within three days of the ruling. This decision's effect is the

4 *Clarín* (Argentina), 1 March 2006.

removal from office of the accused: the condemned party can still be subject to accusation, trial and punishment according to law in the ordinary courts.

The recent reform establishes that the council must immediately inform the executive of its decision to open a process to remove a judge. It does not, however, require that the decision be made public, for example by uploading it to the council's website, which would better serve the interests of transparency.

To date the impeachment jury has not received the same level of criticism as the judicial council. Since 1998 the commission for discipline has issued 31 accusatory rulings, of which 24 were approved by the plenary and sent to the impeachment jury. As a result, 11 judges were removed, five resigned prior to sentence, four were rejected and another four are still in process. This means that in the first years of the council's life 18 judges were forced to leave the judiciary, compared with just 29 judges during the many decades of the previous system.[5]

A majority of these cases were for corruption. In 2005 Judge Juan Mahdjoubian was removed after a hidden camera revealed a lawyer offering to 'forum shop' for a client to ensure the case was heard by Mahdjoubian. That same year Néstor Andrés Narizzano was removed for employing his daughter and his son's girlfriend in his court, and Rodolfo Antonio Herrera was sacked after a hidden camera revealed his attempt to negotiate and profit from the sale of a bankrupt rail company.

Codes of conduct and ethical standards

Another option is to regulate disciplinary failure through codes of conduct for judges and judicial officers. Countries such as the United States penalise breaches of the code of conduct at federal and state levels, and Argentina does so in some provincial jurisdictions.

The adoption of a code of judicial ethics appears in principle to be an ideal route to establish clear rules and make judicial activity transparent. A code of judicial ethics can:

- Help judges resolve questions of professional ethics, giving them autonomy in decision taking and guaranteeing their independence
- Inform the public about standards of conduct that judges can be expected to uphold
- Provide the judiciary with standards against which it can measure its performance
- Provide protection to judges against charges of misconduct that are arbitrary and capricious
- Signal the serious commitment of a concerned judiciary to meet its responsibilities in this regard

There are two main arguments against judicial ethics codes. The first asserts that they jeopardise judicial independence; the second, that they are ineffective.

According to the first argument, judicial independence can be jeopardised by the imposition of a code of conduct from outside the judiciary. What is more, such a code could be used by superior courts to control dissents and differences in judgements by lower courts. Both are dangers that could be mitigated by a committed civil society that acts as a watchdog and reinforcer of judicial independence and by the consolidation of the judiciary as an independent body of ethical practitioners, not rivals pitted against each other. In sum, this first argument against judicial codes of

5 See Emilio Cárdenas and Héctor Chayer, *Corrupción Judicial. Mecanismos para prevenirla y erradicarla* (Judicial corruption. Mechanisms to prevent and eradicate it) (Fores – La Ley: Buenos Aires, 2005).

conduct is weak since ultimately judicial independence is reinforced, rather than curtailed, by a rigorous sense of judicial ethics.

With respect to the second argument, it is true that explicitly defining the standards of behaviour expected of judges orients them and focuses social expectations, facilitating early detection of judges whose behaviour deviates from the standards. But the existence of clear rules of conduct does not guarantee their adoption in practice.

Certain practices that damage the image of the judiciary could still be regulated, for example when judges meet with parties to a case (or their representatives) without all the litigants (or their representatives) being present. In other jurisdictions these *ex parte* meetings are prohibited as a matter of principle.[6]

Conclusion

The question of accountability is complex, but we can draw a few simple but important conclusions. First, judges must be held accountable for their actions, and must be investigated and sanctioned when they engage in corruption. Secondly, the judiciary requires a high degree of independence in order to fulfil its constitutional role to adjudicate impartially and to stand up to political pressure. Hence, the accountability mechanisms required must protect judicial independence by keeping the political branches of government at arm's length. But placing responsibility for judicial oversight outside the judiciary introduces the risk that judges will be investigated and removed for political reasons unless mechanisms are in place to prevent the oversight body being hijacked by any one group, especially the political powers of government. In practice the converse – models that place responsibility exclusively on judges to discipline themselves – might be timid in prosecution of corruption crimes of their peers.

6 Jeffrey M. Shaman, Steven Lubet and James J. Alfini, *Judicial Conduct and Ethics* (Charlottesville: Michie Company, 1990).

The professionalism of judges: education, salaries and career structure in Asia

Vincent Yang and Linda Ehrichs[1]

The comparatively lowly status and remuneration of judges, and the judiciary's subordinate nature in the government structure, are among the early causes of judicial corruption.[2] The

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2 Edgardo Buscaglia, 'Judicial Corruption in Developing Countries: Its Causes and Economic Consequences', paper posted by UN Global Programme against Corruption (2006). See www.unodc.org/pdf/crime/gpacpublications/

Asia Development Bank's work on promoting judicial independence shows that political interference, bribery and corruption co-exist with low standards of professional competence and inadequate financial resources in certain country contexts. Although the causes of corruption are multiple and context-specific, the first measures to fight judicial corruption include training and raising salaries. These are only pre-conditions for reducing judicial corruption, however, and are not sufficient to redress the problem entirely. Since they are such frequent components of judicial reform projects, it is worth examining in more detail what these measures can and cannot achieve in practice.

Budgets and salaries

While it is difficult to draw a causal link between severe under-funding and judicial corruption, severe under-funding always has an impact on the judiciary as it seeks to supplement its needs from other sources. Under-funded judiciaries are unlikely to offer the salaries and benefits that will attract and retain high-quality and qualified candidates. 'You pay peanuts, you get monkeys,' President Lee Kuan Yew is quoted as saying[3] when explaining why Singapore's judges are paid five times more than their US counterparts. In contrast to Asia's middle to high-income countries, the commitment of many governments (for example Bangladesh, Cambodia, Indonesia, Laos, Nepal, Pakistan, Philippines, Thailand and Vietnam) to ensuring adequate support for courts and their personnel has weakened, inviting corruption and undermining the rule of law.[4]

It is the duty of the state to provide adequate resources to enable the judiciary to perform its functions properly. 'Adequate' salaries means a wage that ensures judges and prosecutors can support their families, remain loyal to their profession and, at least, have no economic 'need' for resorting to corruption. In Bangladesh, the salary structure for judges in the countryside is insufficient to support a dignified manner of life and discourages capable people from joining the judiciary (see Bangladesh country report, page 179). Cambodia's Centre for Social Development argues that a poor judge who drives a motorcycle to work commands much less respect from those he passes judgement on (see Cambodia country report, page 183).

cicp14.pdf; Kalus Decker, Caroline Sage and Milena Steganova, 'Law and Justice: Building Equitable Legal Institutions', paper posted by the World Bank. Available at siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law or_ Justice_Building_Equitable_Legal_Institutions.pdf. The World Bank's strategic advice on legal reform states that when there is corruption within the judiciary, anti-corruption campaigns must take a multi-pronged approach with a focus on judges, court staff and prosecutors that includes: training and education; appointment, promotion and salaries; evaluation and discipline; transparency in procedures and decision-making; and the participation of civil society. See World Bank, 'Legal and Judicial Reform: Strategic Directions' (2003). Available at www4.worldbank.org/legal/leglr/GreyBookFinal2003.pdf

3 Asian Development Bank (ADB) (2003) 'Judicial Independence Overview and Country-Level Summaries. Judicial Independence Project', RETA no. 5987. Available at www.adb.org/Documents/Events/2003/RETA5987/Final_Overview_Report.pdf

4 Ibid.

This is light years away from the situation in developed countries where the independent judiciary is respected and afforded the rewards that respect commands. Where judges are paid a high salary, they are more likely to resist corrupting pressures.

Pay scales among other court and law enforcement personnel must also be taken into account when exploring the roots of corruption. In Nepal, many irregularities occur within the nexus of judges and lawyers in which the former supplement their meagre salaries with 'incentives' from the latter (see Nepal country report, page 263). Efforts to grapple with the causes of judicial corruption in China raised the anomaly that judges were paid substantially less than most practising lawyers and, in some provinces, even police officers earned more.[5]

The allocation of resources within a judicial structure is worth examining as a potential cause of corruption. In some countries, for example Nepal and Vietnam, Supreme Court justices receive 10 to 20 times the salary of lower judges, as well as such perks as cars and housing, but the salaries of subordinate judges are abysmally low by comparison, with a civil court judge earning roughly the same as a chauffeur.[6] In such contexts, issues of the judiciary's institutional and financial management capacity, budgetary independence and transparency need to be addressed.

A number of Asian countries have launched reforms to counter poor remuneration in the past decade. But raising judges' salaries when they are widely perceived as corrupt presents a special set of challenges. In China critics asked why judges should be paid more when so many cases of judicial corruption were featured in the media. In coastal cities, where judges are paid much better than colleagues in the country, improved salaries and benefits have had little impact on corruption levels. In Guangdong, the former chief justice of the provincial high court was once the highest paid judge in the province, but he was still convicted of corruption (see country report, page 151).

For subordinate judges in remote areas, the system may have to provide further incentives if it is to maintain their integrity. China launched a comprehensive campaign to fight judicial corruption in the past decade, and adopted policies to raise the salaries and secure the tenure of judges.[7] The 1995 Judges Law requires the government to raise judges' salaries according to 'the particular characteristics of adjudicative work' and to provide special incentives to those who work in poor regions. As of 2006, however, these provisions had still to be implemented

5 In his essay, 'On Restructuring the Judges' Salary System', Du Kai Lin indicates that average salaries of judges in some provinces in China are less than those of police officers. He argues that the system is 'against human nature' if it cannot effectively secure the judges' salaries but demands that they perform their duty by 'maintaining self-control and being happy to be poor'. Available at www.21cs.cn/shtml/117/2005-03-04/164807.shtml.

6 ADB (2003) op. cit.

7 In the essay, 'The Missing Generation of Judges and Prosecutors Requires a Solution to Problems in the Systems and Salaries', Zhong Wen Hua explores the systemic problems causing the shortage of legal professionals willing to work as judges and prosecutors in underdeveloped regions in western China. According to Zhong, the most important underlying factor is the failure of the system to attract qualified legal professionals by securing decent salaries and living conditions. Available at www.chinacourt.org/public/detail.php?id=198213

by local governments.[8] To establish a national standard rate of payment for judges, it may be necessary to transfer additional funds to poorer regions. In the Philippines, local government allowances supplement up to 25 per cent of the salaries of judges and prosecutors, raising issues of judicial independence and heightening risks of corruption.[9] In 2006, a law raising salaries and granting additional compensation for members of the judiciary was linked to a 300 per cent increase in court filing fees. This caused protests from lawyers and civil society groups who complained that the new fees hindered access to justice, especially for the poor.[10]

In countries where salaries have been increased, the impact on corruption levels is difficult to assess. Cambodian judges received a 10-fold pay rise in 2002 in an attempt to curb corruption though critics say the increase has had little effect because it was given universally without reference to job performance. The Philippines also increased the pay of judges and prosecutors, paying particular attention to improved working conditions and career development in order to prevent the haemorrhage of staff to the private sector, yet judicial corruption continues to be a concern.[11]

Under certain conditions generous salaries are seen as removing incentives for judicial corruption. According to the Japanese Federation of Bar Associations, high salaries are guaranteed by the constitution and 'judges feel little motivation to become engaged in corrupt activities that would put them at risk of losing this amount of income'.[12] But high judicial salaries can have a contrary and unwelcome effect. The high salaries judges enjoy in Singapore have been described as a form of 'permanent bribery', intimating that judges' impartiality has been betrayed since they would never take a decision that would jeopardise their lifestyles and incomes.[13]

Promotions

Even when tenure is secure the handling of career progress and promotion can influence judicial integrity, or lead to its breakdown. Promotions reward judges and prosecutors for upholding integrity and refusing to give in to political pressures or other temptations. Establishing transparent, merit-based criteria for promotion helps to prevent career progression based on political affiliation or other inappropriate influence. The actors and processes that determine

8 In his paper, 'Problems and Policies of the Professionalisation of Judges in Underdeveloped Regions', Wu Hongkui examines the serious difficulties facing the economically underdeveloped regions in China in implementing the standards of professionalism proposed by the Supreme People's Court. Available at www.chinacourt.org/public/detail.php?id=206139

9 See Freedom House, *Countries at the Crossroads 2005* (New York: Rowman and Littlefield, 2005); and ADB (2003), op. cit.

10 *Manila Standard Today* (Philippines), 25 August 2006, at www.manilastandardtoday.com/?page=politics02_aug15_2006

11 ADB/OECD 'Progress in Legal and Institutional Reform in 25 Countries', Anti-Corruption Initiative for Asia and the Pacific (2006). Available at www.oecd.org/dataoecd/32/31/36832820.pdf

12 Japan Federation of Bar Associations, 'Corruption and Related Problems in Law Enforcement' (2003). Available at www.nichibenren.or.jp/en/activities/statements/data/POLA2003_5.pdf

13 Francis T. Seow, 'The Politics of Judicial Institutions in Singapore' (1997), available at www.singapore-window.org/1028judi.htm

promotion are also significant. If promotion is handled by a government agency, such as the Ministry of Justice, independence may be compromised. If it is handled by senior judges or a judicial council, the outcome will depend on the independence and integrity of the judicial leadership.[14]

Thailand's judicial commission, an independent government organisation, is required to take into account both personal and professional characteristics and accomplishments prior to appointing judges at various levels of the judiciary. These requirements include subjective and objective criteria, such as prior court and judicial experience, as well as performance on an annual evaluation process.[15] This process also includes a detailed arrangement through which judges after specified periods in junior positions are eligible for promotion to a more senior position or to a higher court.[16] An enquiry into career and promotion among young Japanese judges gives an interesting insight into legal culture in that context. Young judges are generally reassigned to a new appointment every few years based on assessment by the administrative office of the court system, which is staffed by career judges. Analysis shows that those with non-conformist tendencies are less likely to be promoted and more likely to remain in provincial towns.[17]

Education and training

The justice systems of Asian countries reflect multiple legacies, including those of European colonialism, as well as other historical and traditional influences. The majority of countries in East Asia are members of the European civil law tradition. China's 'socialist system with Chinese characteristics' shares many similarities with civil law systems in continental Europe. The 'Indo-China triad' of Cambodia, Laos and Vietnam is largely influenced by French civil law. By contrast, the countries of South Asia – Bangladesh, India, Pakistan and to a lesser extent Nepal – reflect the traditions of English common law. Hong Kong and Singapore also inherited the English system.

The education and training of judges has the dual purpose of acquiring and building knowledge, and acculturating them to the standards of the profession. The education and career structure of judges in civil vs. common law systems are quite different and understanding these differences can help identify reforms to address the problem of judicial corruption. Typically, judges in common law countries or regions, such as Hong Kong and Singapore, are selected from experienced practising lawyers. Once appointed, they are almost certain to

14 Kenneth W. Dam, *The Judiciary and Economic Development* (Chicago: University of Chicago Law School, 2006). Available at www.brookings.edu/views/papers/200603dam.pdf

15 Regulation of Judicial Administration Commission Concerning Appointing, Promoting and Salary Increases of Judges of Courts of Justice, BE 2545 (2002), articles 7, 9, 10, 11 and 12; authorised by The Act on Judicial Regulation of Courts of Justice, BE 2543 (2000) (unofficial translation from Thai to English).

16 Regulation of Judicial Administration Commission Concerning Training and Developing of Judicial Officers, BE 2546 (2003) note 26.

17 J. Mark Ramseyer and Eric B. Rasmusen, 'Why Are Japanese Judges So Conservative in Politically Charged Cases?' *American Political Science Review*, vol. 95, no. 2 (June 2001).

remain until the mandatory age of retirement. Judges in these jurisdictions enjoy high social status, partly because of the power they exercise in making case law.

In civil law countries or regions, including China, judges are often chosen from those who have just completed law school education and applied to work in courts, often without much experience. Their status in general is lower than in common law systems. In the eyes of the public, judges may not seem very different from other civil servants.

Professional standards

For these reasons the 'professionalising' process is almost complete for candidates for common law judgeships before they are appointed to the bench. They have virtually the same qualifications and career path as experienced practising lawyers. Most professional judges in the UK, Canada and Australia will have had at least 10 years of practical experience. Training programmes for judges in common law systems consist mainly of refresher workshops and seminars.

In civil law jurisdictions judges are a separate category of legal professional, trained differently from lawyers and prosecutors. Aside from law school, their professionalisation takes place only after they have passed their selection exams. Carlos Guarnieri's essay in this chapter details how in Germany and France law school graduates who have passed the highly competitive entrance exams become trainees in specialised judge-training programmes that can last from 18 months to four years. Nevertheless, a graduate can be appointed to the bench without ever having been involved in a trial process. In Japan, the Legal Training and Research Institute provides an 18-month judge-training course, and both Taiwan and Thailand follow a similar approach.

The importance of the length and quality of judicial training to combating corruption lies in the capacity of judges to make good decisions and resist incentives to favour particular parties. Good decision making requires detailed knowledge of the law, strong analytical skills to write judgements and give reasons, and understanding of the practical application of ethical standards and the challenges of court and case management.

Some countries combine features from both dominant systems to improve integrity and prevent corruption. Japan requires those who have completed specialised judge's education to work as 'assistant judges' for 10 years before being qualified to sit in courts independently. This combines the benefits of specialised education from the civil law tradition with a long-term assistantship that ensures candidates accumulate a solid body of legal experience before wielding judicial power, as in the common law tradition. South Korea has developed a plan to select new judges from those who have completed post-graduate law degrees and have more than 10 years experience of practising the law.[18] The Philippines, which has elements of

18 Han Dayuan, 'The Constitutional Basis and Impact of Judicial Reforms in East Asian Countries: Focus on the Korean Experience of Judicial Reforms' (2005). Available at www.ccluojia.com/

both civil and common law traditions inherited from Spanish and American colonial experiences, has recently designed a special course for lawyers who wish to become judges. Attendance at the Philippines Judicial Academy is mandatory and performance in courses is taken into account in promotions. In 2002 China introduced a system of uniform judicial exams and started a pilot project to recruit senior judges from well-trained practising lawyers and law professors.[19]

Judicial training to fight corruption

Judicial reform efforts in Asia often include education and training as part of efforts to fight judicial corruption. Along with the UN Basic Principles on the Independence of the Judiciary, the 2002 Bangalore Principles of Judicial Conduct reiterate the core values of judicial competence and diligence, and incorporate elements of education and training. Efforts to implement these international instruments have stressed the need for judges and lawyers throughout the world to receive training in them, inculcating the values of independence and impartiality that prevent corruption.[20] Many international donors provide support for technical assistance, including the training of trainers, joint development of curricula or training manuals, exchange of experience and the sharing of methodologies.

Judicial integrity and ethics are key elements in these programmes, which involve detailed teaching of a code of conduct, laws requiring disclosure of assets, cases of major judicial corruption, lessons learned, and so on. They may form part of a broader programme of legal-judicial reform that aims not only to build knowledge, but to change the attitudes of senior officials, judges and lawyers – the legal profession is strongly resistant to change in many countries.

In some countries the focus is on changing the judiciary from a bureaucracy that acts as a conduit for the safe delivery of political decisions to an impartial, dispute-resolution mechanism. In others, education emphasises a focus on enhancing judicial integrity or eliminating hidden bias from the judicial mind, particularly in relation to gender and ethnic issues.

Donors are becoming cautious in monitoring the results of such programmes. In particular, questions have been raised regarding training methods. Technical assistance in the form of study tours, where judges, prosecutors or lawyers meet with counterparts in a donor country, may degenerate into free tourist trips if not structured carefully. Donors are also aware that partner organisations in recipient countries may become dependent on foreign funding and

19 Article 32 of *A Five Year Outline for the Reform of People's Courts*, issued by the Supreme People's Court of the People's Republic of China in 1999.

20 See Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, UN Commission on Human Rights, 31 December 2003.

lose sustainability. Furthermore, as one observer noticed, projects that provide training, hardware and organisational advice can backfire if they help to legitimise a corrupt regime.[21]

In China, the Supreme People's Court (SPC) has implemented training programmes for 200,000 judges in all courts, half of whom do not even have university degrees.[22] The SPC adopted a set of training regulations that define the roles and responsibilities of the various agencies and individuals involved in the training, which also includes anti-corruption education. These regulations order courts to keep the training records in personnel files and impose disciplinary sanctions on judges who refuse to be trained.

These programmes may satisfy the need to provide Chinese judges with some basic training at an individual level. The National Judges' College, which is responsible for training judges, is trying to use the courses to address the root causes of corruption and to teach judges techniques for handling such cases. However, while it may raise awareness of some issues, it is unlikely to change the fundamental perception that corruption is not just an individual failing, but that it is intimately intertwined with lack of judicial independence, judge selection processes, security of tenure and salary issues (see China country report, page 151).

A common issue related to training is how much to pay for it and how to fund it. The education required for a well-functioning judiciary is expensive. As a point of comparison, the cost of judicial training is US $23 million per year in France and US $20 million per year in the Netherlands, figures that are similar to the judicial education budget of the US Federal Judicial Center in Washington (serving around 1,900 judges and their support staff).[23]

In China, rather than asking the legislature for separate budgetary support the SPC has simply ordered all courts to devote not less than 3 per cent of their regular operational budget to cover the costs of training activities. Knowing that courts in many regions face a serious shortage of staff and funds, the SPC insists that all courts ensure that judges receive full payment of salaries and benefits while attending training programmes.

In other countries from the region, multilateral and bilateral donor assistance is an important source of funding for periods of intense judicial reform that necessitate increased levels of training. But, ultimately, if the executive and legislature accept that a well-functioning and non-corrupt judiciary is essential for sustained social and economic development, it must provide adequate annual funds for the training to support such a judiciary.

21 See the Supreme People's Court 2006–2010 National Court Education and Training Plan at www.ncclj.com/Article_Show.asp?ArticleID=511

22 Lu Zhong Mei, 'The Objective and Status Quo of Judicial Professionalism' (2006) at www.ncclj.com/Article_Show.asp?ArticleID=244

23 Judge Sandra E. Oxner, 'Evaluating Judicial Education Organisations: What Can and Should be Measured?' paper given at the 2nd International Conference on the Training of the Judiciary: Judicial Education in a World of Challenge and Change, Ottawa, Canada, November 2004.

Professional qualifications of the judiciary in Italy, France and Germany

Carlo Guarnieri[1]

The Italian, French and German judiciaries belong to the civil law family of continental Europe and share basic traits.[2] In this tradition judges are selected through examination at a young age and previous professional experience plays a minor role. The judicial corps is organised on a hierarchical pattern, according to which promotions are granted according to criteria that combine seniority and merit, and in which superiors have wide discretion in determining 'merit'. Therefore, the reference group of judges – the people whose judgement is taken into account in making their decisions – is mainly internal to the corps and the higher judges play a considerable role in it. Generally, however, political powers can exert some influence in appointment to the highest ranks.

Significant changes have occurred in the past 50 years. While Germany has remained substantially faithful to the traditional model and judicial councils often play only an advisory role,[3] the power of the executive and the judicial hierarchy has somewhat reduced in France because of the creation of the higher council of the judiciary.[4] It is in Italy, however, where the change has been most radical. There the power of the executive has been effectively erased since all decisions regarding members of the judiciary have been entrusted to the higher council of the judiciary, two thirds of whose members are magistrates elected by colleagues. Thus the traditional power of the judicial hierarchy has been dismantled. In both France and Italy judicial associations elect all judicial members of the higher council. One of the most important consequences of this has been that the reference group of Italian judges – and, to some extent, French judges – has become increasingly horizontal, composed of colleagues and different judicial groups.[5]

Judicial corruption and trust

The three countries are characterised by low levels of judicial corruption. According to the Global Corruption Barometer of 2005 corruption in the legal system and judiciary, as measured on a 1–5 scale, was 2.7 in Germany, 3.1 in France and 3.2 in Italy, compared to a world average

1 Carlo Guarnieri is professor of political science, University of Bologna, Italy.

2 There are 23,034 judges in Germany, 8,865 in Italy and 7,902 in France; the ratio of judges per 20,000 population in Germany (5.1) is more than double that of France (2.1) or Italy (2.3): see *European Judicial Systems 2002*, European Commission for the Efficiency of Justice. Available at www.coe.int

3 In half of the Länder (states), judicial councils play a significant role in the recruitment and promotion of judges. Judicial councils are composed of judges, lawyers and members of the state parliament. The latter are often in the majority.

4 In France, the higher council plays an important role in the promotion of judges. It is composed of 16 members, 12 of whom are magistrates, but usually it sits in two sections, each composed of six magistrates and four lay members.

5 There are presently four of these groups in Italy and three in France. German judges all belong to the same association.

of 3.5. When compared with the average for Western Europe (2.9), however, only Germany scores well. This ranking is indirectly confirmed by Eurobarometer surveys: between 2003–05, more than 57 per cent of people interviewed in Germany expressed trust in their justice system, but the percentage fell to 43 per cent for France and 42 per cent for Italy, compared to an average 49 per cent for the 15 states of the pre-2004 EU.[6]

Popular perceptions have some correspondence with reality. Though systematic data are not available,[7] no case of judicial corruption was reported by the media in Germany and France in the 2001–05 period[8] and researchers concur that cases of corruption seem to be non-existent in Germany and rare in France.[9] In the same period in Italy a number of significant cases were reported that were publicly linked in the press to the then prime minister, Silvio Berlusconi. Recently, the court of cassation adjudicated one of the cases, convicting one former cassation judge and several lawyers.[10] Although the data should be taken with caution,[11] in their own terms they might suggest that Italy exhibits a higher level of judicial corruption compared with Germany if not France. On the other hand, the Italian judiciary – and, to a lesser extent, the French – achieved improved guarantees of independence in the second half of the 20th century with the result that today they are stronger than those enjoyed by German judges (and by most European ones). Perhaps judicial independence cannot be isolated as the most important determinant of judicial corruption. Guarantees of independence protect judges from outside pressures and reduce the probability that they will accept corrupt exchanges,[12] or show less zeal in prosecuting administrative and political corruption.[13] But their impact on corruption is ambiguous because corruption also depends on other factors:

- The effectiveness of controls on judicial behaviour
- Judges' propensity to become corrupted, which is related to the reference group they adopt.

6 See europa.eu.int/comm/public_opinion/index_en.htm

7 The data on disciplinary proceedings provided by the French and Italian higher councils do not single out proceedings on corruption grounds. In Germany, where disciplinary sanctions are entrusted to specialised courts, the federal nature of the system makes it almost impossible to gather complete information.

8 A search using Lexis-Nexis and Proquest was developed of the international media in English, *Le Figaro* for France, of *La Stampa* for Italy, and a sample of German newspapers.

9 For Germany, personal communication from Professor Patrizia Pederzoli, Professor of Judicial Studies at the University of Bologna in Forlì (2 May 2006). For France, interview with Antoine Garapon, secretary general of the Institut des Hautes Etudes sur la Justice, Paris (3 May 2006).

10 See *La Stampa* (Italy), 5 May 2006 and 8 October 2006. The decision concerned the so-called IMI/SIR case. Berlusconi was not personally involved in this last case but was in other two proceedings, the Lodo Mondadori and SME cases, where he was initially charged of court corruption but later acquitted, although in the SME case at least he was only acquitted thanks to the statute of limitations. See *La Stampa* (Italy), 18 November 2001 and 21 April 2005. At this writing the cases (both of which involve allegations against judges) were awaiting a final decision by the court of cassation.

11 Since perception can be influenced by the prominence in the media of the cases reported. The reason why so few cases of corruption – judicial or otherwise – have gone to trial is ambiguous: it could mean that corruption is widespread, but also that it is robustly prosecuted.

12 For a detailed list of these guarantees, see 'Independence, Efficiency and Role of the Judges', Council of Europe, recommendation no. (94) 12. Available at cm.coe.int/ta/rec/1994/94r12.htm

13 A fact that does not *per se* involve judicial corruption, although its significance is evident.

Significant factors affecting corruption

A first set of controls concerns the procedures by which a judicial decision is taken: they are well known because they usually operate in all well-organised judicial systems. They are useful because they delimit the discretion of a single judge and increase the transparency of judicial decisions. In this way, corruption is made more difficult and easier to detect. They include the publicity of judicial decisions, their collegiate nature, the fact that they need to be extensively elaborated and the appellate review. However, controls of this sort are costly in terms of resources and their impact on the overall performance of the judicial system. For example, collegiality and appeal imply not only more judges, but also a more complex and long decision-making process with negative consequences for court delay.

Direct controls on judges in the form of disciplinary proceedings are necessary, but can impinge on judicial independence. If entrusted to executive officials, external independence will be put at risk. If in the charge of senior judges, the internal gradient of independence may be damaged. To avoid collusion, controllers should not be dependent on those they control. This is why entrusting the task to an elected body can lead to factionalisation: that is, a situation in which the way controls are performed is influenced by the groups prevailing in that body[14] and the likely result is inaction due to mutual vetoes. In fact, there are generally more disciplinary proceedings against judges in Italy (107 in 2002) than France (10). But in Italy only 22 of these (21 per cent) resulted in sanctions against the judge, compared with nine in France (90 per cent).[15] It goes without saying that oversight by public opinion – broadly conceived – can play a crucial role in controlling corruption. Though not without flaws – accusations can be exaggerated or baseless – it is less obtrusive from the point of view of judicial independence.

External and internal controls, although important, can have a negative impact since an excess of monitoring can cause the intrinsic pride judges take in their work to be crowded out, with negative consequences for their commitment and a decline in the judiciary's efficiency.

Another factor to take into account is judges' 'availability' to enter into corrupt exchanges and depart from their role of impartially adjudicating disputes according to the law. This availability seems to be *inversely* related to their loyalty to the judicial organisation, which in turn is *positively* related to the professional qualifications of a judge. As learning and experience increase a judge's competence to perform a specific role, they increase the process of internalising the requirements of that role. People are more likely to internalise roles and rules that they fulfil effectively than those they do not.[16]

14 This seems the case with Italy's higher council. See the discussion between two magistrates, Claudio Castelli and Antonio Patrono, denouncing the 'factional logic' of its decisions at www.magistraturademocratica.it

15 Data collected in 2002 by the European Commission for the Efficiency of Justice (CEPEJ). The data do not state whether the disciplinary proceedings were for corruption-related behaviour. See *European Judicial Systems* (2002), op. cit.

16 The relationship is well known in organisational theory. See J. G. March, *A Primer on Decision Making* (New York: Free Press, 1994).

In other words, professionally qualified judges identify with their institutional role and are less prone to be involved in corruption. A qualified judiciary also enjoys more prestige in society. As a result, it attracts better candidates while the sanction of being excluded from the corps, because of corruption or other improper behaviour, comes across more strongly. Moreover, qualified judges are likely to adopt their fellow judges and the legal professions in general as a reference group. In this way, an indirect check is activated by the professional environment since judges will tend to exert the discretion they enjoy according to the values of the whole profession. That said, neither Germany nor France has introduced a formal code of ethics for judges and a bill to that effect, sponsored by Italy's union of magistrates, only passed into law in July 2005.

Comparison of cases

In Germany, the training period between the end of university and appointment as a full judge is six years. After completing law school, candidates sit the 'first state examination'. If successful, they are granted status as temporary civil servants, allowing them to receive a small salary.[17] During this period trainees become familiar with the full range of roles they may perform in future (the judiciary, civil and criminal, bar, civil service and public prosecution). Only after completing a second examination are they made judges.

Appointment to a judgeship in Germany depends on two criteria: marks obtained in state examinations and information on performance during the training period. Only graduates with the highest marks have any chance of selection due to the difference between job supply and demand. Selection is by the regional Ministry of Justice, but appointments are made according to a candidate's position on the pass list. Since 2002 'social competence' has been taken into account.[18] After selection, judicial appointees remain on probation for three to five years. They must follow seminars on various subjects, can be moved from one post to another and may undergo further evaluation before becoming life-tenure judges. German judges are evaluated every four to five years by the head of the court in which they serve.

In France, the training of judges is entrusted to a specialised institution, the *Ecole Nationale de la Magistrature* (ENM). The competition for entry is open to candidates under 27 who hold law degrees. The written and oral admission exams are highly competitive and successful candidates are immediately integrated into the judiciary as trainees, enjoying a salary and certain guarantees of independence.

The 31-month training period consists of general training in the ENM and the courts. At ENM trainees attend courses and seminars, some devoted to judicial ethics. A final period is spent

17 In Germany, trainee judges begin with a respectable monthly salary of €3,100–3,500 (US $3,720–3,920), with gradual increases up to a ceiling of €5,000 (US $6,660) from the age of 49. There are few professions where entrants earn similar salaries.

18 See Giuseppe Di Federico, ed., *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe* (Bologna: IRSIG-CNR, 2005).

on the functions the trainee will be assigned on completion. An apprenticeship in a law firm, public body or international organisation provides trainees with an opportunity to discover institutions governed by different logic, though the apprenticeship is not compulsory and lasts only two months. Subsequent apprenticeships take place in courts under the supervision of senior judges, law firms and correctional institutions so that trainees become familiar with other aspects of the justice system. Recruits are continually assessed and their final ranking determines their assignments. French judges are evaluated every two years by the head of the court of appeal of the district in which they serve.

In Italy, a national public competition is the only way to enter the judiciary and law graduates sit the exam immediately after completing university. There is no need to have had any experience of legal practice before taking the exam. University law faculties and private institutions that prepare candidates for the national competition control legal education. Provisions have recently been made for the creation of a judicial school, modelled on France's ENM, and other institutions devoted to the training of legal professionals. Anyone intending to sit the exam for entry to the judiciary will be required to complete a two-year course at one such institution.

The exam consists of written and oral sections testing knowledge of the main subjects in law curricula. Concern has been expressed that the system is not sufficiently reliable to evaluate legal theory. Although the number of applicants continues to increase (more than 20,000 per year), it is often hard to fill available vacancies and there is a growing number of candidates with minimum marks. Selection and subsequent training of judges and public prosecutors are the responsibility of the higher council of the judiciary. Training time is formally fixed at 18 months, but this can vary according to the pressure to fill vacancies. In the absence of a judicial school, apprenticeship takes place in courts and prosecutors' offices under the supervision of senior magistrates, but it is less structured than in Germany.

In Italy, judicial training is divided into two phases. The first is devoted to familiarising young magistrates with different legal roles, including adjudication and prosecution. As in France, a second six-month phase attempts to train trainees in the functions they perform once appointed. Courses and seminars are organised by the higher council of the judiciary in Rome but last only a few days, and local courses do not seem homogeneous or systematic.[19] No further weeding out of candidates occurs during this period. Reports on performance, drafted by the higher council, are invariably positive as are subsequent evaluations throughout the judicial career, making the initial examination the only effective measure of quality. Among the three countries, Italy is the one that displays the least effective checks on the qualifications of the judiciary.[20]

19 The higher council also runs some in-training courses, although attendance is voluntary.

20 See Di Federico (2005), op. cit. In 2006 the Berlusconi government introduced a reform, based on internal competitive examinations, but the new Prodi government is reconsidering the law, which was hotly contested by the judicial association.

Recommendations

All three countries are characterised by relatively low levels of judicial corruption and a high degree of organisational institutionalisation, involving the operation of a wide set of controls on judicial conduct. However, because of the similarity of their basic traits, the differences between the cases are especially significant.

Since controls are costly and have contra-indications, there is a limit to the extent they can be used. A more efficient way to fight corruption employs preventive measures designed to decrease the propensity of judges to enter into corrupt exchanges. Comparison of the cases considered broadly confirms the importance of role identification in reducing the occurrence of corruption. More concrete interventions must deal with:

- **Recruitment** The process must be capable of ascertaining the professional qualifications of candidates and to predict, as far as possible, their performance on the bench. It is advisable that the recruitment process should be open in part to experienced professionals. In this way, the judicial corps will be enriched with solid experience and assessment of candidates will take into account previous work activity, as well as theoretical knowledge.
- **Internal training** It must be strengthened. The role played by France's ENM in upgrading the qualifications of the judiciary is significant in this context, contributing to substantial improvement in the quality of French judges in the past 40 years.[21] Judicial ethics should also become a part of every curriculum and French and German judges should lobby actively for formal codes of ethics for their judiciaries.
- **Performance assessment** The way judges perform must be evaluated – at least on a mid-term perspective – and the consequences for career should be derived from this process. As for decisions on disciplinary sanctions – up to removal from office – the best guarantee lies in a specialised court, staffed by experienced and respected judges. The principle of judicial independence must be balanced with the role a functioning judicial system plays in any democracy and cannot be considered an obstacle to evaluating judicial performance.

Above all judges must be encouraged to see membership of the bench as the achievement of their ambitions, to adopt a reference group of legal professionals – working inside and outside the judicial corps – and to strive for excellence. Excellent judges should become the role models for all other judges.[22]

21 See Roger Errera, 'The Recruitment, Training, Evaluation, Career and Accountability of the Judiciary in France', in Di Federico (2005), op. cit.

22 Judicial associations can play a positive role in this process, but only if they do not monopolise the definition of who is a 'good' judge. External groups – the legal professions, public opinion and public interest groups – should always be involved.

The international dimensions of judicial accountability

Zora Ledergerber, Gretta Fenner and Mark Pieth[1]

The bribery of judges has a direct impact on the very essence of the judicial function, which is to deliver an independent, fair and impartial decision. The consequence is unfairness and unpredictability in the legal process from start to finish, and a systematic undermining of the rule of law. Corruption in the judiciary is all the more damaging because of the important role the judiciary is expected to play in combating this very evil. As a consequence judicial corruption hampers national development,[2] and the institution at the heart of the fight against corruption is disabled.

In criminal matters judges are mainly bribed to 're-engineer' or reduce a sentence; prosecutors to reduce and re-engineer the charges; and court staff to facilitate the administration of the case.[3] But corruption occurs during all stages of the criminal proceedings. In civil litigation bribery of judges can have very serious financial consequences, such as the loss of real estate titles. Judicial corruption generally includes patronage by people in power that leads to the subversion of justice administration.[4]

This latter element is probably most detrimental in the context of anti-corruption asset recovery, as individuals who have embezzled from a state are often highly influential politicians, possibly former heads of state or their relatives, who continue to enjoy influence and power behind the scenes even after their departure from office.

The UN Convention against Corruption (UNCAC), which entered into force on 14 December 2005, altered the playing field. Chapter V deals with the transfer, laundering and recovery of stolen assets. In the past asset recovery proceedings depended on the existence and functioning of adequate domestic legislation. UNCAC prescribes the recovery of stolen assets as a fundamental principle and calls on state parties 'to afford one another the widest measure of cooperation and assistance in this regard'. The enshrining of this principle in an international treaty is a major step for the international community.

For developed countries with a well-established rule of law culture, the enactment of legislation in compliance with UNCAC will help developing countries trace and confiscate assets. In developing countries, a potentially positive impact is that UNCAC will contribute to consolidating independent and clean judiciaries when corrupt judiciaries are forced to interact with,

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2 Max Katta, 'Examining the National Anti-Corruption Strategy in Relation to the Sierra Leone Judiciary', *The Monitor* (Official Newsletter of the Sierra Leone Court Monitoring Programme, vol. 11, March 2006). See www.news.sl/drwebsite/publish/article_20052124.shtml
3 UNODC, 'Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces, Technical Assessment Report', March 2006.
4 'Towards the Elimination of Corruption and Executive Control of the Judiciary in Asia', First Consultation for the Asian Charter on the Rule of Law, Hong Kong, 16–21 February 2006. See www.article2.org/mainfile.php/ 0501/220/

and be accountable to, functioning judiciaries. As highlighted below, these aims have been hampered due to disparities in legal approaches and the reach of relevant legislation, and because numerous provisions of the UNCAC are non-mandatory in nature.

Repatriation of assets and the role of local judiciaries

Looted assets typically derive from two sorts of activities: bribery and the embezzlement of state assets. Examples of heads of states stealing assets from their own countries are numerous. The former president of Zaire (Democratic Republic of Congo), Mobutu Sese Seko, allegedly plundered the state coffers of some US $5 billion, an amount equal to the country's external debt at the time.[5] The government of Peru reports that around US $227 million were stolen and transferred abroad during the presidency of Alberto Fujimori. Former Ukrainian prime minister Pavlo Lazarenko is believed to have embezzled around US $1 billion.[6]

Success in recovering these assets and returning them to the state and its citizens is of crucial importance for the credibility of any anti-corruption effort. Successful recovery of stolen assets has a deterrent effect, and is thus an element of both enforcement and prevention. Detecting, recovering and repatriating such assets is, however, a highly complex process. Schematically, the recovery of illegally obtained assets is preceded by three stages: tracing, immobilising (freezing, seizing) and confiscating the assets.

The local judiciary plays an important role in most of these stages. It is responsible for the investigation of the corrupt official's criminal conduct as well as granting, or refusing, immunity from prosecution. It is also the judiciary's role to decide what kind of evidence is admissible in court. Finally, the judiciary issues requests for mutual legal assistance and executes orders to confiscate, freeze or seize.

These legal proceedings may be launched in the jurisdiction in which the corruption took place (asset recovery by means of international cooperation); in the jurisdiction in which the assets are located (asset recovery by means of confiscation following a money-laundering conviction or, in some jurisdictions, by civil proceedings); or in both jurisdictions simultaneously.

In either case the proper functioning of the judiciary in *all* involved jurisdictions is a precondition for the success of an already complex procedure. A corrupt judiciary can render the recovery of assets an impossible task. For instance in extradition cases, which are frequently connected to asset recovery and related proceedings, the judiciary plays a major role since extradition will not readily be granted if the local judicial authorities of the requesting state are perceived to be corrupt, inefficient and unable to grant fair trial to the extradited individuals.

All this results in a vicious circle because the looting of a state's assets mostly takes place in poor countries that are known to have a corrupt judiciary. Consequently legal proceedings,

5 UN, 'Preventing and combating corrupt practices and transfer of assets of illicit origin and returning such assets to the countries of origin: Report of the Secretary-General', www.ipu.org/splz-e/unga06/corruption.pdf.
6 UNODC *Perspectives* 2, 2005, www.unodc.org/newsletter/200502/page008.html#_ftn1

including those related to asset recovery, are frequently ineffective. As a result international anti-corruption instruments are blunted and badly needed assets are not available that could otherwise contribute to alleviating poverty.

A comprehensive legal framework is a basic precondition at a domestic level to facilitate asset recovery. This includes clear procedural rules on the permissibility of evidence and on cooperation with other domestic and foreign authorities. Particular legal doctrines, such as the concepts of state sovereignty and immunity, need to be reviewed carefully as they may provide legal cover for corrupt political elites and may assist them in plundering their economies.

When initiating international proceedings, it is important for the requesting state to consider which avenue best suits the particular case (criminal law-based proceedings vs. civil action). Generally, civil action is recommended when prompt recovery is the primary purpose, and not punishment of the offenders. Third-party claims (non-governmental) on the same assets may complicate the recovery process, as the Marcos case illustrates (see below). Disparities among legal systems also bring problems arising from the use of different measures for immobilising assets; questions regarding the legal value of evidence obtained abroad or authority for executing foreign confiscation orders; and divergences on third parties' rights in confiscation proceedings and the disposition of the proceeds of crime.

Case studies

Estimates of the funds allegedly embezzled by former Indonesian President Mohamed Suharto during his 30-year New Order regime (1967–98) amount to between US $15 and 35 billion.[7] Since resigning from the presidency under public pressure, Suharto has been repeatedly hospitalised for stroke, heart and intestinal problems. These conditions have obstructed the many attempts to prosecute Suharto on charges of corruption. His lawyers have repeatedly and successfully claimed that his condition renders him unfit for trial. Critics on the other hand charge that Suharto is only malingering to avoid trial.

Unable to prosecute Suharto, the state pursued legal actions against his former subordinates and family. Suharto's half-brother Probosutedjo was tried and convicted for corrupt practices that created a loss of US $10 million for the state. He was sentenced to four years in jail, but after winning a reduction of sentence to two years, the Indonesian Corruption Eradication Commission uncovered the 'judicial mafia' through which offers of US $600,000 had been paid to various judges. Probosutedjo confessed to the scheme in October 2005, leading to the arrest of his lawyers.[8] He had his full four-year term reinstated.

The Suharto case shows that when prosecuting a former head of state or his or her relatives with the aim of recovering and repatriating stolen assets, the problems related to the independence of the judiciary begin at the first stage of investigating the case. Former heads of states and their relatives are skilled in exerting their influence; can afford powerful protections; and

7 *Global Corruption Report 2004*.
8 *The Jakarta Post* (Indonesia), 1 July 2006.

know how to execute pressure on the judiciary to avoid prosecution, diminish sanctions or buy the judgement outright. Without the lawful conviction of individuals suspected of embezzlement, however, their repatriation remains particularly complex despite the new standards in this regard established by article 57.3 of UNCAC.

Success in asset-recovery cases – even more so, perhaps, before the entry into force of UNCAC and its mandatory provisions under Chapter V – depends on dual criminality rules, and the perceived efficiency and independence of the judiciary in the requesting state. The conditions attached by the Swiss government to the return of assets stolen by Ferdinand Marcos of the Philippines and his family may serve to illustrate this. Switzerland returned approximately US $700 million to the Philippines within the scope of the mutual assistance proceedings. One of the two conditions under which the Swiss federal tribunal approved this early restitution was that the judicial proceedings under which the forfeiture or restitution would be decided in the Philippines would conform with the fundamental fair trial rights enshrined in the UN Covenant on Civil and Political Rights.

The cases of Mobutu and Haiti's Jean-Claude Duvalier illustrate how political influence and lack of good governance in the judiciary of the state concerned with the wrongdoing can hamper asset-recovery proceedings. In 2003, the Swiss federal government ruled that the assets of the deceased Mobutu were to remain frozen for a further three years due to a lack of cooperation by the authorities in Kinshasa in releasing the frozen assets. This ruling was based on the Swiss federal constitution that provides, in its article 184 § 3, that the government may issue temporary ordinances in order to safeguard the country's interests. Returning the assets to Congo without having reached an agreement between the parties involved was judged to be against the interests of the country. Similarly, mutual assistance proceedings initiated in 1986 in the context of recovering and returning assets stolen by Jean-Claude Duvalier of Haiti were discontinued due to lack of cooperation by the Haitian authorities and their failure to provide guarantees concerning legal proceedings against Duvalier in Haiti. This matter is not yet resolved.[9] Outright corruption was not the only reason behind these events of insufficient judicial cooperation. But the two cases illustrate that, when a judiciary is vulnerable to political influence and corruption, former politicians who are most often involved in asset recovery cases directly or indirectly influence the outcome of the proceedings.

Conclusion

Considering the difficulties in returning stolen assets, it comes as no surprise that despite the numerous high-level corruption cases around the globe, the history of successful prosecutions, adequate sanctions and return of looted assets to the rightful owners leaves much to be desired. The judiciary plays a key role in each of the steps related to criminal proceedings in the context of the recovery of stolen assets. Creating an effective, corruption-free and professional

9 Paul Gully-Hart, 'The UN Convention against Corruption, Implementation and Enforcement: Meeting the Challenges. Asset Recovery: The Experience of Switzerland', paper presented at Chatham House, 24–25 April 2006.

judiciary must be *the* most important concern – and challenge – for any country having suffered from a kleptocratic regime. The guidance the UNCAC gives to asset-recovery cases may well contribute to consolidating the integrity and efficiency of judiciaries around the world through their exposure to international judicial proceedings, though not without concomitant efforts at national level to tackle judicial corruption.

4 The broader justice system

Judicial corruption is not confined to the inside of the courts. Corrupt lawyers, prosecutors, police and bailiffs are all in a position to distort the course of justice, as Edgardo Buscaglia shows. Police and prosecutors' offices, which are often branches of the executive, can be vulnerable to government or business pressure in carrying out criminal cases. They may collude by tampering with evidence, distorting the facts in a case, losing files, deliberately ignoring credible lines of inquiry or, in the worst case, extracting confessions under torture. Lawyers play a different role in creating the context for a free and fair trial. They might take bribes to present a sub-standard defence, bribe court staff to delay a case, or pay the judge to rule in favour of their client. Nicholas Cowdery looks at the checks and balances that ensure oversight among the police, prosecutor's office, attorney general's office and judges. Renowned corruption fighter Eva Joly looks at the dwindling power of the investigating magistrate, a hybrid prosecutor-judge common to European civil law systems. Don Deya and Arnold Tsunga look at the linkages between lawyers and corruption in Eastern and Southern Africa. The remaining two pieces look at the supply-side of justice-sector corruption. In an analysis of the Lesotho Highlands Water Project scandal, Fiona Darroch examines the manoeuvres employed by the law teams of international corporations to escape conviction for massive bribery. Jorge Fernández Menéndez presents a bleak account of how some Mexican judges have been bribed by drug traffickers in order to secure the acquittal of their associates despite overwhelming incriminating evidence of their crimes.

Judicial corruption and the broader justice system

Edgardo Buscaglia[1]

Judges and courts are part of a complex web of interdependent institutions, including the police and prosecution, which make up the justice system. Constructive reforms must therefore consider the complexities of the entire justice system and benefit the vast majority in a society, not just the elites. The mix of deregulation, the liberalisation of international trade and the privatisation of state enterprises in an increasingly globalised world has rendered more urgent the need for legal and judicial frameworks to address

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ever more sophisticated types of crimes affecting courts worldwide. Within criminal jurisdictions, the combination of increasing cross-border porosity and the use of advanced technologies by criminals has generated a bonanza for those engaging in public sector corruption. UN crime indicators show that the growth of public sector corruption linked to organised crime has grown by 67 and 39 per cent in Africa and Latin America, respectively, over the past 10 years.[2]

The structure of institutions and the decision-making process are important determinants of the type and level of corruption to be tackled. For ease of analysis, types of corruption within the justice system can be broadly classified into two general categories.

First, *internal court corruption* occurs when court officials (judges and support personnel) engage in procedural, substantive and/or administrative behavioural patterns for private benefit. Examples include cases where court users pay bribes to the court's support personnel in order to alter the legal treatment of files or evidentiary material; where users pay bribes to court employees to accelerate or delay a case or to illegally alter the order in which the case is to be attended or heard by the judge; or where court personnel embezzle public or private property that is in court custody. In civil, administrative and commercial law cases, the large economic interests frequently involved in litigation – particularly in privatisations – present an opportunity for court staff and judges to abuse their administrative or procedural discretion when, for example, issuing notifications to parties in dispute, calling witnesses, issuing injunctions or allowing procedural delays based on frivolous motions.

The second main type of corrupt practices involves *justice-sector corruption* where the interaction between the courts and other justice-sector institutions (i.e. higher courts, police, prosecutors or prison domains) explains the occurrence of corruption.[3] This type of corruption can also involve politically motivated court rulings and/or undue changes of venue where judges, police and prosecutors stand to gain economically or professionally as a result of corrupt action. Examples of this type abound. Studies of justice-sector corruption in Nigeria and Venezuela show that the most common manifestation of judicial corruption involves the tampering with evidence by prosecutors for material or financial gain. Prosecutors usually act in concert with the police in these cases.[4] When the case gets to court, judges are either pressured to stay silent and thus avoid the application of rules of evidence, or may collude with prosecutors for personal gain. In this context any kind of pressure by prosecutors on judges or court personnel (e.g. with the connivance of political actors, members of parliament or the

2 Edgardo Buscaglia, Samuel Gonzalez Ruiz and William Ratliff, 'Undermining the Foundations of Organized Crime and Public Sector Corruption', *Essays in Public Policy* (Stanford: Hoover Institution Press, 2005).

3 Undue pressures from political actors, litigant lawyers and businesses also explain court-specific corruption, as outlined in the case studies contained in this chapter.

4 Edgardo Buscaglia and Samuel Gonzalez Ruiz, 'How to Design a National Strategy Against Organized Crime and Public Sector Corruption in the Framework of the United Nations' Palermo Convention', in *The Fight Against Organized Crime* (New York: UNDP Press, 2002).

executive branch) tends to translate into abuses of substantive or procedural discretion in handling a case.

This essay addresses best practices in counteracting the most common factors that lead to the above-mentioned second type of corruption, that is, intra-institutional, justice-sector corruption. Other factors contributing to judicial corruption linked to the interaction between the courts, the state and society, such as pressures from political actors, litigant lawyers and businesses, and societal attitudes to the legal system, are analysed in other chapters.

Of course, one may perceive an overlap between the two types of corruption although the factors explaining the growth of each are distinctly different. Countries where judicial corruption is perceived as a policy priority, such as Nigeria or Indonesia, tend to experience a mix of both types of corruption.[5] That is, the existence of internal court corruption usually fosters the growth of justice-sector corruption, and vice versa.

Diagnosing justice-sector corruption

Due to their secretive nature, corrupt practices are difficult to measure through objective indicators, but quantitative data on corruption levels, coupled with detailed research of case files to identify abuse of procedural discretion by prosecutors and judges, allow us to draw conclusions about the phenomenon. A UN study published in 2003[6] looked at the extent and frequency with which justice-sector institutions (e.g. police and prosecutors), legal organisations (e.g. lobbies) and illegal groups (e.g. organised crime) penetrate the judiciary and manipulate the court system to bias decisions and favour their interests. (See also 'Mexico: the traffickers' judges' on page 77). To measure high-level judicial corruption, a composite index was constructed that takes into account:

- Court users' perceptions of corrupt practices arising from organised legal and illegal groups
- Court users' perceptions of independence of court decisions from legal and illegal pressure groups
- Likelihood of biased judicial rulings
- Perceptions of the percentage of the amount at stake paid in bribes
- Prevalence of state capture
- Objective measurement of the frequency of abuses of substantive and procedural discretion in rulings through sampling of case files.

5 Edgardo Buscaglia, 'An Analysis of Judicial Corruption and Its Causes: An Objective Governance-based Approach', *International Review of Law and Economics* 21 (2) (2001).

6 Edgardo Buscaglia and Jan van Dijk, 'Controlling Organized Crime and Public Sector Corruption: Results of the Global Trends Study', in *United Nations Forum* (Vienna: United Nations Press, 2003).

To assess the prevalence of low-ranking court corruption, an indicator was used that records how often users experienced actual corrupt practices in court while their cases were subject to legal proceedings. The indicator was compiled by the International Crime Victimization Survey (ICVS), using data that refer mainly to the low and medium-level corruption that an average citizen faces while interacting with the state, including the courts.

This analysis found that judicial independence is strongly related to levels of court corruption linked to prosecutors and police. Independent judges and autonomous prosecutors (working within an institution providing a civil service-based career) were less vulnerable to corruption and better able to implement laws even when the political system and other areas of the state had been captured by organised crime or private legal interest groups. In the 67 countries sampled in the study, the most frequently perceived corrupt judges and prosecutors were found to abuse their substantive and procedural discretion by slowing down or obstructing law enforcement while violating rules of evidence. Factors fostering corruption always included abuses of substantive, administrative and/or procedural judicial and prosecutorial discretion.

The countries with the highest quality of justice-sector resolutions and the lowest levels of corruption among the 67 countries in the UN study were, in descending order: Iceland, Norway, Denmark, Singapore, Finland, Austria, Sweden, Luxembourg, Switzerland, New Zealand, Hong Kong and the United Kingdom. At the opposite end of the scale, countries found to lack consistency and coherence in their justice-sector resolutions (i.e. those having frequent abuses of judicial discretion) were also countries where levels of court, prosecutorial and police corruption were high. Trailing the list of countries, in worsening order, were Venezuela, Indonesia, Nigeria, the Russian Federation, Argentina, Mexico, Brazil,[7] Philippines, South Africa, Thailand, India and Slovakia. The study also found that legal traditions *per se* (civil vs. common vs. Islamic systems) are not a significant factor in the determination of justice-sector corruption.

The most frequent abuses of prosecutorial and police-related discretion associated with court-related corruption (and lack of predictability in judicial rulings) were found to be:

- Contradictory pieces of circumstantial evidence introduced by the police within the material supporting a criminal indictment
- Prosecutors issuing criminal indictments with an insufficient account of crime-specific elements required by the procedural codes
- Lack of uniform criteria applied by prosecutors to the weighing of evidence generated by the police.

7 Although Brazil is not one of the more corrupt judiciaries in other rankings and despite the fact that its prosecutorial services are among the more independent in Latin America, the quality of judicial system resolutions is plagued with abuses of discretion, generating an ideal environment for the growth of future corruption.

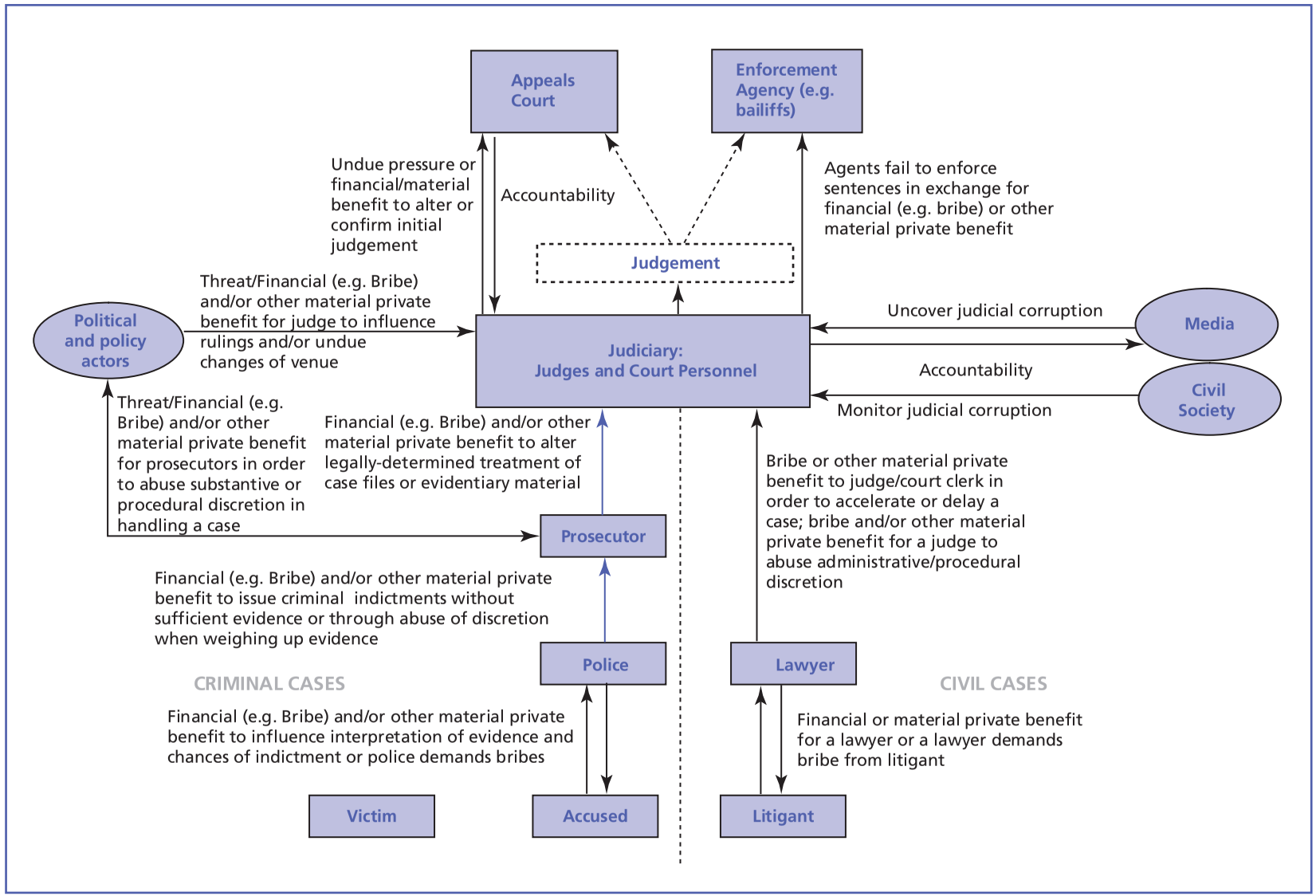

Figure 1: Key Actors in the Judicial System

Best international practices in countering justice-sector corruption

Corruption in the justice sector often occurs at the interfaces among the institutions that investigate, accuse and judge a case brought to the justice sector. Reforms should take all three elements into account, though certain branches of the justice system might be more resistant than others (see, for example, 'Sub-national reform efforts: the Lagos state experience' on page 146). There have been successes that can be drawn on as models of good practice. All these best-practice examples were tailored to local institutions through pilot projects before being carried out nationally.

Experiences in the 67 sampled countries referred to show that 'soft' measures alone, such as integrity-awareness campaigns, do not have much effect and can even reinforce public cynicism. Instead, justice-sector corruption should be tackled through a two-pronged approach: through social control mechanisms on the one hand; and through more effective punitive actions based on joint prosecution-judicial units (e.g. task force approaches used by prosecutors and judges in Italy and the United States), ensuring enhanced quality control of their resolutions and specialisation in complex cases.[8]

Transparency and adversarial systems

An important line of analysis that can be drawn through the countries studied is the distinction between legal systems that are adversarial and where public hearings are held; and countries where closed proceedings are frequent (as in China, Cuba and Zimbabwe). The greater transparency provided by different degrees of adversarial and public proceedings is usually associated with low levels of corruption.[9] Adversarial systems are not confined to common law systems. Islamic legal traditions (e.g. Jordan) and civil law systems (e.g. Italy and Spain) practise different kinds of adversarial proceedings (with different degrees of oral vs. written practices, with more or less transparency attached to them). These tend to increase the capacity of all parties within a dispute to challenge the evidence or resolutions generated by a judge or prosecutor, especially when evidence is based on tainted reports obtained through torture and other types of police corruption. When proceedings are conducted before legally mandated public audiences, the positive multiplier effect on lowering corruption is noteworthy. Judges, prosecutors and defence attorneys have to actively avoid the perception and the actual occurrence of abuses of discretion when they know that they will all be required to publicly provide reasons for their pre-trial and trial decisions.

When legal testimonies are offered in public, the benefits of an adversarial approach tend to neutralise any prior corrupt practices based on informal meetings or communications among prosecutors, defence lawyers and judges. Moreover, adversarial proceedings ensure the required

8 The task force approach does not necessarily mean creating specialised anti-corruption courts, but rather forming small teams of judges and prosecutors that share an *ad hoc* case file-based organisational framework throughout the procedural life of a case.

9 Alan Watson, *Society and Legal Change* (Philadelphia: Temple University Press, 2001).

immediacy between the judge and the evidence generated through the prosecutor/police or defence attorney. In this scenario, public adversarial proceedings allow for the 'ventilation' of evidence that needs to be weighed by all parties, based on clear and narrow criteria provided by the rules of evidence. These procedural characteristics tend to bypass the obscure and discretionary role of untrained administrative personnel that are so often found to be involved in extracting bribes from court users within inquisitorial legal systems. Within this context, the quality of justice-sector resolutions will tend to increase.

The adversarial and public nature of court proceedings is not, however, a guarantee of high-quality judicial resolutions or low levels of judicial corruption. For example, violations of due process within the US plea-bargaining practice abound when not checked through proper judicial review. In these cases overburdened prosecutors and public defence attorneys frequently rush, with weak evidence, toward public audiences where guilty pleas by low-income individuals indicted in homicide cases are entered. Years later, and after a public outcry by human rights organisations, DNA evidence proves their innocence while on death row.[10]

A second important target for reform throughout the broader justice system is the control system in place. Improved consistency and coherence of decisions are ensured by effective control systems within prosecutors' offices and enhanced judicial review mechanisms applied to rulings by either judicial councils or appellate court systems. The police will be less willing or able to generate false or tainted evidence when prosecutors perform their quality control of evidentiary material based on uniform criteria (i.e. procedural code or jurisprudential-related criteria). Field studies show that strict and uniform prosecutorial criteria for archiving or dropping criminal indictments, subject to supervisors' control, reduce the frequency of bribes offered to prosecutors. The experiences of Botswana, Chile, Colombia, Jordan and Malaysia show that judges, in turn, will be less able or willing to engage in corrupt collusion with prosecutors when adversarial proceedings take place at public audiences, while more effective judicial reviews are likely to shed light on irregularities conducted downstream within the judicial process.

Case management and training

In terms of case management, countries with the best legal implementation strategies have developed inter-institutional, computerised, joint case-management processes for police, prosecutors and judges. Multi-agency task force systems with joint management (for investigations, prosecution and court handlings), coupled with computerised court administrative tools that are accessible to defence lawyers in particular, and court users in general, reduce the likelihood of internal court or prosecutorial corruption.[11] Intra-institutional checks and balances are introduced when police, prosecutors and judges handle shared case files. In this connection, law-makers must contribute to empowering the judicial system to take on new and innovative programmes by allowing the introduction of electronic frameworks for handling

10 Edgardo Buscaglia, Samuel Gonzalez Ruiz, Ernesto Mendieta and Moises Moreno, *El Sistema de Justicia Penal y su Reforma: Teoría y Práctica* (Mexico: Editorial Fontamara, 2005).

11 Buscaglia and Gonzalez Ruiz (2002), op. cit.

complex evidence linking many case files; by enacting subsidiary legislation for better case management; and by upgrading judges' salaries based on clear and narrowly defined indicators of their courts' performance.

Investment in training prosecutors and judges in procedural law and case-management techniques, when coupled with performance-based indicators used for appointments and promotions, generates an institutional environment that discourages the application of random informal rules, contributing to fewer incidences of corruption linked to the handling of evidentiary material.[12] The existence of excessive procedural complexities within the legal domain is also correlated with high frequencies of abuses of courts' and prosecutorial discretion, as a precursor of corrupt practices within the courts (see Stefan Voigt, page 296).[13] There are many countries, such as Indonesia and Mexico, with clear formal rules regarding the administrative personnel's role in the investigation, prosecution and court management of a case file. But elsewhere, for instance in Nigeria, Venezuela and Zimbabwe, informal rules might be applied to proceedings. In these cases, administrative personnel adopt *de facto* legal roles in the production of indictments, in the generation of police reports and evidentiary material, and even in drafting sentences. Within this scenario, high levels of court-related corruption tend to be worsened by higher concentrations of administrative tasks in the hands of judges. In short, the gap between the formal and informal allocation of organisational roles and tasks within courts and prosecutorial domains is a factor linked to justice-sector corruption.

Involving civil society

The countries that fight justice-sector corruption most effectively usually rely on the willingness of citizens to help state law enforcement and judicial efforts to bring a case to its final resolution. Public confidence and procedural transparency are required for this citizen–state interaction to be effective. Where hearings are public, specialised NGOs that can technically assess the quality of judicial proceedings can foster social pressure for improvements within the justice sector, by using the media or writing reports aimed at legislatures and the public in general (see 'Civil society's role in combating judicial corruption in Central America' on page 115).

But to build public trust in the criminal justice system civil society needs to see the tangible results of the state's ability – and not just willingness – to implement reforms. Moreover, the leaders of the judiciary and law enforcement agencies (attorney general, chief prosecutors, chief of national police and members of the Supreme Court) must all have track records of organisational leadership and high ethical standards. Political will and the ability to execute reforms are pre-conditions for building trust and carrying out successful criminal justice policies.

Successful criminal justice system reforms first require the help and support of other institutions, particularly the political powers of government. Civil society can help generate the impetus for reforms that might otherwise be unpopular with political actors. In Chile and Costa Rica, for

12 Ibid.

13 Edgardo Buscaglia and Maria Dakolias, 'An Analysis of the Causes of Corruption in the Judiciary', technical paper (Washington, D.C.; World Bank, 1999).

example, the judiciary drove the process of reform, which led to an adversarial system with public hearings and a more independent judicial branch, thereby reducing the risk of prosecutorial and court corruption. The reforms required political actors to make the choice to acquiesce in greater judicial independence and prosecutorial autonomy. It is important, therefore, to take into account the costs and benefits faced by individual politicians and justice-sector actors who will lose their capacity to use the justice sector in their quest for power.

Recognising this early on, countries like Italy sought to build bridges between the public sector and civil society in order to win high-profile cases against judicial corruption linked to organised crime.[14] The relative success in enhancing the effectiveness of the justice sector's fight against the Mafia in Italy was supplemented by public information/education campaigns. Civil society institutions, such as the bar association and law schools, need to play a key role in the reform process.

Effects of judicial independence and accountability on justice-sector corruption

As noted elsewhere in this volume, a balance between judicial accountability and judicial independence is a necessary condition for achieving success in enforcing laws against justice-sector corruption. Judicial independence means that the decision-making autonomy of an individual judge or prosecutor can be ensured by introducing mechanisms that block the influence of undue pressures from inside or outside the justice system during the generation of justice-sector resolutions. Granting judges independence, while subjecting them to effective accountability mechanisms, will deter prosecutorial and police corruption.

Yet lessons from international experience show that the balance between accountability (instilled by meritocracy in judicial appointments, promotions and dismissals, coupled with proper training and monitoring of judicial conduct) and institutional independence often requires a prior pact among the mainstream political forces in the legislative and executive domains.

The cases of Poland, the Czech Republic, Costa Rica and to some degree Chile show that when the political concentration of power in the legislative and executive branches is relatively balanced so that alternation in power through elections is a likely outcome, judicial systems are more able to interpret laws with independence and autonomy,[15] thereby helping to avoid prosecutorial and court corruption. To some degree, a balance of power among truly competing political forces creates an increased willingness among politicians to give up a good part of their political control of court and prosecutorial decisions in order to avoid a 'mutually assured destruction' in subsequent electoral periods when the opposition may take over and also use the justice sector against the incumbents. This sequential game among the political forces operates as a facilitator that promotes the legislative measures needed to implement reforms.

A framework to guide policy makers during legal and judicial reform must first identify the main areas within which corrupt practices are most likely to hamper courts' abilities to adjudicate

14 Leoluca Orlando, *Fighting the Mafia* (New York: Simon & Schuster, 2001).
15 Buscaglia and van Dijk (2003), op. cit.

cases. The identification of these areas must focus on the links between court systems and other justice-sector institutions without neglecting to review the factors hampering independence in the judiciaries themselves. Once the political pre-conditions are met, legal initiatives must then address technical best practices, such as the ones mentioned above. Lessons from Costa Rica, the Czech Republic, Chile, Italy and the US show the following best practices in curbing corruption across the justice system.

- Clear and narrow criteria to be applied by an autonomous body and an autonomous attorney general's office to judicial and prosecutorial appointments, promotions and dismissals.
- Development of uniform case-management systems implemented within the police, prosecutorial and court domains, coupled with transparent, coherent and consistent rules for case assignments and changes of venue.
- Adoption of uniform and predictable administrative (i.e. personnel and budget-related) measures founded on rewards and penalties driven by performance-based indicators, thus clarifying the career horizon of justice-sector officers.
- Reform of the criminal justice system's structure. This includes enforcing clear organisational roles for judicial, prosecutorial and police personnel to secure their own internal autonomy, while assuring transparent mechanisms to share information.
- Enhancement of the ability of judiciaries to review the consistency and coherency of decisions embodied in court rulings by improving the effectiveness of judicial reviews of court decisions, while allowing the monitoring of civil society-based, social control mechanisms through adversarial proceedings conducted within public audiences.

Conclusions

Justice-sector corruption is determined by the quality of governance prevailing within each of the justice-sector institutions and by the nature of the interaction among them, and not just by factors internal to the courts. In this context, institutional policies that foster improvements in the fight against justice-sector corruption within the courts, prosecutorial, police and prison domains are interdependent and need to be coordinated.

The need for sector-wide reforms to tackle corruption is rendered more urgent when their impact on human development is considered. Levels of justice-sector corruption correlate with indicators of human development.[16] It is impossible to say that a lack of human development 'causes' judicial corruption, or vice versa, but, for example, low levels of public literacy/public education are linked in a vicious circle with justice-sector corruption. Countries that have given priority to crime and corruption control in the early stages of development, among them Singapore, Botswana and Costa Rica, have shown some success in the relative improvement of human development in their regions. The list of countries with dysfunctional state systems,

16 Buscaglia and van Dijk (2003), op. cit.; Buscaglia (1997), op. cit.

justice-sector corruption and stagnant economies is depressingly long by comparison. These states need to further emphasise the fact that by strengthening their ability to prevent and control justice-sector corruption, they can also eliminate major impediments to socio-economic and political development.

Mexico: the traffickers' judges

Jorge Fernández Menéndez[1]

Mexico's justice system reacts oddly when dealing with criminals involved in organised crime, especially drug trafficking. Since drug trafficking is a federal crime, it must be addressed by judges from the federal jurisdiction; state and municipal-level justice systems cannot be involved (nor local governments and local police). This leaves the fight against drug trafficking in the hands of a very few people who are therefore more vulnerable to corruption, as well as to pressure, threats and physical attacks from criminal elements.

Judges involved in drugs trafficking cases do not receive any special protection and are more susceptible to coercion and corruption. *Plata o plomo* (meaning 'silver or lead', in other words what will make a judge comply with a corrupt demand: money or a bullet?) is the question asked in trafficking circles to assess how amenable a judge might be to corruption when it comes to sentencing. This 'choice' is repeated at every level of investigation throughout the police and judicial systems. This does not mean that there are not police, prosecutors and judges who are honest and carry out their work efficiently. But in such an environment corruption easily penetrates the system.

José Luis Gómez Martínez, a judge in Mexico's highest security prison, has handed down numerous decisions in the past few years absolving a number of people linked to the Sinaloa drug cartel. His sentences sparked complaints by the attorney general's office, which denounced him to the federal judicial council (CFJ), the agency responsible for evaluating judges' sentences and protecting their integrity, and also started an investigation against him. To date, the CFJ has not found any 'irregularities' in the judge's decisions.

But some irregularities are easy to spot. Judge Gómez Martínez presided in the case against Olga Patricia Gastelum Escobar and Felipe de Jesús Mendivil Ibarra, both accused of harbouring and transporting money belonging to the Sinaloa cartel to drug trafficker Arturo Beltrán Leyva, a close associate of *El Chapo*, the head of the cartel. The couple were detained while attempting to escape from police with close to US $7 million in cash and US $500,000 worth of jewellery and watches. They were armed.

In April 2005, Judge Gómez Martínez cleared Olga Patricia Gastelum Escobar of wrongdoing in a sentence that was marred by many irregularities, most notably that the public prosecutor's office (which instigated the case) was notified of the result only 24 hours after the woman was freed from prison. This violated article 102 of the Criminal Procedural Code, which stipulates that decisions cannot be executed without first notifying the public prosecutor. The defendant went free although a separate investigation had been initiated against her. A complaint about the decision

1 Jorge Fernández Menéndez is a radio and print journalist in Mexico, and author of a number of books on drugs trafficking and power in Mexico.

was filed with the CFJ, which argued that verdicts of innocence did not need to be notified to the public prosecutor. Although Judge Gómez Martínez was not sanctioned, an appeal against the sentence was brought before the second circuit appeals court, which found that Gastélum Escobar's criminal liability had clearly been demonstrated. Nonetheless, she remains at liberty.

But the scandal does not end there. Despite the appeal court's decision against Gastelum Escobar and the fact that she had already declared that her partner, Mendívil Ibarra, was a drug trafficker, the same judge considered that he, too, was innocent.[2]

There are other cases involving Gómez Martínez. In 2004, a group of 18 hit men loyal to the Sinaloa cartel were detained in Nuevo Laredo by the Mexican army. They were carrying 28 long guns, two short guns, 223 cartridges, 10,000 bullets, 12 grenade launchers, 18 hand grenades, smoke grenades, bullet-proof vests and equipment reserved for military use. Gómez Martínez set them free, arguing they were innocent of charges of involvement with organised crime. The same judge ordered Archivaldo Iván Guzmán Salazar, son of *El Chapo*, to be set free after he was accused of money laundering and murdering a young Canadian while leaving a bar.[3]

The case of Gómez Martínez is not exceptional. A judge in Guadalajara, Amado López Morales, decided that Héctor Luis '*El Güero*' Palma, one of Mexico's best known drug traffickers, was no such thing (he called him an 'agricultural producer') despite the fact that he was detained in charge of an arsenal of weapons. He decided the crime of amassing weapons should merit only five years in prison. A second judge, Fernando López Murillo, reduced the penalty to two years and also decided that the former commander of the federal judicial police, Apolinar Pintor, who had sheltered *El Güero*, should be exonerated because he only did it out of 'friendship' – and not because he was paid.[4] When Arturo Martínez Herrera, leader of a group of hit men known as *Los Texas*, was detained with 36 long weapons, and 10 kg of cocaine and marijuana, Judge López Morales dismissed the charges. The only sentence he gave was for criminal association, for which he awarded a sentence of two years, commutable for a fine of US $10,000. When the sentence was reviewed, the appeals court condemned Martínez Herrera to 40 years in prison.[5]

Another notable judge is Humberto Ortega Zurita from Oaxaca. Two men were detained in a car in 1996 with 6 kg of pure cocaine: the judge absolved them declaring that no one could be sure that the cocaine was theirs. Some time later, a woman was detained in a bus with 3 kg of cocaine taped to her stomach. The judge had no doubt: the woman was set free because he considered that 'she did not carry the drugs consciously'. A short time later, Judge Ortega Zurita 'committed suicide' by stabbing himself several times in the heart.[6]

The Mexican judicial system does not function adequately. But it is also true that there are protections against corruption, and institutions, such as the CFJ, that should bring some order to the chaos.

2 An appeals court reversed the decision and sentenced Ibarra to 17 years in prison. See *La Jornada* (Mexico), 5 October 2006.

3 Office of the Attorney General, Boletín 789/05 at www.pgr.gob.mx/cmsocial/bol05/jul/b78905.htm The PGR successfully appealed against the decision to free Guzmán Salazar.

4 Office of the Attorney General, Boletín 183/97 at www.pgr.gob.mx/cmsocial/bol97/jun/b0018397.htm The day after issuing his decision, López Murillo told the press that the case had made him fear for his life.

5 Office of the Attorney General, Boletín 049/97 at www.pgr.gob.mx/cmsocial/bol97/ene/b0004997.htm Judge Morales was dismissed by the CFJ and prosecuted for collusion with drug traffickers. He is currently in prison.

6 Report of the UN special rapporteur on the independence of judges and lawyers, January 2002, E/CN.4/2002/72/Add.1

What is unusual about cases like that of Gómez Martínez is not the quality of his decisions, but the CFJ's refusal to take any action against him when in most cases the appeals court drastically altered the sentences, denouncing the judge's 'ineptitude and lack of knowledge of criminal law'.

The rule of *plomo o plata* continues to taint the justice system. Some traffickers have been detained for years without receiving a firm sentence, exploiting the deficiencies of the justice system with the sole objective of avoiding deportation to the United States where they would face more serious charges.

Judicial corruption from the prosecution's perspective

Nicholas Cowdery AM QC[1]

The prospect of corruption in the criminal jurisdiction of the courts is a matter of special concern to prosecutors. A necessarily close professional relationship exists between prosecutors and judges, and they keep a close eye on each other: partly because prosecutors carry out a quasi-judicial role in some respects; partly because prosecutors, like judges, represent the community at large and the general public interest; and partly because prosecutors, acting professionally, need the judiciary to respond to their cases in a professional manner on a level playing field.

There are many ways in which a prosecutor can engage in corruption in a criminal case. A prosecutor may select a charge that reflects less than the degree of criminality in the conduct of the defendant. Evidence may be withheld. A putative defence may not be challenged to an appropriate extent, in an effective way or at all. Arguments in favour of conviction or penalty may be weakened. Prosecution corruption usually comes about in favour of a defendant because a guilty defendant has a strong personal interest in evading justice. It can, however, also favour the prosecution, through improper influence, reward or threat; through partiality on the part of a prosecutor; or through improper personal association with an investigator, witness or judicial officer.

Prosecution models and limits on independence

The prosecution of crime is an essential function of the executive government. To work at their best, prosecution agencies should be independent of other branches of government – the legislature (which makes the laws), executive agencies (which administer the laws and manage the business of government) and the judiciary (which resolves disputes and applies the law). In some jurisdictions such independence may be qualified in certain respects.

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One of the more independent prosecution models is the English scheme in its applications around the globe (Australia, New Zealand, Canada, Hong Kong, some African countries and Pacific islands and so on). The prosecution sits in the executive but exercises some quasi-judicial, decision-making functions and works most closely with the judiciary. In this model it is regarded as inappropriate for either the judiciary or the prosecution to be specially influenced by the legislature or the executive (or, in the case of the prosecution, other parts of the executive). Prosecutors should be guided by the law, the evidence and any proper guidelines in place. Political interests, media pressure and the wishes of sectional groups or individuals in the community should be eschewed.

There are qualifications on independence even in this model, however. In England and Wales the attorney general who 'superintends' and directs the Crown Prosecution Service is a government minister, a member of the legislature and *ex-officio* chairman of the general counsel of the bar. This closeness of minister and chief prosecutor also exists in Hong Kong, Canada, a number of African Commonwealth countries and in Australia, where directors of public prosecutions (DPPs) are responsible to attorneys general. Such relations need not be a cause for alarm. In New South Wales, for example, the DPP might corruptly decide not to prosecute a matter, but the attorney general could intervene and conduct the prosecution if after consultation the DPP did not change his position. Conversely, the attorney general could corruptly endeavour to persuade the DPP not to proceed with a prosecution, but the DPP might nevertheless proceed. In some common law jurisdictions discussions between the attorney general and the DPP, and the decisions arrived at, are not made public, whereas in some civil law jurisdictions instructions from the minister to the prosecution service in individual cases are part of the public record.

Such independence may be limited in other models. For example, in many jurisdictions (e.g. Malaysia) prosecutors have no discretion to alter charges that have been laid by police. If there is a *prima facie* case for that charge, the prosecution must proceed. There can be no negotiation of charge (plea bargaining) or discretionary adjustment of charges by prosecutors. The prosecutor's independence in decision making and in the conduct of a prosecution is fettered by police action, and the danger of any later influence of corruption at the police level is more marked.

In the Netherlands and France prosecutors are even more closely allied with the judiciary and, indeed, with particular courts. In these countries an inquisitorial system exists where the judge has a different, more investigative role to play, assessing the evidence on the basis of statements and submissions (though, as Eva Joly describes on page 84, this role has been diminished in France). In the Netherlands, prosecutors may even act as judges for short terms. In such cases there is a risk that the judiciary might be seen as lacking independence, aligning itself with the prosecution to the disadvantage of the defendant. The historical development and justification of these arrangements put them in a somewhat different light, but they remain problematic.

Another factor that might compromise prosecutorial independence and increase the risk of corruption is funding. Government funding to prosecution agencies may, overtly or covertly, be made subject to political satisfaction with performance. A chief prosecutor who does not bend to the political wind may have funds withheld or reduced. Performance measures (on which funding may be contingent) may be put in place that encourage corruption and inappropriate

practice (e.g. one measure may be the number of convictions achieved). Additional funding for an unusual, high-profile and politically sensitive prosecution may be denied. Any one of these measures puts pressure on the prosecution.

Another important distinction between models is whether any agencies enjoy a monopoly on prosecuting crime or if there may be private prosecution (by the police, victims, NGOs or others). Private prosecution can provide a last avenue of redress, which is important if political considerations discourage the prosecution from taking on a case. In some jurisdictions, however, the public prosecutor can take over a private prosecution in any event and at any stage of the proceedings.

The prosecutor's career

Prosecutors are essentially lawyers doing one kind of work (prosecuting criminal offences and related proceedings) for one client (the state or an arm of the state, such as customs, an environmental protection agency or other regulatory authority). They are generally legal practitioners, qualified at the tertiary level, of continuing good character, engaging in continuing professional legal education or development, and subject to codes and standards of conduct and practice prescribed by professional associations. Most agencies employ prosecutors of varying experience, from recently qualified lawyers learning the prosecutorial skills under the supervision of managers, to highly experienced professionals making important decisions with minimal supervision. Some may have come from private practice or may go into private practice after a period of prosecuting.

In common law countries judges of superior courts are often appointed from the senior ranks of the practising profession and may come from private practice or the prosecution ranks. In most civil law jurisdictions, by contrast, prosecutors and judges usually follow parallel career paths, training together and changing role from prosecutor to judge, and even back again.

In well-run agencies the pay scales reflect the level of experience and ability at different points in the hierarchy. In some countries prosecuting lawyers and their staff are comfortably remunerated by comparison with colleagues in private practice (although not usually to the same level). In others, prosecutors' pay is poor and this can be an incentive to seek to supplement one's income by corrupt practices. A 2005 study of 16 countries shows wide variations in levels of remuneration and benefits for prosecutors.[2] In Australia, the Czech Republic, Estonia, Finland, Hong Kong, Norway and Scotland, judges earned more than prosecutors while in Austria, Bulgaria, Denmark, Hungary, Netherlands, Slovakia, Slovenia, South Korea and Ukraine, the levels were similar. In Bulgaria, the Czech Republic, Estonia, Hungary, Scotland, Slovakia, Slovenia and Ukraine, salaries increased only a little over one's career, whereas in the others there were significant increases with experience.

Prosecutors may have security of tenure, they may be on term contracts, they may be employed *ad hoc* or they may be popularly elected. All such systems are practised, sometimes together

2 Study reported to the KriminalExpo in Budapest, Hungary in November 2005.

in a single country (e.g. the United States). All have their faults. Prosecutors with tenure may grow lazy or become perverse, knowing they will not be dismissed. If their conditions of employment are not adequate, they may become corrupt. Prosecutors on fixed or short-term contracts are at the mercy of the employer and so may improperly or corruptly seek to please their superiors to ensure continuing employment. Prosecutors who are elected must make campaign promises and seek re-election on the basis of performance. To take one example, in parts of Texas elected judges also assign lawyers to legal aid or public defence briefs. It is an easy matter for a judge to corruptly appoint incompetent and/or ineffective counsel to the defence in order to increase the number of convictions before that judge and thereby enhance his or her prospects for re-election. (See 'Judicial elections in the United States: is corruption an issue?' on page 26.)

Prosecutors as watchdogs on judicial corruption

Prosecution agencies are usually midstream: they receive their work from elsewhere, usually the police or other investigators, and see how the courts subsequently handle it. They are therefore in an excellent position to assess whether or not its collection has been corrupted, or its final processing – the judicial treatment – is corrupted.

Although it is by no means a universal arrangement, many argue that there is value in separating functions into silos of investigation, prosecution and adjudication, provided the silos connect at various levels. Each silo is vulnerable to attack and corruption. If one silo supervises and directs another, then only that silo needs to be targeted to corrupt both. If an investigator is corrupted, for example, there is a good chance of a prosecutor perceiving it before the judiciary becomes involved, or of dealing with it in conjunction with the judiciary (aided by the defence). But if the investigation is subordinate to a corrupt prosecution, the product of the investigation may be corrupted and carried forward to the judicial process in that form.

One way in which these silos connect – and it is a mechanism that provides some protection against corrupt practice – is by disclosure from one to another. Investigators should be required, on pain of disciplinary or criminal penalty, to certify that all relevant information (in proof of charges or of possible defences) has been disclosed to the prosecution. The prosecution, in turn, must disclose all relevant information to the defence in a timely manner.

Corruption by investigators (who are also in the executive branch of government) may be difficult to detect from just the human and material evidence presented for prosecution. If evidence has not been gathered or has been distorted or removed from a brief, its absence may only be discernible from inconsistencies or anomalies in the remaining evidence. Otherwise the prosecution may only become aware of corrupt handling by the investigation from statements made by others involved in the matter, or by an attack made by the defence during a judicial hearing. An additional safeguard is provided where prosecutors confer with witnesses before hearings. Suppressed or inconsistent evidence may be identified in that process. If it is, the prosecutor's remedies include further investigation, further disclosure to the defence or reassessment of the conduct of the prosecution.

Once the investigation work is complete, the prosecutor brings to the court the material that he or she has been given by those whose task it is to gather the evidence (a task shared by prosecutors in many places). In court, a judge might fail to act in accordance with the law or the process applied to that material and other evidence that may be put before the court. The judge's conduct may be deliberate or unwitting, but in either case it corrupts the delivery of justice.

How might the prosecution identify conduct of that sort at that level? One way is if the judge fails to correctly apply legal rules, for example by disallowing proper questions, excluding evidence that should be admitted or admitting strictly inadmissible material. This may give rise to an appeal in many jurisdictions (although a clever corrupt judge may be able to interfere in such a manner without rendering his or her decisions liable to appeal, depending on the particular rules in place). If there is a sufficiently strong suggestion of corruption it should be referred to an appropriate agency, such as a judicial conduct commission or a similar oversight body.

Another way in which a dishonest judge might influence the outcome of a case in a jury trial is by directing the jury so as to favour one side. This may come about by deliberate perversion of the process or, more commonly, it may arise from the judge's own perception of events and views about the way in which the trial should proceed or conclude. The remedies against such conduct are vigilance by the participants in the proceedings at the time and an effective right of appeal to the aggrieved party.

A judge may take a bribe or be threatened and still act according to law, acquitting or convicting on the evidence lawfully considered. That form of corruption may be impossible to detect – although a threat is probably more likely to be reported. Corruption of the process by improper benefits, provided the benefit is hidden, is usually only detectable by examination of the process against the outcome it has produced. If all appears regular on the surface, it will be much harder to identify corruption beneath.

Complicating matters in many jurisdictions are rules barring the prosecution from appealing against an acquittal so the judicial misconduct, deliberate or unwitting, may go uncorrected. At the very least, where judges have a power to direct an acquittal before jury verdict, that direction must be made subject to appeal, as it has been in Australia in Tasmania and Western Australia and recently in New South Wales.

Safeguards

None of these risks of perversion of the course of justice is new or unanticipated and many safeguards are available to meet them.

The primary protection against corruption in the prosecution and adjudication processes is their independence, but it differs among jurisdictions. Prosecutors need independence to make decisions about which charges to press, what evidence to include, when to discontinue prosecution and so on. Such decisions must be based only on the admissible evidence available, the applicable law and any guidelines in place. Decision making must be free from influence by political considerations (except in the broadest sense of importing general community standards in the

general public interest), media comment or representations from individuals or groups in the community with particular agendas that are not part of the prosecution process itself (for example, victims of crime); nor should it be influenced unduly by the views or desires of investigators who may have made large commitments to a particular outcome. In many jurisdictions politicians have considerable influence and control over prosecution decisions and where this occurs the relationships should be transparent, and able to be examined and assessed.

The other side of independence, of course, is accountability. Proper mechanisms must be in place to ensure that prosecution decisions are transparent (i.e. examinable) to an appropriate extent and in appropriate ways. This may need to be balanced against the privacy of individuals and the need for confidentiality about methods of investigation and the like. There also need to be processes by which decision makers can be held accountable for their decisions so that any flaws in the system generally can be identified and corrected in a timely manner. Important safeguards include:

- Appropriate oversight of the conduct of the prosecution, statutorily based
- Regular reporting by the prosecution on the exercise of its functions
- Publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions
- Codes of conduct for prosecutors and the judiciary
- Where private prosecutions may be instituted, a power should be vested in the public prosecutor to take over such matters and either continue or terminate them, but only on the application of principles that are well defined and publicly known
- Performance measures that target conduct and not merely results
- Conduct of judicial proceedings in public (with limited exceptions, for example concerning children) and the publication of reasons for decisions.

For all that, there is no way of guaranteeing a corruption-proof system of justice that employs humans. We can, however, make it very difficult to act corruptly, we can improve ways of uncovering it and we can punish it. We can also increase awareness of the risk and educate people in ways of avoiding it.

The investigating magistrate's loss of influence in France, and the effect on the fight against corruption

Eva Joly[1]

With the benefit of hindsight, I can state with confidence that the successful prosecutions in the Elf affair[2] were made possible mainly through the substantial autonomy and wide-ranging investigative

1 Eva Joly worked as an investigating magistrate in France from 1990–2002. She is currently a special adviser to the Ministries of Justice and Foreign Affairs in Norway.

2 The investigation into the accounts of the Paris-based oil company Elf Aquitaine began in 1994. Over an eight-year period, the investigation uncovered a network of corruption and fraud involving top French executives and political elites.

powers that French investigating magistrates used to have at their disposal.[3] I say 'used to have' advisedly, because it seems that there has been a regression of sorts in the fight against corruption. It is obviously tempting to make a connection between the successes achieved in this affair, which stands out because of the vast amounts known to have been embezzled (around €450 million or US $540 million), and the wave of reforms being introduced to the French judicial system. Some of those prosecuted and found guilty had close links with members of the political elite. The whirlwind of procedural reforms sweeping across the criminal justice system is perhaps not entirely unconnected with the notable independence of the French judiciary.[4] The same process has also taken place in Italy following the *mani pulite* or 'clean hands' investigation, which demonstrated the scale of corruption there in much the same way.

Plenty of other factors, both substantive and peripheral, played a part in ensuring the success of the Elf investigations and legal proceedings, such as the work of specialist police officers, highly motivated and competent in financial matters, and the use of teams of experienced, independent-minded magistrates. But the likelihood that such conditions will arise again in France remains extremely remote due to reforms in criminal procedure – some already implemented, others still to come – and to the stalling of the planned reform of the status of magistrates.

It should be recalled that at the outset my brief related to one affair among many (the Bidermann affair), after a report on the company was sent to me by the Commission des Opérations de Bourse.[5]

Progress was made little by little through my specific requests for information, the results of searches and, in certain cases, the direct hearing of witnesses. It was not due to an aggressive policy of supervision by the public prosecutor's financial office, however competent it may be in principle to instigate inquiries into economic offences and to pursue the fight against corruption.

At the time, investigating magistrates had the power to detain those under investigation for serious offences, or to place them under court supervision. This was not, as has been repeated time and again, to put pressure on such people to make them confess (in grand corruption cases, it is unrealistic to hope for confessions during pre-trial investigation) but, as laid down by law, to avoid pressure being placed on the witnesses or co-accused and/or to avoid the risk of evidence disappearing. Sometimes in the middle of an investigation I have come across people still busy shredding paper. It is not unknown for suspects to escape abroad and, when there are signs of an imminent departure, the power to arrest the persons concerned allows the authorities to thwart their desire to evade justice.

3 The investigating magistrate does not act in the interest of the prosecution or defence, but in the interest of the state in arriving at the truth of a criminal charge. The scope of the inquiry is limited by the mandate given by the prosecutor's office: the investigating magistrate cannot investigate crimes on his or her own initiative.

4 President Jacques Chirac said in 1996 that judicial reform would be a priority of his presidency, but several plans that would have increased independence of the judiciary were shelved when it became unlikely that parliament would vote for a constitutional amendment that would have allowed the High Council of the Magistracy to be reorganised. The government had proposed enlarging the council, which supervises prosecutors and judges, giving it a majority of members from outside the legal profession or politics. The council would then be responsible for appointing senior prosecutors.

5 France's equivalent of the Securities and Exchange Commission. In August 1994 Eva Joly received a report from the Commission raising questions about the accounts of a textile business called Bidermann. Auditors had discovered an Elf investment of 780 million francs (US $140 million) in the textile business. It was later found that Bidermann had been used to channel money to the ex-wife of Elf's recently resigned head, Loïk Le Floch-Prigent.

Since the law on the presumption of innocence was passed on 15 June 2000, coercive measures, such as remanding in custody, can only be decided by a magistrate other than the one in charge of the investigation. This new judge, whose ruling must be given within a few hours, cannot have the detailed knowledge of complex files, thousands of pages long, needed to make a decision based on full knowledge of the facts.[6]

Since then another law on organised crime came into force on 9 March 2004. It strengthens the investigative powers of the public prosecutor's department and makes the status of magistrates even more dependent on the authority of the Minister of Justice, who is a full member of the executive. The chain of authority leading from the Minister of Justice, via the prosecutors' offices, to the deputy public prosecutors is formally recognised in this legislation.

Investigating magistrates in France are currently appointed in only 5 per cent of proceedings. Since the 2004 law, we have witnessed the decline of the office. The public prosecutor's department has now been given investigative powers rivalling those of the investigating magistrate.

A potential obstacle that might have arisen at the very core of the judicial establishment if the powers of investigation into corruption in the Elf affair had been concentrated solely in the hands of the public prosecutor's department relates to the influence of the executive over that department. When serious suspicion began to fall on Loïk Le Floch-Prigent, one of the directors implicated in the affair, he was invited by the president of the republic to head the state-owned railway company during the same period. Such a high-level endorsement of Le Floch-Prigent might have inhibited a less independent public prosecutor from pursuing the case against him.

The crux of the matter remains therefore the status of magistrates in charge of investigations. The close link in France between public prosecutors and the executive, strengthened still further by the 2004 law, has caused a decisive shift in the balance of roles in a case. The investigating magistrate represented a balance of judicial powers between the magistrates in charge of organising prosecutions (the public prosecutor's department) and those responsible for judgement. Given the lack of prosecutorial independence, the planned phasing-out of the investigating magistrate will tilt the balance of authority in the investigation of major corruption scandals, and unduly reinforce political influence. In various ways the possibilities for detecting and curbing major corruption are being closed off. And this is happening just after the Elf affair came to light – the greatest financial scandal ever investigated and brought to trial in Europe. Perhaps it is no coincidence. It was already difficult and even dangerous to attack key figures suspected of corruption, which by definition may implicate people wielding power at the highest levels. But when subtle mechanisms emerge from within the establishment to impede this work, one is facing a near impossible task.

It is a form of internal corruption to introduce additional 'legal' impediments, instead of reinforcing the instruments that already exist and the people who are trying to put them into effect.

It is interesting to note that it is the very parliamentarians who have been under investigation who placed before parliament the most radical plans for abolishing the investigating magistrate. In the wake of the Outreau affair (in which a majority of those detained for alleged child sex abuse were

6 In the common law system, custody/bail decisions are almost always made by magistrates with less than full knowledge of the facts, relying on summaries provided by investigators and prosecutors; a second magistrate might provide a check on incorrect decisions.

subsequently acquitted after a long period in custody), only the investigating magistrate and the role he played were condemned, whereas it was actually the whole institution that failed.

The investigating magistrate did fail, but his lack of insight should have been corrected by the Chambre d'Instruction,[7] by those experts and lawyers who could make themselves heard, and above all by the professionalism and experience of the public prosecutor's department. Quite the reverse: the chief prosecutor contributed to the lack of discernment shown throughout the investigation. Rather than counterbalancing the investigating magistrate, he supported the pre-trial detention by calling for the accused to be remanded in custody, opposing applications for them to be freed and later demanding guilty verdicts at the first trial. It now seems as if this scandal, which highlights all the flaws in the French judicial system, is being used to bring down the single French institution likely to pursue effectively the crimes of the powerful, namely the investigating magistrate. We are at risk of throwing the baby out with the bath water.

In the light of the Elf affair it makes sense to ask if there is not a hidden agenda in the planned reforms that calls into question the very existence of the investigating magistrate, namely, a desire to limit once and for all the powers of the judiciary in the fight against major corruption.

It is as if great corruption scandals are much too serious to fall into the hands of magistrates.

7 The decisions of the investigating magistrate may be the subject of an appeal before the Chambre d'Instruction, a chamber of the court of appeal.

Lesotho Highlands Water Project: corporate pressure on the prosecution and judiciary

Fiona Darroch[1]

The trials for bribery associated with the Lesotho Highlands Water Project (LHWP) began in Lesotho some seven years ago. The indictments before the court, alleging charges of bribe giving and bribe taking, identified 19 defendants, including employees of the LHWP, representatives of corporations, corporations and joint ventures comprising combinations of corporations.[2]

Corporate tactics to evade justice

The corporate defendants in these proceedings did everything within their powers to avoid justice taking its course. Some met privately together in 1999 to discuss the tactics they would employ to fend off conviction.

1 Fiona Darroch is a practising barrister at Hailsham Chambers, London, United Kingdom.
2 *Business Day* (South Africa), 29 July 1999.

The defendants raised an unusually large number of preliminary issues in their efforts to avoid trial. These gave an indication of the fierce struggle to come as large companies with valuable reputations to lose used all the legal arguments at their disposal to avoid the disgrace of criminal conviction. In an early ruling, Judge Brendan Cullinan decided that justice would not, and could not, be served if all the defendants were to be tried together. What followed therefore was a series of sequential trials beginning with that of the chief executive officer of the LHWP, Masupha Sole, presided over by Judge Cullinan. Sole was tried, convicted and subsequently lost an appeal against his conviction.[3]

The Sole trial was followed by the first corporate trial of the Canadian construction company, Acres International Limited. This trial was presided over by Judge Mahapela Lehohla, now Chief Justice of Lesotho. The bench convicted Acres, fined the company heavily and in a subsequent appeal Acres was again defeated.[4] The third trial, that of the German consulting engineering company, Lahmeyer International, followed the same pattern – conviction, a heavy fine and an unsuccessful appeal.[5]

The World Bank evinced interest in both corporate trials. Though it initially found no cause to pursue debarment proceedings against Acres, the Bank subsequently benefited considerably in its own investigation into Acres' corrupt conduct as a result of the work done by the prosecution team in Lesotho. Having wound up its own procedures, the Bank debarred Acres International Limited for a period of three years in July 2004. Significantly, the ban did not extend to Acres' sister companies, Acres International Corporation, Acres Management Consulting and Synexus Global Inc. Debarment procedures in respect of Lahmeyer hesitated during a change in management at the World Bank, but were recently reinstituted.

Acres, the first corporate defendant, was clearly shocked by the judicial process and protested its innocence throughout a trial in which the evidence of its activities clearly pointed to an established pattern of corruption that reflected a wider corporate perspective – echoed privately by other major corporations – that this was an acceptable way to do business in a poor African country. Corporations subsequently facing the same ordeal clearly took a more pragmatic view of their prospects, employing a range of tactics that were aimed at extending the prosecution process far enough to ensure that it would go away. In the main, these involved:

- Attempts to conceal the contents of company bank accounts that would show the movement of corrupt payments to the company's representative and thereafter to the bribe takers
- Attempts to blur the lines between a company and the acts of its employees

3 *E. Sole v The Crown*, Lesotho court of appeal, (CRI) 5 of 2002, judgement delivered 14 April 2003 by Smalberger JA, Melunsky JA (former judges of the South African Supreme Court of Appeal) and Gauntlett JA (senior counsel in South Africa and former chairman of the South African Bar Council).

4 *Acres International Limited v The Crown*, Lesotho Court of Appeal, (CRI) 8 of 2002 delivered on 15 August 2003 by Steyn, president of the court, Ramodibedi JA and Plewman JA (a former judge of the South African Supreme Court of Appeal).

5 *Lahmeyer International GmbH v The Crown*, Lesotho Court of Appeal, (CRI) 6 of 2002, delivered on 7 April 2004 by Steyn, president of the court, Grosskopf JA and Smalberger JA (both former judges of the South African Supreme Court of Appeal).

- Alteration of the identity of the company by its absorption into a different vehicle in the hope that the original company could not be correctly identified, charged and convicted

Following the trial of Lahmeyer, Jacobus Michiel Du Plooy, a 'middle man' responsible for the flow of corrupt payments to corporations working on the LHWP, pleaded guilty. His evidence assisted the prosecution in its pursuit of the Italian corporation Impregilo, the lead corporation in the Highlands Water Venture Consortium (HWV). Impregilo had restructured itself, arguably, in an attempt to avoid prosecution. The company sought unsuccessfully to avoid trial by a number of artful arguments about the serving of the summons, the personal liability of employees for actions taken during the course of their employment and the jurisdiction of the court.[6] In September 2006 Impregilo acknowledged the failure of its evasive tactics and pleaded guilty to 'attempting to defeat the course of justice'. The company was fined M15 million (over US $2 million).[7]

The French corporation, Spie Batignolles, now owned by the multinational AMEC, sought to evade justice by a similar series of unsuccessful legal manoeuvres, arguing that the indictment had cited the 'wrong version' of the company. This argument found no favour with the court. Spie decided to cut its losses by pleading guilty and paying a substantial fine.[8] The trial of Reatile Mochebelele, former chief delegate of the government of Lesotho on the LHWP, was due to start in October 2006. He is accused of taking cash bribes from Lahmeyer. Due to its current debarment proceedings in the World Bank, Lahmeyer is said to be assisting the prosecution.

Political obstacles placed in the prosecution's path

Seven years on this series of trials remains unique, yet Lesotho is one of the poorest countries in the world. The construction of the LHWP has contributed to one of the highest rates of HIV/AIDS on the African continent. The absorption of arable land into the scheme has reduced the capacity of much of the population to sustain itself. There is high unemployment and much suffering. Lesotho's history has been characterised by political instability in recent years. Having gained independence from the UK 40 years ago, it has suffered intermittent threats to peace, although the country has enjoyed constitutional rule from 1993 to the present.

Considerable domestic political pressure was placed at times on the attorney general to reconsider the prosecution of multinational corporations within Lesotho's borders. As each corporate defendant twisted and turned in the attempt to avoid conviction, the process of prosecution has been complex, lengthy and expensive. Frequently, the question arose as to whether this

6 See *Impregilo SpA and Another v Director of Public Prosecutions and others*, Court of Appeal of Lesotho, judgement delivered on 30 April 2006.

7 See Lesotho government press release at www.lesotho.gov.ls/articles/2006/Impregilo_Fined_Justice.htm

8 See address by former attorney general of Lesotho, Fine Maema, to the South African Institute of International Affairs, 19 July 2003. Available at www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=371&CAMSSID=66857a3f4163b0b280bd13a5a1c2465f

was a suitable use of government funds. This pressure could have been alleviated had proper financial assistance (not in the form of loans) been forthcoming from the international community.

The roles that the World Bank and a phalanx of other international institutions played in the investigation and punishment of bribery in the LHWP raised some difficult questions that remained unanswered throughout the trials. The World Bank initiated a groundswell of support for the prosecutions from other lenders at a crucial meeting in Pretoria in November 1999[9] when the magnitude of what the prosecutors intended to achieve was revealed. It was clear that the trials would be unprecedented in the history of prosecution for bribery. Yet throughout – with the exception of the EU's anti-fraud agency, OLAF[10] – the international community remained silent.

Some defendants are still at large in their native countries with no legal assistance forthcoming from the relevant governments. Indeed, no support has been forthcoming at all, except from OLAF. Any other country contemplating such prosecutions in future will think twice before embarking upon such an expensive and fraught course of action since it is clear that the international community is unwilling to provide support. World Bank president Paul Wolfowitz suggested recently that the institution should have contributed financially to the prosecution of these trials,[11] although other officials indicated that the Bank's charter would not permit it to fund litigation directly. The question that remains unanswered is why international financial institutions have not embraced any lessons from these prosecutions?

The prosecution resists pressure

An analysis of the unprecedented success of these prosecutions is not complex:

- The most important feature has been the leadership from within the cabinet of Lesotho, which allowed the attorney general, with unflinching political courage and determination, to provide a consistent mandate for the prosecuting team to continue its work undeterred by political considerations.
- There is an established body of statute and case law in South Africa and Lesotho that now leaves less room for doubt concerning the doctrine of criminal corporate liability. This doctrine has been subject to a variety of unsuccessful attacks by corporate defendants,

9 The meeting was held on 17 November 1999 in Pretoria, South Africa and was described in a World Bank press release as 'LHW project financiers meet to exchange information'. Present were representatives of 15 organisations, including the World Bank Group, World Bank Group Legal Advisors, Lesotho Government, Lesotho Government's Legal Advisors, South African Department of Water Affairs and Forestry, Banque Nationale de Paris, British High Commission, Lesotho Development Bank South Africa, European Investment Bank, European Union, Lesotho Highlands and Development Authority, Lesotho Highland Commission and others.

10 OLAF, based in Brussels, has provided continuing support to the prosecution team in obtaining crucial company information relating to the foreign corporate defendants.

11 At a Conference on Global Corruption, organised by the Pontifical Council for Justice and Peace on 2–3 June 2006, Wolfowitz was a keynote speaker.

which resulted in the development of Lesotho jurisprudence in this area of law from which the international community has much to learn.
- Guido Penzhorn SC and his team of prosecutors showed a tenacity of purpose that has received international acclaim.

An experienced, retired former chief justice, Judge Cullinan, was appointed to ensure that no question of judicial partiality or incompetence would arise. His reputation, experience and faultlessly argued judgements on the preliminary issues (none of which were appealed) ensured that a high judicial standard marked the start of the process and set its tone thereafter. Judge Lehohla's ruling in the conviction of Acres reflected the emerging revulsion of the Lesotho judiciary for the offence of corporate bribery and, in particular, for the contemptuous attitude that characterised Acres' approach to the litigation process. In interview[12] he noted that the message from the Lesotho courts was uncompromising: corruption will not be tolerated, and will be investigated and tried at the highest level. Top South African advocates were instructed throughout by the defendants in these trials. There have been no allegations of judicial corruption thus far. It is certain that no defendant would have shirked from making that allegation if there were any justification for doing so.

Recommendations

In researching this article, the saddest reflection came from Guido Penzhorn SC, leading counsel for the prosecution, who expressed the conviction that the LHWP trials are likely to be the last of their kind.[13] As the government embarked on its prosecution of companies that bribed officials, other African countries watched as the international community promised that help would be forthcoming. They saw that no such help arrived.

These were not simply fascinating corporate trials in a tiny African nation. They were trials that contained the critical, trans-boundary elements of concealment, as does bribery by its nature. Gathering the evidence that can lead to conviction by examining the history of a corporation and understanding its conduct at specific moments should be an international undertaking. The Lesotho courts provided a vanishing opportunity to appreciate that these trials, devoid of judicial corruption, should have been seen through an international lens with the international community taking responsibility for the part it can best play in future. The debate will continue to rage around measures, such as debarment by the World Bank, mutual debarment, effective due diligence, effective mutual legal assistance, and the function of representatives and their agreements. From a practical perspective, as the international community continues to proselytise against corruption, the absence of any tangible initiatives to prosecute corrupt behaviour by large corporations merely serves to devalue the coinage of the debate.

12 Author interview with Judge Mahapela Lehohla, 24 June 2006.
13 Author interview with Guido Penzhorn, 21 June 2006.

Lawyers and corruption: a view from East and Southern Africa

Arnold Tsunga and Don Deya[1]

In the countries of East and Southern Africa lawyers are integral to the concept of the separation of powers because judges, especially those serving at the higher echelons of the judiciary, are almost entirely appointed from among legal practitioners. The independence of the judiciary and the quality of the legal profession are therefore intricately linked. Most countries of the region have lawyers' associations to regulate the conduct of the profession and secure its independence from the political or business powers of the country. Yet all too often, these function as cartels, controlling access to a lucrative profession, or are targets of manipulation or persecution by the state, or others acting on its behalf.

Corruption involving lawyers and legal associations

Behaviour among lawyers who act as a cog in the judicial corruption machine can be characterised in three ways:

- Lawyers who act as 'couriers', conveying litigants' desires to judicial officers, and judicial officers' demands to litigants
- Lawyers who sense from the conduct of the court that their client must have 'seen the judge' (to corrupt him or her), but turn a blind eye to it
- Lawyers whom the rank and file of the profession know to be corrupt, but who are not brought before a disciplinary mechanism.

Promises to speed up delays in the administration of justice are another avenue for corruption and an important source of corrupt revenue for lawyers.[2] The nature of the delay varies across countries, but includes criminal and civil cases, property transfer and registration, company registration, notary deeds registration, labour disputes, administrative justice and immigration cases.[3] Some lawyers bribe officials to expedite the resolution of their cases; others see a delay in resolution as an opportunity for financial gain on behalf of, or from, their clients.

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2 Southern African lawyers' associations meet annually to review the state of the administration of justice in the SADC. At their 2005 meeting in Harare, it was agreed that justice administration in southern Africa faces delays that are significant and impact on effective access to justice.

3 These were general findings of the Second Symposium on the Administration of Justice in the SADC region, 28–29 October 2005.

In South Africa significant delays in justice delivery and speculation about related corruption have been reported in the cases of migrant labourers, asylum seekers and undocumented people as their vulnerability is very high.[4] Hyper-inflationary environments also drive corruption because they reward delaying tactics.[5] A human rights NGO in Zimbabwe launched a public interest litigation in 2000 after a client was unlawfully shot and paralysed, suing police for Z$2 million, then the equivalent of US $100,000. When a judgement was delivered in 2004, inflation had reduced the value of the claim to US $33, though it remained Z$2 million in local currency.

Even when cases are scheduled well in advance, lack of pre-trial preparation and poor communication between judges, lawyers, court staff and police contribute to delays in criminal matters. Lack of capacity in the registrar's office is also widespread (with the exception of South Africa, Botswana and Namibia), resulting in docket loss, confusion over dockets, misfiling or misplacing documents. Lawyers sometimes agree to adjourn or postpone cases by consent, meaning it is redirected to another judge where it may go through the same process. Poor treatment of witnesses also drives delays: they become hostile and refuse to attend future court proceedings.[6] In this atmosphere unethical lawyers can excel, winning cases by manipulating the system.

Lawyers' associations: weak, but gaining support

The accountability and integrity of lawyers begin with effective self-regulation by the profession. Lawyers in East and Southern Africa are generally members of bar associations or law societies, and are usually licensed by these bodies. Many associations are established by statute. In East Africa, Ethiopia, Kenya, Tanzania and Uganda set down an Advocates Act at the time of independence. As of 2006, Rwanda and Zanzibar are at an advanced stage of enacting a Legal Practitioners Act.[7] In Southern Africa, Botswana, Namibia, South Africa and Zimbabwe all have Legal Practitioners Acts, which established their lawyers' associations. The Malawi Law Society was created in 1965 when parliament passed the Legal Education and Legal Practitioners Act.

4 Based on an interview between Arnold Tsunga, a refugee lawyer from Lawyers for Human Rights and a refugee specialist from Zimbabwe Exiles Forum in Johannesburg on 20 April 2006. The backlog in such cases was believed to be in excess of 150,000. The influx of migrants to South Africa is high because of political and economic instability in neighbouring countries, especially Zimbabwe and Mozambique. With no political leadership effectively dealing with democratic and human rights deficits, corruption will continue unabated.

5 According to Zimbabwe's Central Statistics Office, inflation averaged 1,000 per cent in March 2006. See news.bbc.co.uk/2/hi/business/4765187.stm

6 The information in this paragraph is largely reproduced from an interview between Arnold Tsunga and retired justice Tujilane Chizumila of Malawi in October 2005, reinforced by another interview with her in Harare in March 2006. Southern African lawyers agreed with her views on the state of the administration of justice at the SADC Symposium, 28–29 October 2005.

7 Zanzibar has been part of the United Republic of Tanzania since 1964, but was once a separate legal jurisdiction and had a Legal Practitioners Decree that was abolished by presidential decree in that year.

Most lawyers' associations in southern Africa are autonomous and self-regulating bodies with a mandate to:

- Control admission to practise as members of the legal profession
- Maintain registers of members
- Promote the study of law and contribute, undertake or make recommendations on legal training
- Promote justice and defend human rights, the rule of law and judicial independence
- Control, manage and regulate the legal profession, including oversight on compliance with ethics and an acceptable code of behaviour in the practice of law.

Beyond this formalised mandate, lawyers' associations play three additional, implicit roles:

- Trade union for lawyers
- Regulator of the profession
- A wide – usually statutory – public-interest role.

Balancing these roles, particularly the first two, is difficult since they tend to clash. Acting as a trade union means the association and its principals will protect and be lenient to, or at least understanding of, its members. However, the bar association's regulatory role requires it mercilessly to wield the disciplinary stick on the same members. This becomes difficult when the governing council or disciplinary committee of the association is directly elected by the membership.

The easiest way out of this potential quagmire is to insulate the regulatory or disciplinary branch of the profession from direct election. This entails appointment by the appropriate governmental arm, such as the Ministry of Justice, attorney general or a similar office. In Malawi, the Legal Education and Legal Practitioners Act created a disciplinary committee, composed of the solicitor general (a state legal officer) and two members elected by the society, to conduct enquiries into allegations of indiscipline. If necessary and appropriate, matters can be referred to the attorney general.[8] The perception in the Malawi legal profession is that the disciplinary committee is fairly independent, and has a strong voice in fighting for public and private accountability.[9]

Such a process, however, may open the profession to manipulation if the government appoints officers who may be seen as biased. Swaziland and Tanzania, for example, have lawyers' associations but their effectiveness in ensuring true independence is hampered by a disciplining process that is perceived as mainly, if not solely, controlled by the executive.[10] In other countries that have not suppressed corruption and which have declining standards of democracy

8 See Professor Fidelis Edge Kanyongolo, *Malawi – Justice Sector and the Rule of Law*, Open Society Initiative for Southern Africa (2006). Available at www.soros.org/resources/articles_publications/publications/malawi_20060912/malawidiscussion_20060912.pdf#search=%22Malawi%20Law%20Society%20%2Bestablished%22

9 Mabvuto Hara, councillor of Malawi Law Society, reporting to SADC lawyers on 29 October 2005, Harare.

10 Author interview with Caleb Lameck Gamaya, practising lawyer and advocate from Tanzania, on 5 September 2006. Arnold Tsunga also interviewed lawyer Muzi Masuku in Swaziland on 1 July 2006.

and poor human rights records, lawyers' associations are often targets of manipulation and persecution by the state.

Without a primary focus on its ethical, disciplinary and regulatory roles, lawyers' associations operate as virtual cartels, controlling the price of legal support services, entry into practice of new or foreign lawyers, and so on. They ensure work only for registered legal practitioners and thereby protect, guarantee and control a market. External environments that are systemically corrupt may reinforce these dynamics. Success for lawyers is then not seen as related to merit, but to patronage. In Zimbabwe, this may mean being given farms and other expropriated assets (see 'Corrupt judges and land rights in Zimbabwe' on page 35). Lawyers who remain ethical and upright may be persecuted, vilified, de-legitimised and often dismissed as agents of foreign interests. The Law Society of Zimbabwe (LSZ) finds itself in this ideological dilemma as a result of attempting to enact an ethical and disciplinary role. Some lawyers and judges collaborating with and protected by powerful ruling politicians benefited from property expropriations under the guise of 'correcting the historical imbalances of colonialism' and at least three lawyers – one of whom was promoted to deputy chairperson of the government-controlled anti-corruption commission – are under review by the LSZ's disciplinary committee. It will determine whether their involvement in the forcible expropriation of assets constituted dishonourable conduct that brought the legal profession and the administration of justice into disrepute. In attempting to address these challenges and distinguish ethical from corrupt practices, the LSZ has earned the wrath of the authorities, which labelled it a vestige of colonialism and a tool of imperialism.[11]

Beyond political factors, security sector instability may leave the profession with no capacity to act as a force of accountability. In Southern Africa, the post-conflict situations in Mozambique, Angola and the Democratic Republic of Congo have weakened lawyers' associations, and access to justice is in its teething stage for the majority of people. Mozambique and Angola report a serious lack of resources and adequately trained legal and judicial officers. Their governments have not fully accepted that self-regulating lawyers' associations are part of the process that nurtures democracy and good governance, and a prerequisite for fighting corruption effectively.[12]

Recommendations to the profession and lawyers' associations

Here are seven recommendations to engender more independent and effective lawyers' associations that can assert adherence to rules and ethics amongst their members. Such associations can also insulate lawyers from corruption in the wider political and socio-economic context.

- **Establishment of lawyers' associations by statute**
  Lawyers in most Southern African countries experience improved ethical behaviour when the legal profession regulates itself, rather than answering to the executive or another

11 Based on author's interview with Tinoziva Bere, a lawyer and counsellor with the LSZ, on 28 July 2006.

12 The Mozambican League for Human Rights reports that the rule of law situation has deteriorated, resulting in police brutality, corruption, labour strife and prison conditions that remain extremely harsh.

government office.[13] The ability of lawyers' associations to act independently may be linked to their size: the smaller the bar, the less likely it will be able to be stand up to the state or other influential political and economic sectors. Experience from East Africa shows that when an association's active membership passes 1,000, it is better able to insulate itself from external interference. It appears that a critical mass of members is needed to take a principled position, including on corruption.

- **Structures must support associations' ability to discipline members**
  Disciplinary proceedings should be brought before an impartial disciplinary committee established by the profession, an independent statutory authority or a court, and should be subject to independent judicial review. This may mean insulating the regulatory/disciplinary arm of the association from direct election by members toward appointment by another appropriate office (i.e. Minister for Justice, or attorney general), although this might imply a risk of political interference.

- **Regulate the admission of new lawyers into practice/partnerships**
  Statutes must empower associations to regulate the admission of new lawyers into partnerships to protect the public from unscrupulous, incompetent and unqualified practitioners. This may mean setting minimum periods of tutelage or assistantship before lawyers are empowered to run their own practices. Pay rates for non-partnered lawyers may need to be reviewed by associations. If lower-ranked lawyers are grossly underpaid compared to partners, they may resort to separately charging clients or receiving payment outside the office to supplement their incomes.[14]

- **Periodic renewal of practice certificates**
  Legislation that allows associations periodically to renew practising certificates can strengthen their ability to maintain the integrity of the profession. In Botswana, Namibia, South Africa, Tanzania, Zambia and Zimbabwe, lawyers' associations require a clean audit certificate on trust funds before practice certificates can be renewed. Such scrutiny of audit certificates can effectively prevent corruption and money laundering by lawyers.[15]

- **Continuing legal education as condition for renewal of practice licences**
  Lawyers' associations can set minimum compulsory continuous legal education for members as a condition for renewal of practising licences. Legal education should include ethics, anti-corruption law and practice, and other areas to improve competence, reducing the temptation to cut corners.

13 The promulgation of Botswana's Legal Practitioners Act 1996 has improved the conduct of attorneys in that country, according to Sanji Monageng, then executive secretary of the Botswana Law Society and a commissioner in the African Commission. Before that the attorney general's office regulated lawyers in private practice.

14 In many Southern African countries the difference between the pay scales of partners and qualified professional assistants (non-partner lawyers) is highly disproportionate. A non-partner lawyer with seven years experience in Mutare, Zimbabwe earns Z$30 million (US $100) per month, while a partner in the same firm earns in excess of Z$300 million (US $1,000).

15 Based on author's interview with Caleb Lameck Gamaya.

- **Codes of conduct for legal practitioners**
  Lawyers' associations should establish codes of conduct in accordance with recognised international standards and norms.[16] Since cases of corruption are difficult to prove, lawyers' associations should use their power to ensure that unethical conduct, even if it falls short of criminality, is promptly investigated and punished. This includes cases where charges against a lawyer for criminal conduct or corruption are dismissed in a court of law. The association should reserve the right of inquiry in the interests of protecting the profession's reputation.

- **Monitoring compliance with codes of conduct**
  Legislation creating statutory lawyers' associations in Malawi, Namibia, South Africa, Zambia and Zimbabwe allows them to define methods for testing compliance with ethical conduct. If used wisely, spot checks can be potent in detecting corrupt behaviour and rooting it out.[17]

Broader reforms to fight corruption in the legal profession

- **Use of alternative dispute resolution (ADR) to reduce backlogs**
  ADR mechanisms, whereby the plaintiff and defendant try to reach a settlement outside court, could significantly reduce backlogs, speed up hearings and limit incentives for corruption. There is recognition in principle of the need for these improvements in most countries of East and Southern Africa though implementation has yet to get off the starting block.[18]

- **Computerisation and use of information and communication technologies**
  Computerisation allows for better accessibility of files and improved monitoring, reduces backlog and limits loss of information. Bringing computer-based systems into legal practice narrows the scope for rent seeking or other corrupt activity. This is an area where lawyers, lawyers' associations and law schools could lead by example. Compulsory IT training for legal professionals should be made a requirement for renewal of licences to practise. Partnerships between IT and law faculties in universities could produce prototypes of case file-management systems, making it more difficult for government to say that it is impossible, difficult or expensive. Lawyers' associations could help members to procure law chambers' information systems. Once a critical mass of chambers has become computerised, courts that are manual will be less acceptable.

- **Involvement in judicial appointments by legal practitioners**
  Authorities wanting to appoint judges from the bar should involve the heads of lawyers' associations to ensure that appointees have clean practice records. Representatives of lawyers' associations – as well as representatives of other civil society organisations – should

16 See UN Basic Principles on the Role of Lawyers (article 26).
17 Based on author's interview with Tinoziva Bere.
18 See 'The "other 90 per cent": how NGOs combat corruption in non-judicial justice systems' on page 129.

be included in the judicial decision-making processes (e.g. on the judicial service commission).

- **Anti-corruption education in law faculties and post-graduate law schools**
  There is now a significant body of international and regional conventions, national statutes, and international, regional and national case law to sustain a one-semester course on corruption prevention. The course should be multi-disciplinary, incorporating economic analyses of the negative effects of corruption on economies, and on economic, social and cultural rights.[19]

- **Mentoring programmes**
  Mentoring programmes that expose promising lawyers to reputable senior judges and magistrates have been shown to improve legal-judicial performance while maintaining transparency and accountability.[20]

- **Other types of organisations to support corruption prevention among lawyers**
  Lawyers' associations tend to be conservative clubs. Experience in East Africa shows that other constellations of lawyers tend to be more dynamic and proactive. For instance, women lawyers' associations[21] have been able to address not only traditional women's issues, such as property and inheritance rights, but wider governance issues including constitutional reform and budget advocacy. Other membership organisations, such as the Kenyan Section of the International Commission of Jurists, have a consistent programmatic focus on judicial integrity and have become a key knowledge repository on the issue. Looking beyond traditional associations, incorporating whistleblower protections or anti-corruption telephone hotlines can help strengthen the fight against corruption in the profession.

19 This is how environmental law was introduced as a discipline in African law schools in the mid-1990s.
20 See Economic Commission for Africa, African Governance Report (2005). Available at www.uneca.org/agr/
21 For example, the Ethiopian Women Lawyers' Association (EWLA), the Federation of Kenya Women Lawyers (FIDA Kenya), Federation of Uganda Women Lawyers (FIDA Uganda), Tanzania Women Lawyers' Association (TAWLA) and the Zanzibar Female Lawyers' Association (ZAFELA).

5 Courts, culture and corruption

The justice system does not exist in a vacuum. Society, broadly understood, has a role in moulding justice systems and continually monitoring them. Marina Kurkchiyan describes how some countries have managed to internalise the principles identified with the vocation of judge, while others discover that the impartiality required of the profession conflicts with the networks of family, religion or friendship that define who judges are as individuals. Barrister Geoffrey Robertson focuses on the role the media must play in teaming up with whistleblowers to expose corruption in the courts – and the legal obstacles that are in place to prevent them doing so. In Central America, civil society organisations are exploring inventive ways to highlight judicial corruption through research, diagnostics, networks to promote dialogue about the need for judicial reform and by monitoring the implementation of international conventions, as described by Katya Salazar and Jacqueline de Gramont. Parts of society experience the justice sector, and judicial corruption, differently. In Asia and Africa, as Stephen Golub describes, NGOs are working with paralegals to raise awareness about corruption in the non-judicial justice systems to which an estimated 90 per cent of the developing world's population resorts in order to settle their disputes. Celestine Nyamu-Musembi examines the gender dimensions of corruption in the administration of justice and argues that the currency of corruption is not always monetary.

Judicial corruption in the context of legal culture

Marina Kurkchiyan[1]

The context of legal culture

Why does a judge become corrupt? What determines the frequency and severity of corruption? Why does the magnitude and nature of corruption vary from country to country? Economists typically seek answers to such questions through cost-benefit models which posit that removing incentives and maximising penalties for corrupt behaviour makes it difficult for anyone to offer a bribe to a judge, and detrimental for a judge to accept it. Affording judges the highest degree of independence, while still holding them to account, enables judges to

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resist inducements or pressure. Previous chapters have analysed the carrots and sticks that may be used to combat corruption, including paying higher salaries, strengthening audit procedures, and imposing effective mechanisms of control and punishment. But, as this essay will explore, fine-tuning the institutional framework perhaps by applying a cost-benefit analysis, whilst important, is not sufficient by itself.

By way of illustration of this, in the early 1990s, a group of Italian judges was strong enough to expose a nationwide scandal and bring down a corrupt political regime. This earned high respect for the judges, both in Italy and beyond. Despite the scale of their achievement in the *mani pulite* (clean hands) campaign, it was actually conducted by only 5 per cent of Italy's 7,000 or so judges and therefore signified little about the judiciary as a whole. It did not stop many other judges from colluding with politicians and big business in illegal acts. In 1998 alone, 203 judges in Italy were under investigation for corruption, abuse of power and Mafia links.[2] (See 'Culture and corruption in Italy', page 107.) Although one cannot downplay the institutional independence of Italian judges because it makes the judiciary one of Italy's least corrupt institutions, the above sketch of how the Italian judiciary has dealt with corruption indicates that institutional independence has not successfully immunised judges from infection by the surrounding culture of cooption and favour-exchange.

Legal culture

Understanding and transforming 'legal culture' offers a different approach to tackling judicial corruption. If judges are examined in their local context, one gains a deeper insight into just what it means for them to use public office for private gain. In this part of the essay we explore both the legal culture of judges and the legal culture of the general public in order to understand the attitudes, behaviours, allegiances and pressures that affect judicial activity. Technically legal culture is understood as legally oriented behaviour that derives from shared attitudes, social expectations and established ways of thinking.[3]

The perspective of legal culture shows us the importance of self-identity; the feelings of honour and pride that come with group membership; the habit of networking in societies where survival may depend on it; the instinctive trust felt for some people and not for others; the social and family relationships that enmesh everyone from judges downward; and above all the extent to which corruption is socially tolerated. An emphasis on legal culture allows us to understand corruption in the context of how each society has evolved its own well-oiled ways of doing things. The perspective does not suggest that corruption is incurable, but it demonstrates that whatever kind of social engineering is chosen to stamp it out must be sophisticated rather than simplistic, and meticulously tailored to fit the shape of the society it is intended to help.

2 *L'Espresso* (Italy), 17 December 1998.

3 For an expanded definition of the concept of legal culture, see the entry by David Nelken in David Clark, ed., *Encyclopaedia of Law and Society* (London: Sage, 2007).

Life as a judge

Within the legal-culture perspective, judicial corruption is a distinct form of behaviour that arises at the interface between what sociologists call the 'internal legal culture', shared by the legal professionals, and the 'external legal culture' – the culture generated by the general public.[4] Analytically the two spheres of judiciary and society are quite distinct, but in practice they are so closely intertwined that it is not possible to draw a clear line between them. On the one hand, judges in every country are public figures. Their pronouncements, decisions and conduct are widely reported and commented upon, with the result that they have an influence both on the way ordinary people think about law, and also how they deal with it. On the other hand, to the extent that judges are members of society like everyone else (whether or not that claim is disingenuous) they must live within the external culture and share it with the public. They cannot avoid being tied into a network of relationships at every level from the personal to the societal. They have to be responsive to the demands of the external legal culture or face the alternative of becoming misfits, even outcasts.

But the judicial hat is radically different from the citizen's hat. As a professional group, judges are given authority to apply the law and in some traditions also to develop it. That is a considerable responsibility and it helps to analyse judges as a specific unit that is characterised by the strength of the group's identity in relation to its members; the distance it has created between itself and the rest of the society; the self-created interpretation of its role in society; and the code of conduct exercised by the group in relation to each of its members.

Whichever country they live in, judges behave like judges; for that reason each internal legal culture resembles all others to some extent. But the cultures also diverge from one another, and it is the differences between each judicial culture that yield clues to the variation in rates of corruption around the world. The importance of this cultural differentiation and its implications for the propensity of a judge to use public office for private gain can be illustrated by a brief comparison of the English and continental European judicial cultures.

In England, law was introduced as a protective device against the sovereign. Its foundation was a set of restrictions imposed by parliament and landowners upon the king to curb his power; in other words, a minority of highly privileged people chose to use law to help them retain, and if possible extend, their property and privileges.[5] This positioned the law as an independent institution capable of confronting the state, distancing itself both from the everyday politics of governance and the petty concerns of the public. The subsequent role of judges in building

4 On the distinction between internal and external legal cultures, see L. M. Friedman, *The Republic of Choice: Law, Authority and Culture* (Cambridge, MA: Harvard University Press, 1990). As a separation of the set of those members of society who perform special legal tasks from the set made up of all other citizens, it is an important analytical device within the legal-culture perspective. Although it is true that each entity has a complex structure, internal legal culture can be seen as a combination of the sub-cultures of prosecutors, lawyers in business firms, judges etc.; and the external legal culture as consisting of the sub-cultures of poor and rich, black and white, young and old, political elite and electorate, etc.

5 Daniel Treisman, 'The Causes of Corruption: A Cross-National Study', *Journal of Public Economics* 76 (2000).

up the wider body of common law on the basis of precedent gave them a fierce sense of ownership over the law of the land, while elevating their status and intensifying their solidarity. In today's United Kingdom the public perceives judges as a closed, apolitical group, detached from everyday life. Judges seem deliberately to cultivate an image of exclusivity through their clothes, wigs and elaborate symbolic rituals. The self-reproducing homogeneity of the group, with its white, upper class, mostly male membership, contributes to its perception as a 'club' with strictly restricted access. The effect of this is that a socially constructed gap exists between the judiciary and the rest of society so wide that it seems unimaginable that anyone could step over it with the intention of corrupting a judge. The image of being 'unreachable' also works as a psychological barrier, preventing attempts at initiating collusion.[6]

Ironically, this untouchable exclusivity does not mean that UK judges enjoy the unconditional confidence of the public. A Eurobarometer survey in 2001 found that only half of the UK's population trusted its judiciary. But the general scepticism is not based on a suspicion of corruption; it stems from the very remoteness that judges in the UK work so hard to cultivate. As the TI Barometer 2005 demonstrates, people in the UK put corruption in the judiciary below the level believed to exist in other powerful institutions, such as political parties, parliament, businesses and the media.[7] Even the tabloid press stops short of accusing judges of corruption, for example in instances when the outcome of a public inquiry gives a strong impression of being a whitewash (like the report of the recent Hutton Inquiry that centred on the circumstances of the death of a government weapons scientist and the actions of the government in the Iraq war), the press are more likely to attribute the findings to the conservative mentality of an old judge, rather than dishonesty or political pressure.

In the continental tradition, by contrast, legal codes were introduced at the behest of the sovereign to keep society in order. Law came to be seen as an activity of the state bureaucracy, like taxation or conscription, and judges as another class of civil servant. In that tradition, judges never built up a sense of group cohesion comparable with their UK counterparts. Their group boundary is less sharp, and the perception of social distance between them and the public is smaller. In Italy and France, judges are seen to be politically engaged and open to pressure or outright collusion.

If the UK is located at one end of a spectrum of judicial distinctiveness and other Western European countries are in the middle, it becomes easier to visualise the situation in countries at the far end of the spectrum where the judiciary has barely succeeded in forming a distinct group. In these societies – mostly developing countries or ones in which radical change has recently occurred – little or no internal judicial culture has evolved. There is no impression of even a slight social distance between those who judge and those who are judged. Under these conditions a judge's professional self-identity is not a dominant construct for him or her; to be a judge is to have a job and little more. A person's sense of being a judge is less significant

6 Although it should be added that in public inquiries and matters of public policy, UK judges often display a powerful bias in favour of whichever government happens to have appointed them.

7 See www.transparency.org/policy_research/surveys_indices/global/gcb

than his or her awareness of belonging to a family, a social network or a wider community based on religion, locality, politics and so forth.

In author interviews with Armenian judges, one observed that a proposed reform to keep judges in office for life in order to strengthen judicial freedom would simply not work. 'How can I be free when I live in society and am tied into the social network? Let's imagine that a member of my family falls badly ill and needs special treatment. Naturally I would do everything I could to find someone in the Ministry of Health and ask him for help to get the treatment. Doing that would automatically make me dependent on him. I would have to do what I could for him if he should ever need it.'[8]

In the conditions that prevail in those societies, judges must be fully integrated into the legal culture of the general public if they are to survive. They find themselves under pressure not only from substantial groups and institutions, such as politicians, big business and organised crime, but from the looser, still potent informal networks formed by extended family, friends, neighbours and other groups with whom they associate. To a judge working in this setting, the form, extent and significance of corrupt practices become indistinct because they reflect local norms of networking, exchanging favours and gifts, and offering and receiving payoffs to ensure favourable outcomes. The manner in which long-established informal networks can undermine well-intentioned reform is demonstrated in 'Informality, legal institutions and social norms', page 306.

Legal culture of the general public

A major factor determining whether people choose to obey the law is whether they believe that everyone else does. If there is a general assumption that the law is commonly violated, people lose their respect for it. This disrespect can be extended to the entire set of agencies and agents of law: parliament, civil service, police, tax collectors, lawyers, even health and safety inspectors. Courts and judges are trusted least of all. At the extreme, complete cynicism reigns, a situation neatly described in the remark of a Ugandan focus group participant: 'If you do not cough up (pay a bribe) for something, the case will always be turned against you and you end up losing it.'[9] A household survey by TI in Bangladesh in 2005 found that 66 per cent of plaintiffs and 65 per cent of accused admitted having paid bribes to the lower judiciary.[10]

Once people become convinced that the law will not bring about a just outcome if left to itself, the effect is that everyone involved feels compelled to make an effort to exert influence by whatever means available. The judges and officials who administer the law are then placed in a vulnerable position. A judge from Dnipropetrovsk in Ukraine described this situation as

8 Author interview, Yerevan, 1999.

9 CIET International and Makerere University, 'National Integrity Survey in Uganda 1998', available at www.ciet.org/en/

10 TI-Bangladesh, *Corruption in Bangladesh: A Household Survey*, April 2005. Available at www.ti-bangladesh.org/HH%20Survey/Household%Survey%20–%202005.pdf

follows: 'When a case is about a small amount of money, it usually proceeds without interference. But once the sum in dispute reaches a reasonable figure, I cannot recall an instance in which both sides of the case did not find some way to put pressure on me – even if it was only by sending someone to talk. And the approach does not depend on which side is in the right.'[11]

In such an environment, the question of how to proceed with a case presents those involved with an almost Shakespearian choice: 'To bribe, or not to bribe?' Everyone contemplates this dilemma when they face a criminal charge or are engaged in a civil dispute that has to be determined legally. They may well have thought about bribery even if they do not resort to it, which might be because they lack the resources, because the case is not worth it or because they conclude it would probably not work. Where a negative image of judges holds sway, it does not matter what actually happens in the routine flow of cases and decisions; even if every decision is entirely just, the public perception is preconditioned by a strong disbelief in their judgements. Even when an indisputably positive example occurs, it is cynically interpreted in a way consistent with the general assumption that no judicial decision is ever made according to principle.

Indeed, the public perception of the judiciary is generally not an accurate reflection of the actual conduct of judges.[12] A negative image of the judiciary is self-fulfilling and self-extending: it creates a corrupt environment around the entire court process in which other professional groups, such as lawyers, lower-level administrative staff and those who present themselves as middlemen in communicating with a judge, all have a role in making collusion possible. In the course of explaining his distaste for this environment, one Ukrainian judge openly detailed the corrupt practices around him, adding: 'There were cases in which I discovered only later that money had been taken in my name.' In defence of the use of non-legal means of solving problems as a part of his law practice, a Russian advocate remarked: 'We cannot live by any rules other than those of the society that we are working in. If the environment is corrupt, you cannot defend your client's interests if you do not play by the same rules.'[13] Nevertheless, it is evident that in some cases extortion starts and ends at the lower level, never reaching as high as the judge.[14]

Where negative expectations about the practice of the law act in combination with a general habit of informal problem solving, the social inhibition of shame loses its force – because people do not feel that they are doing anything that others would not do. Famously, the typical defence of politicians and businessmen brought to account in the Italian 'clean hands' trials was that they did what everyone else was doing; the system forced them to behave that way. This does not mean that collective behaviour reflects the true values of citizens at the personal level, or that people think of bribery, shortcuts and other corrupt practices as desirable

11 Author interview, Dnipropetrovsk, 2000.

12 Marina Kurkchiyan, 'The Illegitimacy of Law in Post-Soviet Societies', in M. Kurkchiyan and D. J. Galligan, eds., *Law and Informal Practices: The Post-Soviet Experience* (Oxford: Oxford University Press, 2003).

13 Author interview, Nizhni Novgorod, 2005.

14 'Strengthening Judicial Integrity Against Corruption', UN Global Programme against Corruption, Centre for International Crime Prevention, Vienna, March 2001.

and rational. Quite the opposite. People often act against their own values when they conform to the general practice; they do it because they feel they must, not because they want to.

Yet the belief that corruption has become the norm prepares the ground for social tolerance of it. The level of tolerance is one of the most powerful forces preventing or abetting corruption. Where tolerance is high, even a case where an abuse of office has become public knowledge need not result in communal condemnation and exclusion. Values such as family ties, friendship or the social need to keep in touch are considered more important than the moral impulse to distance oneself from a corrupt person. Only in a climate of extreme social tolerance is it possible to pervert the course of justice as openly as described in 'Mexico: the traffickers' judges', page 77.

It is often the case that holding a particular political view or belonging to a particular ethnic group can be seen as a bigger problem than dishonesty in a corruption-tolerant society. This point was illustrated by the case of Satnarine Sharma, chief justice of Trinidad and Tobago. In July 2006 Sharma was arrested (although the arrest was later stayed on technical grounds) for attempting to help a former prime minister who had been tried for corruption. He was also charged with interfering with the course of justice by trying to stop the prosecution of his family doctor, who had been accused of murder two years previously. These were not trivial allegations, but in the view of the Trinidad and Tobago public they mattered less than the political and ethnic divisions in the country. Among the Indo-Trinidadian population to which Sharma belongs, he continued to enjoy support.[15]

The frequent penetration of the legal process by influence seekers does not necessarily distort the outcome in all cases. Logically, lobbying can be self-defeating: an equal amount of pressure on the judge by both sides to a dispute leaves the judge as free as if there had been none. In countries where scrutiny and control of performance are strong but corruption has nevertheless become part of normal life, a judge need only make a point of playing safe to avoid being caught – regardless of whether his decisions are actually bought or not. Safety from exposure can be achieved by handing down elaborate judgements, taking meticulous care about procedure and sticking to the safest possible interpretation of evidence and legal principle. On the surface the law may seem to be fully observed, even while the office is being used in a systematic fashion for private gain.

Conclusions and policy considerations

The interplay of internal and external legal cultures creates a confused space filled with ambiguity and contradiction in which corrupt practices may occur. Any reform is likely to be incremental and may take time to yield real change, but people do alter their attitudes, and internal and external legal cultures do respond to policy interventions, provided they are well crafted, introduced at the right time and incrementally implemented thereafter. In several countries in which research was conducted, the overwhelming majority of people wanted to be free of

15 Communication by Senator Mary King of Trinidad and Tobago. See also *The Economist* (UK), 22 July 2006.

corruption and would welcome stringent measures to eradicate it – if they could believe that the measures would be effective. Most significantly, a range of possible anti-corruption measures does exist, some of which are mentioned below.

Radical social transformations open a window of hope for a new life. Great historical events trigger huge waves of idealism and a general belief that everything in society is about to change for the better. These feelings flourish whenever a people fights its way to independence from a colonial power, forms a new homeland out of a collapsed superstate or mobilises to drive a despised regime from power. At such times people reject the past, suspend disbelief and open their purses and minds to contribute to a new future. Neither the optimism nor the generosity last very long, however, and they need to be quickly channelled into constructive reforms by honest, educated and determined leaders. Unfortunately this happens rarely, but it does happen. The case of Botswana illustrates the point. Corruption was a way of life during the colonial period. Oxbridge-educated lawyer Seretse Khama led the country to independence in the 1960s and his evident integrity, however authoritarian, combined with a determination to become a driving force behind setting up strong state institutions run by efficient civil servants. The smallness of the population of the country, 525,000 in 1965, was advantageous for improving administrative coordination, minimising communication problems and exercising political control.

Change can be achieved if institutional reforms incorporate education policies and combine with projects to build up a common way of thinking. Hong Kong's success in doing this is notable. After a number of earlier reforms to curb a long-established tradition of corruption failed, new measures introduced in 1974 achieved a considerable improvement in a comparatively short time. The cause was not immediately obvious, but observers pointed out that the 1974 reforms incorporated a novel policy: promoting ethical values against corruption. The moral element was instilled in children via primary education and in adults by means of an energetic campaign of advertisements and public relations. In their assessment of the importance of this factor 25 years later, Hauk and Saez-Marti identified a large shift between successive generations in their willingness to tolerate corruption in Hong Kong.[16]

A powerful vehicle in constructing people's views in the contemporary world is the mass media. Politically censored and economically motivated media can be a major contributor to shoring up a corrupt society by covering up for those responsible by distorting facts and providing misleading commentaries. Media that command trust and respect, by contrast, can have not only a constructive, but even a dramatic, impact on how people view the world, how they behave toward it and how they feel about their role in it. The media played a prominent role in reducing the scale of corruption in the United States at the beginning of the 20th century,[17] and in more recent times in the Italian anti-corruption campaign of the l990s. Although it is too soon to make a final assessment, there is a strong argument that the wholehearted

16 Esther Hauk and Maria Saez-Marti, 'On the Cultural Transmission of Corruption', *Journal of Economic Theory* 107 (2002).

17 Matthew Gentzkow, Edward L. Glaeser and Claudia Goldin, 'The Rise of the Fourth Estate', in Edward L. Glaeser and Claudia Goldin, eds., *Corruption and Reform: Lessons from America's Economic History* (Chicago: University of Chicago Press, 2006).

commitment of the media to publicising the prosecution of the corrupt leadership in the 'clean hands' cases had a strong impact upon the perception of corruption by ordinary people, and increased their intolerance of it.

Both the understanding and prevention of corruption, especially at the level of the judiciary, require a combination of approaches, some localised in relation to the judiciary, others spreading outward into the legal culture of the wider society around it. The nature and probable success of any selected reform will depend on the circumstances, but it is clear that in all cases and all situations a planned reform will be successful only if it takes account of the local legal culture and targets practices that are locally and culturally established.

Culture and corruption in Italy

Gherardo Colombo[1]

Interference by institutional and non-institutional powers affects the impartiality of judges and prosecutors in several ways. Where the law, as in Italy, guarantees the independence of judges and prosecutors, no form of pressure can influence the outcome of a case if a magistrate is tough enough to resist it. The minds of magistrates can, however, be altered through reasons of convenience: pressure comes openly from a very wide sphere, particularly through the media.

Recently, a member of a special court appointed to investigate football managers and referees involved in rigging matches in the prestigious 'Serie A' league openly told a newspaper that its decision had taken into account Italy's victory in the 2006 World Cup, a spate of popular demonstrations and the support of some mayors of the cities whose teams were most implicated.[2] It is certainly not illegal to express an opinion, participate in a public demonstration or, obviously, to win a World Championship. But whatever the judge may have meant about why he acted as he did, it is not correct for a judge to decide on the existence and gravity of an unlawful behaviour with reference not only to the rules, but to popular opinion, public protest and national pride. Such an action in this case is at least evidence of extraordinary bad judgement and a misconception of the judicial role, if not actual corruption in the traditional sense.

Not all magistrates are willing or able to resist improper interference. A number of different situations need to be considered, looking at three specific indicators: the manner and degree of involvement; the seriousness of interference; and the gravity of the behaviour requested of a judge or prosecutor.

Sometimes all that may be required is the magistrate's general benevolence. Rather than offer money in exchange for a specific judgement, it may only be necessary to invite the magistrate to a glamorous restaurant or sponsor his or her membership of an exclusive club in exchange for compliance or deference. The relationship is licit – the magistrate has not breached any criminal law – and only by chance will he or she have trespassed on disciplinary or deontological rules. Nevertheless, the magistrate's future conduct may express partiality by unconsciously dedicating more attention to future cases of the new friend and patron.

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2 *La Repubblica* (Italy), 27 July 2006.

This can mark the starting point for a magistrate's effective involvement in corruption. Nobody approaches a magistrate with the offer of a bribe, acceptance being highly unlikely. Nor will a magistrate solicit a bribe without being absolutely sure that the giver is discreet. The creation of a conducive atmosphere through hospitality gives the potential corrupter an opportunity to gauge a magistrate's availability. Some magistrates halt on the brink of the forbidden; some go as far as total betrayal of their profession; while others assume an intermediate position. Last year's investigations into corruption in the Italian judiciary demonstrated some of these situations. In May 2006, a former judge was sentenced to six years in prison for corruption in the so-called IMI-SIR case.[3]

Independence is a powerful shield against interference, but that independence can be reduced, hindered or modified by ordinary laws (in contrast with the constitution which can only be amended by a qualified majority). Such changes can be obtained in several ways, for example by introducing immunities (an ordinary law introducing temporary immunities was introduced in 2003, but cancelled a year later by Italy's constitutional court)[4] or by restricting opportunities for investigations.

In Italy, the issue of pardons deserves particular attention. Parliament recently passed a law that provides a three-year reduction in prison sentences for crimes committed before 2 May 2006,[5] excluding such offences as terrorism, Mafia crimes, paedophilia, sexual crimes, money laundering and usury. The goal of the provision – and it was not the first of its kind – was to reduce the excessive crowding in Italy's jails. The law does not apparently interfere with the judiciary's independence, but since corruption and other financial crimes are included in the general pardon, sanctions against corrupters and the corrupted will naturally be reduced, making it more difficult for the judiciary to tackle the crime effectively.

3 *Corriere della Sera* (Italy), 6 May 2006.
4 Article 1 law 20.6.2003, n.140 was cancelled by the decision of the constitutional court n. 24, 20.1.2004. The law gave immunity from trial to five key office-holders: the president (apart from crimes of high treason and violations of the constitution), the speaker of the senate, the speaker of the chamber of deputies, the prime minister (apart from crimes committed while carrying out his duties) and the speaker of the constitutional court. This applied to all crimes, even those committed before their term of office, and lasted until they left office.
5 Law 31.7. 2006 n. 241.

The media and judicial corruption

Geoffrey Robertson QC[1]

The media have a crucial role to play in combating the scourge of corruption throughout the world. All the conventions, laws and disclosure regulations on the subject will be ineffective unless they are enforced by independent judges and monitored by a free press – a press protected

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from reprisal when it exposes corruption or criticises judges for lacking independence. In the movement for greater transparency too little attention is paid to the interdependent relationship between the justice system and the media. It is no coincidence that corruption thrives most in countries where judges are corrupt, either because they are personally venal or because they are compliant with governments that seek to muzzle the press. Editors and journalists who have no 'public interest' defence when they make credible allegations about malfeasance in the justice system, or who are liable to go to jail if they allege judicial misconduct, cannot fulfil their role as public watchdogs.

In many countries judicial corruption occurs within the closed ranks of a profession protected by its powers to jail for contempt of court and by the enforceable secrecy of professional privilege. It is particularly difficult for journalists, untrained in law, to unmask. Bribes are facilitated by lawyers, court clerks and police, who take their cut on behalf of clients who do not complain when they win their case, are acquitted or released on bail as a result. Judges who are political lickspittles, ruling in favour of the state, police or army because they wish for favours, promotion or post-retirement appointments, can usually dress up their wrong decisions with bogus legal arguments or manipulate the facts to support their findings. This form of intellectual dishonesty can only be exposed by journalists or legal observers who attend court and have the experience to identify obfuscation and distortion in corrupt judgements. It is a task that cannot be essayed when they are excluded from courts or threatened with jail if they publish articles that 'scandalise the court'. The media are often criticised for sensational coverage of court cases, especially when they attack judges of integrity who produce honest but unpopular decisions, and there is no doubt that journalism in all countries would be improved by better training in legal principle. But the greatest advantage of such training is that it would improve their ability to detect defects in the legal system and incidents of venality or political corruption in the professionals who operate it.

Training will be unavailing, however, unless the press is free to gather information about cases and to publish the results. In the great majority of countries – the United States being the most notable exception – the media do not have this freedom. There is no right of access to court files. There is no absolute right to attend hearings: courts can be closed arbitrarily or on various pretexts. Just as sunlight is the best disinfectant, open justice is a vital protection against corruption: as Jeremy Bentham said, 'Publicity keeps the judge, while trying, under trial.'[2] Most countries have special contempt laws protecting judges from criticism – laws that are enforced self-interestedly by the judges themselves. Regrettably the European Convention on Human Rights has a special exemption to its guarantee of free speech, upholding laws that are 'necessary . . . for maintaining the authority and impartiality of the judiciary'. Impartiality is fine, but how can it be consonant with freedom of expression to suppress criticism of the 'authority' of a judiciary which can credibly be accused of corruption or of taking political dictation? Then there are defamation laws that punish journalists with heavy damages if they criticise powerful figures, often members of the same ruling establishment as the judges who award the damages.

2 *The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring* (Edinburgh: Tait, 1843) vol. 4.

Little headway will be made in freeing the media to expose corruption until these laws are changed: and unless all states are required to adopt the 'open justice' principle and provide public interest defence for media outlets that contain criticism of judicial and political chicanery.

Corruption generally comes to light only through a partnership between courageous members of both professions. It takes lawyers of integrity – often members of independent bar associations – to alert journalists to improper behaviour, which would otherwise go unnoticed by outsiders. Then it takes real dedication by journalists and editors to dig for proof, usually by cultivating sources or encouraging whistleblowers in the police or court services to come forward under firm guarantees of confidentiality. Publication is always a problem and requires access to international newspapers, NGOs or the internet. Only then will governments and their anti-corruption agencies conduct any sort of inquiry.

Perhaps the best example of this process at work was the exposure of questionable behaviour in a number of commercial cases decided by a group of judges in Malaysia.[3] Journalists and lawyers (including the UN's former special rapporteur on the independence of judges and lawyers, Param Cumaraswamy) faced a barrage of libel actions, one of which was settled for a reported payment of millions of dollars in damages. It was not until the *Wall Street Journal* put up a defence in one of the libel cases, detailing evidence of alleged corruption, that the bar association felt confident enough to raise the issue publicly.[4]

This saga provides a good example of the difficulty, even for international publishers, of investigating and exposing corruption. The result is that corruption flourishes to a much greater extent than recognised. It was the same in Kenya, where for years courageous lawyers and journalists suffered persecution for referring – truthfully – to the massive corruption in the courts during the presidency of Daniel Arap Moi. The instruments used for the unjust persecutions were the laws of criminal libel, sedition and contempt of court.

How, then, should we free the media in the 21st century to expose corruption in the institutions of governance, particularly in the justice system?

It is a happy feature of recent history that the number of totalitarian states has considerably diminished: the majority of countries (those in the Middle East excepted) are now more or less democratic. At last count, 154 had signed up to Article 19 of the UN Covenant on Civil and Political Rights, which echoes the promise of Article 19 of the Universal Declaration:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

3 See, for example, *Asia Times* (China), 9 June 1999.

4 The defendant, the *Wall Street Journal* correspondent, alleged that the plaintiff's counsel had cultivated inappropriately close relations with a number of judges, including the Chief Justice. Photos of the counsel and the former Chief Justice on holiday together were subsequently posted on the internet. See, for example, www.hrsolidarity.net/mainfile.php/1999vol09no12/1960/

Thus it may be said that international law provides a presumption in favour of free speech that should only be overridden on clear proof that it is outweighed by a countervailing interest, for example national security. The right to freedom of expression is an essential human right, which must be guaranteed to every citizen and even non-citizens in respect of opinions, however shocking or unattractive. That there must be exceptions admits of no doubt. Since the free speech principle is grounded in the public interest, it must give way on occasions when the public interest points the other way – to secure a fair trial or to protect citizens against unwarranted invasion of their privacy. These exceptions, however, should be narrowly and carefully defined.

The right to freedom of expression – to receive and impart newsworthy information that has resulted from journalistic investigation or been relayed to journalists by reliable and confidential sources – discomforts political and commercial interests and is resisted to varying extents in states where they control or influence the legislative process. The legal tools used to repress investigative journalism have long histories. Common law, developed over the centuries by English judges, is now the basis of law in 57 Commonwealth countries. It permits the media to be sued for large amounts of money whenever an allegation of corruption is made. This is regarded as 'defamatory' and the media, when sued, have a heavy burden of proving that the allegation is true. This is often impossible (even when it is true) because their sources will not come forward for fear of reprisal. When the media criticise judges, this is treated as the crime of 'scandalising the court' (in Scotland, it is called 'murmuring judges') and can result in two years' imprisonment. It must be said that this crime is almost obsolete in England, but it is regularly used in former colonies across Africa and Asia to jail judicial critics (and since judges are often compliant with their governments, these amount to political criticisms). Similarly other obsolete crimes inconsistent with Article 19, such as sedition, blasphemy and criminal libel, are rarely deployed in the United Kingdom, but are in regular use to jail or bankrupt critics in countries of the former British empire. It is disgraceful that the UK government has not taken the lead in abolishing these offences.

Civil law is just as bad, though in a different way. The *Code Napoléon* imposed 'insult laws' on most of Europe and they are still entrenched in continental codes, and the laws of former French, Spanish, Portuguese and Belgian colonies. These make it a criminal offence to denigrate officials, no matter how petty: police and low-level administrators are protected from criticism, as well as politicians and top civil servants. They are known as *desacato* (contempt) laws in Latin America. Insult an official by accusing him of taking a bribe, and you may be sent to prison. These laws are so entrenched that even the European Court of Human Rights has failed to strike them down, although it has ruled that the freedom of expression guarantee means that they cannot be used to put journalists in jail. However, a fine for a criminal offence is an unpleasant consequence for anyone determined to expose corruption.

In most democracies today, corrupt politicians, officials and businessmen can exploit both civil and criminal law to silence their critics. In the case of judges, they have a special power to punish critics for contempt of court, and they can misinterpret these laws or twist the facts to support unjust rulings in favour of the state, or its favourites. The fight for media freedom is essentially a fight to strike down these laws, or to reform them so that they give more weight

to the public right to know. There have been some notable successes in this respect in recent years, for example:

- ***Goodwin v UK*** (1996). In this case the European Court held that the right to freedom of information carries the implication that journalists must be permitted to protect their sources, otherwise there would be no information to be free with and sources would dry up. This is an essential protection of the news-gathering function. In relation to judicial corruption, sources in the police, courts or legal profession will usually be subject to severe reprisals for blowing the whistle – they may be sacked, debarred, sued or sometimes killed. They are essential sources of inside information, which is why corrupt governments and businesses try to unmask and silence them.
- ***Claude Reyes v Chile*** (2006). The Inter-American Court held that the right to seek and impart information implied a right of access to information held by the state, which had a corresponding duty to disclose it subject to the usual exemptions. Freedom of information legislation is common enough in advanced political systems, where it is seen as part of the definition of democratic culture. It is bolstered by the right to participate in government under Article 21 of the Universal Declaration. But most countries in the developing world have no interest in moving towards such openness, which makes this decision particularly progressive. It has important implications for combating judicial corruption since court files should be accessible in order that allegations of judicial impropriety can be checked.
- ***Jameel v Wall Street Journal*** (2006). In this case the House of Lords (the UK's highest court, which has pervasive influence on courts throughout the Commonwealth) held that there had to be a public interest defence to libel actions so that journalists can put into the public domain allegations about corruption so long as the allegations were believed to be true at the time of publication and responsible efforts had been made to check them. It remains to be seen to what extent this important decision is adopted in other Commonwealth countries. Singapore courts have not accepted that there can ever be a public interest defence to 'defamation' of Singapore's leaders and the Australian High Court has only been prepared to allow such a defence for the discussion of politics, but not for alleged corporate corruption.

Article 19 of the Universal Declaration and the associated human rights treaties are increasingly important in freeing the media to ask necessary questions about government and corporate behaviour. They are being used to impose duties on governments to divulge information; to protect whistleblowers who breach employment contracts to speak out conscientiously from within government agencies or businesses; and to permit journalists to refuse to divulge their sources. It is particularly important to protect the internet as a provider of information: allegations of corruption are now frequently first made on websites. It is therefore regrettable that the High Court of Australia, in *Gutnick v Wall Street Journal* (2002), held that it was possible to sue for defamation wherever an internet libel could be downloaded, thereby permitting a plaintiff to choose to sue where libel laws are most favourable. Many states are trying to restrict access to the internet, either by criminal laws that prohibit it entirely (in Burma, North Korea,

Iraq, Libya and Syria) or by controlling a sole service provider (in Saudi Arabia, for example, all traffic goes through a ministry which disallows access to the sites offering 'information contrary to Islamic values'). A similar 'fire wall' has been erected by China, not only to stop information coming in other than through the official gateway, but to prevent 'official secrets' (i.e. criticisms of the regime) from being emailed abroad.

Where coverage of the courts is concerned, local laws should rigorously uphold the open justice principle, which is based on the notion that justice is not done unless it is seen to be done. This transparency must extend to the court files – all pleadings and evidence submitted should be open to public scrutiny. There should be obligations upon chief justices to present annual reports about court performance, and greater opportunities for radio and television coverage. The International Bar Association could take the lead in making a critical examination of judicial corruption, which has become institutionalised in some countries as a result of low judicial salaries.

If the media are to play their proper role as a watchdog of the justice system, national laws should not have a chilling effect on public interest journalism. Most countries have in place laws and punishments that do exert such an effect, however. For example:

- **Laws that provide for the jailing of journalists**
  Progressive societies no longer send people to prison for what they write or publish, but many legal systems still threaten – and sometimes impose – imprisonment for crimes of sedition, insult, contempt of court, criminal defamation and 'spreading false news'. Crimes that are committed by criticising judges, such as 'scandalising the court', are particularly objectionable in that they threaten jail for any allegation of judicial corruption, however justified (there is no defence of truth or public interest). Canadian journalist Murray Hiebert was recently jailed for three months in Malaysia after alleging, in an article in the *Far Eastern Economic Review*, that a private case brought by the wife of a judge had been heard more speedily than most. Penal laws against the press are unnecessary and contrary to Article 19. They should be repealed or struck down.

- **Massive fines or damages**
  There is a tendency for libel damages in many systems to be 'at large', i.e. at the discretion of the judge or jury. The result can be bankruptcy for the journalist or publishing company as a result of a single error. Media operations are such that errors are inevitable: there are means of correcting or compensating for them that do not have such a chilling effect on future investigations. The European Court has ruled that damages should be moderate in defamation cases, but this has no influence in countries where crooked businessmen and politicians can be awarded millions for allegations that they are corrupt.

- **Licensing or restricting publication**
  This is the most common form of censorship. Although licensing can be justified in some circumstances – e.g. where there are scarce frequencies for radio and television – it should always be conducted according to fair and rational rules, and never as a means of silencing critics of official conduct or providing government with a monopoly of channels.

Common law systems offer many opportunities for gagging the media ahead of time by 'interim injunctions', which threaten prison for disobedience, however truthful and important the story.

- **Forum shopping**
  An unattractive consequence of variations in press laws across the globe is that wealthy and powerful figures seek out the forum with the most plaintiff-friendly law for legal actions against newspapers, books and magazines that are distributed worldwide, as well as satellite television and the internet. The power to 'forum shop' for the jurisdiction least tolerant to free speech should be curtailed: in a global village it makes no sense for the new breed of international businessmen and multinationals to enjoy different reputations in different parts of town.

- **Transnational corporations**
  More than half the wealthiest entities in the world today are multinational corporations rather than states. Any libel action they bring can be intolerably expensive to fight. A good example was the action brought by McDonald's Corporation in London against two protesters who had accused them of exploiting cheap labour. The European Court found that a law that denied the defendants legal aid was defective, but a better solution would be to deny companies the right to sue in similar cases. Several progressive nations have moved in this direction: in 2006, Australia abolished a corporation's right to sue for libel if they had more than 10 employees. These developments should be encouraged.

The reason why media exposure of corruption is so important is that in many, if not most, countries corruption is rarely exposed in the courts or by anti-corruption commissions. In consequence, it is next to impossible to assess true levels of corruption. For example, TI's Bribe Payers Index in 2002 hailed Australia as the country where companies were least likely to offer bribes to win business. At the time it received this accolade, businessmen in the Australian Wheat Board were allegedly paying massive bribes totalling US $225 million to Saddam Hussein as part of the 'oil for food' scandal.[5] It would have been difficult for the Australian media to expose this without risking a potentially crippling defamation suit given the existence of laws that say there is no public interest defence for the exposure of business corruption.

The performance of the media in supporting judicial and legal reform varies from country to country: the only generalisation that can be made is that it is uneven and underwhelming. The challenge of law reform is twofold: to the media, in equipping their practitioners with the skills to understand and explain to the public the importance of having an advanced justice system; and to parliaments and courts, in appreciating the importance of giving the media more freedom to investigate and expose, however uncomfortable (and, sometimes, erroneous)

5 The Federal Court found that a 'transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the UN'. See 'Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme', available at www.ag.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report

their conclusions. The occasional error is a small price to pay for the media's capacity to expose and deter corruption.

It must be emphasised that media investigation of judicial corruption is difficult when it is a matter of bribery and exceptionally difficult if it involves a court that has buckled under political pressure. It calls for reporters knowledgeable about law, judicial systems and procedures, and for editors and proprietors prepared to stand up to threats, fines and imprisonment. It calls for media practitioners skilled not only in reporting the courts but in presenting legal issues comprehensively for the general public. Above all it calls for 'integrity partnerships' between journalists and lawyers with the courage to risk their careers by speaking out, or at least informing, against judges who betray their calling by turning the rule of law into rule by corrupt lawyers.

Civil society's role in combating judicial corruption in Central America

Katya Salazar and Jacqueline de Gramont[1]

The justice reform movement in Central America started 20 years ago in response to the prevalence of endemic problems, including corruption, undue influence of politics in the judicial sphere, lack of human rights protection, judicial uncertainty, non-existent transparency and growing distrust of the justice system. The initial reforms were developed and implemented with the help of the international community within the framework of a transition toward democracy and, in El Salvador and Guatemala, within the framework of the Peace Accords. Civil society was not actively engaged in the early stages, except for a few organisations that focused on strategic litigation or campaigns designed to win justice for human rights violations.

A second wave of reforms was directed at two elements vital to strengthening the judiciary and fighting judicial corruption: independence and transparency. Attempts to promote an independent judiciary focused on creating new mechanisms for the selection of Supreme Court justices; strengthening judicial councils with powers to select, evaluate, discipline and administer judges; promoting the stability or tenure of judges; developing educational and ethical standards; and shifting control of judiciary budgets. Efforts aimed at promoting transparency formed part of a wider strategy to reform the region's criminal procedure codes by changing the system from an inquisitorial to an accusatorial one with oral trials, some open to the public, to provide stronger protection for defendants and to make the process more efficient.

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More recent efforts to promote transparency have focused on adopting new laws on access to information and the modernisation of access to information systems.

In spite of these reforms, there is widespread recognition that the objectives of independence, transparency and efficiency have not fully materialised. The perception of the judiciary as corrupt and politicised in most Central American countries, with the exception of Costa Rica, prompted new initiatives from outside government to participate more directly in judicial reform. Civil society organisations have promoted a range of initiatives, including: research and diagnostics; forming networks to have a stronger voice in the development of policies and laws; promoting dialogue across society to discuss the elements needed for real reform and how civil society can help; monitoring the implementation of international conventions and standards; engaging in strategic litigation; training judicial officials; and conducting public awareness campaigns. Whereas NGOs previously concentrated on seeking protection for victims of human rights violations, they now perceive the judiciary as a public service, liable to public scrutiny and pressure to improve its accountability, impartiality and transparency.[2]

More recently civil society has launched a new wave of monitoring and accountability initiatives aimed directly at combating corruption in response to the failure of institutional mechanisms to address unethical behaviour in the judiciary. Below, some of these monitoring and accountability initiatives are described.

Evaluation of institutional control mechanisms

The Centro de Documentación de Honduras (CEDOH) recently published a study of the internal review and control mechanisms within the judiciary, the Justice Ministry and the national police.[3] Using in-depth interviews, analyses of norms and procedures, and focus groups, it was one of the few studies directly to evaluate mechanisms within the justice institutions. Although, as the lead CEDOH investigator admitted, it is a study that needs amplification, the novelty of a civil society organisation conducting a detailed study of the justice sector was noteworthy. The study uncovered some surprising findings, including the fact that the image of the disciplinary body of the Supreme Court was disproportionately more negative within the institution than warranted by its actual defects. Unfortunately the report's recommendations were not adopted due to governance issues in some institutions and lack of political will in others. The next step is to convince institutions (especially those whose images are tarnished) that adopting the recommendations would strengthen controls and be to their ultimate advantage.

Acción Ciudadana, the TI Guatemala chapter currently in formation, has carried out a number of significant analyses of norms, procedures and principles necessary to fight corruption

2 For further information, see Due Process of Law Foundation, *Sociedad Civil y Reforma Judicial en América Latina* at www.dplf.org

3 Miroslava Meza, *Controles Democráticos de los Operadores de Justicia* (Tegucigalpa: CEDOH, 2005). Available from www.cedoh.org

in the justice system.[4] A 2005 study analysed the capacity and limitations of the judiciary's disciplinary body in Guatemala,[5] while an earlier publication presented the findings and recommendations that came out of a series of workshops with civil society and government representatives relating to training in anti-corruption issues, social perceptions of judicial corruption, and mechanisms to prevent and penalise judicial corruption. Although the organisation recognises that overwhelming obstacles to radical change exist – lack of political will being the most important – it continues to work on diagnostics in the hope that persistence and public pressure will bring about reform.

It is notable that the response of institutions criticised in NGO evaluations is often defensive, meaning that they are unlikely to adopt any recommendations made. Strategies are needed to promote the acceptance of the results of NGO research, for example by creating multisectoral coalitions and public campaigns to pressure an institution to adopt change. Where the political will to make changes does exist, NGO evaluation can form part of a technical support agreement with the institution.

In-depth review of controversial cases

One tactic used by civil society groups targeting judicial corruption or unethical behaviour is to 'audit' individual cases. In Panama, Alianza Ciudadana Pro Justicia (Alianza), a coalition of 16 NGOs, carried out an in-depth review of six judicial decisions issued by the Supreme Court in favour of defendants accused of drugs and arms trafficking, bribery and illegal channelling of public funds. Alianza's scrutiny came in response to Supreme Court Justice Arnulfo Arjona's denunciation of the decisions and the National Assembly's statement that it could not lift the immunity of three justices concerned for lack of 'probatory evidence'. The review concluded that four of the six decisions were indicative either of serious deficiency in the work of the Supreme Court judges, or undue influence by forces beyond the margins of the law. The other two contained worrisome irregularities. (See 'Political hold on judiciary guarantees impunity for Panama's elite', page 252.)

In Nicaragua, the disappearance of a large sum of money from a Supreme Court bank account resulted in a public outcry and an in-depth review by Probidad, an organisation that, among other things, trains journalists in anti-corruption work. In April 2004, police had confiscated US $610,000 from a Colombian and four Nicaraguans who were charged with money laundering and falsification of documents. The money was deposited in a Supreme Court account, and the defendants sentenced to three years in prison. While they were serving their sentences, some

4 For more information about Acción Ciudadana, see www.accionciudadana.org.gt

5 See *El Régimen Disciplinario en las Instituciones del Sector Justicia* (The Disciplinary System in the Institutions of the Justice Sector) Acción Ciudadana, Guatemala City, August 2005; and *Sistematización de Análisis de Iniciativas Anticorrupción en el Sector Justicia* (Systematization of Anti-corruption Initiatives in the Justice Sector), Acción Ciudadana, Guatemala City, 2004.

US $600,000 was withdrawn by an individual representing the defendants with signed authorisation from members of the Supreme Court. The defendants' subsequent release generated further public anger. Probidad prepared a detailed review of the case and organised a panel to discuss it. In spite of the media coverage, formal accusations against the judges were stalled by 'procedural obstacles' and by the Supreme Court's monopoly over initiating judicial investigations.[6]

Case reviews often produce a negative reaction, however. Judges view them as undermining their authority, and infringing their independence and impartiality. This is partly due to the sensationalist and biased coverage that such cases often receive in the media. To minimise skewed journalistic coverage, care must be taken to ensure that such studies are unbiased, factually accurate and pertain to issues that affect all citizens. In this way, the justice institutions will be less likely to dismiss or overlook them. Case studies cannot alone bring about the adoption of reforms, but they are important tools that civil society coalitions can use to bring about change, as Alianza did in Panama. While Probidad's initiative did not bring about the desired response, it was valuable for obtaining and disseminating information about a case of national interest.

Systematic review of guidelines for judicial performance

A recent trend is for civil society organisations to develop oversight mechanisms and indicators to evaluate in a systematic way the impartiality of judicial decisions and performance. In El Salvador, the NGO Protejes designed indicators to evaluate the transparency, independence and performance of Salvadoran judges. The initiative is intended to strengthen the evaluation system of the national judicial council and its findings will be submitted to the legislative branch for revision and approval. Through workshops with judges from different parts of the country, Protejes gathered key information about the best criteria to evaluate their performances. The indicators seek to evaluate judges, according to the number of decisions per month, their attendance record, administrative skills and the quality of decision making. Although it is not a part of Protejes' remit, some civil society organisations also advocate the adoption of indicators specifically designed to detect outside influences on judicial decisions. The project is considered authoritative in part because it is carried out by an organisation headed by two respected Salvadorans[7] and also because it takes into account judges' perspectives in the process of improving the judiciary.

Protejes is also promoting the Alliance for Transparency and Judicial Excellence, a network of universities, judges' associations and civil society groups that aims to improve the quality of justice. Among its activities, the Alliance analyses problems involving the judiciary and organises educational activities to promote awareness of the role of judges in a democratic society.

6 The report on the case is available at www.probidad.org

7 They are Francisco Díaz, lawyer and former member of the Consejo Nacional de la Judicatura, and Sidney Blanco, a judge on sabbatical and professor of law at the Universidad Centroamericana in El Salvador.

Judicial observatories

A related trend is the creation of 'judicial observatories', designed to monitor the administration of justice and implementation of reforms in a comprehensive manner. In Nicaragua, civic group Ética y Transparencia has created an observatory to follow the progress of important corruption cases; conducted an analysis of constitutional jurisprudence and precedents behind Supreme Court decisions; participated in the development of a law dealing with judicial salaries, appointments, promotions and conditions; conducted a study of why there are delays in the judicial system; followed the progress in cases of corruption and judicial irregularities that had not yet been resolved; and conducted a study on corruption in public registries. Ética y Transparencia's work on judicial monitoring is still new so its impact is hard to assess.

In Guatemala, the mandate of the Myrna Mack Foundation is to combat impunity and strengthen the rule of law. Initially, the Foundation aimed only to promote litigation related to Myrna Mack's assassination,[8] but in fighting the case it realised that the obstacles encountered were endemic in Guatemala's judicial system and determined to promote activities toward overcoming them. Through research, analysis, proposals for change, education and the spread of information, the Foundation has become a key participant in any discussion of judicial reform in Guatemala. It is also part of the Movimiento Pro Justicia, an umbrella group of civil society organisations that has carried out studies and initiatives to improve the quality of justice since 1999. Movimiento Pro Justicia monitors selection processes for judges, designs proposals to reduce the impact of politics on the selection method and suggests 'ideal profiles' for candidates. Its recommendations are widely publicised and the authorities take some of its advice into account.

The Myrna Mack Foundation has published two reports on judicial corruption that discuss its manifestations and the internal systems that facilitate it.[9] The Foundation's voice is one of the most influential in Guatemala and Helen Mack, Myrna's sister, the founder of the Foundation and its current president, is a member of the national commission of civil society and government representatives charged with implementing recommendations to improve the justice system under the Peace Accords.

Public surveys

While lawyers' associations have not generally played a leading role in monitoring judicial corruption, the Bar Association of Costa Rica has been active in promoting judicial reforms in the country. In 2002, members of the board launched the Forum on the National Agenda of Reforms of the Judiciary with support from the Supreme Court with the aim of identifying

8 Myrna Mack was a Guatemalan anthropologist who conducted research on populations displaced by the Guatemalan civil war. She was assassinated by government agents in 1990.

9 *Corrupción en la Administración de Justicia* (Fundación Myrna Mack: Ciudad de Guatemala, 1998); and *El Problema de la Corrupción en el Sistema de Administración de Justicia* (Fundación Myrna Mack: Ciudad de Guatemala, 2002).

the main problems in the justice sector through public surveys and proposing changes to overcome them. The association made an open call to citizens for their opinions on the judiciary's main problems and the most urgently needed reforms. They also carried out in-depth interviews with lawyers, academics, public servants, journalists, trade unionists, entrepreneurs and civil society representatives.

Although corruption was not among the problems identified by the initiative, there was interest in ascertaining the dimensions of the problem. A sociologist, a political scientist and two lawyers evaluated the data received from the public surveys and drafted a preliminary report that was validated by three groups of 15 people, drawn from civil society, experts and public officials. Based on the comments received, the team prepared a final draft that was distributed to authorities, public officials, judges, public officers, universities and participants in the Forum. In December 2003, the presidents of Costa Rica, the national assembly and the Supreme Court signed a Pact for Justice through which they made a commitment to promote the reforms approved after the validation meetings. For the first time in Costa Rica's history, the three branches of power agreed to work together to implement a plan of judicial reform as a direct result of an initiative by civil society.[10]

Conclusions

Civil society groups have taken on new monitoring and oversight roles over the judiciary in Central America. Unfortunately, their initiatives often meet strong criticism because they are seen as infringing the independence and impartiality of the judiciary. Analysis of specific decisions is problematic because of the perception that cases are being tried in public, or at least outside the established institutional and legal framework. This has led to reluctance on the part of justice institutions to work with civil society in many countries.

The tension created inevitably fuels a more fundamental debate on whether it is possible to find an appropriate balance between respect for judicial independence and the need for judicial accountability. Some of the proposed solutions focus on strengthening institutional control mechanisms: without them monitoring and accountability initiatives by civil society will continue to proliferate. Whatever the initiative for reform, it will be more successful when based on serious diagnostic studies and supported by coalitions that combine professional associations, universities, business associations and so on. Further, initiatives display more success when they offer specific proposals for reform and not just criticism, and are accompanied by projects that allow for deeper collaboration with the justice institutions. Media coverage of any initiative must be carefully calibrated. Civil society groups should adopt a more active role in educating the press about the justice system, with a view to promoting more accurate coverage

10 For more information, see Paul Rueda, 'La Participación de la Sociedad Civil en la Modernización del Sistema Judicial Costarricense: El Papel del Colegio de Abogados de Costa Rica' (Washington D.C.: Due Process of Law Foundation, 2005). Available at www.dplf.org

and follow-up of cases, and moving beyond sensationalist reporting. Finally, promoting a deep and coherent discussion within civil society about the scope, causes and impact of judicial corruption, and the exchange of information about initiatives to combat it, will help in the development of new ways for civil society to strengthen faith in the judicial system.

Gender and corruption in the administration of justice

Celestine Nyamu-Musembi[1]

Introduction

Corruption raises particular concerns when it occurs in justice institutions because they are fundamental to enforcing citizens' rights and probity in public office. Figures on people's perceptions and experiences of corruption in the justice sector range from total loss of faith to suggestions that a significant proportion of judicial officers are highly corrupt.[2] It is an exceptional country whose citizens perceive justice officials as corruption-free.[3]

Given these challenges it may seem unimportant to dwell on the gender dimensions of corruption in the administration of justice. But in order to understand how corruption in judicial institutions undermines the trust of ordinary people in the administration of justice, violates the rights of ordinary people and denies them access to justice, it is imperative to examine the experiences of different people by gender, religion, ethnicity, race, class or caste. Such an examination leads to a fuller understanding of the problem, and more focused and effective solutions. This essay therefore selects and concentrates on how gender impacts on people's experience of corruption in the justice system.

In exploring the gender-differentiated consequences of corruption in the justice system, a dilemma arises that is common to any context characterised by the system's general failure to deliver. Identifying gendered consequences of such failures is not the most difficult task. More difficult is the question of attribution. How much do we attribute failure to lack of adequate resources or sheer incompetence? How much can be attributed to corruption,

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2 See 'How prevalent is bribery in the judicial sector?', page 11. See also www.afrobarometer.org/surveys.html and www.transparency.org/policy_research/nis/regional/africa_middle_east

3 Exceptions to this general trend in Africa include Botswana and Tanzania. In Tanzania superior court judges are seen as clean, but magistrates and other court officials are perceived as corrupt. See www.transparency.org/policy_research/nis/regional/africa_middle_east

defined as the abuse of entrusted power for private gain, and how much is due to gender bias?[4] Another key question is how tangible the 'private gain' needs to be. Is it corruption when the 'private gain' is self-gratification, or actualisation of a deeply held prejudice against women holding certain entitlements? When is gender bias itself a form of corruption? Are there instances when it is strategic to name bias – whether on the basis of gender, ethnicity, religion or other sectarianism – as corruption? Do all instances of non-delivery or bias in the delivery of justice earn the label 'corrupt'?

This essay explores these questions and aims to provoke debate, rather than provide definitive answers. It covers both formal and informal justice institutions. Formal justice institutions include courts, registries, prosecution and probation services, and the police. The term 'informal-justice institutions' refers to systems that have evolved around tradition or religion, but it incorporates a wide range of community-based systems. These include those that have little interaction with formal state structures, such as intra-family mediation and quasi-judicial forums sponsored or created by the state to apply norms such as customary or religious law.

This essay makes three propositions on the relationship between gender bias and corruption:[5]

- Gender relations shape the currency of corruption
- Corruption in the justice system affects men and women differently
- Gender relations play a central role in shaping networks of corruption.

Gender relations shape the currency of corruption

Though the definition of corruption – abuse of entrusted power for private gain – is broad enough to cover a range of conducts, the currency of corruption is generally presumed to be monetary. Sexual extortion or harassment is rarely, if ever, included when discussing corruption in the justice system (or indeed in any sector) or formulating remedial measures.[6] There are a few notable exceptions: a Tanzanian commission of inquiry into corruption, chaired by Joseph Warioba in 1996, addressed sexual extortion as part and parcel of what corrupt

4 The term 'gender bias' is used as a shorthand reference to the near-universal experience of systemic outcomes that disadvantage women, relative to men. Legal systems (including informal justice institutions), both in the content of laws and their enforcement, are more likely than not to reproduce gender inequalities (UNRISD, 'Gender Equality: Striving for Justice in an Unequal World', Geneva, 2005). It is in recognition of this systemic reality that the UN Convention on the Elimination of All Forms of Discrimination Against Women defines discrimination with an emphasis on *outcomes* rather than *intent*. See CEDAW, at www.unhchr.ch/html/menu2/6/cedw.htm

5 These propositions relate to gender and corruption in general, not only in the administration of justice. The list has been adapted from Anne-Marie Goetz, 'Political Cleaners: How Women are the New Anti-Corruption Force. Does the Evidence Wash?' (2005), available at www.u4.no/helpdesk/helpdesk/queries/query98.cfm. Though the focus is on gender, these arguments can apply to any marginalised group.

6 See for example Petter Langseth, 'Strengthening Judicial Integrity and Capacity through an Integrated Approach', in *Forum on Crime and Society*, vol. 2, no. 1 (December 2002), available at www.unodc.org/pdf/crime/publications/strengthening_judicial.pdf; and George Kanyeihamba, Damian Lubuva, Yvonne Mokgoro, Robert Sharpe and Ed Ratushny, 'Report of the Advisory Panel of Eminent Commonwealth Judicial Experts' (Nairobi: International Commission of Jurists, May 2002), available at www.icjcanada.org

conduct is.[7] A Kenyan report on judicial corruption also lists 'sexual favours' among forms of corrupt behaviour, but notes that it is the least prevalent,[8] as does Namibia's anti-corruption movement.[9] A more probable conclusion is that it is the least reported.

Corruption in the justice system affects men and women differently

All users of the justice system suffer the impact of corruption. Indices such as the TI Global Corruption Barometer give some indication of public sector corruption's impact on ordinary people,[10] but do not report results disaggregated by gender. Moreover, studies specific to the impact of justice-system corruption on ordinary people are few. The evidence is largely anecdotal. In the absence of systematised evidence, arguments that women suffer a disproportionate impact from judicial corruption tend to be based on intuitive, if plausible, claims. These can include:

- Women's increased vulnerability to extortion and abuse of procedures on account of statistically lower literacy levels
- Women's relatively weaker control of resources in a context where bribery has become a prerequisite to accessing justice institutions
- The statistical reality that women constitute a majority of the poor and therefore disproportionately suffer the impact of disinvestment in services on account of corruption.[11]

It is possible to build on arguments made in existing studies to substantiate the gender-differentiated impact of corruption in the justice system in concrete cases. Four specific arguments are illustrated below.

Argument 1: Stigma reinforces corruption

When a vulnerable group is also socially stigmatised, it is at higher risk of extortion where there are ambiguities in laws and procedures, or inadequate supervision to ensure accountability of 'street-level' officials implementing laws and procedures. This risk is reinforced by a low likelihood that the people affected will publicly challenge the behaviour of officials due to social stigma (see boxes 1 and 2).

7 United Republic of Tanzania, 'Report of the Commission on Corruption' ('The Warioba Report') (Dar-es-Salaam: 1996).

8 Government of Kenya, 'Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya' (the 'Ringera Report') (2003). For further information, see www.icj.org/news.php3?id_article=3112&lang=en

9 See www.anticorruption.info/types.htm

10 See Global Corruption Barometer reports at www.transparency.org/policy_research/surveys_indices/gcb

11 For examples, see www.u4.no/helpdesk/helpdesk/queries/query98.cfm; Lilian Ekeanyanwu, 'Women in Anti-Corruption: Impact of Corruption in the Judiciary on Nigerian Women', paper prepared for the 10th International Anti-Corruption Conference, Prague, Czech Republic, 7–11 October 2001; and GTZ, 'Corruption and Gender: Approaches and Recommendations for TA. Focal Theme: Corruption and Trafficking in Women' (2004), available at www.gtz.de/de/dokumente/en-corruption-and-gender.pdf

Box 1: Bribery and law enforcement in Kenya

Kenya's Bribe Payers Index shows that avoidance of law enforcement is the most common reason for bribe paying, i.e. avoiding the consequences of wrongdoing or avoiding harassment by law enforcement authorities (46 per cent). Disaggregating by type of occupation sheds light on the gender-differentiated consequences of corrupt law enforcement. For example, working in the informal economy places one at risk of extortion for bribes by street-level officials, but that risk is higher for those engaged in activities that border on illegality or are stigmatised. These include prostitution and illicit brewing, categories where women are overrepresented. The inquiry could be broadened beyond monetary bribes to other forms of extortion, such as sexual abuse, sexual threats or harassment.

Source: TI Kenya, 2006.

Box 2: Police extortion from prostitutes in Azerbaijan

Although prostitution is legal in Azerbaijan, it is a stigmatised occupation. Prostitutes are vulnerable to extortion by police and are compelled to pay bribes to avoid being forcibly (and illegally) subjected to medical examination. This is because they can be charged under the law with disseminating venereal disease. The police act beyond their authority, however, because the law stipulates that they can commence investigation only when a third party makes a complaint. Knowing that young stigmatised women are unlikely to challenge such action fuels their extortionist behaviour.

Source: www.transparency.org/publications/newsletter/2006/april_2006/anti_corruption_work/azerbaijan_alac

Argument 2: Gender bias sustains systemic inertia in responding to corrupt practices whose impact falls exclusively or predominantly on women

An illustration of this is the inadequate response to human trafficking and the organised criminal acts that sustain it. This includes the well-coordinated market in fake documentation, bribery of officials at the highest level and failure to respond when witnesses and complainants are threatened with violence.[12] Why does the allocation of state resources for prosecution and investigation not reflect priority attention to this issue and to gender-based violence in general?[13] Are gender bias and undue influence over the resource allocation process also implicated? Box 3 illustrates how the intersection of corruption and gender bias helps to explain

12 'Corruption and Gender' (2004), op. cit.

13 Other prominent examples of underinvestment in official responses to systemic gender-based violence include abductions, rapes and murders of young women in Ciudad Juárez, Mexico (see web.amnesty.org/library/index/ENGAMR410112004) and acid attacks on women in Bangladesh (see www.icj.org/news.php3?id_article=3101&lang=en).

the inadequate justice system response to human trafficking, particularly of women and girls, into sexual slavery.

Box 3: Trafficking of Russian women

Human trafficking was a non-issue for the Russian government and denied by some politicians and law enforcement officials for much of the l990s. At the time international organisations, the US State Department, NGOs, Russian women's groups and Russian and western academics named it a growing problem, and called for anti-trafficking legislation and rehabilitation of those who returned to Russia. Thousands of girls, women, boys and men, who thought they were going to good jobs, were trafficked out of Russia into prostitution, domestic labour and building work, often in slave-like conditions. In the post-Soviet era, criminal gangs, official corruption and the involvement of some law-enforcement officials in lucrative domestic prostitution did not facilitate the 'labelling' of the problem as human trafficking.

The first draft anti-trafficking legislation was put to the Duma in 2002 but did not become law due to its low priority. Research suggests that far more women than men are trafficked due to the international political economy of sex. Discriminatory and misogynistic attitudes about the 'worth' of women who went into prostitution, however, deterred many from prioritising the problem, along with concern about the high budgetary costs that tackling it would entail. While not all Russians held these views, research uncovered the following attitudes: that women 'deserved' what happened to them since they must have known that prostitution would be required; that they were 'bad', rather than 'good', women, so not deserving of rescue, counselling, rehabilitation and protection; that they were now 'dirty' and 'deserved' to be shunned by families and communities due to the shame that they brought. In December 2003, after more pressure from the US State Department and with support from President Vladimir Putin, the Duma amended the Russian Criminal Code to include anti-trafficking articles. How the complicated enforcement process will proceed remains to be seen.

Source: Interview with Mary Buckley, 15 August 2006.[14]

Argument 3: 'Minor' system failures amplify existing inequalities in accessing justice

Inattention to day-to-day system failures in justice administration normalises corruption and deters people from seeking justice. While all users of the justice system are affected, system failures that appear minor can have a relatively larger effect on certain categories of users. Box 4 illustrates this.

14 For fuller details see Mary Buckley, 'Trafficking in People', *The World Today*, August/September 2004; and her 'Menschenhandel als Politikum: Gesetzgebung and Problembewusstsein in Russland', *Osteuropa* (Germany), June 2006, osteuropa.dgo-online.org.

Box 4: Public access to information on court schedules in Timor-Leste

In Timor-Leste the Judicial Sector Monitoring Programme (JSMP) found that the system for posting the court's daily schedule of hearings on a publicly accessible notice board had fallen into disuse. Victims and families were forced to enquire in person from registry staff. This meant identifying oneself and stating one's reason for being there. Intimidation and the probability of petty bribery to obtain the information from the (mostly male) clerks is commonplace. Such an environment inhibits victims and families affected by sexual or domestic violence, crimes that are already seriously under-prosecuted.

Source: JSMP.[15]

Argument 4: Lack of clear regulation of the interface between formal and informal institutions exposes women and children to disproportionate risk of corrupt practices

When a citizen's right to choose the forum in which to resolve a dispute is not fully recognised, certain parties may use intimidation or bribery to coerce a less powerful party into using or avoiding a particular forum.[16] In contexts where domestic violence, rape and other sexual assaults are perceived as 'family matters', there is likely to be more pressure to keep them 'quiet', and therefore victims – mostly women and children – suffer disproportionately from this susceptibility to corrupt practice. Box 5 illustrates this.

Box 5: Sexual and domestic violence cases in informal forums in Timor-Leste

Studies by Timor-Leste's JSMP confirm that a high number of incidents of sexual and domestic violence are settled informally in family and village forums. Police admitted that unless injuries are 'serious' they routinely refer complainants back to these forums. In all criminal cases the law allows police to detain a suspect for 72 hours without charge while they conduct investigations. In cases involving domestic violence, however, rather than conduct investigations the police treat this period as a time for the victim to decide whether she wants the perpetrator formally charged or released.

Source: JSMP.[17]

15 JSMP, 'Women in the Formal Justice Sector: Report on Dili District Court' (2004); JSMP, 'An Analysis of Decisions in Cases Involving Women and Children Victims: June 2004–March 2005' (2005) and JSMP, 'Police Treatment of Women in Timor-Leste' (2005), all available at www.jsmp.minihub.org

16 In contexts where formal and informal justice institutions coexist, citizens in theory have the freedom to choose either forum for resolution of their disputes. However, the meaningful exercise of choice requires knowledge and resources. It is important that the law makes clear, as is the case in South Africa, that by choosing to submit a dispute to informal adjudication a person has not thereby relinquished his or her inherent right to pursue court action, a right that is open to all citizens. See South African Law Commission, discussion paper no. 87, 'Community Dispute Resolution Structures' (1999). Available at www.doj.gov.za/salrc/dpapers/dp87_prj94_dispute_1999oct.pdf

17 'Police Treatment of Women in Timor-Leste' (2005), op. cit.

Gender relations shape networks and opportunities for corruption

Consider how networks of corruption are consolidated and maintained within an organisation. Working in the background is an informal guarantee of impunity, an assurance that no one is likely to break ranks, so that those involved feel the chances of exposure, let alone sanction, are low. These informal guarantees come in the form of a shared identity or mutual obligation based on a range of factors – educational background, kinship, ethnicity, religion or gender. Solidarity on the basis of gender does play a role, although it should not be overplayed above other nodes of solidarity as some studies have tended to do.[18]

Figures from developing countries have a general pattern: the highest offices, namely superior court judges and registrars, are predominantly male. Lower courts and offices of the magistracy have more representation of women, but men are still the majority.[19] This same set-up is reflected in police forces and the prison service. Such demographics make it more likely that corruption in the form of intimidation and sexual extortion will occur, for example in exchange for promotions, particularly where the discretionary powers of superiors are poorly defined.[20]

In such gender-imbalanced settings, informal channels often come to matter more than formal procedures for decision making, leaving room for undue influence and limiting accountability. It is therefore useful to ask whether undertaking measures for gender (or ethnicity, race, class or caste) inclusiveness can reshape the 'power map'. Under what conditions can such inclusiveness dilute the influence of the exclusive networks that foster corruption? Considering the relationship between inclusiveness and corruption in public office must, however, guard against slippage into a popular but simplistic claim that increasing proportions of women in public institutions is in itself a measure against corruption.[21]

Informal justice institutions do not differ much from formal institutions when it comes to gender imbalance. Perhaps the significant difference is that informal institutions tend to operate in a narrower social circle. The chances that excluded groups can tap into those circles to influence decisions, or even enter spaces where they convene, is low due to unspoken social rules and norms. These may include that it is inappropriate for women to associate with men who are not relatives, or to be seen in certain places, such as beer parlours, where deals are made.[22]

18 Ranjana Mukherjee and Omer Gokcekus, 'Gender and Corruption in the Public Sector', *Global Corruption Report 2004*.

19 Women and Law in Southern Africa (WLSA), *Chasing the Mirage: Women and the Administration of Justice* (Gaborone: Bay Publishing, 1999); WLSA, *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (Harare: WLSA Trust, 2000); and WLSA, *In Search of Justice: Women and the Administration of Justice in Malawi* (Blantyre: Dzuka Publishing, 2000).

20 'Corruption and Gender' (2004), op. cit.

21 Sung Hung-En, 'From Victims to Saviours? Women, Power and Corruption', *Current History* vol. 105, no. 689 (2006); and Goetz (2005), op. cit.

22 Lynn Khadiagala, 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights', *Development and Change*, no. 32 (2001); and Goetz (2005), op. cit.

Considering gender imbalances in staffing underlines the fact that gender dynamics shape opportunities to engage in corrupt networks. It further highlights the general importance of analysing corruption networks. What drives them in specific contexts? What are the key axes along which they are constructed? Such analysis is important for programmes that seek to equip vulnerable groups to access justice institutions. It can help anticipate and handle forces likely to subvert the empowerment agenda. For example, access to justice strategies may need in the short term to provide resources so that disadvantaged groups can by-pass local forums if they are so dominated by tightly knit corrupt networks that such groups can never expect a just outcome.

Conclusion and recommendations

Three points for further action emerge from this discussion. *The first recommendation is that sexual extortion be explicitly recognised as a form of corrupt behaviour.* The currency of corruption is still widely perceived as monetary. This shapes the collection of data on corruption, the design of official responses to it and civil society campaigns to address corruption. A more textured analysis of corruption that takes into account positions of specific groups of people would move into a genuinely open-ended inquiry into forms of corruption that are most frequently experienced and of most gravity to these groups of people.

Secondly, *the importance of transparent and predictable procedures for the day-to-day operation of justice systems cannot be over-emphasised.* Adverse effects from lack of institutionalised practices – such as random case assignment, etc. – can be amplified for marginalised groups. In informal systems, the less formal and visible a forum is, the more difficult it is to speak of procedures that ensure transparency and predictability. Empirical research into informal justice systems needs to ask questions, such as whether they have standards of fairness (both substantive and procedural); whether those served by the systems know the standards and the expected procedures so they are in a position to demand that the forums adhere to them; and whether channels exist to verify that these forums are operating in a fair and just manner.

The final recommendation comes from the observation noted above, that the major corruption indices are not disaggregated by factors such as gender, education level or type of occupation. This makes it difficult to understand the gender-differentiated perception and impact of corruption. Without this differentiated information, it is extremely difficult to develop appropriate strategies to fight corruption. Although gender and income data are sometimes gathered, the data are often not analysed along these lines. *Such disaggregation should become integral to the general collection and analysis of data on corruption. The rationale for this is even stronger for experiences of corruption in the justice system*. As stated at the outset, this is because the legitimacy of justice institutions in the eyes of ordinary people is at stake. Any meaningful analysis and solution seeking must be informed by the concrete experiences of the various groups of people affected.

The 'other 90 per cent': how NGOs combat corruption in non-judicial justice systems[1]

Stephen Golub[2]

Beyond the courts

This essay probes the problem of corruption in non-judicial justice systems (NJJSs), or justice systems that do not involve the courts. It addresses two broad types of NJJS: customary and administrative. The essay also explores how NGOs help to constrain such corruption. It focuses on the Philippines, Bangladesh and Sierra Leone because they offer diverse examples of the problem and the strategies employed by NGOs to address the problems.[3]

NJJSs[4] are important because they handle most disputes and other justice processes in many societies, with major consequences for social stability and poverty alleviation. By contrast, courts are costly, inconvenient and incomprehensible for poor people across the globe. The UK's Department for International Development estimates that 'in many developing countries, traditional or customary legal systems account for 80 per cent of total cases'.[5] The Organisation for Economic Co-operation and Development points to research suggesting that 'non-state systems are the main providers of justice and security for up to 80–90 per cent of the population' in fragile states.[6] These admittedly imprecise calculations reflect the fact that by choice or necessity the poor tend to use non-state forums. If state-run administrative justice processes are also counted, judiciaries probably handle no more than 10 per cent of cases in much of the developing world.

1 This essay is based on research supported by the author's Open Society Institute Individual Project Fellowship, a University of California at Berkeley Professional Development Fellowship and consultancies in Bangladesh and the Philippines. The author wishes to thank Dina Siddiqi and Vivek Maru for their comments on drafts of this essay, and also Marlon Manuel and Peter van Tuijl for their input.

2 Stephen Golub teaches International Development and Law at Boalt Hall Law School of the University of California at Berkeley, United States.

3 The Philippines, Bangladesh and Sierra Leone respectively score 2.5, 2.0 and 2.2 on the 0–10 scale of TI's 2006 Corruption Perceptions Index (CPI), with 0 representing a perception of a high degree of corruption. The Index relates to perceptions of the degree of corruption as reported by business leaders and country analysts. See CPI 2006 on page 324 or www.transparency.org/policy_research/surveys_indices/cpi/2006

4 The concept of non-*judicial* justice systems (NJJSs) should not be confused with non-*state* justice systems (NSJSs). NJJSs include, but are not limited to, NSJSs. The latter refers to usually customary justice systems that originate outside the state, but that the state may adopt. By contrast, non-judicial justice systems include NSJSs as well as those created by the state, as long as they are not judicial in nature. Thus, administrative law systems are non-judicial, but not non-state. Customary systems are both non-judicial and non-state.

5 DFID, *Safety, Security and Accessible Justice: Putting Policy into Practice*, July 2002. Available at www.dfid.gov.uk/pubs/files/safesecureaccjustice.pdf

6 OECD/DAC Network on Conflict, Peace and Development Co-operation, *Enhancing the Delivery of Justice and Security in Fragile States*, August 2006, 4.

NJJSs process disputes, but they also involve non-adversarial legal processes administered by government agencies. These include deciding on land title applications and enforcing environmental laws. They involve core principles of justice – fair treatment or upholding rights – as much as dispute resolution. NJJSs include:

- Administrative law systems that delegate to executive and local government bodies powers to settle disputes, enforce laws and approve applications
- Customary dispute resolution forums, such as informal village panels, that settle land, family and other disputes independently of the state
- Customary–state hybrids, or processes that originate in custom but that have been wholly or partly adopted by the state
- Processes administered by police, prosecutors and prisons (for the sake of focus this paper does not examine these institutions).

The TI definition of corruption, 'the abuse of entrusted power for personal gain', can be applied in the context of NJJSs. However, it can be difficult to distinguish where personal bias ends and personal gain begins, particularly in customary justice systems. Similarly, personal gain – in terms of economic, political or social power – may spring from perpetuating the system, rather than from case-specific bribes or other abuses.

The NGO efforts described here do not fall under the explicit rubric of anti-corruption initiatives, but rather pursue access to justice, greater gender equity, economic empowerment and other goals. For the disadvantaged and their allies, the fight against corruption is often part of other struggles. This reality does not, however, make their anti-corruption work any less important.

Neither NJJS corruption nor civil society constraints on it have been the focus of extensive research. Most commentary on customary systems highlights their roles as alternatives to graft-ridden government processes, rather than their own intrinsic weaknesses. This essay sketches selected NJJS problems and solutions.

Administrative law systems in the Philippines

As in many other countries, executive agencies and local governments in the Philippines handle many of the justice issues that most affect citizens. For example, the Department of Agrarian Reform (DAR) administers the regulations that transfer ownership or greater control of land to low-income farmers. The Department of Environment and Natural Resources (DENR) allocates permits to cut trees and harvest other forest products. Local governments decide on fishing rights that can help or harm livelihoods. It is difficult to say whether corruption pervades these administrative law systems to a greater degree than the judiciary. But these bodies often evince a patrimonialism in which public office can flow from patronage and serve as a vehicle for personal profit.[7]

7 See Paul D. Hutchcroft, 'Oligarchs and Cronies in the Philippine State: The Politics of Patrimonial Plunder', *World Politics* vol. 43, no. 3 (April 1991).

Filipino society prizes personal connections to an extraordinary degree. The phenomenon has its positive, friendly, functional side. But a landmark government report contends that 'extreme personalism . . . leads to the graft and corruption evident in Philippine society'.[8] A World Bank study finds only 5 per cent of Filipinos believe that 'most people can be trusted', a phenomenon that reinforces reliance on special favours.[9] This favouritism in turn creates *utang na loob* ('debt of gratitude') that imposes reciprocal, sometimes corrupting, obligations.

To complicate matters further, corruption in the Philippines does not just involve reaping material and personal benefits. Those who fail to honour the interests of powerbrokers can face social ostracism, economic harm or professional damage. For government personnel, this includes transfers to bureaucratic backwaters or unappealing parts of the country. The upshot is that governance is not a set of neutral institutions, but rather a web of personal and financial connections. This blocks law reform, law enforcement and the poorly connected majority's access to justice.

The NGO network known as Alternative Law Groups (ALGs) helps to combat such problems by providing legal services to disadvantaged Filipinos. Most also engage in related activities, such as public interest litigation, community organising, judicial training and facilitating law students' engagement with public service. Individual ALGs tend to focus on a specific issue or sector – gender, farmers, labour, the urban poor, cultural minorities, the environment or local governance. As *de facto* legal counsels for civil society coalitions, ALGs have helped to draft and pass hundreds of pro-poor laws, ordinances, regulations and executive orders over the years. The largest ALG, Saligan, is currently lobbying for a law that will simplify dispute resolution in ways that could minimise possible corruption in labour tribunals.

In terms of corruption, perhaps the most important slice of the ALGs' programmatic pie is their engagement with administrative law. Paralegal development – training and supporting laypersons to tackle legal problems affecting the disadvantaged – is an important facet of such engagement. Filipino paralegals typically belong to the communities they serve, helping to level an otherwise uneven playing field.

Paralegals' ongoing involvement with specific issues goes beyond their legal knowledge and skills. For example, an ordinary farmer who seeks help from a government office bumps up against a bewildering wall of bureaucracy. Simply finding out who to ask for help can be intimidating or impossible. Such ignorance can breed an environment of graft, where information or help is only provided in exchange for bribes. By contrast, a farmer paralegal can stroll into a DAR office, chat with staff about a land reform application, and obtain useful official or unofficial information.

Knowledge of administrative processes and personnel helps the paralegal identify allies and enemies, derailing efforts to exploit citizens' ignorance of the regulations and personnel involved.

8 Senate of the Philippines, Committee on the Education, Arts and Culture and Committee on Social Justice, Welfare and Development, *A Moral Recovery Program: Building a People, Building a Nation*, report submitted by Senator Leticia Ramos Shahani, 9 May 1988.

9 Stephen Knack, 'Trust, Associational Life and Economic Performance' (Washington, D.C.: World Bank, 2000), as cited in William Easterly, *White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin, 2006).

When backed by a strong farmers' organisation, this expertise constrains corruption by building countervailing political influence on a local level. Certain ALGs have trained and supported several hundred paralegals to shepherd their fellow farmers' land reform applications through DAR processes. A 2001 study for the Asian Development Bank used surveys, focus groups and interviews to document the ALG Kaisahan's apparently favourable impact on implementing land reform.[10]

ALGs are similarly active in cases of land ownership, land use and other resources that provide livelihoods. Working through allies in DENR and local governments, a number of ALGs have helped to block or reverse decisions that have been unduly influenced by firms that violate environmental laws.

Legal representation and media advocacy sometimes complement administrative law strategies. Tanggol Kalikasan has defended partner populations and DENR personnel against harassing lawsuits brought by violators of environmental law. When officials in one province passed a zoning ordinance allowing a cement plant to evade land-use regulations, the Environmental Legal Assistance Center undertook various media-oriented activities. This ALG organised a site visit and press conference, helping journalists to arrange interviews with community members. The ensuing publicity apparently contributed to the local government revoking the ordinance.

Ironically, the ALGs' anti-corruption work may impact executive agencies and local governments more than the courts. The veil of judicial independence in the Philippines actually serves to insulate the judiciary from legitimate anti-graft pressure, while allowing pernicious forces to continue to exercise influence. Other arms of government lack such insulation.

Another way in which ALGs combat corruption involves the appointment of their leaders to important positions in DAR, DENR and other agencies. When this occurred under President Fidel Ramos in the 1990s, they were able to revamp regulations, procedures and personnel in reforming ways.

Shalish and Bangladeshi NGOs

'*Shalish*' (or '*salish*') refers to a widespread, informal Bangladeshi process through which panels of influential local figures resolve community members' disputes and/or impose sanctions on them. *Shalish* typically involves disputants' voluntary submission to mediation or arbitration, and often it blends the two. The disputants can accept or reject the panel's suggestions, as in mediation. But *shalish* resembles arbitration in that the process pushes them to reach a settlement consistent with the panel's preferences or community norms.

10 See 'The Impact of Legal Empowerment Activities on Agrarian Reform Implementation in the Philippines', in Stephen Golub and Kim McQuay, 'Legal Empowerment: Advancing Good Governance and Poverty Reduction', in *Law and Policy Reform at the Asian Development Bank* (Manila: Asian Development Bank, 2001). Available at www.asiandevbank.org/Documents/Others/Law_ADB/lpr_2001_Appendix1.pdf

The terms 'mediation' and 'arbitration' suggest calm deliberation, but *shalish* can be a passionate event. Disputants, relatives, panellists and community members loudly proclaim their opinions, often simultaneously. The process may extend over numerous sessions and months, and negotiations between disputants, sometimes represented by family members, also take place outside of these sessions.

Shalish addresses a wide variety of civil matters, some with criminal implications. These may include gender and family issues, such as violence against women (whether within or outside marriage), inheritance, dowry, polygamy, divorce, financial maintenance for a wife and children, or a combination of such issues. Other foci include conflicts over the boundaries between neighbours' land.

Traditional *shalish* – which does not involve NGO influence – can be unfair, favouring men over women and the affluent over the impoverished. One study highlights how panel members' solutions to disputes can aim to 'ensure the continuity of their leadership, to strengthen their relational alliances, or to uphold the perceived cultural norms and biases', with the process sometimes influenced by 'corrupt touts [persons claiming legal expertise] and local musclemen' hired to manipulate or intimidate the participants.[11] Another study describes an often corrupt triumvirate of interests that controls village affairs, including *shalish*. This alliance comprises low-level, elected officials who control public resources and are tied to local politicians and other powerbrokers; village elders who have 'vested interests in the village economy as *rentiers* and moneylenders'; and religious leaders who 'are sometimes quite influential as they endorse the activities of village elders, albeit in the name of Islamic or *sharia* law'.[12] Both sources emphasise that *shalish* is often strongly biased against women.

Given these manifold problems, why do people turn to *shalish?* They do so partly because it is convenient and partly because they have no real choice. The formal courts are slow, costly, incomprehensible, bureaucratic, distant, backlogged and perceived as corrupt and gender-biased. *Shalish* is free, flexible, understandable, community-based, sometimes fair and, despite its flaws, part of the pattern of village life.

In recent years – and in recognition that *shalish* will remain more accessible even if the courts improve – various Bangladeshi NGOs have tried to modify its negative aspects. The need to do so is all the greater due to the fact that corruption, unfairness and gender bias in *shalish* frequently constitute the same phenomenon. Gender biases, for example, can lead to unfair treatment of women as part of a pattern that benefits male elders by perpetuating their social, political and economic status. In the context of *shalish,* human rights and gender issues often entwine with abuse of entrusted power (as in favouritism by *shalish* panel members) for personal gain.

11 Sumaiya Khair, Karen L. Casper, Julia Chen, Debbie Ingram and Riffat Jahan, *Access to Justice: Best Practices under the Democracy Partnership* (Dhaka: Asia Foundation, 2002).

12 Taj Hashmi, *Women and Islam in Bangladesh: Beyond Subjection and Tyranny* (London: Macmillan, 2000).

The Madaripur Legal Aid Association (MLAA), a legal service NGO, pioneered the concept of NGO-modified *shalish* and trained other NGOs in its techniques. The MLAA addresses clients' problems through three main options: the courts, utilising MLAA-affiliated lawyers if clients have been victimised by severe criminal conduct; the mediation of its field workers (who refer the clients to *shalish* if their initial efforts fail); or *shalish* that the field workers organise and whose members MLAA has recruited and trained. The NGO, Nagorik Uddyog, trains alternative *shalish* panels and 'legal aid committees' to review all *shalish* sessions (whether conducted by its own panels or others).[13]

These efforts have undercut a diverse array of corrupt practices. They counteract the power of the aforementioned 'touts' who, for a fee paid by a disputant's family, exploit their (apparent) legal knowledge to sway a *shalish* panel's deliberations. They have also helped reduce the practice that ill-informed divorced couples must endure if they wish to reconcile. Through intentional misinterpretation of religious law and general ignorance, an intermediary with religious credentials (such as a local *imam*) might tell a couple that the woman must first marry and sleep with another man – often the intermediary himself – before re-marrying her original husband.

Research suggests that NGO-modified *shalish* is the most effective forum for delivering a degree of justice and alleviating poverty.[14] Though self-reporting must be taken with a pinch of salt, NGO records indicate high rates of successful dispute resolution: 88 per cent by the MLAA and 75 per cent by the development NGO, Ganoshahajjo Sangstha.[15]

One final and unfortunate development regarding *shalish* deserves mention. Over the past few years, a combustible mix of violence, intimidation and political patronage has increased in Bangladesh, even at the village level. The ramifications are that criminal elements, often with ties to political parties, seek to dominate *shalish* decision making in some communities. This emerging reality sees young thugs, rather than elders and traditional elites, controlling the process.

Putting aside this recent development, it would be an overstatement to suggest that NGO efforts have eliminated corruption and bias in *shalish*. But where NGOs are active, they have ameliorated these deeply engrained problems and started down the long road towards making *shalish* a more equitable process. Given how corruption is entwined with other biased aspects of *shalish*, addressing one problem often helps to address the others.

13 External reviews of Nagorik Uddyog's work have tended to validate its multi-faceted impact, including on constraining corruption of *shalish*. See Dina Siddiqi, *Paving the Way to Justice: The Experience of Nagorik Uddyog, Bangladesh* (London: One World Action, 2003); and Lena Hasle, 'Too Poor for Rights? Access to Justice for Poor Women in Bangladesh: A Case Study' (unpublished MSC dissertation for the London School of Economics, 2004).

14 Tatjana Haque, Karen L. Casper, Debbie Ingram and Riffat Jahan, *In Search of Justice: Women's Encounters with Alternative Dispute Resolution* (Dhaka: The Asia Foundation, 2002).

15 United Nations Development Programme, *Human Security in Bangladesh: In Search of Justice and Dignity* (Dhaka: UNDP, 2002).

Legal pluralism and Timap for Justice in Sierra Leone[16]

As in many other African countries, multiple legal systems hold sway in Sierra Leone and are partly integrated. One is the formal, state system derived from the United Kingdom, while the others are customary and rooted in the nation's history. In view of the country's widespread corruption, war-torn history and severe poverty, the formal system operates dysfunctionally. The judiciary is largely confined to the nation's capital, Freetown, as are most of the country's magistrates and judges, and around 90 of its 100 lawyers.

Sierra Leone's tribes each practise their own versions of customary law. They are partly products of colonial rule in that they evolved in response to Britain's concentration of authority under tribal chiefs in ways that undercut their accountability. As elsewhere, customary systems are not codified and are continuing to evolve.

Integration of the formal and customary systems occurs at state-sanctioned 'local courts', which apply customary law. The chairmen are appointed by paramount chiefs, the top officials of the chiefdoms (districts), with the approval of the local government ministry. To complicate matters further, many paramount and lower chiefs preside over 'chiefs' courts', which are banned by statute but nevertheless administer customary law in the countryside.

Sierra Leoneans' use of the customary system is a matter of convenience and necessity. It can be fair and functional, but can also be subject to corruption. Unlike Bangladesh and the Philippines, where domestic NGOs have initiated programmes to strengthen access to justice, post-war civil society in Sierra Leone has not exhibited the same capacity for indigenous efforts. In 2003 the Sierra Leonean National Forum for Human Rights and the US-based Open Society Justice Initiative (OSJI) collaborated to launch a programme, Timap for Justice, partly inspired by South African NGOs' rich experience with paralegal development.[17]

Now an NGO, Timap for Justice is staffed by 13 paralegals spread over several jurisdictions. One example of its work involved the paramount chief of Kholifa Rowalla, who removed consideration of a farmer's case from the local court and insisted on hearing it himself, despite the fact that he was related to the two parties opposing the farmer. He repeatedly fined the farmer and charged him costs while hearing the case.

Approached for advice, a Timap paralegal informed the farmer that the chief's action in removing the case from the court was illegal under the formal justice system's Local Courts Act. This information buttressed the farmer's willingness to pursue the case. A Timap attorney helped

16 This section is largely based on papers prepared by Vivek Maru, who helped launch Timap for Justice. See Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (New York: Open Society Institute, 2006); and Vivek Maru, 'Between Law & Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide', *Yale Journal of International Law*, vol. 31, no. 2, Summer 2006.

17 For example, the South African NGO Black Sash comprises paralegals who help citizens navigate obstacles to accessing social services and enforcing their rights. These obstacles include corrupt behaviour by officials and some of the solutions involve pursuing complaints through administrative law. Where patterns of corruption emerge, Black Sash moves beyond individual case work to advocate reforms in policies and general practices.

the paralegal draft a letter to a local court officer about the matter. The paralegal also approached the official, who in turn contacted the country's customary law officer – it only had one at the time – a Freetown-based lawyer working in the office of the attorney general. When the latter visited the area, the two officials discussed the matter with the paramount chief. Perhaps persuaded by the presence of the lawyer he returned the funds and relinquished control of the case. The paralegal followed up by visiting the chief to assuage any hard feelings stemming from the incident.

Timap also intervened after a paramount chief and other officials in Bumpeh-Gao chiefdom failed to persuade two NGOs to act accountably. The NGOs had failed to follow up on services they had paid local contractors to deliver to amputees who had lost limbs during the civil war. The NGOs had provided some assistance, but had not pressed the contractors to use funds for other help (building wells), allowing them to abscond with the money. A combination of meetings, letters, threats of legal action and other pressure on both the NGOs and contractors resulted in the delivery of the promised aid.

How was Timap able to prevail? In the words of one of the NGO's co-founders: 'Though it has no statutory authority, the project has demonstrated that sometimes just the colour of law – "human rights" ID cards (issued by Timap to its personnel), typed letters on letterhead paper (in a society that is largely illiterate), knowledge of the law and, importantly, the power to litigate if push comes to shove – causes many Sierra Leoneans to treat the Timap office with respect.'[18] This intimidation or persuasion will not influence a person powerful enough to ignore top officials. But many persons seeking justice in Sierra Leone and elsewhere are not going up against leading powerbrokers.

Conclusion

One insight that emerges from international NJJS experience is that NGOs' anti-corruption impact typically springs from broader efforts to improve justice, governance or development. What does this mean for international anti-corruption efforts and what should policymakers, funding agencies and NGOs do?

- There is a need for expanded donor funding for civil society engagement with NJJSs, given the importance of such systems in people's lives. Even where such support does not target corruption, it can yield useful anti-corruption impacts.
- Much of the funding should go to NGOs and allies that work to improve NJJS as a whole, or that focus on access to justice, gender justice or other governance and development issues. Support that focuses exclusively on anti-corruption can be useful, but NGOs with broader agendas may be equally viable vehicles for good governance (including anticorruption) impact.

18 Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (New York: Open Society Institute, 2006).

- NGOs are not the sole components of civil society or its anti-corruption endeavours: community-based groups, mass movements, media, religious federations and other institutions can all be part of the mix.
- A promising feature of NGOs' legal service work is paralegal development. It stretches anti-corruption support in a cost-effective manner by providing legal help in places where lawyers are unavailable or unaffordable.
- Civil society approaches to combating NJJS corruption must be tailored to specific contexts, with lessons from one society being adapted cautiously, if at all, to another.
- There is a drive in development circles to transform justice systems, judicial or otherwise, by funding ambitious government programmes in the hope they will achieve systemic change. This works to the exclusion of more modest but effective NGO efforts. Even under the best circumstances justice reform and anti-corruption progress are likely to be modest and often indirect. A patient approach that includes ample civil society funding can make the most sense.[19]
- Donors should think more in terms of sustainability of impact than organisational sustainability. Regardless of whether an NGO thrives, investment in it will be worthwhile if its impact lives on through paralegal knowledge or contributions to community dynamics.
- Policymakers and funding agencies should support research that explores the dynamics of corruption in NJJSs and civil society efforts to combat it. Such research can reap substantial benefits in improving the lives of 'the other 90 per cent' of developing country populations whose justice priorities lie beyond the courts.

19 See Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Rule of Law Series, No. 41, Democracy and Rule of Law Project, Carnegie Endowment for International Peace (Washington: Carnegie Endowment, 2003), www.carnegieendowment.org/publications/index.cfm?fa=view&id=1367&prog=zgp&proj=zdrl

6 Lessons learned about fighting judicial corruption

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

Fighting judicial corruption: a comparative perspective from Latin America

Linn Hammergren[1]

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

1 Linn Hammergren is a senior public sector management specialist in the World Bank Latin America regional department, working in the areas of judicial reform and anti-corruption. The opinions expressed here are those of the author and in no way represent the official views of the World Bank.

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

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

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

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

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

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

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

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

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

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

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

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

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

Argentina and Brazil

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

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

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

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

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

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

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

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

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

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

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

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

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

Dominican Republic and Paraguay

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

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

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

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

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

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

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

Review

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

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

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

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

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

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

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

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

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

Sub-national reform efforts: the Lagos state experience

Oluyemi Osinbajo[1]

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

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

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

1 Professor Oluyemi Osinbajo is Lagos State Commissioner for Justice and Attorney General. Additional information was provided by Osita Nnamani Ogbu (TI Nigeria, Abuja).
2 Sections 231, 238 and 250 of the 1999 constitution.

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

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

A blueprint for change

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

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

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

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

3 Section 271 of the 1999 constitution.

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

5 Ibid.

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

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

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

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

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

A new deal for judges

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

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

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

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

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

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

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

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

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

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

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

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

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

Trial time down by nearly half

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

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

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

10 Anecdotal evidence collected by the authors.

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

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

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

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

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

Keith Henderson[1]

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

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

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

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

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

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

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

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

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

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

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

Centralised power vs. judicial independence

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

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

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

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

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

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

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

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

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

Networks, bribery and political interference

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

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

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

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

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

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

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

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

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

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

The Wuhan affair

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

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

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

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

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

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

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

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

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

16 See www.worldbank.org/wbi

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

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

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

Judicial education and standards

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

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

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

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

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

Next steps

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

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

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

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

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

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

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

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

Assisting judicial reform: lessons from UNODC's experience

Fabrizio Sarrica and Oliver Stolpe[1]

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

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

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

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Project design and implementation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Implementing and monitoring reforms

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

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

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

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

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

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

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

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

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

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

Evaluation and impact

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

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

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

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.

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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.

Roxana Salazar and
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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(Supreme Court advocate and legal adviser, TI Pakistan, Karachi)

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.

Judith February
(Institute for Democracy in South Africa, Cape Town)

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.

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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.

Davies Chikalanga, Goodwell Lungu and Ngoza Yezi (TI Zambia, Lusaka)

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

Part three

Corruption research

8 Introduction

Robin Hodess[1]

Each year the *Global Corruption Report* includes a selection of recent research on various aspects of corruption. The first part of the research section this year focuses on judicial corruption, complementing the previous two sections of the book by providing an empirical grounding and analysis of this widespread problem. The other contributions to this section present a range of approaches, from new methodologies for measuring corruption to studies that assess the effectiveness of anti-corruption efforts to date. All aim to offer guidance to policy-makers that can help increase the chance of success of anti-corruption efforts.

Corruption and the judicial system

Stefan Voigt's study investigates the possible determinants of judicial corruption by examining various factors thought to influence levels of corruption in the judiciary. The study provides evidence of strong associations between levels of judicial corruption and factors such as the official salary of judges, the level of complexity of the judicial system and the expediency with which the courts process cases.

Next, Ernesto Dal Bó, Pedro Dal Bó and Rafael Di Tella address the role immunity laws play in the fight against corruption. By considering an environment where influence on public officials is carried out not only through bribes but also through threats, they are able to conclude that immunity laws do not hinder the fight against corruption, but rather, in the presence of threats and an ineffective justice system, might actually help.

Åse Grødeland's contribution analyses why judicial reform processes that consider only changes in formal institutions and laws may not be enough to curb corruption. Via interviews and surveys gathered from various transition countries, Grødeland highlights how informal networks and social norms might help foster an environment of corrupt practices. Her findings support the conclusion that any successful judicial reform process must consider factors that lie outside the formal system.

A number of recent studies focus on measuring the effectiveness of the anti-corruption policies already in place in the judicial system. This is important for determining the progress made in the anti-corruption effort, since unless anti-corruption initiatives are properly enforced, they have little real impact on curbing corruption. Eric Frye, Tiernan Mennen and Richard Messick describe the importance of monitoring the enforcement of anti-corruption laws, measuring the

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degree of enforcement in various countries by analysing data from primary government corruption enforcement institutions, such as anti-corruption agencies and prosecution services.

Measuring corruption trends

Researchers continue to seek ways to measure the largely hidden phenomenon of corruption. Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi reflect on several of the main issues perplexing analysts who seek to measure corruption, arguing that perception data are a valid measure of corruption, are actionable, and are crucial to anti-corruption work.

Transparency International's Corruption Perceptions Index (CPI), now in its 12th year, ranks 163 countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. Nearly half of the countries scored below 3 points, indicating rampant perceived corruption. The CPI 2006 shows that corruption and poverty often go hand-in-hand.

Corruption and private businesses

Transparency International's Bribe Payers Index (BPI) 2006 focuses on the supply side of bribery. Results of the BPI 2006 signal an apparent double standard employed by foreign companies when operating abroad: companies are shown to be more likely to resort to bribery when working in poorer countries. Thus the countries least equipped to deal with corruption are often the hardest hit by bribery from abroad, which can often undermine and elude anti-corruption initiatives at home.

The importance of the private sector in the international debate on combating corruption is emphasised in two further research contributions. The first, by John Bray, analyses the contrasting experiences of companies from seven different jurisdictions, showing that corruption remains a major cost to international business. Despite the existence of various anti-bribery laws, many companies have low awareness levels of anti-corruption laws in their countries and are also unconvinced that corruption levels will be reduced in the international business arena in the near future. The second study, by Tina Søreide, looks at the reasons why firms hesitate in speaking out against bribes given by their competitors, and examines the role of competition authorities in the fight against business corruption.

Country case studies

As more innovative empirical methods are developed and employed, increasingly detailed data on corruption emerge and enable more in-depth assessment of corruption's country-specific characteristics. The study by Leon Zurawicki compares specific levels of perceived corruption from various surveys in two emerging world economic giants, Brazil and Russia, across several industries and their dealings with the state. The analysis both highlights the variability of specific indices of corruption and suggests that detailed analysis at country and industry level can help determine the premium for investment in one country.

Other contributions to the *GCR 2007* focus on corruption trends within one country. TI Czech Republic developed a methodology for estimating losses caused by the inefficiency and lack of transparency in the awarding of public contracts at both the central and municipal levels. TI Russia measures differences in the incidence of corruption across Russia. By dividing the country into 40 regions of analysis, authors Phyllis Dininio and Robert Orttung are able to demonstrate extensive variation in corruption trends within the country and can recommend policies at both national and regional levels.

With the increased prevalence of surveys as the method of collecting data on corruption, it is important to develop methods for ascertaining the accuracy and reliability of the survey data collected. Since corruption is a sensitive topic, it might be expected that some survey respondents would be 'reticent' to acknowledge corruption, preferring to give incomplete or non-truthful responses. In a study focused on private sector firms in Romania, Omar Azfar and Peter Murrell explore an innovative randomised response method that could be used to identify reticent respondents, who can then be removed from the sample. Innovations in methodology such as these help to make headway in the collection of more accurate and reliable data, for the analysis of both national and cross-national corruption trends.

Measuring progress and looking ahead

While corruption's prominence on the international agenda has risen significantly over recent years, there have been only limited assessments of anti-corruption campaigns thus far. TI's Global Corruption Barometer 2006 gives an indication of the progress of anti-corruption efforts, with mixed results. The survey highlights the low opinion that the majority of respondents have of their government's anti-corruption efforts, and the extent to which the police are by far the most bribed public sector grouping around the world.

Luís de Sousa and João Triães' study traces the creation and development of anti-corruption agencies, providing a picture of the agencies' far broader mandate at the time of their creation compared to that at present and revealing the time taken for them to act on complaints. Carlos Santiso examines the effectiveness of Autonomous Audit Agencies in strengthening transparency and accountability in public finances in Latin America.

The very existence of anti-corruption campaigns and institutions in so many countries is an encouraging sign that the battle against corruption has become entrenched. If these anti-corruption initiatives are poorly implemented, however, their existence is of little benefit. In continuing the fight against corruption, it is important therefore to continue assessing progress, not just to identify needs for new anti-corruption laws and institutions but to evaluate whether those already in place are being effectively employed to curb corruption.

9 When are judges likely to be corrupt?

Stefan Voigt[1]

What factors influence the level of corruption within the judiciary? To answer this question a number of hypotheses will be developed and tested against a measure of judicial corruption from the World Economic Forum's *Global Competitiveness Report*, which asks local businesspeople about the frequency with which 'irregular payments in judicial decisions' occur.[2] Tentative policy implications can be drawn from the results.

Possible determinants of judicial corruption

Corruption can be defined as the misuse of public office for private gain. Judicial corruption refers to corruption in the judiciary broadly conceived. Here, the focus is primarily on prosecutors and judges.

Economists assume that actors react systematically to incentives. The higher the (expected) utility of a certain behaviour, the more likely it is that this behaviour can be observed. The more attractive corrupt behaviour appears to be, the more it can be expected. In order to explain different levels of corruption we can ask how attractive it is to be corrupt in different institutional settings.

The expected utility of being corrupt can be calculated as the expected advantage (e.g. the sum of money paid) times the probability of *not* being discovered misusing public office. From this product, we need to subtract the potential costs that a member of the judiciary has to bear if his or her behaviour is discovered, times the probability of being discovered. But since being discovered is not identical to being sentenced, an additional probability has also to be factored in. This equation can now be used to derive a number of hypotheses.

Hypothesis 1

The lower the official salary, the higher the likelihood of corrupt behaviour. If the official salary of judges and prosecutors is low, then bribes can appear quite attractive. If official salaries are high, the potential cost of being corrupt may be high – the official salary will be lost if the

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2 World Economic Forum, *Global Competitiveness Report* (Oxford: Oxford University Press, 2004). The answers range from 1 ('very common') to 7 ('never occurs') and are available for some 80 countries.

judge or prosecutor is discovered and sentenced. Information on remuneration of judges and prosecutors was generated through questionnaires.[3]

Hypothesis 2

The higher the complexity of the judicial system, the higher the expected level of judicial corruption. Some judicial systems are highly complex, meaning that a high number of procedural provisions exist for many steps of judicial decision making. Highly complex systems often lack transparency, both for those who use them and for outside observers. We assume that complexity increases the incentives to offer bribes because many things can go wrong in such systems. Due to the lack of transparency, the likelihood of being discovered might be lower than in simpler systems. The indicator developed by Djankov et al to proxy for procedural formalism of the judicial system is used.[4]

Hypothesis 3

If judicial decisions, as well as the underlying reasoning, need to be published, expected corruption levels are lower. A low degree of transparency is central to the last hypothesis. It can, in turn, be argued that a high degree of transparency ought to be connected with low degrees of corruption. In their questionnaire, Feld and Voigt (2003, 2006) collected information on this variable.

Hypothesis 4

The slower the judicial system, the higher the likelihood of corruption. It appears plausible to assume that slow judicial systems increase the incentives of private parties to offer bribes to judges to speed up their case. Djankov et al. (2003) have constructed two standard cases (evicting a tenant for not paying her rent; cashing a bounced cheque) and have collected information on how long it takes to get them through the court system in more than 100 countries. These two indicators are used as a proxy for the time dimension here.

Hypothesis 5

The higher the degree of checks and balances, the lower the expected level of judicial corruption. An ideal proxy would look at the degree of checks and balances within a judicial process, and that could be the subject of future work. Here, we measure the number of veto players in a

3 Information on prosecutors' salaries collected by S. Voigt, L. Feld and A. van Aaken, 'Power over Prosecutors Corrupts Politicians – Cross Country Evidence Using a New Indicator', Mimeo: University of Kassel (2004). Information on judges' salaries from L. Feld and S. Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators', *European Journal of Political Economy*, 19(3) (2003); and L. Feld and S. Voigt, 'Making Judges Independent – Some Proposals Regarding the Judiciary', R. Congleton, ed., *Democratic Constitutional Design and Public Policy – Analysis and Evidence* (Cambridge, MA: MIT Press, 2006).

4 S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'Courts: The Lex Mundi Project', *The Quarterly Journal of Economics*, 118(2) (2003).

government system, that is the number of actors who have to agree on new legislation, provided by the variable 'checks' contained in the *Database of Political Institutions*.[5]

Hypothesis 6

If anti-corruption agencies increase the likelihood of corrupt behaviour being sentenced, then such agencies will be correlated with lower degrees of corruption. Our test looks simply at whether an anti-corruption agency exists (using a list of all known anti-corruption agencies produced by Alan Doig, University of Teesside, England), but does not look at the relative performance of anti-corruption agencies.

Hypothesis 7

Countries in which the prosecution agencies enjoy a monopoly have a higher level of corruption. Economists predict that monopolists supply goods in sub-optimal quantities. If courts and prosecutors have a monopoly in prosecuting corruption, the degree of prosecution 'supplied' might be too low. Some countries allocate the competence to initiate prosecution to other actors, such as the police, the victims, NGOs and the like, which should increase the amount of prosecution and reduce the expected utility from corruption. Voigt et al. (2004) collected information on how many actors beyond the prosecution agency have the right to prosecute.

Empirical results

Former studies on the general causes of corruption have shown that the higher the per capita income and the more open to international trade an economy is, the lower the expected level of corruption. These two variables[6] are used as our vector of standard explanatory variables, M. The variables just discussed are added one by one. Eventually, all these explanatory variables are tested simultaneously in order to test the robustness of the explanatory variables. N is the vector of the other variables, and δ is the error term.[7] Most results are based on 63 countries. We are, thus, interested in estimating the following equation:

$$\text{Judicial corruption}_i = \alpha + \beta M_i + \chi N_i + \delta_i$$

Table 1 contains the results. Column 1 shows that per capita income and the openness of an economy already 'explain' some 46 per cent of the variation in judicial corruption (though the openness variable is not significant).

5 T. Beck, G. Clarke, A. Groff, P. Keefer, P. Walsh, 'New Tools and New Tests in Comparative Political Economy: The Database of Political Institutions' (Washington, D.C.: The World Bank, 2000).

6 Both variables from A. Heston, R. Summers and B. Aten, *Penn World Table, Version 6.1*, Center for International Comparisons at the University of Pennsylvania (CICUP), December 2002.

7 We are dealing with a variety of explanatory variables and cannot exclude the possibility that some of them are highly correlated among each other. We have analysed the correlation matrix. None of the correlations is larger than 0.5 and very few turn out to be significantly correlated. To be sure that the results are not driven by outliers, we repeated all estimations excluding outliers (here defined as observations deviating more than two standard deviations from their predicted values). It turns out that the coefficients are rather stable.

The income of judges and prosecutors is found to be highly – and negatively – correlated with judicial corruption: the higher their salary, the lower judicial corruption (see column 2). However, the other columns show that this result is influenced by other factors: column 7 shows that an improvement of judicial income of one standard deviation (which is 0.46 for this variable) would only lead to an improvement of judicial corruption of 0.23 (on a scale from 1 to 7).

Columns 3 and 4 show that both procedural formalism as well as the time needed to get a court decision are highly significant for explaining differences in the levels of judicial corruption between countries. The adjusted R square (the part of the variation in corruption levels that is 'explained' by the variables considered) improves by some 13 percentage points (from 0.504 to 0.633) simply by including the formalism variable, and by 10 percentage points by simply including the time variable. It should be noted, however, that causation might run in the opposite direction. It is possible that corrupt judges and their staff might introduce more complex judicial procedures and also delay cases on purpose to get payoffs from corruption. Nonetheless, it can be seen from this analysis that there is a clear association between procedural formalism/time needed to get a court decision and judicial corruption.

Column 5 contains three insignificant variables that are also insignificant when estimated one by one (not shown here). Neither the obligation to publish court decisions, nor the level of checks and balances nor the existence of anti-corruption commissions has a significant impact on the level of corruption within the judiciary. In columns 6 and 7 the dummy for anti-corruption commissions has a negative sign, implying that they are correlated with a *higher* level of judicial corruption. Without time-series data it is impossible to conclude that the introduction of such agencies causes corruption levels to increase. Causality could run from high levels of corruption to the introduction of anti-corruption agencies, and not the other way around.

Column 6 unites all explanatory variables used until here in a single estimation. It shows that all of the explanatory variables that were significant when estimated in isolation keep their significance at least at the 10 per cent level when estimated jointly with the other variables. Finally, column 7 documents the effect of the absence of a monopoly to prosecute on judicial corruption levels. The variable has the expected sign (implying that the absence of a monopoly leads to less corruption), and is also significant at the 5 per cent level. The explanatory variables contained in column 7 'explain' more than 67 per cent of the variation in corruption levels.[8]

Potential policy implications

Our results seem to imply four measures to reduce judicial corruption: increase the remuneration of judges and prosecutors; reduce procedural formalism; reduce the time needed to arrive at judicial decisions; and get rid of the monopoly of prosecution agencies to initiate the prosecution of suspects. Yet, whether a marginal improvement in the salary of judges and

8 But also note that the number of observations has dropped to 43 in this column.

Table 1: OLS regressions with judicial corruption 2004 as dependent variable

Variables	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Per cap. income 2000 log	1.727** (7.597)	1.421** (5.068)	1.456** (6.170)	1.143** (4.818)	1.510** (4.356)	1.159** (4.269)	1.324** (5.595)
Openness (imports plus exports)/GDP	0.003 (1.519)	0.005* (2.463)	0.002 (1.039)	0.003(*) (1.659)	0.004(*) (1.770)	0.002 (0.842)	0.002 (0.846)
Income of judges and prosecutors		0.703** (3.519)	0.479(*) (1.675)	0.487(*) (1.726)	0.646* (2.019)	0.474(*) (1.665)	0.452 (1.542)
Procedural formalism			−0.454** (6.156)			−0.359** (3.977)	−0.415** (4.086)
Time needed to decide				−0.015** (4.454)		−0.010** (2.816)	−0.009* (2.233)
Obligation to publish decisions					0.118 (0.294)	0.067 (0.202)	0.123 (0.437)
Checks and balances					−0.037 (0.438)	−0.001 (0.011)	−0.022 (0.296)
Anti-corruption agency					0.183 (0.606)	−0.215 (0.897)	−0.249 (1.075)
Prosecution monopoly							0.619* (2.000)
Constant	−7.099	−5.484	−3.758	−2.685	−6.053	−1.529	−2.329
$\bar{R}^2$	0.462	0.504	0.633	0.606	0.485	0.653	0.672
SER	0.900	0.864	0.743	0.770	0.881	0.723	0.785
J.-B. Test on Normality	3.893	3.289	1.242	2.446	3.372	0.660	2.118
Number of observations	63	63	63	63	63	63	43

prosecutors would indeed lead to a reduced level of judicial corruption is unclear: as long as corruption is safe (expected sanctions are low), why should one stop being corrupt all of a sudden? This situation can also be interpreted as an equilibrium with high rates of corruption. In such a situation, the question becomes: what can be done to switch to an equilibrium with low corruption levels? It seems plausible to argue that a number of isolated measures are unlikely to induce such a change of equilibriums and that simultaneous changes in a number of judicial institutions promise to have more significant effects. At this stage of research these are little more than educated guesses. For future research, the analysis of single cases that have been identified as success stories would be worthwhile.

10 Bribes, punishment and judicial immunity

Ernesto Dal Bó, Pedro Dal Bó and Rafael Di Tella[1]

During the height of the Argentine crisis of 2002, amid crowds of furious protesters shouting '*que se vayan todos*' (Spanish for 'let them all go') against a political class perceived as deeply corrupt and self-serving, the IMF requested that the country pass an immunity law for central bank directors. Since this would extend the protection already enjoyed by politicians from judicial investigations of misconduct to members of an institution at the centre of the country's financial crisis, this appeared to be an incomprehensible proposal. In the timid debate that followed, it was argued that, while possibly detrimental to fighting corruption, such laws were necessary for the sound functioning of the financial system. For those seriously concerned with reducing corruption, however, this presents a legitimate question: Are immunity laws an obstacle in reducing corruption?

The short answer we offer in Dal Bó et al. (2006) is that not only do immunity laws not hinder the fight against corruption, but that, under some conditions, they actually help. To understand this, we must first accept that influence is carried out not only through bribes and lobbying, but also through threats and punishment.

Political influence in the real world

During their first week in office, Colombian judges and other public officials involved in the anti-drug war often receive a message asking '*Plata o plomo?*' It reminds public officials that there is an alternative to fighting drugs and receiving *plomo* (Spanish for lead, as in bullets), which is not fighting drugs and receiving *plata* (Spanish for silver or money, as in a bribe). The literature on political influence cannot explain this phenomenon, as it concentrates almost exclusively on bribes, presenting the policymaker as an auctioneer who receives alluring 'bids' from one or more interest groups.[2] Since the overwhelming evidence on influence reflects the simultaneous use of both positive and negative incentives (including violence, legal harassment and smear campaigns) in the real world, this is a big limitation to our understanding of influence. In order to make some progress towards a more realistic understanding

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2 See e.g. D. Baron, 'Service Induced Campaign Contributions and Electoral Competition', *Quarterly Journal of Economics* (1989); G. Grossman and E. Helpman, 'Protection for Sale', *American Economic Review*, 84(1994); T. Groseclose and J. Snyder, 'Buying Supermajorities', *American Political Science Review*, 90(1996); E. Dal Bó, 'Bribing Voters', Oxford University Working Paper (2000).

of political influence, we build a model where groups attempt to influence policies using both bribes *and* the threat of punishment. We show that this more realistic model leads to interesting and testable predictions about the quality of a country's public officials and also helps us to better understand the role of some institutions, such as those granting politicians immunity from legal prosecution.[3]

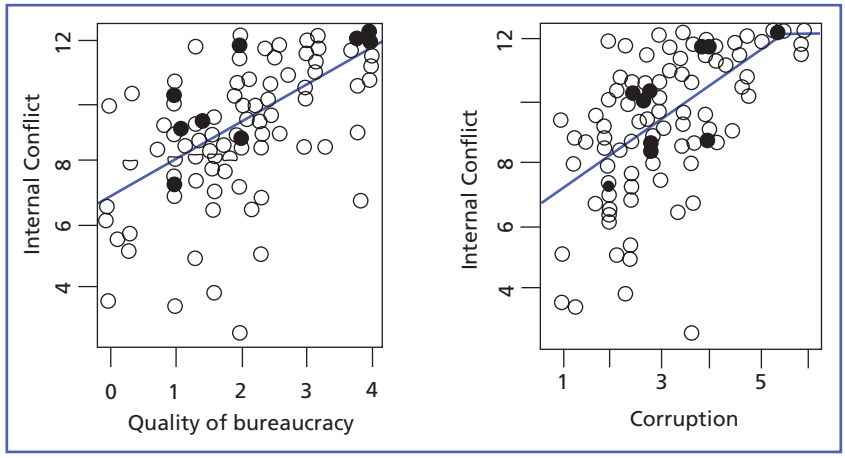
The model has two stages. In the first, citizens with different abilities decide to enter public life depending on the total expected payoff (including all bribes and threats) received by public officials. In the second stage, the official is influenced by a pressure group that has access to both methods of influence (bribery and threat of punishment) in order to obtain a given favour or resource. While bribes may increase the expected payoff to public officials, threats definitely lower the attraction of entry into public office, introducing a *negative* payoff for entry. These assumptions imply that in a world where the pressure group has access to both bribes and threats, the quality of public officials falls relative to that in a world where bribes are the only avenue of influence. This is because in a world where *plomo* is present, payoffs for public service are lower, driving away high-ability individuals who are more likely to find attractive jobs in the private sector.

The cheaper the access to threats (e.g. the less expensive it is to hire thugs, manipulate the judicial system or influence the media), the greater the number of pressure groups who can afford to influence public officials (via both bribes and threats) in the *plata o plomo* arena. A further effect of cheaper threats is that there is a higher likelihood of pressure groups using the *plomo* route of influence as a substitute to the *plata* route, further lowering payoffs for public officials and in turn, the quality of individuals in public office. Therefore, a testable prediction from this model is that *more violent countries – where threats are cheaper – will have worse politicians and more corruption*.

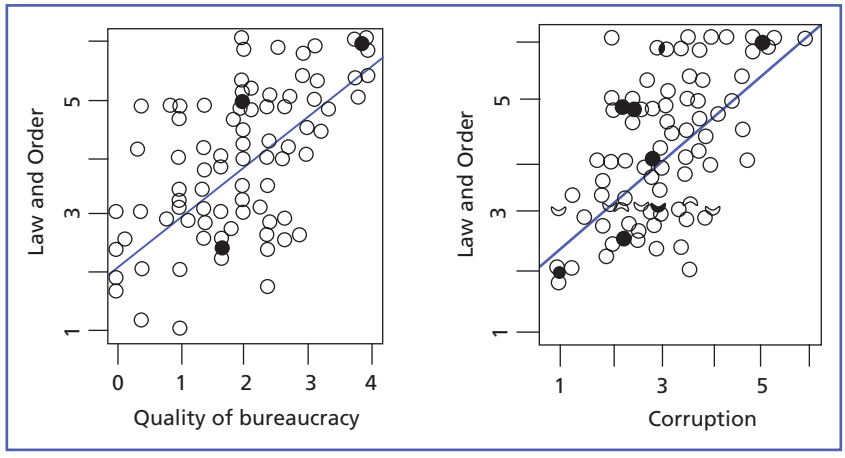
This prediction does not appear far-fetched. The following panels show correlations between corruption, the quality of public bureaucracy, and two different proxies for the level of violence in the country: (i) the intensity of internal violent conflict, and (ii) the prevalence of law and order. These correlations are computed on indices produced by the International Country Risk Guide for 145 countries between 1994 and 2001. The measures of internal conflict and corruption are in fact measures of how good a grade a country obtains. Thus, a high index of internal conflict means a peaceful country, and a high index of corruption means the country has clean practices. As is clear, countries with lower grades in terms of proxies for violence (i.e. the conflict and law and order indices are lower) display both worse grades in terms of corruption (a lower corruption index, indicating more corruption) and worse grades in terms of public bureaucracies, indicating bureaucracies of lower quality.

3 See *American Political Science Review* Vol. 100, No. 1 (February 2006) for the full version of this model.

(i) Internal conflict



(ii) Law and order



Moreover, countries might be trapped in a vicious cycle, where in an environment of cheap *plomo*, low-ability people take up public office. Since these low-ability individuals are incapable of altering the undesirable environment (e.g. by providing tighter law enforcement to limit the use of threats), good candidates stay away from politics and the bad conditions are perpetuated.

Judicial immunity

The *plata-plomo* model can be further extended and applied to official immunity. As explained above, the granting of immunity to the president and board of directors of the Central Bank of Argentina was the key request of the IMF during negotiations in 2002 in the context of the economy's collapse. Given the weakness of the country's judicial institutions,

banks affected by the decisions of the Central Bank found it easy to initiate legal actions against bank regulators.[4]

Note that one possible form of attack is to accuse an official of corruption. In countries with weak judicial systems, it is hard for the unjustly accused officials to prove their honesty. Thus, an honest official will fear such bogus accusation for fear of loss of reputation, loss of future employment opportunities, high costs of a legal defence, and the possibility of jail time. Thus, in relation to our model, immunity has two effects. On the one hand, it benefits honest officials by insulating them from judicial actions manipulated by a pressure group. On the other hand, it makes corrupt officials less accountable to an independent judiciary.

The model shows that when justice is relatively ineffective (which means that the likelihood of the justice system detecting corruption is low, and its ability to discard politically motivated accusations is also low), immunity has a greater effect on protecting the honest politician from false accusations than on sheltering the corrupt politician from true justice. A society with a bad judiciary *may be able to improve the quality of politicians and reduce the amount of corruption by granting immunity to officials*. When justice is relatively *effective*, an increase in immunity has a higher effect on sheltering the corrupt politician than on protecting the honest one, hence increasing state capture.

An important question is how a country with high corruption and bad officials can change for the better. Our basic model emphasises that gradual restrictions on the scope for private coercion (for instance, through better judiciary and independent media) will gradually reduce corruption and improve the quality of politicians. The idea that countries might be trapped in an undesirable equilibrium of cheap *plomo* and low-quality politicians suggests the possibility that crackdowns may take the system from a bad equilibrium to a good one, permanently improving matters. In terms of granting immunity to officials, this study shows that tradeoffs to increased immunity may exist, and whether or not it is appropriate to grant immunity would depend a lot on the general situation of justice in the relevant country.

4 See W. Bernhard, 'A Political Explanation of Variations in Central Bank Independence', *American Political Science Review*, 92(2) (1998).

11 Informality, legal institutions and social norms

Åse Berit Grødeland[1]

During the socialist era, the main purpose of the judiciary was to protect the socialist order and the rights of the citizens. Transition brought about a dramatic change in the role of the judiciary and also greatly expanded its tasks. Judicial reform has so far been only partially successful. One of the reasons is that it has failed to address the mentality and behaviour of those working within the judiciary, as well as those interacting with it from the outside.

NIBR, in collaboration with Charles University/GfK Prague (Czech Republic), University of Maribor/CATI (Slovenia), Vitosha Research (Bulgaria) and the Romanian Academic Society/ Gallup Romania (Romania), recently completed a three-year project funded by the Research Council of Norway. The project investigated manifestations of informality in these countries in general, and the use of contacts and informal networks, in particular in the judiciary, politics and public procurement. Data were generated by means of elite in-depth interviews (IDIs) and quota-based elite surveys (ES),[2] including 40 IDIs (10 per country) and 300 survey interviews (75 per country) with judges and prosecutors.

Findings

Judges and prosecutors in all countries except Bulgaria think people in their countries are not more law-abiding now than they were during communism. Further, there have been no major changes in the willingness to abide by the law during the last five years (all countries). Laws are primarily violated as a result of transition, and the EU accession process seems to have, if not reinforced, then at least not reduced, this trend. One Romanian respondent noted: 'As a jurist . . . I feel totally helpless in front of this avalanche of laws, especially when it is about adapting to a completely new system that is foreign to every one of us. When I said that Romanians generally respect the laws, I referred to their struggle and disposition to obey common social rules. But in reality (they are) put in the situation of not being able to respect the law . . .'.

Seeking informal outcomes in the judiciary is fairly common in Bulgaria and Romania but less common in the Czech Republic and Slovenia (see fig. 1). Still, the number of justice-sector respondents admitting that they had personally received informal requests, for example to

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2 For a detailed outline of the project structure, definitions and methodology, see Åse Berit Grødeland, 'Informal Networks and Corruption in the Judiciary' Paper presented at World Bank 'New Frontiers of Social Policy' conference, Arusha, Tanzania, 2005.

speed up or delay procedures or verdicts or otherwise influence the outcome of a court case, is rather small (see fig. 2).[3]

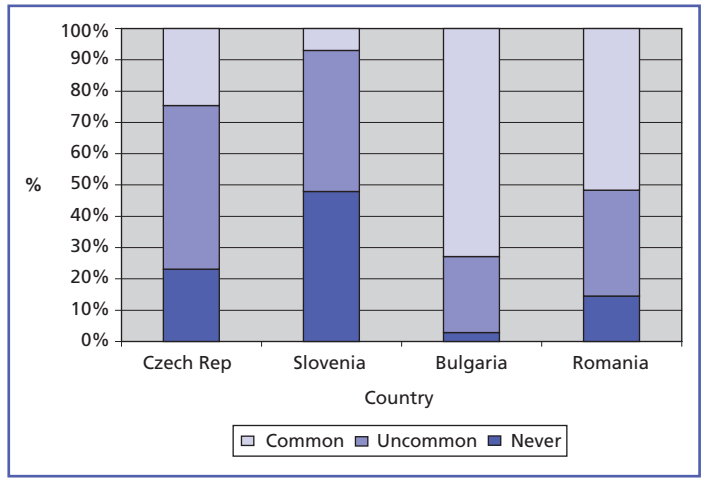

Figure 1: Seeking informal outcomes in the judiciary: the view of the judiciary

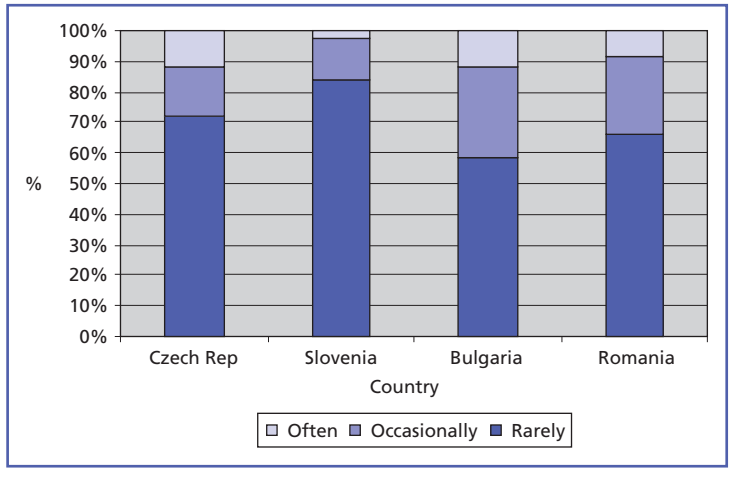

Figure 2: Personal exposure to informal requests

The IDIs suggest that contacts are primarily used to obtain favours: more specifically, to speed up or delay procedures or verdicts (Czech Republic, Slovenia); to seek promotions

3 For all figures, weighted N = 300 (75 respondents per country). Depends/don't know/missing values not included in figures.

(Slovenia); to influence court cases (Bulgaria); or to purchase favours and secure fair trials (Romania). Requests from informal networks are less common. Still, 20% of the Czech, nearly 33% of the Bulgarian and just over 33% of the Romanian respondents who took part in our quantitative survey thought informal networks are used to influence decisions in court (ES).

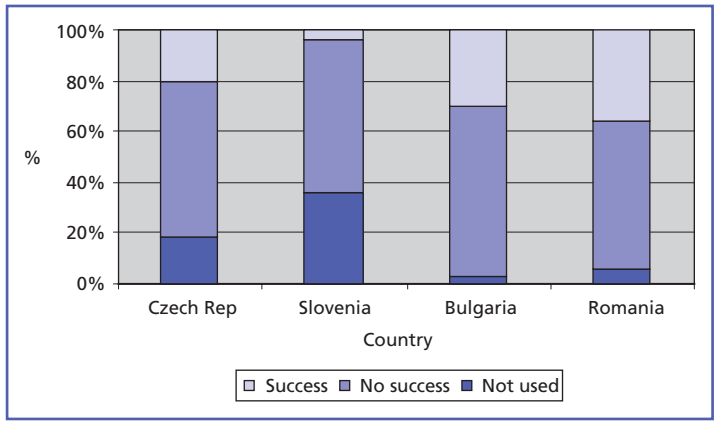

Figure 3: The judiciary on the use of informal networks to influence decisions in court

Requesters representing informal networks often make a point of conveying on whose behalf the request is made. Respondents (IDIs) identified the following networks: networks linking people in the judiciary and politics, a network around the Judges' Union (Czech Republic); networks formed around court presidents (Slovenia); networks composed of friends, former colleagues and people who graduated together and a network of former police officers-turned-lawyers (Bulgaria); a network of magistrates, education-based networks and a network linking professors, lawyers and MPs (Romania).

Respondents (IDIs) reported that a number of different strategies were applied to influence their decisions, ranging from asking or begging (Slovenia), displaying emotions or persisting (Bulgaria) to offering incentives or attempting to coerce or threaten those from whom the requests were made (Bulgaria, Romania). Combinations of strategies were also employed (Bulgaria). Romanian respondents were exposed to internal (by colleagues) as well as external (by the media or political interest) pressure. Respondents in all countries said they would only comply with requests that were within the limits of the law. Still, informal networks were perceived as influential – and as influencing the judiciary in a negative rather than a positive manner (data from survey). Bulgarian and Romanian informal networks are perceived as fairly corrupt.

Conclusions

Law-abidingness – or the lack of it – is closely linked with social norms. Changing such social norms requires a different time perspective as well as measures other than those required to

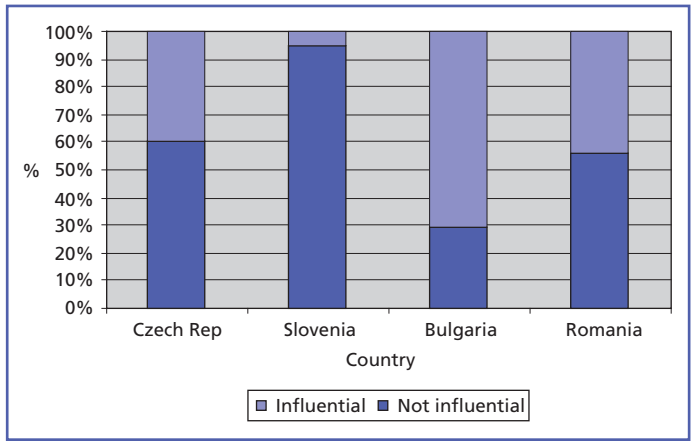

Figure 4: The judiciary on the influence of informal networks in the judiciary

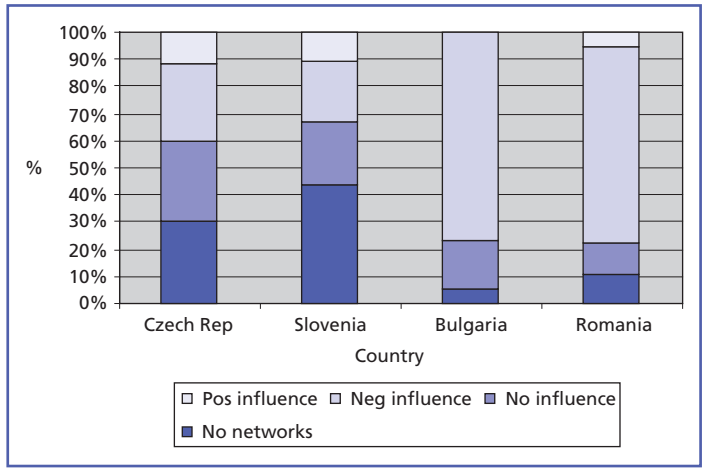

Figure 5: The judiciary on the type of influence informal networks exert in the judiciary

change formal institutions, laws, rules and regulations. The experience of post-communist states to date shows that unless judicial reform targets such social norms, it is likely to be only partially successful. In Bulgaria, the Czech Republic, Romania and Slovenia, reforms have failed to address informal practices carried over from communism. Increasing judiciary independence, improving capacity and enhancing efficiency should reduce some of the scope for informal practices. But such measures need to be accompanied by efforts to educate the general public in the rule of law and to enhance its understanding of the judiciary and how to approach it. More specific confidence building measures are also called for: the judiciary should demonstrate to the general public that everybody is equal before the law.

12 Enforcement of anti-corruption laws: the need for performance monitoring

Tiernan Mennen, Eric Frye and Richard E. Messick[1]

Central to any successful comprehensive anti-corruption policy is the deterrence of corrupt behaviour. Allegations of bribery, influence peddling, money laundering and other violations must be investigated and, when the evidence warrants, prosecuted. Courts must expeditiously, but fairly, adjudicate the resulting cases, and the penalties imposed on those convicted must be sufficient to dissuade others from similar acts.

To ensure that anti-corruption laws are indeed being effectively enforced, governments need to begin monitoring the enforcement process. Enforcement data can help administrators discover trends and allocate limited resources based on actual enforcement activities and developments rather than on perceptions. Bottlenecks in processing individuals through the various steps in the criminal justice system can be identified and resources allocated to relieve them. Statistical outliers and precipitous trends can help identify areas warranting further investigation and possible corrective action.

The World Bank is developing tools to help countries improve the ways in which they monitor the enforcement of their anti-corruption laws.[2] Preliminary work discloses a number of issues that complicate the effective monitoring of enforcement. In some countries corrupt officials may be charged with bribery but end up being convicted of, or agreeing to plead guilty to, tax evasion or lying to the police. Without careful cross-checking of data, such cases may be incorrectly catalogued. Nor is the criminal law the only avenue of enforcement. Public servants guilty of corruption are typically fired and often lose their pensions and other accrued benefits under administrative proceedings. A complete picture of the enforcement regime must pick up such non-criminal actions as well.

Despite these challenges, an objective in the monitoring of anti-corruption laws is to provide performance measures that can be acted upon. These are in contrast to such indicators as perceptions of corruption. At least in the short run there is very little policymakers can do to change perceptions of corruption. By contrast, an actionable indicator is one that is within a country's power to address. Thus, if a country finds that it has an inordinately low rate of convictions for corruption offences, it can improve its score by such steps as providing better training to prosecutors and judges and more carefully selecting cases for prosecution.

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2 This work is supported by the Dutch government.

An important part of the World Bank's project involves the development of a body of data that will capture, by way of two or more indicators, tangible efforts to enforce corruption legislation, as well as a nation's commitment to monitoring enforcement and realisation of anti-corruption goals. To this end the Bank is focusing on the primary government corruption enforcement institutions – anti-corruption agencies, prosecution services, and the courts. The World Bank research is then asking: To what degree are they investigating and prosecuting allegations of corruption? What percentage of complaints is investigated? How many investigations mature into prosecutions? How many result in convictions? And within this, are anti-corruption institutions monitoring these questions and to what degree and certainty?

Results

The data below illustrate some of the corruption enforcement monitoring results to date. Table 1 contains some enforcement statistics from anti-corruption agencies. These agencies are often created as an independent investigative commission, other times a special division of the president's office. It can be seen that Nigeria's anticorruption agency gathers data at each stage of the enforcement process – from investigation all the way to conviction or acquittal. Data posted on the agency's website show that in 2005 the government initiated 209 investigations. That same year prosecutions were begun in 14 cases, and one court case ended with an acquittal. In contrast, Colombia has an anti-corruption programme run from the president's office, but no agency that specifically monitors or reports enforcement levels.

Table 2 indicates the results for another corruption enforcement institution, namely that for the prosecutor's office of the government. Prosecutorial offices of government are largely responsible for enforcement of national corruption laws; however, few have taken the steps necessary to increase enforcement, or to actively set and monitor enforcement objectives. The mandate of more powerful corruption agencies often overlaps with prosecutors' offices, but rarely to the extent that they usurp all corruption enforcement responsibilities of the office. Thus it is important that countries have monitoring at both agency and prosecutor's office level. The data in Table 2 indicate, again, varying treatment across the sample countries. While Armenia monitors corruption investigations and prosecutions to the conviction level, Colombia monitors only up to the prosecution level. Further, while Nigeria's anti-corruption agencies monitor at all levels, its prosecution office does no reporting.

Enforcement monitoring is not a panacea. The collection and publication of enforcement data could encourage informal quotas and therefore provide a perverse incentive for unwarranted enforcement actions. A functioning and independent judiciary is one safeguard against this concern. A second is appropriate policies on promotion and publishing of data, with sufficient aggregation and time lag so as not to place perverse incentives on current law enforcement activities. Aggregation of data and delay in publication can also address any concern that publication of enforcement statistics could compromise current investigations.

Enforcement statistics can also be easily misinterpreted. They are not reliable indicators of the prevalence of corruption because their variation may result from contradictory causes.

Table 1: Enforcement statistics – anti-corruption agency

Country	Year	Investigations						Administrative proceedings		Judicial proceedings			
		Complaints	Investigations	Closed	Penalty/ resignation	Pending	Sent to prosecution	Referred to agencies	Administrative liability	Prosecuted	Pending	Acquitted	Convictions
Colombia	NA												
Armenia	NA												
Nigeria	2005	–	209	–	–	–	–	–	–	14	13	1	0
	2004	–	327	19	–	292	–	–	–	8	6	0	0
	2003	–	439	87	–	335	–	–	–	13	7	1	2

Table 2: Enforcement statistics – prosecutor's office

Country	Year	Investigations	Closed	Pending	Penalty/ resignation	Sent to prosecution	Prosecuted	Pending	Acquitted	Convicted	Average penalty
Colombia	2005 (3rd trimester)	161	–	–	–	–	–	–	–	–	–
	2004	202	–	–	–	147	–	–	–	–	–
	2003	306	–	–	–	147	–	–	–	–	–
Armenia	2002	–	–	–	–	–	463	–	–	10 (bribe)	Confiscation of property – 2
	2001	–	–	–	–	–	274	–	–	27 (bribe)	Confiscation of property – 8
Nigeria	NA										

Prosecution rates may decrease because there is less corruption to prosecute. They may increase because of greater citizen cooperation, better detection, or an increase in actual corruption. Tracking the number of investigations and prosecutions also does not address the quality and merit of these enforcement activities. Investigations and prosecutions for political purposes and without regard for due process can occur under the guise of anti-corruption efforts. The data must therefore be reviewed in combination with a country's human rights record and the due process rights afforded to the accused.

Yet, with all these caveats, it is clear that better, more comprehensive monitoring of the enforcement of the anti-corruption laws is a necessary element in an anti-corruption programme.

13 The Global Corruption Barometer 2006

Tom Lavers[1]

Introduction

TI's Global Corruption Barometer 2006 seeks to understand how and in what ways corruption affects ordinary people's lives, providing an indication of the form and extent of corruption from the view of citizens around the world.

The Barometer 2006 presents the results of a public opinion survey of 59,661 people in 62 low-, middle- and high-income countries. Now in its fourth round, the survey was carried out by Gallup International as part of its Voice of the People Survey, on behalf of TI, between July and September 2006.

Summary of results

Experience of bribery

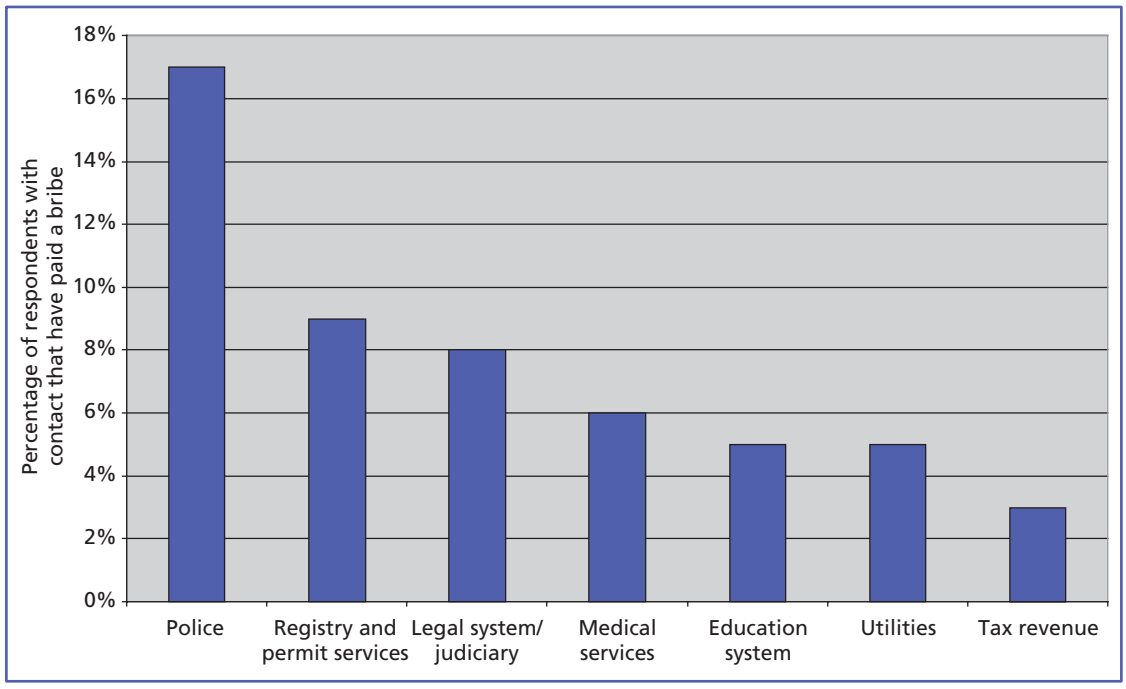
The 2006 Barometer asked respondents about their contact with different service organisations and whether they have to pay bribes in their dealings with them. The resulting data allow analysis of the patterns of bribery, the sectors most affected in different parts of the world and the people who suffer most as a result of having to make these extra payments.

Which sectors are most affected by bribery?

Figure 1 shows that the experience of paying bribes differs greatly among the different organisations covered in the Barometer. The police are the organisation to which bribes are most commonly paid, taking into account the full sample. This, viewed alongside the legal system and judiciary, which is the third most commonly affected sector, presents considerable concerns regarding corruption in processes of law enforcement. Registry and permit services are the second most commonly affected sector, with nearly one in 10 respondents who had had contact with the service reporting that they had paid a bribe.

Given that corruption in the police is shown as a major problem when we consider the aggregated responses of all 62 countries, it is interesting to see that the extent of corruption in the police force varies enormously when we break the analysis down into regional groupings. As can be seen in figure 2 below, only a small proportion of respondents from North America and the EU+ regional groupings have paid a bribe to the police. In comparison, more than half the

1 Tom Lavers was a member of the policy and research department at Transparency International.



Source: TI Global Corruption Barometer 2006

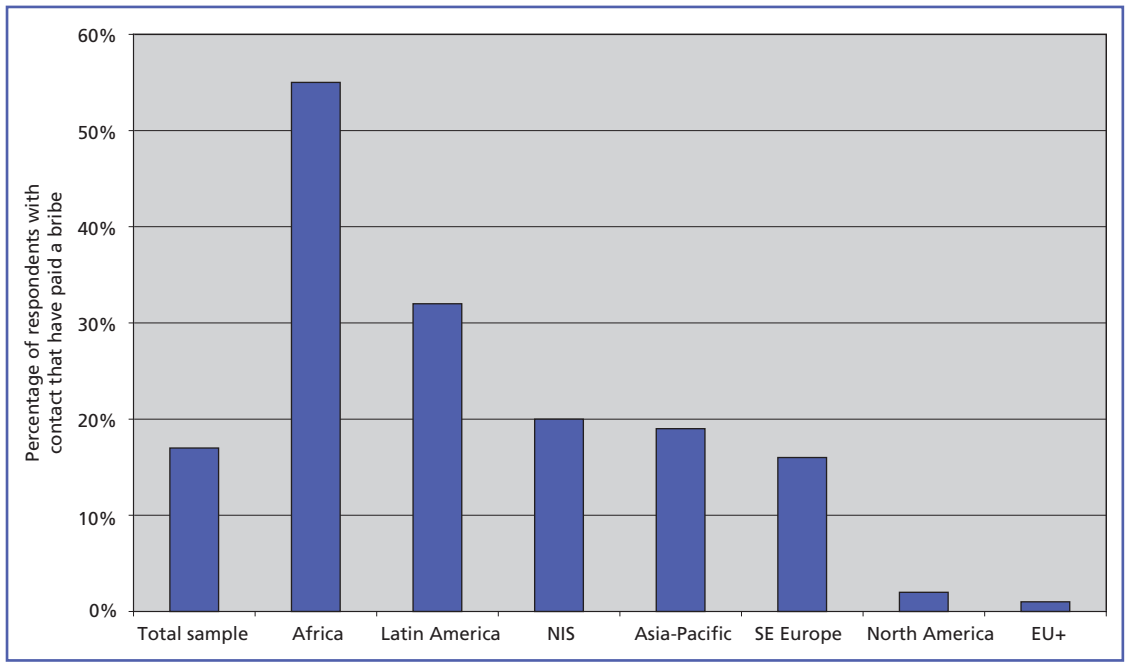
Figure 1: Percentage of respondents who have paid a bribe to different sectors (total sample)

respondents in Africa that had contact with the police in the past 12 months paid a bribe. Between the two extremes, the other regional groupings present worrying levels of corruption in the police. In Latin America nearly one in three respondents who had contact with the police paid a bribe, and in the NIS, Asia-Pacific and South East Europe the figure varies between 15 and 20 per cent.

Which regions are most affected by bribery?

African respondents to the Barometer indicated that they had, on average, paid more than two bribes each in the last year for access to services that should be their right, which is more than for any other region. The fact that more than one in two respondents in Latin America and nearly one in three in the NIS paid a bribe in the last year constitutes a major problem.

Despite the perception that corruption severely affects the organisations and spheres of life covered in the Barometer, the reported experience of bribery in the EU+ grouping and North America is relatively low, with fewer than one in 10 respondents having paid a bribe in North America and barely one in 20 in the EU+. A distinction, however, should be drawn between the different forms of corruption – the questions in the Barometer survey investigate facilitating payments paid for access to services, rather than the grand corruption that affects public



Source: TI Global Corruption Barometer 2006

Figure 2: The percentage of respondents that have paid a bribe to the police by regional grouping[2]

and private sectors. While bribery for services does not seem to be a major problem in these regions, this does not necessarily invalidate people's concerns regarding large-scale corruption.

The efficacy of governments' fight against corruption

It is interesting to examine how well respondents believe their governments are tackling corruption, or whether they indicate that government is actually encouraging corruption to continue. For governments that have been in power for a short period of time, it is unreasonable to lay the entire blame for corruption in the country at their door.

The results shown in table 1, below, highlight the poor opinion that the majority of respondents have of their governments' anti-corruption efforts. By far the most common answer is that the government is 'not effective' in its anti-corruption activities.

2 The regional groupings used here are: EU and other Western European Countries (EU+): Austria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and the United Kingdom; South East Europe: Albania, Bulgaria, Croatia, Kosovo, Macedonia, Romania, Serbia and Turkey; Newly Independent States (NIS): Moldova, Russia and Ukraine; Africa: Cameroon, Congo-Brazzaville, Gabon, Kenya, Morocco, Nigeria, Senegal and South Africa; Latin America: Argentina, Bolivia, Chile, Colombia, Dominican Republic, Mexico, Panama, Paraguay, Peru and Venezuela; Asia-Pacific: Fiji, Hong Kong, India, Indonesia, Japan, Korea (South), Malaysia, Pakistan, the Philippines, Singapore, Taiwan and Thailand; and North America: Canada and the United States.

Table 1: How would you assess your government's actions in the fight against corruption?

	Total sample	EU+	South East Europe	NIS	Africa	Latin America	Asia-Pacific	North America
Very effective	5%	4%	6%	3%	17%	7%	4%	2%
Effective	17%	18%	21%	14%	27%	18%	15%	17%
Not effective	38%	42%	30%	40%	24%	29%	34%	50%
Does not fight at all	16%	14%	19%	24%	20%	19%	18%	9%
Encourages it	15%	14%	9%	15%	9%	23%	15%	19%
Don't know	8%	8%	14%	5%	3%	4%	15%	4%

Source: TI Global Corruption Barometer 2006

Regional results

Disaggregating the results by regions shows that 42 per cent of respondents in the EU and 50 per cent in North America think that their governments are ineffective in fighting corruption. Of additional concern is the 19 per cent of respondents in North America that think their governments actually encourage corruption rather than fighting it.

The results for Latin America and Africa demonstrate a considerable difference in opinion among the sample.

Respondents in the NIS paint a picture of governments that make little attempt to fight corruption and are ineffective when they do. The most common response was that governments were 'not effective' in the fight against corruption (40 per cent), while 24 per cent answered that the government does not fight at all. This figure is the largest of all the regional groupings.

One partial explanation for the results seen here is the relative importance of anti-corruption efforts in different regions. According to most indicators, Western Europe and North America face a comparatively low risk of petty corruption, with strong institutions and a very real threat of prosecution for anyone caught resorting to illicit activities. As a result, anti-corruption efforts in these countries are relatively low on the agenda of current governments, and judgement is based on prosecution of headline cases, not on the work of anti-corruption commissions or the relative success of anti-corruption strategies. In contrast, in Africa, where corruption is generally considered to present a substantially higher risk, governments must address corruption, at least ensuring it is on the political agenda, whether or not this translates into effective action.

14 Measuring corruption: myths and realities

Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi[1]

The recognition that progress in fighting corruption requires measurement of corruption in order to diagnose problems and monitor results has sparked debate on how best to measure corruption and monitor progress in reducing it. In this context, some popular notions are commonly espoused that either lack clarity or are not backed up by rigorous analysis or evidence. In this article we highlight some of the main issues, in the form of six myths and their associated realities, and conclude by pointing to some brief implications for the private sector's role in fighting corruption.

Myth 1: Corruption cannot be measured

Reality

Corruption can be and is being measured in many forms. Different approaches serve different purposes:[2]

1. *By gathering the informed views of relevant stakeholders*. These include surveys of firms, public officials and individuals, as well as outside observers such as NGOs, multilateral donors and experts in investment rating agencies and think tanks. These data sources can be used individually or in aggregate measures that combine information from many such sources. Dozens of such sources are available, many of them covering very large sets of countries, often over several years. These are the only available data sources that currently permit large-scale cross-country comparisons and monitoring of corruption over time.
2. *By tracking countries' institutional features*. This provides information that can be related to opportunities or incentives for corruption, such as procurement practices and budget

1 The six myths on measuring corruption in this note appeared in an article in the September 2006 issue of *Development Outreach*, and are reproduced here with their kind permission. The views expressed here are the authors' and do not reflect those of the World Bank, its Executive Directors or the countries they represent. Contacts: dkaufmann@worldbank.org, akraay@worldbank.org, mmastruzzi@worldbank.org

2 D. Kaufmann, A. Kraay and M. Mastruzzi, 'Measuring Governance Using Perceptions Data' (forthcoming in Susan Rose-Ackerman, ed., *International Handbook on the Economics of Corruption*, Cheltenham: Edward Elgar, 2006), provide an exhaustive list of 22 different data sources that provide perceptions data on corruption. Examples of measuring institutional features that create opportunities for corruption include the Public Expenditure and Financial Accountability (PEFA) framework, and the Public Integrity Index of Global Integrity. Examples of audits include B. Olken, 'Monitoring Corruption: Evidence from a Field Experiment in Indonesia', NBER Working Paper No. 11753 (2005); and C.T. Hsieh and E. Moretti, 'Did Iraq Cheat the United Nations? Underpricing, Bribes, and the Oil for Food Program', *Quarterly Journal of Economics* (forthcoming).

transparency. These do not measure actual corruption, but can provide useful indications of the possibility of corruption. These efforts as yet have limited country coverage, and almost no time dimension.

3. *By careful audits of specific projects*. These can be purely financial audits or more detailed comparisons of spending with the physical output of projects. Such audits can provide information about malfeasance in specific projects within a very particular context within a country, but not about countrywide corruption more generally. These tend to be confined to specific projects and countries, and so are not suited for cross-country comparisons or for monitoring over time.

Myth 2: Subjective data reflect vague and generic perceptions of corruption rather than specific objective realities

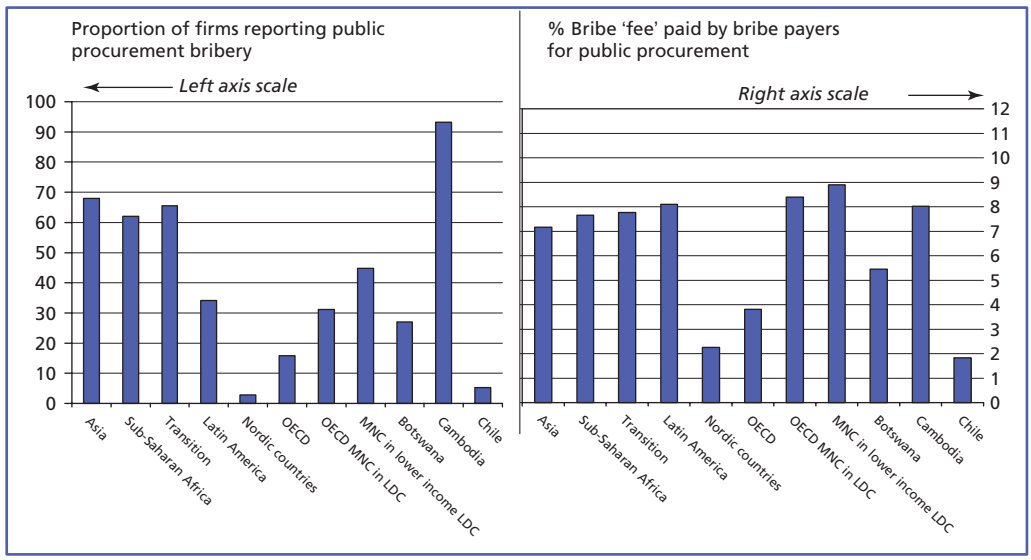
Reality

Since corruption usually leaves no paper trail, perceptions of corruption based on individuals' actual experiences are sometimes the best – and the only – information we have. Perceptions also matter directly: when citizens view the courts and police as corrupt, they will not want to use their services, regardless of what the 'objective' reality is. Similarly, firms will pay fewer taxes if they believe they will be wasted by corruption, and they will invest less in their country. Further, while social norms might affect what people view as corruption, in practice such cultural bias in perceptions does not appear to be substantial. It is telling for example that perceptions of corruption from cross-country surveys of domestic firms tend to be very highly correlated with perceptions of corruption from expert ratings in commercial risk rating agencies or multilateral development banks.[3]

Survey-based questions of corruption have also become increasingly specific, focused, and quantitative. For example, we have commissioned the following question from the Global Competitiveness Survey coordinated by the World Economic Forum: 'When firms like yours do business with the government, how much of the contract value must they offer in additional payments to secure the contract?' As illustrated in figure 1, the results can be very specific – and also sobering – pointing in this case to the frequency and extent to which firms (including many multinationals) pay bribes to obtain public procurement contracts. Household surveys such as Gallup's Voice of the People and Global Barometer Surveys and

3 There is a very high correlation between corruption in the ratings of the Global Competitiveness Surveys and those of expert pollsters such as Economist Intelligence Unit and Global Insight, or multilateral institution ratings such as the World Bank's Country Policy and Institutional Assessments (CPIA). A related critique is that assessments of corruption produced by think tanks and commercial risk-rating agencies display ideological biases, generally pro-market and pro-rightwing. In D. Kaufmann, A. Kraay and M. Mastruzzi, 'Governance Matters III: Governance Indicators for 1996, 1998, 2000 and 2002', *World Bank Economic Review* (2004), we develop a test for such ideological biases and find that they are quantitatively unimportant.

the Latinobarometer ask respondents (citizens and companies residing in the country, including the subsidiaries of multinationals) to report the number of times they witnessed acts of corruption.



Source: Authors' calculations based on EOS enterprise survey by World Economic Forum. MNC stands for multinational corporation while LDC stands for less-developed country.

Figure 1: Bribery reported by firms for public procurement

Myth 3: Subjective data are too unreliable for use in measuring corruption

Reality

All *efforts to measure corruption using any kind of data involve an irreducible element of uncertainty*. No measure of corruption, objective or subjective, specific or aggregate, can be 100 per cent reliable in the sense of giving precise measures of corruption, but reasons for this imprecision are common to all types of data, specific, subjective or otherwise:

1. *There is measurement 'noise' in specific corruption measures*. A survey question about corruption in the courts is subject to sampling error. Even a detailed audit of a project cannot conclusively distinguish between corruption, incompetence and waste, and other sources of noise in the data.
2. *Specific measures of corruption are imperfectly related to overall corruption – or to another manifestation of corruption*. A survey question about corruption in the police need not be very informative about corruption in public procurement. Even if an audit turns up evidence

of corruption in a project, this need not signal corruption in other projects or elsewhere in the public sector.

Efforts to measure corruption should aim at minimising measurement error, which aggregate indicators attempt to do by using many different data sources per country.[4] It is also important to be explicit and transparent about imprecision in estimates of corruption or other dimensions of governance, although this practice is uncommon. In the Governance Matters aggregate indicators (measuring six dimensions of governance, one of which is corruption), we report explicit margins of error.

Users of governance data should not confuse the absence of explicit margins of error with accuracy. Nor should they confuse specificity of corruption measures with precision or reliability. Very specific measures, such as proxying for the opportunity for corruption in procurement, based on a review of procurement practices (or through specific survey questions), are affected by both types of measurement error.

Myth 4: We need hard objective measures of corruption in order to progress in the fight against corruption

Reality

Since corruption is clandestine, it is virtually impossible to come up with precise objective measures of it. An innovative effort to monitor corruption in road building projects in Indonesia illustrates the difficulties involved in constructing direct objective measures of corruption.[5] The audit compared reported expenditures on building materials with estimates of materials actually used, based on digging holes in the roads and assessing the quantity and quality of materials present. But separating sand from gravel, and both from the soil present before the road was built, is difficult and inevitably involves substantial measurement error. As a result the study could not provide reliable estimates of the *level* of corruption, although it was still useful as it could provide good estimates of differences in corruption across projects.

One can also obtain objective data on institutional features such as procurement practices or budget procedures that might create opportunities for corruption, for example through the Public Expenditure and Financial Accountability (PEFA) initiative for monitoring financial management procedures in the public sector. Such approaches can usefully document the 'on the books' or official description of specific rules and procedures. *But these will only be imperfect proxies for actual corruption, not least because the 'on the ground' application of these rules and*

4 How much measurement error is reduced by aggregation depends on the extent to which individual data sources provide independent estimates of corruption. In D. Kaufmann, A. Kraay and M. Mastruzzi, 'Governance Matters V: Aggregate and Individual Governance Indicators for 1996–2005', World Bank Policy Research Department Working Paper (2006), www.worldbank.org/wbi/governance/govdata.

5 B. Olken (2005), op. cit.

procedures might be very different.[6] We have estimated the margins of error in the so-called 'objective' indicators to be at least as substantial as reports from experts, citizens or firms on the ground – irrespective of the extent of 'subjectivity' of the latter.

Myth 5: Subjective measures of corruption are not 'actionable' and so cannot guide policymakers in the fight against corruption

Reality

Several different surveys of firms and individuals ask detailed and disaggregated questions about corruption in different areas of government. Figure 1 illustrated the kind of specific detail on procurement bribery, for instance, that can nowadays be gathered through surveys. While such detail does not always point to which specific reforms are needed, say, *within* procurement or the judiciary, it is useful in identifying priority areas for action. Specific objective indicators of opportunities for corruption are no more 'actionable', in the sense of guiding specific policy interventions. One can measure whether a country has an anti-corruption commission or whether competitive bidding is mandated 'in the books' for some areas of public procurement, for example. But this does not tell us whether such reforms are effectively implemented and enforced on the ground, or whether implementing such reforms in these specific areas will have an impact on corruption.

Tracking even quite general perceptions about corruption can also be a useful way, if not in isolation, of monitoring anti-corruption programmes. Governments in democracies around the world rely on polling data to set policy priorities and track their progress.

Myth 6: Many countries with high corruption also had fast growth

Sceptics of the anti-corruption agenda are quick to point out that countries such as Bangladesh that score poorly on most cross-country assessments of corruption, yet have managed to turn in impressive growth performance over the past decade. One should not confuse these exceptions with the more general strong empirical finding that corruption adversely affects growth in the medium to long run. Studies have shown that a 1 standard-deviation increase in corruption lowers investment rates by 3 percentage points and lowers average annual growth by about 1 percentage point.[7]

6 See for example D. Kaufmann, A. Kraay and M. Mastruzzi (2005) op. cit. and D. Kaufmann (2005) op. cit., who show that much of the difference between objective measures of business entry based on statutory requirements and firms' perceptions of the ease of business entry can be explained by the extent of corruption.

7 P. Mauro, 'Corruption and Growth', *Quarterly Journal of Economics*, 110(3) (1995).

These results are at some level difficult to interpret when we recognise that corruption is likely to be a symptom of wider institutional failures. A large body of recent empirical work has documented that broader measures of institutional quality explain a significant portion of income differences across countries. One widely cited study found that an improvement in institutional quality from levels observed in Nigeria to those in Chile would translate into a seven-fold difference in per capita incomes in the long run.[8] This type of evidence suggests that policy-makers ignore corruption, and the institutional failures that permit it, at their peril.

8 D. Acemoglu, A. Johnson and J. Robinson, 'The Colonial Origins of Comparative Development', *American Economic Review* 91(5) (2001). Other studies include: S. Knack and P. Keefer, 'Institutions and Economic Performance: Cross-Country Tests Using Alternative Measures', *Economics and Politics*, 7 (1995); R. Rigobon and D. Rodrik, 'Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships', manuscript, MIT and Kennedy School (2004); D. Rodrik, A. Subramanian and F. Trebbi, 'Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development', *Journal of Economic Growth* 9(2) (2004); R. E. Hall and C. Jones, 'Why Do Some Countries Produce So Much More Output per Worker than Others?', *Quarterly Journal of Economics*, 114(1) (1999).

15 Corruption Perceptions Index 2006

Johann Graf Lambsdorff[1]

The Corruption Perceptions Index (CPI), now in its 12th year, ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index, making use of surveys of business people and assessments by country analysts.

The CPI 2006 ranks 163 countries (an increase from 159 countries last year), and draws on 12 different polls and surveys from nine independent institutions, using data compiled between 2005 and 2006. Data from the following sources were included:

- Country Policy and Institutional Assessment by the IDA and IBRD (World Bank)
- Economist Intelligence Unit
- Freedom House 'Nations in Transit'
- International Institute for Management Development (in Lausanne)
- Merchant International Group Limited (in London)
- Political and Economic Risk Consultancy (in Hong Kong)
- United Nations Commission for Africa
- World Economic Forum (WEF)
- World Markets Research Centre (in London).

One change to the methodology of the CPI in 2006 is that the index no longer reflects a three-year moving average, but now uses only two years of data. The TI CPI therefore reflects data from 2005 and 2006 only. The reason for this methodological change was to rely on more topical data. While this change does not make the CPI a measure of up-to-date anti-corruption policies, it may improve the ability of individual country assessments to reflect recent developments, without lowering measurement precision.

In 2006, testing was carried out to discover to what extent an awareness of the TI CPI was creating a problem of circularity. Given that the CPI has gained wide prominence in the international media, have respondents' judgements become influenced by the data reported by TI? The hypothesis is that respondents might 'go with the herd' instead of submitting their experienced judgement. To test this, respondents to the WEF 2006 survey were asked: 'How well do you know the TI Corruption Perceptions Index?' (1 = unknown; 6 = well known). Based on more than 9,000 responses, two different corruption indices were then produced, one by those who know the CPI well (responses 4–6) and another one by those who do not know the

1 Johann Graf Lambsdorff holds the chair in economic theory at the University of Passau (Germany) and a research consultant with Transparency International, for whom he has coordinated the CPI since 1995.

CPI (responses 1–3). Both these indices were compared with the CPI 2005. The sample familiar with the CPI produced an index that correlates slightly less (0.89) with the CPI 2005 than the sample that does not know the CPI (0.90). This indicates that knowledge of the CPI does not induce business experts to 'go with the herd'; it is even possible that knowledge of the CPI might in fact motivate respondents to determine their own views. This provides a strong indication that there is no circularity in the present approach.[2]

In sum, the perceptions gathered in the CPI continue to be a helpful contribution to the understanding of real levels of corruption from one country to another.

Table 1: Corruption Perceptions Index 2006

Country rank	Country	2006 CPI score[a]	Surveys used[b]	Standard deviation[c]	High–low range[d]	Confidence range[e]
1	Finland	9.6	7	0.2	9.2–9.8	9.4–9.7
	Iceland	9.6	6	0.2	9.2–9.8	9.5–9.7
	New Zealand	9.6	7	0.2	9.2–9.7	9.4–9.6
4	Denmark	9.5	7	0.2	9.2–9.7	9.4–9.6
5	Singapore	9.4	9	0.2	8.9–9.7	9.2–9.5
6	Sweden	9.2	7	0.2	8.8–9.4	9.0–9.3
7	Switzerland	9.1	7	0.3	8.6–9.4	8.9–9.2
8	Norway	8.8	7	0.6	7.7–9.3	8.4–9.1
9	Australia	8.7	8	0.7	7.7–9.4	8.3–9.0
	Netherlands	8.7	7	0.5	7.7–9.3	8.3–9.0
11	Austria	8.6	7	0.6	7.7–9.2	8.2–8.9
	Luxembourg	8.6	6	0.7	7.7–9.7	8.1–9.0
	United Kingdom	8.6	7	0.6	7.7–9.2	8.2–8.9
14	Canada	8.5	7	0.7	7.6–9.3	8.0–8.9
15	Hong Kong	8.3	9	1.0	6.7–9.3	7.7–8.8
16	Germany	8.0	7	0.5	7.5–9.1	7.8–8.4
17	Japan	7.6	9	1.0	5.4–8.9	7.0–8.1
18	France	7.4	7	0.9	5.5–8.5	6.7–7.8
	Ireland	7.4	7	0.9	5.5–8.4	6.7–7.9

(*continued*)

2 A more detailed description of the methodology is available at www.transparency.org/content/download/10854/93146/version/1/file/CPI_2006_long_methodology.pdf

Table 1: (Continued)

Country rank	Country	2006 CPI score[a]	Surveys used[b]	Standard deviation[c]	High–low range[d]	Confidence range[e]
20	Belgium	7.3	7	1.0	5.5–8.9	6.6–7.9
	Chile	7.3	7	0.8	5.5–7.7	6.6–7.6
	USA	7.3	8	1.1	5.1–8.6	6.6–7.8
23	Spain	6.8	7	0.8	5.5–7.7	6.3–7.2
24	Barbados	6.7	4	0.8	5.8–7.7	6.0–7.2
	Estonia	6.7	8	1.1	5.4–8.9	6.1–7.4
26	Macao	6.6	3	1.2	5.4–7.7	5.4–7.1
	Portugal	6.6	7	1.2	5.1–7.7	5.9–7.3
28	Malta	6.4	4	1.7	5.0–8.9	5.4–7.3
	Slovenia	6.4	8	1.2	4.9–8.0	5.7–7.0
	Uruguay	6.4	5	0.8	5.7–7.7	5.9–7.0
31	United Arab Emirates	6.2	5	0.9	5.4–7.6	5.6–6.9
32	Bhutan	6.0	3	1.9	4.1–8.0	4.1–7.3
	Qatar	6.0	5	0.7	5.4–7.0	5.6–6.5
34	Israel	5.9	7	1.1	4.1–7.6	5.2–6.5
	Taiwan	5.9	9	0.5	5.2–6.6	5.6–6.2
36	Bahrain	5.7	5	0.7	4.9–6.7	5.3–6.2
37	Botswana	5.6	6	1.4	4.1–7.7	4.8–6.6
	Cyprus	5.6	4	0.5	5.1–6.1	5.2–5.9
39	Oman	5.4	3	1.3	4.1–6.7	4.1–6.2
40	Jordan	5.3	7	1.0	3.2–6.2	4.5–5.7
41	Hungary	5.2	8	0.4	4.6–5.8	5.0–5.4
42	Mauritius	5.1	5	1.7	3.6–7.7	4.1–6.3
	South Korea	5.1	9	0.8	4.0–6.0	4.7–5.5
44	Malaysia	5.0	9	1.0	3.5–6.6	4.5–5.5
45	Italy	4.9	7	0.9	4.0–6.1	4.4–5.4
46	Czech Republic	4.8	8	0.7	4.0–5.8	4.4–5.2
	Kuwait	4.8	5	1.0	3.2–5.8	4.0–5.4
	Lithuania	4.8	6	1.1	3.4–6.7	4.2–5.6
49	Latvia	4.7	6	1.1	3.6–6.7	4.0–5.5

(*continued*)

Table 1: (Continued)

Country rank	Country	2006 CPI score[a]	Surveys used[b]	Standard deviation[c]	High–low range[d]	Confidence range[e]
	Slovakia	4.7	8	0.8	3.6–5.8	4.3–5.2
51	South Africa	4.6	8	0.9	3.2–6.2	4.1–5.1
	Tunisia	4.6	5	1.2	3.5–6.7	3.9–5.6
53	Dominican Republic	4.5	3	1.2	3.5–5.8	3.5–5.3
54	Greece	4.4	7	0.9	3.6–5.8	3.9–5.0
55	Costa Rica	4.1	5	1.0	3.2–5.4	3.3–4.8
	Namibia	4.1	6	1.0	3.4–6.1	3.6–4.9
57	Bulgaria	4.0	7	1.2	2.7–6.0	3.4–4.8
	El Salvador	4.0	5	1.1	2.6–5.5	3.2–4.8
59	Colombia	3.9	7	1.0	3.2–5.9	3.5–4.7
60	Turkey	3.8	7	0.8	2.3–4.9	3.3–4.2
61	Jamaica	3.7	5	0.4	3.2–4.1	3.4–4.0
	Poland	3.7	8	1.0	2.8–5.8	3.2–4.4
63	Lebanon	3.6	3	0.4	3.2–4.0	3.2–3.8
	Seychelles	3.6	3	0.4	3.2–4.0	3.2–3.8
	Thailand	3.6	9	0.7	2.4–4.6	3.2–3.9
66	Belize	3.5	3	1.0	2.3–4.1	2.3–4.0
	Cuba	3.5	3	1.8	1.8–5.4	1.8–4.7
	Grenada	3.5	3	1.1	2.3–4.1	2.3–4.1
69	Croatia	3.4	7	0.5	2.7–4.1	3.1–3.7
70	Brazil	3.3	7	0.4	2.7–3.9	3.1–3.6
	China	3.3	9	0.5	2.2–4.2	3.0–3.6
	Egypt	3.3	6	0.5	2.6–4.0	3.0–3.7
	Ghana	3.3	6	0.5	2.6–4.0	3.0–3.6
	India	3.3	10	0.5	2.7–4.3	3.1–3.6
	Mexico	3.3	7	0.3	2.7–3.5	3.1–3.4
	Peru	3.3	5	0.7	2.6–4.1	2.8–3.8
	Saudi Arabia	3.3	3	1.0	2.2–4.1	2.2–3.7
	Senegal	3.3	5	0.6	2.7–4.1	2.8–3.7
79	Burkina Faso	3.2	5	0.6	2.7–4.1	2.8–3.6

(*continued*)

Table 1: (Continued)

Country rank	Country	2006 CPI score[a]	Surveys used[b]	Standard deviation[c]	High–low range[d]	Confidence range[e]
	Lesotho	3.2	5	0.5	2.6–4.0	2.9–3.6
	Moldova	3.2	7	0.9	2.3–4.5	2.7–3.8
	Morocco	3.2	6	0.6	2.2–4.0	2.8–3.5
	Trinidad and Tobago	3.2	5	0.6	2.6–4.0	2.8–3.6
84	Algeria	3.1	5	0.7	2.3–4.1	2.7–3.6
	Madagascar	3.1	5	1.0	2.1–4.1	2.3–3.7
	Mauritania	3.1	4	1.1	2.0–4.1	2.1–3.7
	Panama	3.1	5	0.4	2.6–3.5	2.8–3.3
	Romania	3.1	8	0.3	2.7–3.5	3.0–3.2
	Sri Lanka	3.1	6	0.6	2.3–4.0	2.7–3.5
90	Gabon	3.0	4	0.6	2.2–3.5	2.4–3.3
	Serbia	3.0	7	0.6	2.3–4.0	2.7–3.3
	Suriname	3.0	4	0.4	2.6–3.5	2.7–3.3
93	Argentina	2.9	7	0.4	2.4–3.5	2.7–3.2
	Armenia	2.9	6	0.3	2.5–3.2	2.7–3.0
	Bosnia and Herzegovina	2.9	6	0.3	2.7–3.2	2.7–3.1
	Eritrea	2.9	3	1.1	2.2–4.1	2.2–3.5
	Syria	2.9	3	0.5	2.3–3.2	2.3–3.2
	Tanzania	2.9	7	0.4	2.4–3.5	2.7–3.1
99	Dominican Republic	2.8	5	0.6	2.1–3.5	2.4–3.2
	Georgia	2.8	6	0.4	2.2–3.2	2.5–3.0
	Mali	2.8	7	0.7	2.2–4.0	2.5–3.3
	Mongolia	2.8	5	0.8	2.2–4.1	2.3–3.4
	Mozambique	2.8	7	0.4	2.1–3.5	2.5–3.0
	Ukraine	2.8	6	0.4	2.3–3.4	2.5–3.0
105	Bolivia	2.7	6	0.4	2.2–3.5	2.4–3.0
	Iran	2.7	3	0.5	2.3–3.2	2.3–3.1
	Libya	2.7	3	0.5	2.3–3.2	2.4–3.2
	Macedonia	2.7	6	0.3	2.3–3.2	2.6–2.9
	Malawi	2.7	7	0.5	2.2–3.5	2.5–3.0

(*continued*)

Table 1: (Continued)

Country rank	Country	2006 CPI score[a]	Surveys used[b]	Standard deviation[c]	High–low range[d]	Confidence range[e]
	Uganda	2.7	7	0.5	2.1–3.5	2.4–3.0
111	Albania	2.6	5	0.3	2.2–2.8	2.4–2.7
	Guatemala	2.6	5	0.5	2.2–3.5	2.3–3.0
	Kazakhstan	2.6	6	0.4	2.1–3.2	2.3–2.8
	Laos	2.6	4	1.0	1.9–4.0	2.0–3.1
	Nicaragua	2.6	6	0.4	2.2–3.2	2.4–2.9
	Paraguay	2.6	5	0.8	2.2–4.0	2.2–3.3
	Timor-Leste	2.6	3	0.6	2.1–3.2	2.3–3.0
	Vietnam	2.6	8	0.4	1.9–3.5	2.4–2.9
	Yemen	2.6	4	0.2	2.3–2.7	2.4–2.7
	Zambia	2.6	6	0.7	1.6–3.5	2.1–3.0
121	Benin	2.5	6	0.6	1.8–3.2	2.1–2.9
	Gambia	2.5	6	0.4	1.9–3.2	2.3–2.8
	Guyana	2.5	5	0.3	2.0–2.7	2.2–2.6
	Honduras	2.5	6	0.3	2.2–3.0	2.4–2.7
	Nepal	2.5	5	0.4	2.2–3.2	2.3–2.9
	Philippines	2.5	9	0.4	1.9–3.5	2.3–2.8
	Russia	2.5	8	0.4	1.9–3.2	2.3–2.7
	Rwanda	2.5	3	0.2	2.3–2.7	2.3–2.6
	Swaziland	2.5	3	0.3	2.2–2.7	2.2–2.7
130	Azerbaijan	2.4	7	0.3	2.2–3.1	2.2–2.6
	Burundi	2.4	5	0.3	2.1–2.7	2.2–2.6
	Central African Republic	2.4	3	0.3	2.2–2.7	2.2–2.5
	Ethiopia	2.4	7	0.4	1.8–2.8	2.2–2.6
	Indonesia	2.4	10	0.4	1.8–3.2	2.2–2.6
	Papua New Guinea	2.4	4	0.2	2.2–2.7	2.3–2.6
	Togo	2.4	3	0.4	1.9–2.7	1.9–2.6
	Zimbabwe	2.4	7	0.6	1.6–3.2	2.0–2.8
138	Cameroon	2.3	7	0.3	1.8–2.7	2.1–2.5
	Ecuador	2.3	5	0.2	2.0–2.6	2.2–2.5

(*continued*)

Table 1: (Continued)

Country rank	Country	2006 CPI score[a]	Surveys used[b]	Standard deviation[c]	High–low range[d]	Confidence range[e]
	Niger	2.3	5	0.3	1.8–2.7	2.1–2.6
	Venezuela	2.3	7	0.1	2.1–2.5	2.2–2.4
142	Angola	2.2	5	0.3	1.7–2.6	1.9–2.4
	Congo, Republic	2.2	4	0.0	2.2–2.3	2.2–2.3
	Kenya	2.2	7	0.4	1.5–2.7	2.0–2.4
	Kyrgyzstan	2.2	6	0.5	1.7–3.2	2.0–2.6
	Nigeria	2.2	7	0.3	1.8–2.7	2.0–2.3
	Pakistan	2.2	6	0.3	1.6–2.6	2.0–2.4
	Sierra Leone	2.2	3	0.1	2.2–2.3	2.2–2.3
	Tajikistan	2.2	6	0.3	1.9–2.7	2.0–2.4
	Turkmenistan	2.2	4	0.4	1.7–2.7	1.9–2.5
151	Belarus	2.1	4	0.2	1.8–2.3	1.9–2.2
	Cambodia	2.1	6	0.4	1.6–2.6	1.9–2.4
	Côte d'Ivoire	2.1	4	0.2	1.9–2.3	2.0–2.2
	Equatorial Guinea	2.1	3	0.3	1.7–2.3	1.7–2.2
	Uzbekistan	2.1	5	0.3	1.6–2.3	1.8–2.2
156	Bangladesh	2.0	6	0.4	1.4–2.3	1.7–2.2
	Chad	2.0	6	0.4	1.5–2.7	1.8–2.3
	Congo, Democratic Rep.	2.0	4	0.3	1.7–2.3	1.8–2.2
	Sudan	2.0	4	0.2	1.8–2.3	1.8–2.2
160	Guinea	1.9	3	0.3	1.7–2.2	1.7–2.1
	Iraq	1.9	3	0.4	1.6–2.3	1.6–2.1
	Myanmar	1.9	3	0.3	1.7–2.3	1.8–2.3
163	Haiti	1.8	3	0.1	1.7–1.9	1.7–1.8

a '2006 CPI score' relates to perceptions of the degree of corruption as seen by business people and country analysts and ranges between 10 (highly clean) and 0 (highly corrupt).

b 'Surveys used' refers to the number of surveys that assessed a country's performance. A total of 12 surveys and expert assessments were used and at least three were required for a country to be included in the CPI.

c 'Standard deviation' indicates differences in the values of the sources: the greater the standard deviation, the greater the differences in perceptions of a country among the sources.

d 'High-low range' provides the highest and lowest values of the sources.

e 'Confidence range' provides a range of possible values of the CPI score. This reflects how a country's score may vary, depending on measurement precision. Nominally, with 5 per cent probability the score is above this range and with another 5 per cent it is below. However, particularly when only few sources (n) are available, an unbiased estimate of the mean coverage probability is lower than the nominal value of 90 per cent. It is 65.3 per cent for n = 3; 73.6 per cent for n = 4; 78.4 per cent for n = 5; 80.2 per cent for n = 6 and 81.8 per cent for n = 7.

16 Bribe Payers Index (BPI) 2006

Diane Mak[1]

Methodology

The BPI is a ranking of 30 leading export countries according to the propensity of firms with headquarters in those countries to bribe when operating abroad. It is based on the responses of more than 8,000 business executives from companies in 125 countries, who were polled as part of the World Economic Forum's Executive Opinion Survey 2006.[2] To create the BPI 2006, which assesses the international supply side of bribery, executives were asked about the propensity of foreign firms that do the most business in their country to pay bribes or to make undocumented extra payments.

Respondents rank the foreign countries whose firms they know to be doing significant business in their own country on a scale of 1 (bribes are common) to 7 (bribes never occur). In calculating the BPI, the answers are converted to a score between 0 and 10, and the ranking reflects the average score.

Summary of results

1) The ranking

Table 1 shows the results of the TI Bribe Payers Index 2006. The 30 countries ranked are among the leading international or regional exporters, whose combined global exports represented 82 per cent of the world total in 2005.[3] Higher scores reveal a lower propensity of companies from a country to offer bribes or undocumented extra payments when doing business abroad.

The results show that there is a smaller range of scores than might be expected, with Switzerland ranking first at 7.81 and India at the bottom with a score of 4.62. Therefore, with all countries falling well short of a perfect score of 10, the results show a considerable propensity for companies of all nationalities to bribe when operating abroad.

1 Diane Mak is an intern in TI's policy and research department.

2 The WEF is responsible for overall coordination of the survey and the data quality control process, but relies on a network of partner institutes to carry out the survey locally. WEF's local partners include economics departments of national universities, independent research institutes and/or business organisations. Contact details for WEF partner institutes can be found on the TI website at: www.transparency.org/policy_research/surveys_indices/bpi. The survey was carried out between February and May 2006. The survey was anonymous.

3 IMF, International Finance Statistics (2005), available at ifs.apdi.net/imf/output/93B496BD-DCF8-41F8-B0F5 31C7A0A0793C/IFS_Table_36789.701535.xls

Table 1: The TI BPI 2006

Rank	Country/territory	Number of respondents	Average score	Standard deviation	95% confidence interval*
1	Switzerland	1,744	7.81	2.65	0.12
2	Sweden	1,451	7.62	2.66	0.14
3	Australia	1,447	7.59	2.62	0.14
4	Austria	1,560	7.50	2.60	0.13
5	Canada	1,870	7.46	2.70	0.12
6	UK	3,442	7.39	2.67	0.09
7	Germany	3,873	7.34	2.74	0.09
8	Netherlands	1,821	7.28	2.69	0.12
9	Belgium	1,329	7.22	2.70	0.15
10	US	5,401	7.22	2.77	0.07
11	Japan	3,279	7.10	2.87	0.10
12	Singapore	1,297	6.78	3.04	0.17
13	Spain	2,111	6.63	2.73	0.12
14	UAE	1,928	6.62	3.09	0.14
15	France	3,085	6.50	3.00	0.11
16	Portugal	973	6.47	2.79	0.18
17	Mexico	1,765	6.45	3.17	0.15
18	Hong Kong	1,556	6.01	3.13	0.16
19	Israel	1,482	6.01	3.14	0.16
20	Italy	2,525	5.94	2.99	0.12
21	South Korea	1,930	5.83	2.93	0.13
22	Saudi Arabia	1,302	5.75	3.17	0.17
23	Brazil	1,317	5.65	3.02	0.16
24	South Africa	1,488	5.61	3.11	0.16
25	Malaysia	1,319	5.59	3.07	0.17
26	Taiwan	1,731	5.41	3.08	0.15
27	Turkey	1,755	5.23	3.14	0.15
28	Russia	2,203	5.16	3.34	0.14
29	China	3,448	4.94	3.29	0.11
30	India	2,145	4.62	3.28	0.14

* The margin of error at 95 per cent confidence is provided to demonstrate the precision of results. The confidence level indicates that there is a 95 per cent probability that the true value of the results lies within the range given by the margin of error above and below each score.

2) Cluster analysis

Since the differences in scores on the ranking are relatively small, cluster analysis[4] provides further material with which to interpret the results by grouping together countries that exhibit similar behaviour in terms of their companies' propensity to bribe abroad.

The four clusters are as follows, with cluster 1 comprising countries least likely to bribe and cluster 4 comprising countries most likely to bribe:

Cluster 1: Switzerland, Sweden, Australia, Austria, Canada, UK, Germany, Netherlands, Belgium, USA, Japan
Cluster 2: Singapore, Spain, United Arab Emirates, France, Portugal, Mexico
Cluster 3: Hong Kong, Israel, Italy, South Korea, Saudi Arabia, Brazil, South Africa, Malaysia
Cluster 4: Taiwan, Turkey, Russia, China, India.

These results raise concerns about emerging market economies and their apparent lack of controls regarding the behaviour of their firms abroad. At the same time, further analysis of the data shows that companies from the 30 countries ranked in the BPI 2006 – including those from countries whose regulations and controls mean they are judged to be less corrupt by business experts – nevertheless exhibit a different propensity to bribe in different areas of the world. In short, bribery by foreign firms is more likely in less developed countries than in highly industrialised ones. A comparison of assessments by respondents in Low-Income Countries (LICs)[5] and OECD countries is illustrated in figure 1.

Perhaps the most significant finding regarding this comparison is the apparent double standard employed by foreign companies in the two groups. While the scores for companies from the majority of countries tend to look considerably higher in the OECD than in the full sample,[6] their performance falls when looking at scores in LICs. Italy's performance in LICs is particularly poor. The result is that less developed countries with poor governance and ineffective legal systems for dealing with corruption are the ones that are hardest hit, with their anti-corruption initiatives undermined. This helps trap many of the world's most disadvantaged people in chronic poverty.

4 This analysis uses an agglomerative hierarchical cluster procedure to form four clusters. The decision to use four clusters was made using a graphical approach, 'the elbow criterion', to examine the reduction of variance.

5 There are 54 Low-Income Countries as defined by the World Bank (see www.worldbank.org for further information), 27 of which were included in the survey. Assessments by respondents from these countries make up the analysis.

6 For example, the performance of companies headquartered in the United Arab Emirates, Singapore, Mexico and Hong Kong is considerably better in the OECD than in the full sample.

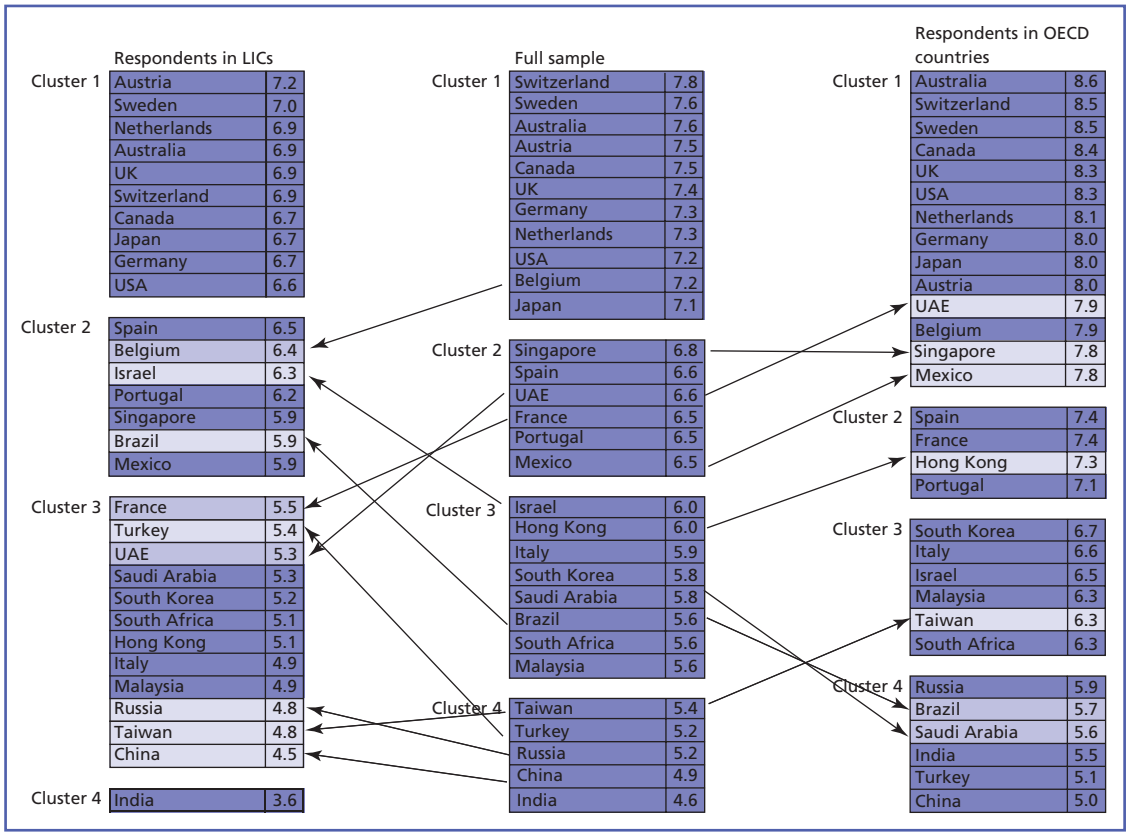


Figure 1: Comparison of the views of respondents in Low-Income and OECD countries

17 International business attitudes to corruption

John Bray[1]

In mid-2006 Control Risks in association with Simmons & Simmons commissioned the fourth in a series of surveys on international business attitudes to corruption. The purpose of the survey was to analyse the contrasting experiences of companies from seven different jurisdictions, drawing on comparisons with the previous survey in 2002 (see *Global Corruption Report 2004*).

IRB Ltd carried out the survey, and conducted a total of 350 telephone interviews with 50 companies in Brazil, France, Germany, Hong Kong, the Netherlands, the United Kingdom and the United States. Brazil and France had not been covered in the 2002 survey. All respondents were senior decision-makers at or near board level, and all the companies operate internationally.[2]

Lost business

The survey showed that corruption remains a major cost to international business: 43 per cent of respondents believed that their companies had failed to win a contract, or gain new business, because a competitor had paid a bribe in the previous five years. As many as a third believed they had lost business in this way in the previous 12 months.

However, there were wide disparities between jurisdictions. In Hong Kong, 76 per cent of companies believed that they had failed to win international business because of bribery in the previous five years, and 66 per cent in the last year – giving it the worst result. Even in the United Kingdom a quarter of companies claimed they had lost business to bribery in the previous five years. In the United States, the Netherlands and Hong Kong there was a noticeable increase in the percentage of companies reporting lost business compared to 2002.

Impact of anti-bribery legislation

Apart from Hong Kong, all the jurisdictions surveyed had ratified the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, nearly half of respondents confessed to being 'totally ignorant' of

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2 A detailed analysis of the findings is published on www.control-risks.com

Table 1: Percentage of companies believing they lost business because a competitor had paid a bribe …

	in the last 12 months		in the last 5 years	
	2006 findings	2002 findings	2006 findings	2002 findings
Hong Kong	66	56	76	60
Netherlands	26	24	46	40
US	20	18	44	32
Brazil	42	N/A	38	N/A
Germany	28	24	36	36
France	32	N/A	34	N/A
UK	22	16	26	26

their country's legislation on foreign bribery. Levels of ignorance were highest in Brazil, but even in the United States, which has nearly 30 years of experience with the Foreign Corrupt Practices Act (FCPA), more than 40 per cent of respondents confessed to being totally ignorant of the law, and a further 20 per cent had no more than a 'vague awareness'. In the United Kingdom awareness levels appear to have declined since the 2002 survey when 68 per cent of respondents claimed familiarity with the country's anti-corruption laws. Elsewhere, knowledge of the law is broadly similar to before.

Reviews of anti-corruption procedures

Despite these low levels of awareness, 74 per cent of US companies said that they had reviewed internal procedures in the last three years in the light of the increased international focus on corruption. This high percentage is likely to be the combined result of stricter enforcement of the FCPA and the impact of the Sarbanes-Oxley corporate governance reforms. In Germany, just over half the companies surveyed had reviewed procedures. This compares favourably with the results of the 2002 survey, and may reflect the impact of a series of high-profile scandals and investigations in Germany in 2005 and 2006. Trailing were France and Brazil where only 36 per cent and 12 per cent of companies, respectively, had reviewed internal procedures in the past three years in response to international attention to corruption.

Almost all Western companies now have business codes explicitly forbidding the payment of bribes to secure business, and a majority ban facilitation payments. This is true even in the United States where the FCPA does not include facilitation payments in its definition of 'bribery'. In Hong Kong, however, only half the companies have codes forbidding bribes and facilitation payments, while in Brazil only one quarter per cent have anti-bribery codes and just under one third per cent ban facilitation payments.

'Alternatives' to bribery?

One of the most common allegations in the international corruption debate is that companies frequently circumvent anti-bribery legislation by using intermediaries – such as commercial agents or joint venture partners – to pay bribes on their behalf. The survey shows that a majority of businesspeople believe that companies from their own countries engage in this practice either 'regularly' or 'occasionally'. This is despite the fact that the OECD convention prohibits bribes paid 'directly or indirectly' and that there is a substantial body of FCPA case law concerning companies that have been successfully prosecuted for paying bribes via middlemen.

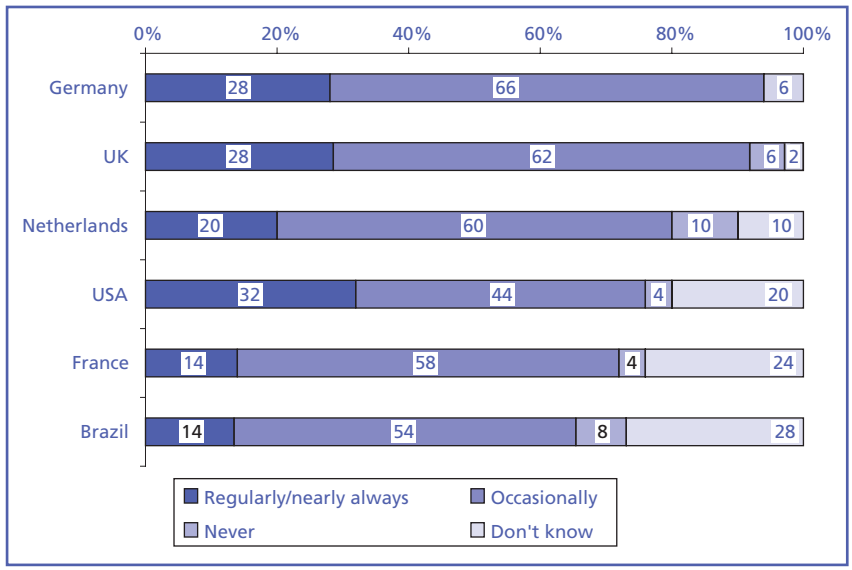


Figure 1: Respondents believing that corporations from their own country circumvent legislation on transnational bribery by using intermediaries

Expectations for the future

Companies' expectations for the future range from realistic to pessimistic. Overall, 42 per cent expected current corruption levels to remain the same. The optimists (20 per cent) who expected corruption levels to decrease were outnumbered by the pessimists (32 per cent) who expected them to increase. The pessimists were most numerous in France (46 per cent), and the optimists most numerous in the United States (54 per cent).

18 Business corruption: speak out or take part?

Tina Søreide[1]

A high level of corruption in a market implies that some firms will lose contracts because competitors offer bribes. An interesting question relates to the responses of the victimised firms: what is the reaction if a contract is lost because a competitor has offered a bribe? If firms were to react constructively to each other's bribery, the potential positive impact on the business climate would be significant. This suggests that multinationals may have a broader responsibility with respect to combating corruption than simply adopting a passive 'we-do-not-pay-bribes-ourselves' stance.

Adjustment to local business culture

The project's empirical basis was a 2004 business survey of Norwegian exporting firms.[2] The survey contained about 100 questions on corruption and was answered by 82 executives with extensive international experience. Focus on anti-corruption efforts in the business sector was strong in Norway prior to this survey, and many firms had adopted new codes of conduct specifically targeted at corruption-related challenges. The survey found a strong tendency among firms to 'adjust to the local business culture' if contracts were lost because competitors had offered bribes, meaning they too considered engaging in bribery. Indeed, one out of four respondents agreed with the statement 'corruption is part of the game'. Few firms, only 5 per cent of those responding to the survey, would leave a market because of corruption-related challenges.

Very few firms indicated they would take a proactive stance against corruption. When asked what they would typically do 'if you generally choose not to complain [about bribery], or if complaints [to the customer or to the tender authority] are ignored or rejected', only 13 per cent would report the case through formal appeal processes, or through informal or diplomatic channels. Overall, the firms polled were very reluctant to speak out, even if convinced they had lost business due to competitors' corruption-related practices.

So why do firms not formally complain about corruption or speak out in other ways about the problem? To explore this issue, the survey asked respondents to rank alternative explanations for keeping quiet. The following two explanations appeared most significant.

1 Tina Søreide is an economist at Chr. Michelsen Institute, Norway. This study is based on T. Søreide, 'Business Corruption: Incidents, Mechanisms and Consequences', PhD in economics at the Norwegian School of Economics and Business Administration, 2006.

2 T. Søreide, 'Corruption in International Business Transactions: The Perspective of Norwegian Firms' in S. Rose-Ackerman, ed., *International Handbook on the Economics of Corruption* (Cheltenham: Edward Elgar Publishing, 2006). The questionnaire applied in the survey-project is available on www.cmi.no.

i) Opportunity for cartel profits

'Concern about future business cooperation' was the most frequently cited explanation, given by 31% of the firms. 'Business cooperation' can be understood as either legal or illegal cooperation with other firms in the market. While it is understandable that legal cooperation is important in many industries, it is also possible that the potential for illegal collusion between firms can reinforce their incentives to remain silent. Firms will be careful not to offend their 'competitors' (i.e. cartel members or potential cartel members) by accusing them of involvement in corruption. Other possible responses to the question about 'keeping quiet' included concerns about customer reactions, sanctions from other firms and sanctions from the bribing company, but were less frequently chosen.

This speculation is supported by Figure 1, which presents estimates based on data from the World Bank Business Environment Survey. According to this data set there is a strong correlation between the function of anti-trust institutions in a given country and the firms' reported corruption-related challenges.[3]

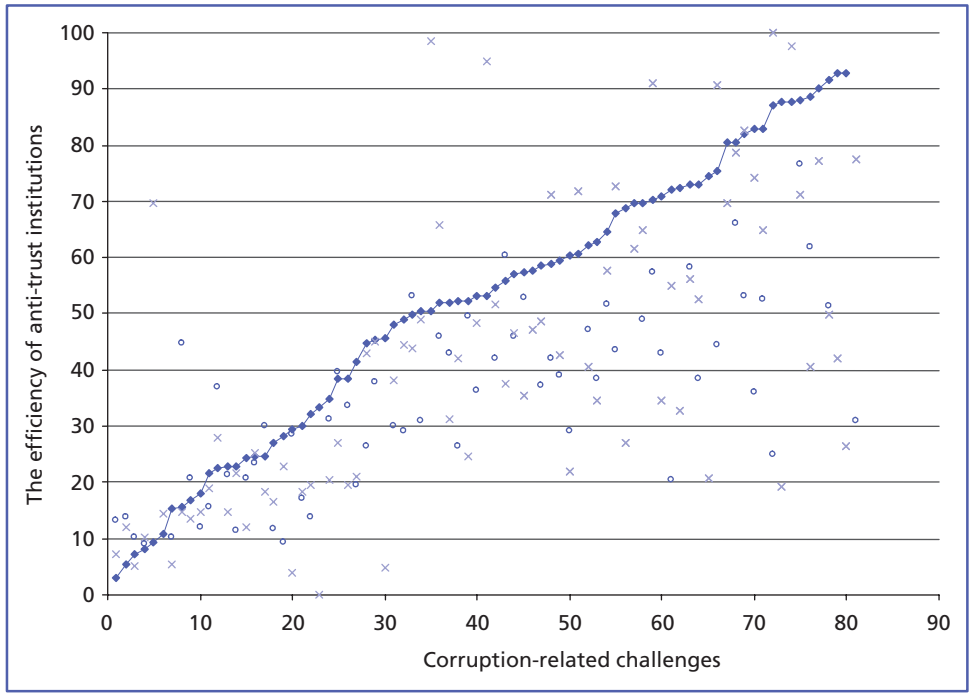


Figure 1: Percentages of business people in various countries who consider the level of corruption and the quality of domestic anti-trust policies, respectively, as obstacles to business. The line shows a clear correlation. The figure shows far weaker correlations between corruption-related challenges and i) the quality of the judiciary (shown as circles), and ii) the level of organised crime (shown as crosses)

3 G. Batra, D. Kaufmann and A. H. W. Stone, 'Investment Climate around the World: Voices of the Firms in the World Business Environment Survey', The World Bank/IBRD (2003). The correlation in Figure 1 is significant at the 1% level.

Apparently, there is more corruption in countries with weak anti-trust institutions. Firms will more frequently lose contracts because of corruption in countries where cartel profits are relatively easy to obtain. Therefore the firm's decision on whether to blow the whistle on corruption might be weighted against its present and future opportunities in obtaining cartel profits. Where politicians or high-ranking civil servants are susceptible to corrupt activities, collusion among firms creates a higher financial potential for bribes to be made. At the same time, collusion presents an opportunity for government officials to demand bribes by means of extortion, since this form of secret collaboration on prices or quantities is usually illegal.

ii) Uncertainty about the legal status of the acts

'Lack of proof' was cited by 12 per cent of the Norwegian business respondents as a probable explanation for why firms may not speak out about corruption, while 15 per cent suggested 'lack of knowledge about the legal status of the acts'. Even if convinced that a competitor had been favoured on an illegitimate basis, many firms would not react against it because of the difficulties of proving the case in a court.

Despite many legal improvements to fight corruption in the form of better definitions, international conventions and domestic legal reforms, it can still be difficult to tell the legal status of the acts in specific cases. Business corruption does not necessarily take the form of clear-cut bribery. As illustrated in Figure 2, there are many 'grey zone' practices that can be used to

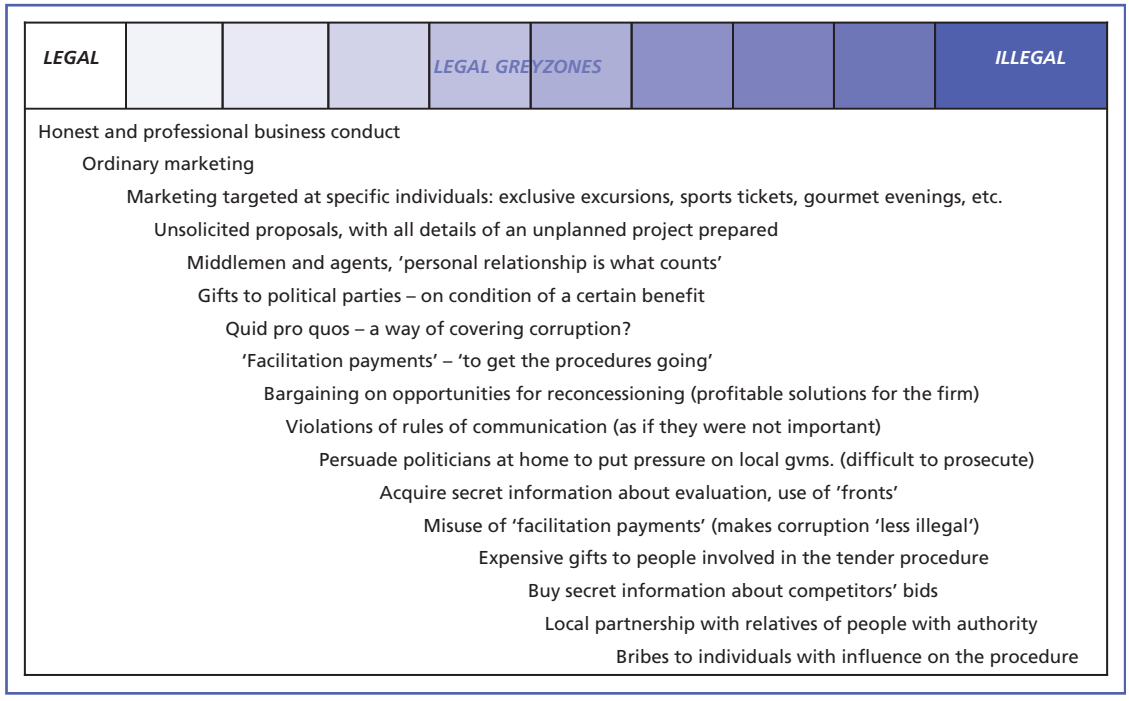


Figure 2: Influence on tender procedures – not necessarily corruption

hide clear-cut corruption and provide a firm with the benefit it needs to win a tender (for example, secret tender information or influence on the choice of technical solutions).

Policy implications

The business survey reveals very different reasons for firms' decisions to keep quiet when competitors make use of unethical business practices such as bribery. The potential for cartel profits and uncertainty about the legal status of the acts reflects different incentives and obstacles.

The role of competition authorities is critical in reducing the potential for cartel profits. Where the presence of an efficient competition authority makes cartel profits through illegal market power less accessible, firms are likely to have less tolerance for business corruption and will more likely speak out against it. Competition authorities' ability to identify accumulation of rents through market mechanisms, as well as political deviations from welfare-enhancing solutions for private markets, dissuades firms from taking part in corrupt acts and also reduces some of the barriers that may prevent firms from speaking out against corruption.

Improved competition reduces the need to determine the precise legal status of the acts: efficient regulation by competition authorities would mean that whatever the legal status of the act performed, contracts would still be awarded based on free and fair competition. Moreover, where proof of corruption is difficult, the firm seeking to speak out against unfair competition is likely to be better directed to alternative ways of confronting the problem if assisted by reliable and efficient competition authorities in the country of operation.

19 Specific manifestations of corruption: comparing Brazil and Russia

Leon Zurawicki[1]

Introduction

A general index of national corruption levels, such as TI's Corruption Perceptions Index (CPI), is convenient, but may not explain important differences and similarities among economies. Moreover, within a specific individual economy, the intensity of corruption may vary by region, industry and type of interaction with the government, among other factors. This paper compares specific levels of perceived corruption in two emerging economic giants, Brazil and Russia, across several industries and points of interaction with the state.

Specific indices of corruption compared

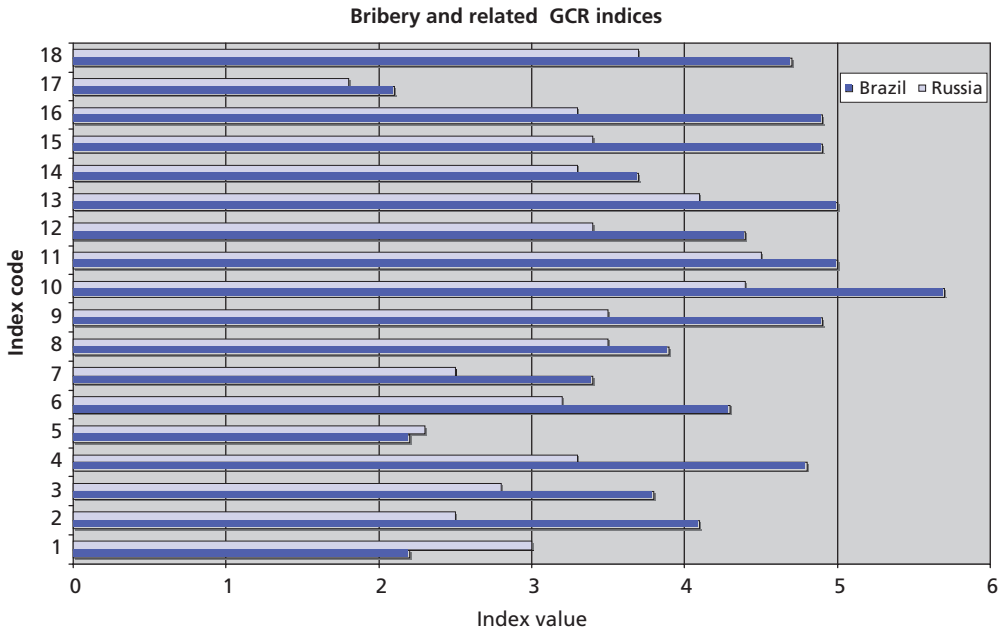
Corruption has been a problem for both Brazil and Russia for a long time. Russia scores consistently lower than Brazil on the TI CPI: the difference in their respective CPI scores ranges between 1.1 and 1.8 for different years from 1998 through 2005. Despite the substantial and consistent differences between the two countries' CPI scores, detailed data from other sources show a more complex picture. Indeed on some measures of corruption Russia performs better than Brazil.

Figure 1 illustrates the differences between Brazil and Russia according to 18 factors that have a bearing on corruption, such as distorting government subsidies, efficiency of legal framework and transparency of government policymaking, taken from the 2003 *Global Competitiveness Report* indices of bribery and corruption.[2] As can be observed, the differences between the ratings for Brazil and Russia do not show a uniform pattern. First, the differences in macro-characteristics such as judicial independence and property rights (variables 2 and 4) are generally more accentuated than variations in the micro-aspects of corruption, such as the indices that point to bribery in specific areas (variables 9 through 14).[3] This observation puts the challenge of corruption in each country in a broader context, one influenced by the hurdles to conducting business. Poor institutions separate Russia from Brazil more than the manifestations of bribery, with Brazil performing most poorly overall. Second, there is a great similarity in lack of trust in politicians (variable 17, which has the lowest rating for both countries) and in the cost of organised crime and bribery in tax collection (variables 8 and 11, respectively).

1 Leon Zurawicki, University of Massachusetts-Boston, leon.zurawicki@umb.edu

2 Executive Opinion Survey in World Economic Forum, *The Global Competitiveness Report* (Oxford: Oxford University Press, 2003).

3 The differences become clearer when we calculate the relative deviation between the indices for both countries (this means that, say, a difference of 0.8 is greater relative to the absolute index value of, say, 3.0 rather than 5.0).



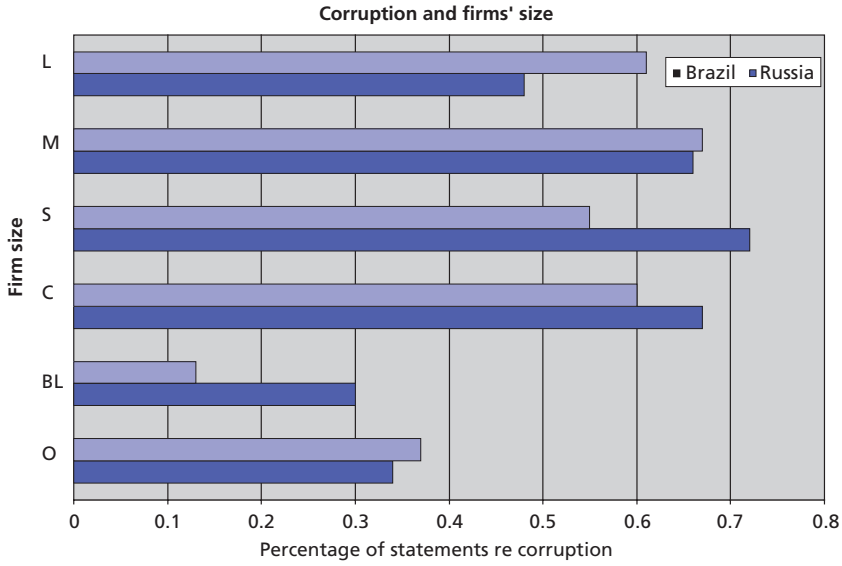
Average ratings for each country based upon the Executive Opinion Survey (from the *Global Competitiveness Report 2003*); scale goes from 1 (common problem) to 7 (never an issue). 1 – Distortive government subsidies; 2 – Judicial independence; 3 – Efficiency of legal framework; 4 – Property rights; 5 – Burden of regulation; 6 – Transparency of govt. policymaking; 7 – Favouritism in govt. decisions; 8 – Cost of organised crime; 9 – Bribery in exports and imports; 10 – Bribery in public utilities; 11 – Bribery in tax collection; 12 – Bribery in public contracts; 13 – Bribery in loan applications; 14 – Bribery in government policymaking; 15 – Bribery in judicial decisions; 16 – Business costs of corruption; 17 – Public trust in politicians; 18 – Ethical behaviour of firms.

Figure 1: Presentation of various bribery and related indices for Brazil and Russia in 2003

Further, Figure 1 leads to interesting speculations. For example, the difference in the perceived business cost of corruption (index 16) is greater than the difference in the evaluation of the ethical behaviour of firms (index 18). Comparative costs of corruption to business might prove *higher* than is suggested by comparisons of national ratings of ethical conduct.

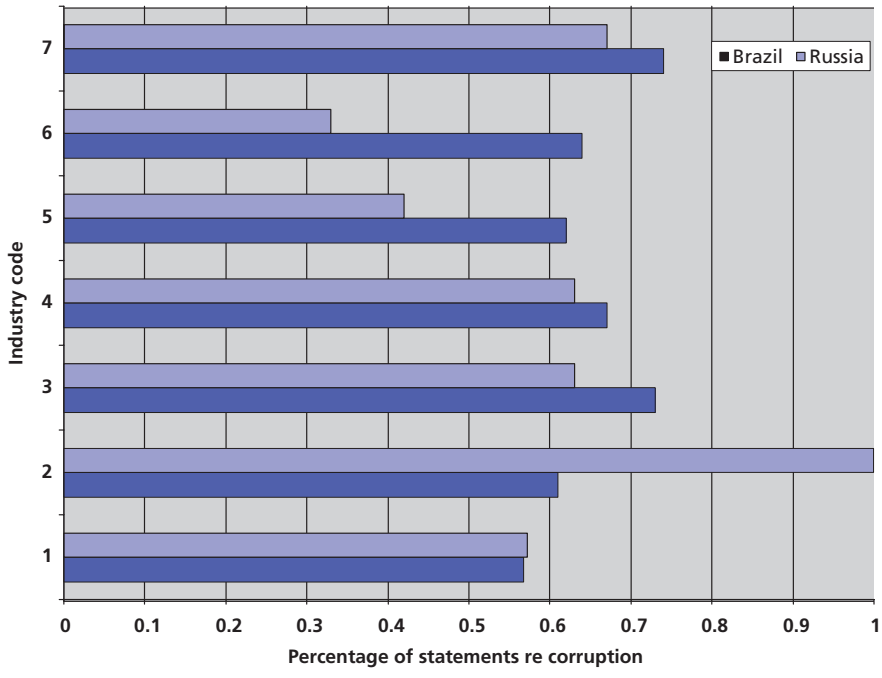
Figure 2 illustrates the differences in perceived corruption from the perspective of small, medium and large Brazilian and Russian companies, using data from the World Bank Investment Climate Surveys.[4] The coordinates reflect the percentages of businesses acknowledging the need to make payments to get things done. For benchmarking purposes, the observations on the predictability of the officials' interpretation of regulations (scale O) and problems with business licensing (scale BL) were also included. Whereas the small (scale S) and medium (scale M) sized companies in Brazil and Russia perceive a higher than average burden of corruption, the difference between the two countries is strongest for small companies and

4 Available at rru.worldbank.org/InvestmentClimate/



Percentages of statements on importance of bribing from the World Bank 'Investment Climate Surveys' O – Consistency/predictability of officials' interpretations of regulations affecting the firm; BL – Business licensing and operating permits; C – Overall corruption; S – Small companies; M – Medium size companies; L – Large companies.

Figure 2: Perceived corruption and firms' size for Brazil and Russia in 2003



Percentages of statements on importance of bribing from: World Bank, 'Investment Climate Surveys' 1 – Chemicals and pharmaceuticals; 2 – Food industry; 3 – Garments; 4 – Hotels and restaurants; 5 – Metals and machinery; 6 – Textiles; 7 – Wood and furniture.

Figure 3: Similarity of corruption in selected industries in Brazil and Russia in 2003

lowest for the medium ones. The overall burden of corruption (scale C) is higher in both countries than problems relating to officials' interpretation of regulations and to business licensing. This suggests that companies face more traps in the operational stage than in the initial start up phase of running a business. Also, officials' unpredictability only partly explains bribery.

Finally, Figure 3 shows the variations between Brazil and Russia for individual industries, again data from World Bank Investment Climate Surveys.[5] It is important to note that except for the food industry (index 2), corruption in Brazil is deemed *worse* than in Russia in the industries assessed, which may or may not capture the most relevant industrial groupings in each country.

Conclusion

This analysis highlights two aspects of the variability of specific indices of corruption: (1) within a particular economy, (2) between two countries. Brazil and Russia were selected because of their similar size, resources, GDP/capita and potential as powerhouses of the world economy. The conclusion is straightforward: different components of corruption might not have the same impact on overall corruption measures such as the CPI. A challenging task remains to determine how the overall impression of the state of corruption derives from its specific manifestations. A more nuanced picture of corruption, such as this analysis provides, could be usefully applied to decisions to invest in a particular country or sector rather than another.

5 The World Bank, Investment Climate Surveys, op. cit.

20 Explaining patterns of corruption in the Russian regions

Phyllis Dininio and Robert Orttung[1]

Corruption is one of the key problems facing Russia as it seeks to grow out of its socialist past. High levels of corruption pose a serious threat to the establishment of democracy and the creation of a robust, market-based economy. Cross-national indices highlight the severity of the problem, but cross-national data only provide a superficial picture of a country as large and diverse as the Russian Federation. To make up for this shortcoming, TI-Russia and the Information for Democracy Foundation (INDEM) conducted a survey of 40 regions in 2002 that was the first attempt to measure differences in corruption levels across Russia.[2] The survey demonstrates that there is extensive variation at the regional level. We analyse these variations in an effort to understand how to reduce corruption in Russia.[3]

We tested a number of economic and political theories to explain the variation in corruption across Russian regions. The first we examined focuses on level of development. Studies of corruption emphasise the importance of this variable in explaining different levels of corruption across countries, and it may be important in explaining regional differences within a country, too. The second variable we examined is the presence of natural resources, as theory suggests that countries rich in resources face more governance challenges due to greater opportunities for rent seeking. In the political sphere, we examined the size of government since theory suggests that a larger state may engender more corruption because of the greater opportunities for abuse of office. We also look at the imbalance of power between the state and the business sector: theory suggests that levels of corruption increase when there are imbalances of power between these groups because one party has monopoly power over the other.[4] Another variable we examine is accountability, which theory suggests will lower corruption levels. We use voter turnout and the level of media freedom as measures for getting at political and civil aspects of accountability.

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2 TI and INDEM Foundation, 'Regional'nyi indeksy korruptsii', 9 October 2002, available at www.transparency.org.ru/DOC/Presentation_index.doc. Funds were not available for surveys in all 89 regions, but the 40 surveyed are generally representative, including a mix of ethnic Russian and non-Russian regions, rich and poor, and across the country from west to east. The regions in the survey accounted for 73 per cent of the population.

3 We published an article on this research in the July 2005 issue of *World Politics*.

4 Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 1999). See also David Kang, *Crony Capitalism: Corruption and Development in South Korea and the Philippines* (Cambridge: Cambridge University Press, 2002), which explains different levels of corruption in South Korea and the Philippines by classifying business–government relations in each country by how concentrated or dispersed the business sector is and by how coherent or fractured the state is.

The data for corruption levels come from a TI/INDEM survey of 5,666 citizens and 1,838 representatives of small and medium-sized enterprises in 40 Russian regions.[5] TI/INDEM compiled an index of the amount of corruption that aggregates citizens' and entrepreneurs' personal experiences with corruption along the following dimensions:

- Share of respondents stating that they have given a bribe at least once
- Share of respondents stating that they gave a bribe the last time they felt they had to
- Average annual number of bribes local residents paid to officials
- Average amount of a bribe
- Total annual amount of bribes paid by local residents
- Total annual amount of bribes as a percentage of the gross regional product.

The index assigns 0 to the region demonstrating the smallest amount of corruption and 1 to the region demonstrating the maximum value of corruption.[6] Admittedly, this methodology produces an incomplete index: it focuses on bribes in health care, traffic violations and higher education, and does not include other kinds of corruption, such as asset stripping by officials or state capture by corrupt networks that may be more harmful to Russia's transition toward a market economy.

We tested the model using ordinary least square estimates. As the coefficient table shows, only two variables – the per capita gross regional product and the number of bureaucrats – are statistically significant and have large standardised coefficients. These two variables alone explain 46 per cent of the variation in corruption.[7] Our research shows that the amount of corruption in each region increases as the number of bureaucrats grows and gross regional product per capita decreases. This suggests that Russian policymakers can work to reduce corruption by reforming or scaling back bureaucracies and by encouraging economic development outside of the key centres of Moscow and St Petersburg. Though President Putin set up a presidential commission to combat corruption on 24 November 2003, his efforts to address this issue have had little impact since his administration has not focused more on reform of bureaucracy and regional development.

5 Although the researchers claimed that this sample size was unprecedented, it did not meet sample size requirements in all regions, making some of the findings indicative, but not statistically significant.

6 See 'The Methods Applied to Implement the Project "Indices of Corruption in Russia's Regions"' for a detailed discussion of how TI/INDEM constructed the corruption indices on the base of the survey questions. The paper is available at www.transparency.org.ru/proj_index.asp.

7 This number is the R square generated from running the regression with only two independent variables: the per capita gross regional product and the number of bureaucrats.

Table 1: Regression results explaining amount of corruption

Model	Coefficients[a]			t	Sig.
	Unstandardised coefficients		Standardised coefficients		
	B	Std. error	Beta		
(Constant)	.437	.316		1.385	.176
GRP capita (thousands)	−.010	.005	−.589	−2.102	.044
Natural resources	−3.3E-005	.001	−.011	−.043	.966
Bureaucrats (thousands)	.037	.008	.834	4.727	.000
State capture	−.078	.094	−.132	−.831	.413
Predatory state	−.042	.128	−.051	−.325	.748
Competitive market	−.035	.141	−.036	−.251	.804
Voter turnout	−.003	.004	−.119	−.811	.424
Media freedom	−.001	.007	−.029	−.170	.866

[a] Dependent variable: corruption amount

21 Quantifying public procurement losses in the Czech Republic

David Ondráčka[1]

Corruption in public contracting is a major problem all over the world. Czech contracting processes are no exception and suffer from a serious lack of transparency and efficiency. Policy debate on public procurement often lacks the quantitative data needed to provide a correct assessment of the problem. TI Czech Republic (TIC) has attempted to provide such data by estimating losses caused by the inefficiency and lack of transparency in the awarding of public contracts in the country.

The methodology for arriving at this estimate was produced by TIC in cooperation with experts in public administration and economics from Prague University of Economics.[2] The data collection and research was undertaken between February and June 2005.

TIC used official data only, collected from the Ministry of Finance, the Czech Statistics Office and the independent Supreme Audit Office (SAO). The methodology was divided into an assessment of public procurement losses at the central government level and at the municipal level. According to the Public Procurement Act, procurement can take place by one of three methods: open, restricted competition or awarded without competition. The Act stipulates that a public tender must be held when the value of the contract exceeds CZK 2 million (US $90,000).

Assessment of public procurement losses at the central government level

To evaluate the level of losses in central government contracting, the total amount of public funds used at the central level of public budgeting for the purchase of goods and services (public procurement) was determined, using data from the System of National Accounts (SNA) of the Czech Statistics Office. The SNA quantifies the maximum possible expenditure in the public contracting category at the central level. Based on the data, expenditure for the purchase of goods and services at the central level was calculated to be 4.3 per cent of GDP, or CZK 118.3 billion (US $5.4 billion).

The average inefficiency rate occurring in the public sector was also assessed, by analysing data from the SAO's annual reports. During the past 12 years, the SAO has audited assets worth a total of nearly CZK 2,400 billion (US $109 billion). Out of this, detected management deficiencies amounted to nearly CZK 350 billion (US $16 billion), approximately 14.7 per cent, which is the figure we can use for inefficiency in public funds and property management. According to the SAO the term 'detected deficiencies' means direct as well as indirect state property losses;

1 David Ondráčka is responsible for public procurement at TI Czech Republic.

2 All the materials used for the assessment of the losses and other related information are available on the TIC website, www.transparency.cz

public budget fund losses in general; defects in the conclusion of agreements; and incorrect, incomplete and non-evidentiary accounting. Such a wide definition is useful for our purpose because losses occur for the state not only due to lack of transparency in public procurement, but also due to incorrect evaluation and accounting and incorrectly written agreements.

The inefficiency rate of 14.7 per cent was then applied to expenditure for the purchase of goods and services by the public sector at the central level in 2004. The extent of inefficient management in this area of public funds expenditure was subsequently assessed. A rough estimate of financial expenditure related to public contracts due to various deficiencies can be made by a simple multiplication of the calculated inefficiency coefficient by the amount of funds that flow from the public sector mostly to the private sector in this way (14.7% × 118.3 billion = CZK 17.411 billion). In 2004, we estimate that out of the total amount of public funds, CZK 17.4 billion (US $775 million) was used inefficiently at the central level.

Assessment of public procurement losses at the municipal level

Information concerning the provision of certain public services (collection of municipal waste, maintenance of roads, operation of water treatment plants, street lighting, cemeteries etc.) was obtained from more than 60 municipalities. The sample was selected so that it reflects the existing structure of municipalities in the country; municipalities located in non-standard conditions, such as mountain or spa resorts, were excluded. Data concerning the financial aspects of these services were obtained from the finance ministry website.

The calculations revealed that the costs per person of providing public services differ when a certain form of tendering procedure was used (open or restricted) as opposed to when the contract was awarded to a business company with majority municipal shareholding or when it was awarded directly, without competition. In the municipalities tested, the average price per person was 13.5 per cent higher when the contract was not tendered. Based on TIC research, 75 per cent of municipal expenses is paid through single-source procurement or to a municipal company. Applying these findings to all the municipalities in the Czech Republic, the average amount of economic losses is 12 per cent. If we accept certain simplifying assumptions, we can estimate the volume of economic losses, using simple extrapolation of the calculated coefficients to the size of the public procurement market, which is allocated by both above-mentioned methods: 12 per cent of the approximately CZK 171 billion (US $ 8 billion) spent by municipalities on goods and services in 2004 gives us CZK 15 billion (US $ 668 million) used inefficiently at the municipal level.

Adding losses at central and municipal levels gives a total of CZK 32.4 billion (US $ 1.4 billion) in 2004.[3]

Conclusion

The research results were presented in June 2005 and widely reported in the national media. TIC followed up with meetings with the prime minister, government officials, MPs and other

3 Exchange rate in June 2005 was US $1/23.1 CZK.

decision-makers to discuss proposals for reform of the national public procurement system and legislation.

Reactions to the published research results varied. Public sector representatives believed the numbers were too high; private companies frequently commented that losses might be even higher. There was no direct criticism of the research methodology, as TIC used official data.

22 Identifying reticent respondents in Romanian corruption surveys

Omar Azfar and Peter Murrell[1]

The accurate measurement of corruption has become an issue of critical importance to both researchers and policy makers. One increasingly prevalent method of collecting data on corruption is surveys. But corruption is a highly sensitive topic; many survey respondents are 'reticent' and may prefer to give incomplete or non-truthful responses. The following summarises how reticent respondents can be identified and removed from the data, thus increasing the accuracy of survey-based estimates of corruption.[2] The IRIS Center of the University of Maryland conducted a survey of 514 private sector firms in Romania. The survey design included innovative modules that could be used to identify respondents who were not giving candid answers to sensitive questions.

The general purpose of the survey was to understand the degree and nature of corruption in registering, licensing and inspecting businesses in Romania. The questionnaire therefore focused on business interactions with two government entities: the One-Stop Shops, charged with administering the registration (and frequent re-registration) of businesses; and the inspections and authorisations departments of the local branches of the health ministry. The former was chosen because all firms have to deal with the One-Stop Shops and the latter because health licensing is one of the most intrusive and administratively burdensome requirements that Romanian businesses face.

The randomised response method used to identify reticent respondents is as follows. Each respondent was asked to read a sensitive question and to toss a coin. An example of the question asked might be: 'Have you ever paid less in personal taxes than you should have under the law?' The respondent was then asked to say yes if *either* the coin came up heads *or* if he or she had indeed committed the act (which in this case would mean that he or she had paid less in personal taxes than was legally required). The procedure was repeated another six times with a different coin toss and a different sensitive question. None of these seven sensitive questions were about corruption.

If the respondent said no seven times in a row, he or she is classified as reticent, because it is very unlikely that the respondent would have tossed seven tails in a row. All other combinations are classified as 'possibly candid' as this group contains both candid respondents as well as some reticent respondents.

1 Omar Azfar is at the John Jay College of Criminal Justice at the City University of New York, and Peter Murrell is at the Department of Economics of the University of Maryland, College Park: Omarazfar2@yahoo.com

2 The full paper is available at papers.ssrn.com/sol3/papers.cfm?abstract_id = 870887

The respondents identified as reticent by the randomised response method admit to corruption interactions significantly less often than others do. The admission rate, among reticent respondents, for corrupt interactions with the One-Stop Shop and health inspectorate is around ¼ of the admission rate for the rest of the sample (3.7 per cent versus 15.3 per cent). Reticent respondents are also much more likely to state that there is no corruption in their *judets* (counties), even if the question is not about their own behaviour. They are also more likely to state that it is impermissible to break socially beneficial rules, ironically including the rule on not telling lies.

The findings show that older respondents are likely to be reticent, possibly because they have spent more time under communist rule, which probably has led to ingrained suspicion of strangers asking sensitive questions (every decade of life makes a respondent 2 per cent more likely to be identifiably reticent, which is a large effect in view of the average identifiable reticence of 10 per cent for the population). This implies that corruption reports in Romania may rise simply because of increased candour, as new cohorts of managers with no experience of communist rule enter the market.

Alternative theories were considered, but in order to explain the results observed, any alternative theory would necessarily imply that respondents who give a series of implausible answers on the randomised response questions are also less corrupt. Implausible answers would be given, presumably, for reasons such as fear of over-zealous prosecutors (in league with the surveyors) or averting moral opprobrium (of the Bayesian interviewers). This is possible, but inconsistent with several features of the study. The list of randomised response questions includes several such as 'promoting someone for an inappropriate personal reason' that are not illegal, and others such as that stated above, 'Have you ever paid less in personal taxes than you should have under the law?', which in Romania at least does not bear strongly on moral issues.

Finally it is worth noting that the technique developed to isolate unreliable respondents can be used to improve estimates in other surveys of the prevalence of many sensitive behaviours, like drug addiction, crime and health status, where surveys are used to estimate the extent of a particular behaviour.

23 ANCORAGE-NET: Sharing knowledge-based solutions to corruption control

Luís de Sousa and João Triães[1]

ANCORAGE-NET is a research network of anti-corruption agencies (ACAs) whose primary aim is to provide comprehensive and easily accessible information about the format, functioning and activities of these bodies to practitioners and analysts in the field of corruption control.

Anti-corruption agencies are publicly funded bodies whose specific mission is to fight corruption and associated crimes, and to reduce the opportunity structures favourable to the occurrence of corruption through preventive and repressive strategies. The first ACAs date from the post-colonial period after World War II and they have since been set up in many countries in the developed and developing world.[2] Many global institutions[3] recommend the creation of ACAs as an important piece of the national institutional architecture. In Central and East European countries, ACAs have also been recommended as part of macro anti-corruption programmes promoted in view of EU membership.[4]

ACAs vary in scope and powers. Some have been endowed with investigative and prosecuting powers (e.g. Croatia, Romania and Slovakia), others play a more preventive, educational and informative role (e.g. France, Malta and Montenegro). There are also differences with regard to their scope of action, resources, accountability requirements, and so on. Independent of format and competences, however, ACAs encounter various constraints to their mandate, which explains the meagre results obtained by some of them:

- Technical, statutory and cultural difficulties in unveiling corruption via complaints
- Difficulties in obtaining information about corruption and its opportunity structures from other state bodies/agencies
- Difficulties in establishing a good working relationship with the politicians

Certain ACAs remain unknown to the wider public and have not anchored their anti-corruption/fraud role in civil society. This may partly be due to their format and partly to a lack of understanding of the centrality of citizens to the process of control.

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2 1952, Singapore, Corrupt Practices Investigation Bureau; 1967, Malaysia, Anti-Corruption Agency; 1974, Hong Kong SAR, Independent Commission Against Corruption.

3 Art. 6 of the UN Convention Against Corruption, Art 20 of the Council of Europe Criminal Law Convention on Corruption, OECD Ethics infrastructure, Transparency International's *Anti-Corruption Handbook*.

4 The Copenhagen Criteria suggest reforms related to the functioning of the political sphere and the judiciary as a pre-condition to accession.

ANCORAGE-NET is the first attempt to provide an internet database with substantive country-based and comparative institutional information on ACAs in Europe and abroad. Its intention is to help ACAs gradually anchor their activities in civil society (by making citizens more involved and aware of their activities and modus operandi) and to bring about knowledge-based, innovative and integrated solutions to corruption control.

Prior to a first meeting to discuss the project,[5] the heads of ACAs voluntarily replied to a National Assessment Survey on ACAs. We wanted these primary data to be provided by ACAs themselves, rather than relying on expert perceptions external to the organisation. The intention was to understand the nature, format and performance of these institutions, which have grown in numbers and visibility in recent years.

The survey was composed of 65 questions focusing on various aspects of their mission, mandate, competences, special powers, internal and external accountability framework, funding, organisation and social composition, activities, networking and usage of ICT. Participating countries, which included Argentina, Australia, Croatia, Czech Republic, France, Germany, Hungary, Latvia, Lithuania, Macedonia, Malta, Moldova, Montenegro, Portugal, Slovakia, and Turkey, provided an account of their national strategies against corruption, including those that do not have them officially or those where there is a current debate about the creation of such specialised agencies. For the purposes of our analysis, we only considered countries that have such agencies effectively in place.

Some results from the survey are shown below. As can be seen from Table 1, the most common reasons given for the creation of ACAs are to curb corruption in a knowledge-based manner, to curb corruption without political interference and to transform policy into action.

Most agencies were initially expected to combat and address corruption in areas such as public administration and national politics (see Table 2). It can be seen that corruption in public administration has remained a priority area of intervention for most of the countries surveyed. There can, however, be big differences in response times to complaints (see Table 3), ranging from one week to one year.

The sample is still small and we cannot yet extrapolate any general patterns or conclusions, but given its homogeneity, we expect to find interesting clusters as we expand the project beyond its initial focus on ACAs in Europe.

5 For further information, visit aca2006.cies.iscte.pt/ The meeting was organised by CIES – Centro de Investigação e Estudos de Sociologia (Lisbon, Portugal) in collaboration with The Australian National University (Canberra, Australia) and was co-financed by the Hercule Grant Programme of the European Antifraud Office.

Table 1: Raison d'être of ACAs

Main reasons justifying creation of ACAs	Country
To curb corruption in a knowledge-based manner Croatia	Montenegro, Moldova, Latvia, Argentina, Slovakia, France, Lithuania, Czech Republic, Malawi,
To curb corruption without political interference	Slovakia, Australia, Malta, Macedonia, Malawi, Czech Republic
To transform policy into action	Romania, Moldova, Argentina, Slovakia, France, Croatia
To avoid the inertia of traditional enforcement mechanisms	Slovakia, Malawi
To get visible results fast	Lithuania
To prevent investigations being stopped by corrupt members in traditional enforcement mechanisms	Argentina, Slovakia, Lithuania, Czech Republic
To retain control over the chain of command	

Table 2: Type of corruption the agency was initially expected to combat/address and the agency's current top priority

Type of corruption	Initial priorities of agencies	Current priorities of agencies
In the public administration	Moldova, Latvia, Argentina, Australia, Lithuania, Malawi, Croatia	Czech Republic, Lithuania, Macedonia, Malta, Moldova, Montenegro, Romania, Argentina, Latvia
In national politics	Romania, Latvia, France, Malawi, Croatia	Czech Republic
In local politics	Latvia, Australia, France, Malawi	France
In police forces	Latvia, Australia, Malawi, Croatia	Slovakia
In judiciary	Montenegro, Latvia, Malawi, Croatia	Croatia
In quangos or the para-public sector (institutes, public foundations, etc.)	Romania, Moldova, Macedonia, Malawi	
In the private sector	Montenegro, Moldova	
In the armed forces	Montenegro, Latvia, Malawi	

Table 3: Acting on complaints (timings)

Timings	Country
One week to one month	Montenegro, Latvia, Malawi
One month to three months	Lithuania, Czech Republic
Three to six months	Argentina, Australia, Republic of Macedonia, Croatia
Six months to one year	–
More than one year	Malta

24 Auditing, accountability and anti-corruption: how relevant are autonomous audit agencies?

Carlos Santiso[1]

Government auditing and corruption control

Strengthening transparency and accountability in public finances is a defining challenge for emerging economies seeking to foster fiscal responsibility and curb corruption.[2] There is renewed interest in those oversight agencies tasked with scrutinising public spending and enforcing horizontal accountability within the state. However, little is known as to what explains the effectiveness of autonomous audit agencies (AAAs). How effective are they in enforcing financial accountability, improving fiscal governance and controlling corruption?

Institutional arrangements for government auditing

The core functions of AAAs, traditionally referred to as supreme audit institutions, are to oversee government financial management, ensure the integrity of government finances and verify the truthfulness of government financial information. AAAs contribute to anchoring the rule of law in public finances, including through the imposition of administrative sanctions. In some countries, they also perform key anti-corruption functions, such as overseeing asset declarations, public procurement or privatisation processes.

There exist different institutional arrangements for organising the external audit function, which can be regrouped in the following three broad ideal types:

(i) the **court model** of collegiate courts of auditors or tribunals of accounts with quasi-judicial powers in administrative matters, often acting as an administrative tribunal, such as in France, Italy, Spain, Portugal, Brazil or El Salvador;

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2 See C. Santiso, 'Banking on Accountability? Strengthening Budget Oversight and Public Sector Auditing in Emerging Economies', *Public Budgeting and Finance* 6(2) (2006); C. Santiso, 'Pour le meilleur ou pour le pire? Les parlements et le contrôle budgétaire dans les pays en développement', *Revue française d'administration publique* 117 (Special issue on State Reform and Budgetary Reform), forthcoming; C. Santiso, 'Lending to Credibility: The Inter-American Development Bank and Budget Oversight Institutions in Latin America', *CEPAL Review* 83 (2004); C. Santiso, 'Legislatures and Budget Oversight in Latin America: Strengthening Public Finance Accountability in Emerging Economies', *OECD Journal on Budgeting* 4(2) (2004).

(ii) the **board model** of a collegiate decision-making agency but without jurisdictional authority, such as in Germany, Netherlands, Sweden, Argentina or Nicaragua; and
(iii) the **monocratic model** of a uninominal audit agency headed by a single auditor-general and often acting as an auxiliary institution to the legislature, such as the US, the UK, Canada, Chile, Colombia, Mexico and Peru.

In practice, however, AAAs are unique hybrids that combine several elements of the different models. Key variations between agencies include the timing of control (ex-ante or ex-post), its nature (compliance or performance auditing), its effects (follow-up of audit recommendations), as well as its status (legal standing of audit rulings). The most important issue, however, concerns the agencies' approaches to fiscal control, which vary across countries and have evolved over time.

Fiscal control can be preventive, corrective or punitive. Compliance control is concerned with the formal adherence to budget rules and financial regulations, including through the imposition of administrative sanctions. Performance control is concerned with the manner in which public resources are deployed, emphasising the economy, efficiency and effectiveness of public spending. The trend is towards greater emphasis on the preventive and corrective functions of government auditing through ex-post performance auditing.

Measuring effectiveness of government auditing

We construct an indicator of institutional effectiveness of AAAs in 10 Latin American countries along the four key attributes, (i) their independence from the executive, (ii) the credibility of audit findings, (iii) the timeliness of audit reports, and (iv) the enforcement of audit recommendations, measured resorting to qualitative data. The aggregate indicator of institutional credibility is reproduced in figure 1 and its components in table 1.

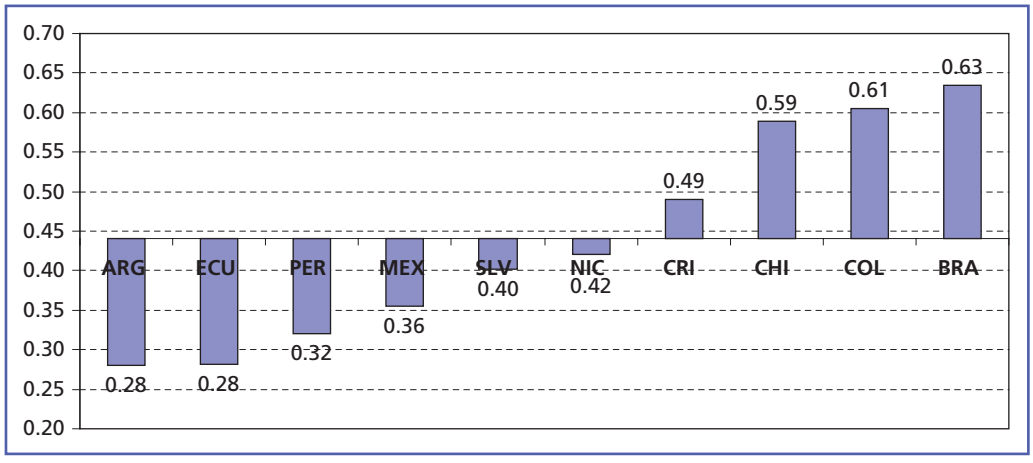

Figure 1: Indicator of effectiveness of autonomous audit agencies in Latin America (LAC10: 0.44)

Table 1: Indicator of effectiveness of autonomous audit agencies in Latin America

Country	Aggregate indicator	Independence	Credibility	Timeliness	Enforcement
ARG	**0.28**	0.44	0.22	0.13	0.33
BRA	**0.63**	0.88	0.42	0.24	1.00
CHI	**0.59**	0.78	0.40	0.18	1.00
COL	**0.61**	0.75	0.46	0.21	1.00
CRI	**0.49**	0.66	0.48	0.16	0.67
ECU	**0.28**	0.66	0.14	0.00	0.33
SLV	**0.40**	0.53	0.08	0.00	1.00
MEX	**0.36**	0.59	0.38	0.12	0.33
NIC	**0.42**	0.78	0.20	0.03	0.67
PER	**0.32**	0.78	0.12	0.04	0.33
LAC10	**0.44**	0.68	0.29	0.11	0.67

Note: Indicators are in a scale from 0 to 1, with lower scores meaning lower performance.

These data suggest that (i) the model of external auditing chosen does not predetermine overall agency performance; (ii) specific institutional arrangements greatly vary within ideal types and (iii) the broader governance context appears to have significant influence on organisational performance.

Government auditing and fiscal governance

Furthermore, statistical correlations suggest that, while AAAs do not have a direct influence on fiscal performance (budget deficits, volatility or out-turns), they do have an impact on fiscal governance and institutional quality, in particular corruption control (figure 2), bureaucratic efficiency (figure 3) and budget transparency (figure 4).

The data reveal a weaker connection between external auditing and adherence to the rule of law and constraints on the executive, which suggests that AAAs only marginally contribute to the systems of checks and balances. This latter finding confirms that, while AAAs could play a critical role in strengthening financial accountability, they often fail to do so because of structural dysfunctions in the systems of fiscal control in which they are embedded.[3]

3 See C. Santiso, 'Auditing for Accountability? Political Economy of Government Auditing and Budget Oversight in Emerging Economies', (Baltimore, MD: Johns Hopkins University, unpublished dissertation, 2006); C. Santiso, 'Keeping a Watchful Eye? Autonomous Audit Agencies, Fiscal Control and Financial Accountability in Emerging Economies' (mimeo, 2006); C. Santiso, 'Eyes Wide Shut: Reform and Capture of the Argentine Audit Agency' (mimeo, 2006).

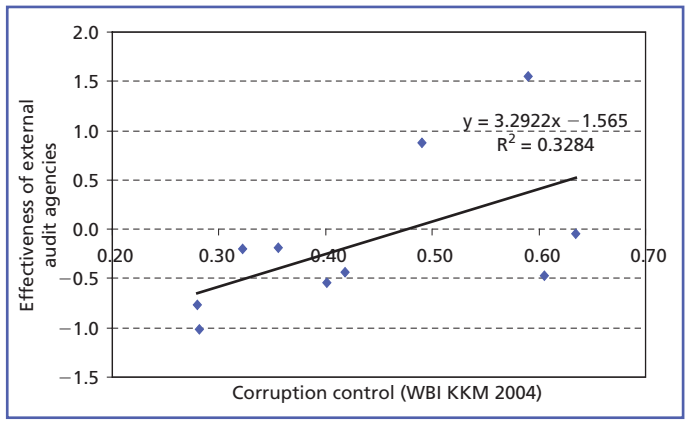

Figure 2: External auditing and corruption control

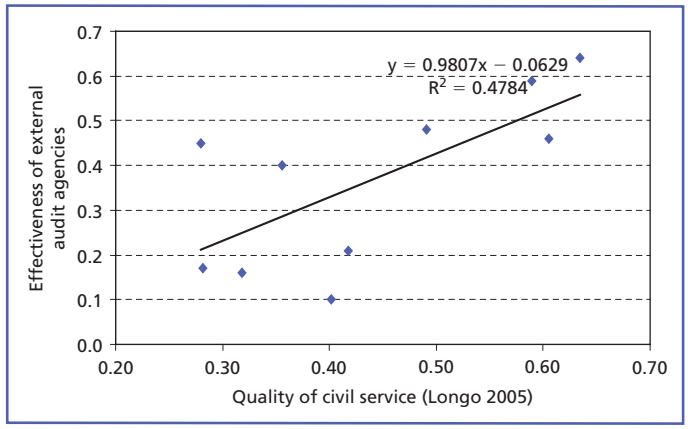

Figure 3: External auditing and bureaucratic efficiency

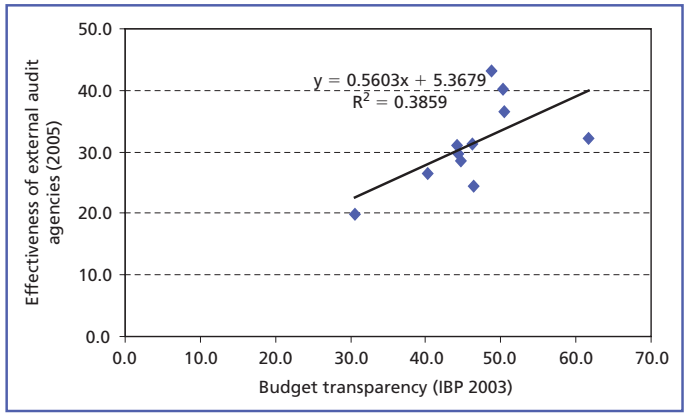

Figure 4: External auditing and budget transparency

Conclusions and policy implications

This research confirms that the contribution of AAAs to fiscal control and financial accountability is hampered by structural factors linked to the political economy of government auditing, in particular the dysfunctional linkages between government auditing, legislative oversight and judicial control.[4] It also underlines that budget institutions cannot be strengthened in isolation and that reform strategies based on radical reform or institutional transplant are likely to fail. The paradox of independence is that while AAAs ought to be sufficiently autonomous to act independently as oversight agencies, they must also develop effective functional relations with the institutions of accountability, the legislature, the judiciary and civil society.

4 C. Santiso, 'Budget Institutions and Fiscal Responsibility: Parliaments and the Political Economy of the Budget Process' (Washington, DC: World Bank Institute Working Paper No. 37253, 2005); C. Santiso, 'Parliaments and Budgeting: Understanding the Politics of the Budget', paper presented at the Annual Meeting of the Governance for Development Network of the IDB (Hamburg, Germany, on 12–13 December 2005).

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