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.

1 Gherardo Colombo is a judge at the Corte di Cassazione or High Court in Rome, Italy. He was formerly deputy public prosecutor in Milan and responsible with other colleagues for the *mani pulite* (clean hands) anti-corruption trials.

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