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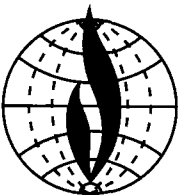
Strengthening Judicial  
Independence

Eliminating Judicial  
Corruption

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*CIJL Yearbook 2000*



Editor: Justice Robert D. Nicholson

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*Centre for the Independence of Judges and Lawyers*  
of the *International Commission of Jurists*

Geneva, Switzerland

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## TABLE OF CONTENTS

|  |     |
|--|-----|
| EDITORIAL  | 7   |
| <i>Robert D Nicholson</i>  |     |
| THE MEETING OF THE CIJL EXPERT WORKSHOP<br>ON JUDICIAL CORRUPTION  | 11  |
| <i>Greg Mayne</i>  |     |
| THE LEGAL CONCEPT OF JUDICIAL CORRUPTION   | 35  |
| <i>Robert D Nicholson</i>  |     |
| STRENGTHENING THE JUDICIARY AGAINST CORRUPTION   | 53  |
| <i>Petter Langseth and Oliver Stolpe</i>   |     |
| THE MULTILATERAL DEVELOPMENT BANKS<br>AND JUDICIAL CORRUPTION  | 73  |
| <i>Linn Hammergren</i>   |     |
| PROFESSIONAL AND PUBLIC CONTROL OF JUDICIAL CORRUPTION   | 97  |
| <i>Dalmo de Abreu Dallari</i>  |     |
| TOWARDS AN ETHIC TO CONTROL JUDICIAL CORRUPTION  | 115 |
| <i>Richard J Scott</i>   |     |
| ANNEX  |     |
| CIJL POLICY FRAMEWORK<br>FOR PREVENTING AND ELIMINATING CORRUPTION<br>AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM | 127 |

## EDITORIAL

The work of the Centre for the Independence of Judges and Lawyers has been to encourage the continuance and development of conditions positive to the existence of judicial independence. That has been done not for the benefit of the judiciary, but for the wider public and political benefit which flows from the existence and operation of an independent judiciary. When judgments are decided only according to law – and to no other influence – an essential condition for democracy will exist.

It is unusual, therefore, for the Centre to focus on a negative aspect discerned in some instances in the judiciaries of the world. That negative aspect is the existence of corruption in the judicial decision-making process. Such corruption may be brought about by money or other influences. Whatever the corrupting influence, it destroys the essential condition of judicial independence, which is that judgments be made and disputes resolved only according to law. It is the existence of that condition which is the foundation of public confidence in the judiciary and the expectation of the litigant that justice will be done in the particular case according to law and law alone.

The reason the CIJL has turned to this aspect of the judicial condition is that in the course of its work it has become apparent to it that the biggest obstacle to the attainment and operation of judicial independence is the existence of conditions which corrupt the true judicial function. The CIJL therefore decided the issue required addressing in an open and analytical way. It commenced by convening an Expert Workshop on the subject. It now focuses further attention on the issue in this Yearbook. It hopes that what is written in the Yearbook will inform and encourage the exposure of corrupting influences on the judicial power wherever they exist. Corruption is easy to allege and difficult to prove. Exposure of the issues inherent in it will encourage the development of the critical eye of public scrutiny to ensure its elimination and prevention.

The Yearbook commences with a report on the meeting of the Expert Workshop. This has been compiled by Greg Mayne, then a researcher at the CIJL, who was in attendance throughout at the Workshop. It is

supported by the statement from the Workshop of a Policy Framework contained in the text which follows the papers in the Yearbook.

One of the issues which the Expert Workshop was unable to fully explore was the meaning or definition of “judicial corruption”. Justice Robert D Nicholson of the Federal Court of Australia, an attendee at the Workshop, has drawn attention in his paper to the wide range of concepts considered to be addressed by the description in statutory and other materials.

Against these opening statements setting the ambit of the topic of judicial corruption, the Yearbook contains papers providing different perspectives to how the issue can be addressed. It discloses the range of bodies which are taking an increasing interest in addressing the topic.

The first perspective is provided from the United Nations by Mr Petter Langseth, Programme Manager, and Oliver Stope, Associate Expert, of the UN Global Programme Against Corruption at the Centre for International Crime Prevention in Vienna. The Centre sponsored a successful meeting of a Judicial Group on Strengthening Judicial Integrity in Vienna in April.\* The role of international banks in working to eliminate judicial corruption is addressed by Ms Linn Hammergren, also an attendee at the Workshop.

The experience of some nations and bodies is that corruption, including judicial corruption, not only requires to be addressed by professional bodies but also by public involvement leading to exposure of the condition. Professor Dalmo de Abreu Dallari explores these perspectives.

One of the issues flagged by the Expert Workshop was the need to develop a universal statement on judicial ethics. There are two reasons for this. The first is to tell new judges in newly independent countries what is expected of them in the discharge of their judicial duties. The second is to inform the public what they can rightly expect from someone holding the title of judge or magistrate. The Hon Richard J Scott, Chief Justice of Manitoba, played a leading role in the development of the Canadian Statement of Ethical Principles. He has contributed a paper on the subject of developing an ethic to control judicial corruption.

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\* The record of this meeting may be found at the Centre’s website: [www.odccp.org/corruption\\_judiciary.html](http://www.odccp.org/corruption_judiciary.html).

It will be well known to many readers of the Yearbook that for a number of years it has been edited by Mona A Rishmawi in her capacity as Director of the CIJL. She has now retired from that position to take up an appointment as the Senior Policy Adviser to the UN High Commissioner for Human Rights. Her global perceptions and fundamental appreciation of conditions relevant to judicial and professional independence will be greatly missed by the CIJL. This opportunity is taken to pay tribute to her on behalf of all who have worked with her.

Judicial independence secures the condition in public life by which citizens can live under the freedom of the rule of law rather than the tyranny of power. The goal of the CIJL to work towards the elimination of judicial corruption by encouraging the exposure of it and the establishment of conditions antithetical to it, is indeed a worthy one. It is hoped this Yearbook will stimulate worldwide debate and a strengthening of the resolve that the issue must be faced and addressed wherever it exists.

Robert D Nicholson  
*Justice of the Federal Court of Australia*  
*Yearbook Editor*  
December 2000

## THE MEETING OF THE CIJL EXPERT WORKSHOP ON JUDICIAL CORRUPTION

*Greg Mayne<sup>1</sup>*

Many international and regional human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention of Human Rights, recognise that an independent and impartial judiciary is fundamental to the protection of human rights. The existence of corruption seriously undermines this protection, as a corrupt judiciary cannot provide impartial justice to those that appear before it.

Through its work in promoting an independent judiciary and legal profession, the CIJL has emphasised at least three ways that corruption within the judicial system serves as an impediment to the rule of law. First, the existence of corruption denies individuals their fundamental right to an independent and impartial tribunal. Secondly, the existence of corruption within the judicial system is often used by governments to attack the judicial system. In recent years, some governments, such as Venezuela, Democratic Republic of Congo, and Ethiopia, have used allegations of corruption in the judiciary as an opportunity to dismiss, on mass, members of the judiciary without due process. Such actions disguise an attempt by the government to influence the judiciary, or to reconstitute the judiciary with members sympathetic to the government. Thirdly, the existence of corruption undermines public faith and support for the independence of the judiciary. The existence of corruption nullifies activities that promote judicial independence.

Once it is acknowledged that judicial corruption is a significant problem and that the judiciary should be made accountable for its actions, the next step is to address the question as to how the problem should be approached. Standard means of combating corruption may need to be modified to take into account the special requirement of maintaining the

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1 Legal Researcher, Centre for the Independence of Judges and Lawyers.



independence of the judiciary. Otherwise, as noted above, measures to combat corruption can be used as a disguise for attacks on the judiciary. Therefore, the combating of corruption will require a variety of strategies that, whilst they ensure that the judiciary are accountable for their actions, also take proper consideration of the requirement of independence.

Recognising the complexity of the phenomenon and the diversity of approaches that are required to address judicial corruption, the CIJL convened a meeting of experts in Geneva, Switzerland from 23 - 25 February 2000, to discuss the issue. The meeting was attended by persons from a variety of disciplines, including representatives of international lending institutions, high judicial officials, distinguished lawyers and NGO's dedicated to combating corruption. The meeting was chaired by Adama Dieng, the then-Secretary General of the International Commission of Jurists, and the meeting's rapporteurs were Justice Robert Nicholson of the Federal Court of Australia and Ms Mona Rishmawi, CIJL director. The meeting looked at a variety of issues, ranging from a determination of the constituent elements of judicial corruption, identification of its causes, the actors that need to be involved in combating it and the variety of approaches that can be taken to resolve the phenomenon. The presentations and discussion of the meeting are described below.

## **I. Combating Judicial Corruption: An Overview**

As an introduction to the issue of judicial corruption and to provide a framework for discussion, a background paper was presented by the director of the CIJL, Ms Mona Rishmawi.

Ms. Rishmawi noted that efforts must be made to address the issue of judicial corruption if any meaningful benefits were to be obtained from the promotion of judicial independence and the enhancement of the legal protection of human rights. The existence of corruption undermines the fundamental purpose of the judiciary "to decide matters before it impartially, on the basis of facts and in accordance with the law without improper influences and inducements." However, the measures adopted to combat corruption generally within society are not easily applicable to the judicial arm. Action taken by the legislative or executive branches to

investigate corruption within the judiciary will rarely be acceptable from a standpoint of safeguarding judicial independence. Therefore, any solution to the issue will need to adopt a proper balance between judicial independence and judicial accountability, the latter of which is essential in a democratic society.

A primary problem in addressing judicial corruption is that of determining what actually constitutes corruption. It was suggested that corruption be considered to “mean the act of doing something with the intent of giving some advantage inconsistent with official duty and the rights of others.” The paper noted that this definition was most probably open to abuse and too broad to be consistent with judicial independence. However, a number of specific activities, such as bribery, fraud, misappropriation of funds, abuse of power, breach of trust, and conflict of interest have been identified as common corrupt acts in various jurisdictions. They are useful in providing guidance in the formulation of an appropriate definition. These different formulations cover a range of activities and also counter certain evidential problems that often exist when trying to identify whether a corrupt act has taken place. As corruption results primarily from secretive activity, it is often difficult to determine, to an appropriate standard of proof, the particulars surrounding the actual act and the intentions of the parties, even if the results are clear.

In order to formulate appropriate strategies to address judicial corruption, it is necessary to identify the contributing causes to the phenomenon. A primary cause of corruption is inadequate judicial resources. In many countries the allocation of funds to the judiciary are a low budget priority for governments. However, low salaries for judges and inadequate work conditions, including the salaries of court staff, affect the ability of those employed in the administration of justice to resist pressure from various sources. This issue can be resolved in several ways, including by adopting a specific constitutional provision for the judicial budget and engaging in greater consultation with members of the judiciary when deciding on the allocation of funds.

Another cause of corruption is the lack of appropriate safeguards for the independence of the judiciary. This is particularly the case when judges are selected, promoted, transferred or removed not on the basis of merit, but as a result of political considerations. Similarly, the lack of adequate guarantees can result in judicial opportunism. This problem could be

addressed through the creation of a constitutional and legal framework that protects the independence of the judiciary, including provisions that ensure selection based on merit, security of tenure and protection against arbitrary removal from office. The development of a comprehensive plan of action can additionally serve as a useful tool in assisting national efforts to prevent judicial corruption.

### *Discussion*

The introductory discussion focused on several broad themes. The majority of the discussion revolved around the interplay between judicial independence and the need for accountability. The need to promote the accountability of the judiciary to the public was recognised as a crucial requirement for combating corruption and as a necessary support to the principle of judicial independence. If the public no longer believe that the judiciary is deciding cases in an impartial manner, they are less likely to react to threats to judicial independence. Accountability was also necessary to ensure that the judiciary *did not gain too much independence*, in the sense that they become too far removed from general society and begin to apply exclusively their own values. Recently there has been an increase in calls by the wider public for the judiciary to become more accountable. The public acknowledges the centrality of the judiciary's position in society, as one of the three arms of government, and therefore believes that it should be subject to the same requirements of accountability as the executive and the legislature. However, it is not just corruption of judges that needs to be addressed, but corruption within the judicial system as a whole. This includes all levels of the judiciary, officials, clerks and all participants in the administration of justice. The issue of corruption needs to be dealt with in the wider public interest.

Concerns were raised by some participants as to the implications the move towards greater judicial accountability would have on judicial independence, and whether these two principles were reconcilable. It was pointed out, however, that the tension that exists between the principles of *independence and accountability* was not a conceptual tension. It was not that the requirements of both these principles could not be resolved without the sacrifice of aspects of either one of the principles; rather the tension inhered in the operation of the principles.

It was also recognised that it was necessary to improve the public perception and knowledge of the judicial process. In light of this necessity, it was important for members of the judiciary themselves to be active in speaking out against any form of corruption in the judicial process, and to ensure that any corrupt activities are dealt with in an appropriate manner and by an appropriate body. A suggestion was made that this could be achieved through signs in court buildings and other venues of the justice system requesting that the public make complaints about corrupt actions of officials, whether regular or judicial staff. It was also necessary to clearly point out to those who were lodging complaints that their concerns would be dealt with seriously and that they would be treated fairly and impartially throughout the process. The promotion of a continuing critical dialogue by and between members of the public and the judiciary was essential to maintain accountability.

The media was identified as an important ally in the task of promoting judicial accountability to the public. A media campaign can assist in developing a culture that does not accept corruption, and may be used by the judiciary to illustrate its commitment to eliminating corruption. It was acknowledged that the use of the media, however, may be a double edged sword, as many attacks on the judiciary occur through the press and the independence of the judiciary can be threatened through irresponsible and untruthful reporting. In many countries the media is owned by the government or by influential people closely connected to the government. Therefore, whilst the press may be useful in creating an anti corruption culture and for educating the general public about acceptable conduct within the judicial system, it must be used with caution. A wider public discussion must take place in manner that does not destroy the credibility of the institution.

The opening session also began to address the content and the scope of the conduct that could be considered to constitute judicial corruption. Whether repeated violations of the core values of a national constitution could be construed to amount to corruption was raised for further discussion. The issue of bias by judicial officers on the grounds of gender, religion, sexual orientation was also a point that was given particular attention. Many participants considered that although bias was unacceptable behaviour, it did not amount to corruption. It was argued that some of these elements make up the general social philosophy of an individual judge and are intrinsic to the person concerned and therefore difficult to

eliminate. However, there are limits to subjectivity. Subjectivity is not acceptable if it leads to a denial of a requirement of a law or if it represents a consistent behaviour contrary to minimum standards of human rights or the constitution. Even in respect to this situation, there was some disagreement as to whether such an abuse of process or abuse of judicial power actually could be considered as coming within the definition of corruption.

An independent selection process is an important stabilising factor in eliminating bias from the judiciary and preventing the development of corruption. This process will assist in ensuring that the membership of the judiciary represents a broad cross section of society and ensuring that selection is based upon merit. Another important stabilising factor for the judiciary is the adequate training of lawyers, the main source of judicial personnel. It was recognised that in many countries, corrupt activities often occur at the instigation of lawyers. Training in ethics and appropriate professional standards is crucial to enable lawyers to resist corruption, or to prevent them from becoming a source of corruption. The higher levels of the judiciary can also play an important role in the promotion of appropriate ethics and professional standards, and they should actively supervise the lower levels of the judiciary to prevent corruption from occurring.

The overall theme of the session was that whilst the principle of judicial independence is central, the existence of corruption threatened that independence. Therefore, steps need to be taken to improve accountability and to alter the public perception regarding judicial accountability. However, any measures taken to improve accountability should not violate the UN Basic Principles on the Independence of the Judiciary and should strengthen, rather than weaken, the institution as a whole.

## **II. What is Judicial Corruption?**

The background paper for this session was delivered by Mr Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers.

According to Mr. Kumaraswamy, there can be no effective judicial independence unless those that are entrusted with the dispensation of justice remain accountable and are seen to be so. Judicial independence is a necessary requirement for ensuring that a society operates under the principle of the rule of law. The existence of corruption in the judicial system undermines the rule of law, as corruption indicates that decisions are being made with consideration to extraneous factors, rather than on the basis of and in accordance with the law. Corruption therefore not only violates the rule of law, but it also threatens the principle of judicial independence. In a society where the judiciary is not accountable for its actions and therefore more prone to participate in corrupt activities, there will be an increase in attacks on its independence. The principle of judicial independence no longer becomes a worthwhile objective, as it serves to inhibit the rule of law, rather than enhance its protection.

The background paper suggests some reasons for the phenomena of judicial corruption. Primarily, judicial corruption is symptomatic of the degeneration of public institutions in various countries. With the majority of state bodies in some countries afflicted by corruption, it was difficult to maintain sufficient independence to isolate the judiciary from corruption. In addition, the financing of an adequate judicial system is seen as a low priority in countries where there are other endemic problems. This failure to provide adequate resources to the judicial arm tempts some judges or other actors within the system to accept "side incomes." Finally, the paper suggests that some members of the judiciary are abusing the powers conferred upon them for the protection of the independence of their office, for their own personal gain.

Persons that actively seek to corrupt members of the judiciary include litigants, businessmen and, particularly, lawyers. The background paper identified some types of conduct that could be considered to amount to corruption. Corruption could be direct, as in the case of bribery. But it could also be indirect, as, for example, when a particular firm is favoured, close associations are maintained with certain lawyers, or expectations are held regarding opportunities after retirement from the government, consultancy firms or law firms. The diversity of these activities and their different facets, particularly in situations where there is no material gain, makes it difficult to formulate a comprehensive definition. There are also evidentiary problems with some forms of corruption, as often there is no direct evidence to substantiate claims of corrupt activities. Those

involved in inducing the corruption will not be willing to come forward with information, for obvious reasons, and those who are attempting to combat the issue may be subject to threats, such as sedition or contempt.

Mr Cumaraswamy suggested the following broad definition of corruption as a basis for further discussion:

any act of conduct of a judge which results in his or her judicial impartiality in an adjudicative process being brought into question for want of his or her judicial integrity.

He noted that this definition placed a higher standard on judges than did many criminal statutes. However this must be so because of the important role that judges play in interpreting and developing the law upon which society is structured and also that their appointment to the bench should only be based upon proven competence and integrity. At all times the actions and conduct of judicial officers, both inside and outside the court, must be above suspicion and must be seen to be so if they are going to be able to command the respect of the public.

Another question that arose was whether judges should have a separate mechanism for dealing with corruption, and whether that would be consistent with independence. Before deciding, consideration should be given as to how the public would perceive such a mechanism and whether it would convey the impression that there is something wrong with the judiciary. In developing a plan of action, the question should be addressed as to how to confront a judiciary that is already afflicted with this problem. Efforts should be directed toward considering whether short-term solutions should be adopted. Over the long term, the question of prevention must be tackled.

Finally, Mr Cumaraswamy stated that in his capacity as Special Rapporteur on the Independence of Judges and Lawyers, he would like to conduct a study and make recommendations in the form of an international code of judicial ethics that can be submitted to the UN Commission on Human Rights.

### *Discussion*

During the discussion several other suggestions were advanced with regard to a potential definition of judicial corruption or the approach that

a definition should take. However, no effort to come up with a comprehensive definition was made by the participants, as this task was seen to be outside the capacity of the seminar, for reasons of time and practicality. A point was raised that similar problems in defining corruption occurred during the drafting of the OECD convention on International Bribery. This convention proceeded on the assumption that it could not define corruption and called upon the parties to implement “functional equivalence.” Also, due to wide variations in law and the types of corrupt activities that occur in various countries and in the context of existing conventions, it was thought to be unnecessary to finalise a definition in the context of developing this policy framework.

In light of the foregoing, some of the suggestions for a definition of judicial corruption follow. Justice Bhagwati formulated the following, stating that he believed it to be reasonably comprehensive but not all inclusive:

A symptom of judicial corruption is behaviour which deviates from the normal duties of a public role of a judge because of private regard or private concern, such as for family or friends, or pecuniary or status gain or ambition. It includes such behaviour as accepting a bribe or reward to pervert a judgement, nepotism, or on account of considerations other than merit, and the illegal appropriation of public resources for private gain.

Justice Nicholson suggested that

Judicial corruption occurs when any act or conduct, or proposed act or conduct, does or threatens to influence or control the exercise of judgement by the judge in the case (by an opposing party) independently of all other considerations other than the evidence in the case and the applicable law

Mona Rishmawi, CIJL Director, also pointed out that the UN Basic Principles on the Independence of the Judiciary addresses the issue of judicial corruption. Principle 2 states

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.



It was generally agreed that a useful approach to determining the types of conduct that amount to judicial corruption would be to formulate a general definition accompanied by an illustrative box, detailing various examples of conduct that constitute corruption. This could avoid the inherent problems associated with attempting comprehensively and precisely to define corruption. It was also noted that it might be necessary to distinguish between corrupt acts and conduct that might encourage corruption, but is not necessarily by itself corrupt. An examples of such conduct would be socialising with lawyers in certain sensitive situations.

Several examples of conduct that may constitute judicial corruption were given. An obvious form was bribery or reward. In this situation, it is important to note that payment of a bribe need not result in a consequence favourable to the wishes of the briber to constitute corruption. The mere fact that a bribe is made is sufficient to this end. Another form of corruption is that resulting from political pressure and influence. This corruption might occur in the appointment process, where a judge may feel a sense of obligation to a person or body for an appointment, or the need to lobby for a position may increase the *potential for corruption*. Also, where promotion is controlled by the government, the judges are dependent on the executive for career advancement and can therefore be exposed to political influence and pressure, increasing the potential for corruption.

Corrupt conduct can also occur when there is a conflict of interest or duty. For example, if a judge has a financial or personal interest in a corporation that may benefit from the outcome of legal proceedings, a conflict of interest may arise for the judge. These sorts of interests need to be declared to enable the parties to the proceeding to decide whether it is appropriate for the judge to recuse himself or herself in all the circumstances. Conflicts of interest may occur where relatives or friends appear before colleagues of a judge in the same court. Similarly, when a judge approaches retirement, he or she may be influenced by a desire to secure employment with the government or in legal practice. Other types of corruption may include utilisation of public resources for private gain, tax evasion and blackmail.

Although many types of conduct may pervert the decision making process, they will not all necessitate the same form of response. Not all activities require the imposition of criminal sanctions. Some may be

appropriately addressed through administrative or disciplinary action. On the other hand, traditional forms of corruption, such as bribery, should be dealt with by the criminal law. The other forms of activity mentioned may be better assessed through a code of conduct which can provide guidance for members of the judiciary and prescribe acceptable limits for certain conduct. Any method of enforcing norms prohibiting certain conduct, however, must be structured in a way that ensures respect for the principle of judicial independence. Therefore any judicial complaints or disciplinary body should not be controlled by the government. A disciplinary mechanism under government control could become a vehicle for launching attacks against the judiciary.

### **III. Public Tolerance of Corrupt Practices**

The issue of public tolerance was introduced by Kamal Hossain. Public confidence is particularly important in the context of the judiciary. In many jurisdictions the judiciary consists of unelected judges and so the basis of its authority to exercise the judicial function rests upon the moral authority that it possesses when it decides cases in an impartial manner. An absence of public confidence will undermine its exercise of the judicial function.

A seemingly high level of public tolerance for corruption may signify several conditions. First, it may indicate that the problem of corruption is widespread and probably exists in many sectors of society. However, a perceived high public tolerance for corruption may also result from certain inherent societal factors. In authoritarian societies, where those that are corrupt also have the authority to impose restrictive sanctions, the acceptance of corruption by the wider society cannot be seen as facilitating or breeding the existence of corruption. In this situation the concentration of power in a restrictive regime itself is what may have promoted corruption. In other societies, which may be democratic, there is often a corrupt powerful elite who can effectively insulate themselves from accountability, because the judiciary finds that it simply cannot beat them. In this situation, public tolerance may not be based in acceptance of corrupt activities, but rather in cynicism regarding the futility of or fear of complaining.

In societies where corrupt activities are prevalent and accepted, they are justified on any of number of grounds. Some observers argue that corruption is a necessary tool for making bureaucratic societies more effective. Also, for countries converting to a market economy, the issue of corruption is ignored in the rush to make money and modernise. Those who are successful quickly are admired and considered to be efficient, irrespective of the manner in which they made their wealth. Studies in Eastern European countries have identified some of the elements of a corrupt environment. There is usually the existence of moral double standards, a decline in professional ethics, the lack of a distinction between the public and private and a lack of transparency in independent agencies.

Where corruption is endemic in a society, it is necessary to change the public's attitude to it. A mere changing of the law will not work, as often sufficient laws are already in place, and generally the necessary task is to find a way to make the law more efficacious. The changing of public perception can be achieved through a public campaign which highlights the deleterious effects that corruption has on people's lives, on investment, and on development, and informs them that effective ways of combating these effects have been established. For example, in Hong Kong, a separate investigative arm was established to deal with corruption and a public hotline was set up to take complaints. This encouraged a public belief that corruption was an issue that had to be addressed and that it was possible to be successful in fighting the practice. It is also necessary to involve a broad cross section of society in any campaign.

### *Discussion*

The ensuing discussion was generally confirmatory of Mr Hossain's introduction. Participants emphasised that corruption was often tolerated out of fear, or out of a sense of powerlessness. Corruption in society was perceived to occur primarily in the elite, who have the power to punish those that speak out against corrupt activities. Therefore, the public did not necessarily accept corruption, but rather felt powerless to do anything about it without risking an attack in response. Also, often those who are in a position to stand up to corruption are the same persons that benefit the most from corrupt activities. The majority, who are disadvantaged by corruption, have no power to instigate a change. This has the effect of derailing any attempts to address this issue, or undermines any anti-

corruption measures in place. It is crucial to provide adequate information to the public about what they can expect from their officials, what activities constitute corruption, what mechanisms are available to report the existence of a corrupt official and how to gain a remedy.

The need to organise and gather political and public support to end corruption was also emphasised. Institutional reforms will not, by themselves, generate change without a collective urge to combat corruption. However, problems were likely to occur between different regions or different minority groups in the perception of what activities on the periphery could be considered to be corrupt. For example, in certain societies, persons in public positions have a social obligation to look after their families or friends, a custom which in other countries or sections of society, would be seen as corrupt. To avoid some of these problems, a useful approach in a campaign against corruption would be to emphasise the public deprivation resulting from corruption, such as negative impact on development and equality of treatment.

The involvement of actors such as international lending institutions and the judiciary was also raised. International lending institutions were seen to be crucial in the fight against corruption, as they deal directly with governments and the existence of corruption directly undermined their development activities. The judiciary could also play an active role in recognising the need for fair competition and by providing a mechanism through which an individual's concerns about corruption could be addressed. In the case of corruption in the judiciary, a judicial corruption investigative body could be established under the auspices of the Supreme Court. However, concern was raised over the effectiveness of the judiciary in these circumstances, as often the elite have sufficient power to bypass judicial processes by utilising other forms of dispute resolution.

#### **IV. Indicators of Judicial Corruption**

Linn Hammergren of the World Bank presented an introduction to the process of identifying indicators of judicial corruption and the advantages and disadvantages of the various mechanisms. A preliminary point was made that addressing corruption in the judiciary cannot simply be done in

isolation, but must take place within the wider context of improving the overall quality of service that the judiciary provides. Also, simply informing members of the judiciary that they are acting improperly is likely to generate resistance and not improve overall judicial performance. Finally, in assessing corruption, account must be taken of the unique conditions and requirements of the particular country, rather than reverting to a standardised model.

The process of identifying corruption indicators requires considering three questions: 1) What is an indicator?; 2) How does an indicator operate, or what are we looking for in an indicator?; and 3) Why are indicators desirable?

In response to the first question, an indicator can fulfil any number of functions. It may help to establish the presence or existence of a phenomenon. It may also demonstrate the extent of that phenomenon, facilitate the comparing of different systems or assist in measuring progress in addressing the measured phenomenon. Indicators are different in a social science context than in a legal context. Social science indicators do not individualise a phenomenon, rather they look at the system. They also have different evidentiary requirements, with social science indicators usually relying on indirect evidence and a standard of proof of the balance of probabilities. The reasons for using an indicator also vary. They include to establish the existence of a problem, to inspire action, to measure progress, or to assist in the design of a reform program.

Several types of indicators have been developed to examine the problem of corruption. They fit into two general categories, qualitative and quantitative. Qualitative studies are useful for understanding the details of how corruption operates in a system, but they generally do not lend themselves to a comparison between systems. Quantitative studies are more useful in this situation because they focus on measuring systemic characteristics. An example of this later kind of study is one that involves asking people about their perceptions of corruption in the judicial system. However, this type of study can be unreliable because a person's perception of corruption may be far removed from the actual levels. In responding to a survey, a person may only rely on secondary sources, such as press reports, rather than on personal experience. Another example of a quantitative study involves asking members of the court or persons with experience of the court about their perceptions of corruption within the

system. This type of study is more reliable than the previous type, as the focus is upon those actually in the system. Still, such studies may suffer from a degree of under reporting, particularly with respect to high level corruption, unless the participants are guaranteed anonymity.

A third form of quantitative study focuses on personal experiences of corruption in order to establish what is actually occurring in the judicial system. These surveys have to be carefully constructed so as to allow persons to report corruption without incriminating themselves. They also require those developing the study to have knowledge of how corruption operates within the system so that the appropriate questions can be asked. These studies, although useful in drawing attention to the issue of corruption, often provoke a negative reaction from governments and can lead to judicial purges. Therefore, these tools, although useful, need to be used carefully and in conjunction with other elements.

To deal adequately with corruption, it is necessary to look at the motive, means and the risks. Assessing the motive for corruption requires examining the kinds of things that makes corruption acceptable or unavoidable, such as the salaries or conditions of work of judges. Assessing the means requires an evaluation of the judicial process. Finally, one must increase the risk that those engaging in corruption will be caught and sanctioned.

### *Discussion*

It was generally agreed that the types of surveys presented, irrespective of their faults, were essential in any fight against corruption. The group considered it important not to focus on the methodological problems associated with them, as these surveys were not to be used as a basis for individual action, but rather for the general trends that they may indicate. They may be useful in raising awareness, in mobilising public opinion, in creating an intolerance and possibly for comparing levels of corruption across systems. The consideration of the public's perception of the level and types of corruption is a crucial element in any process to address the existence of corruption. These types of indicators must be used in conjunction with other processes, and care must be exercised to ensure that the information obtained by the surveys is not co-opted for political purposes.

Also, these surveys are generally not very good at measuring overall progress. Their methodological problems may mean that a country with reportedly high levels of corruption and another with reportedly low levels may in actual fact have the same levels of corruption. In the years following the commencement of a campaign against corruption, the reported levels of corruption may rise, as more corrupt conduct that previously had gone unmentioned is reported in surveys.

## V. Codes of Ethics

The introduction to the session on codes of ethics was presented by Justice Bhagwati. In his presentation, Justice Bhagwati emphasised that the judiciary plays a central role in society that is based upon the rule of law and that has a proper respect for human rights. The importance of this role requires judges to conform to higher standards of conduct than would apply to “ordinary men”, thereby ensuring that the public perceives judicial officials to be of utmost integrity. Where the judicial system has become corrupted it sheds its appearance of integrity and the general public loses respect for the rule of law. A code of ethics is useful in the fight against corruption, as it can circumscribe the boundaries of acceptable conduct for judges by laying down a set of rules to follow.

Rules of behaviour contained in a code, if breached, can be useful indicators of corruption, at least as far as the public is concerned. A breach of such a rule may not in all situations actually amount to judicial corruption, in the sense that it has actually resulted in a perversion of the justice or influenced the decision of a judge. Justice Bhagwati considered, however, that any act or behaviour of a judge that creates reasonable doubt or apprehension about the integrity of a judge, should be regarded as judicial corruption. This may not necessarily require a criminal sanction, but may require condemnation or other administrative action.

Several issues must be addressed in the formulation of a code. First, who should draft such a code? A code should be drafted by the judiciary themselves and the executive should be excluded from the process, so ensuring that the code is not used as an instrument to harass or threaten the judiciary. Secondly, should the rules in the code have a legally binding effect? Justice Bhagwati suggested that there might be some rules in

the code that are so important to the integrity of a judge that a breach of such a rule should be considered judicial misconduct. In such situation, a judicial or quasi-judicial mechanism should be set up by the highest court for the purpose of deciding whether to take disciplinary or administrative action. Finally, some recommendations were made for the contents of the code. Judges should be required to declare their assets at appointment and for each subsequent year of their tenure. Whenever a matter comes before a judge in which he has an interest, financial or otherwise, this interest should be disclosed to enable the parties to object if they so desire. Also, there should be rules regarding the practice of relatives before the court in which a judge presides to avoid a perception of impartiality by a court.

### *Discussion*

The discussion participants universally accepted the need for a code of conduct to provide direction as to what constitutes acceptable conduct for members of the judiciary. It was also noted that the UN Basic Principles on the Independence of the Judiciary implicitly sanction the drafting of code by requiring, in Principle 19 that “all disciplinary, suspension or removal proceedings shall be determined in accordance with *established standards of judicial conduct*.”

A code is necessary to provide greater clarity to those grey areas of conduct that may be actually innocent, but is perceived by the public to diminish the integrity of the judiciary, as well as to provide standards to guide that conduct. It was also generally agreed that the judiciary should draft the code, but that wider consultations with other actors in society, such as the legal profession, academics, general public, and the other arms of government, should take place. General consultations will ensure widespread acceptance and understanding of the contents of the code. However, the executive or the legislature should not draft the code.

The participants agreed that a precise formulation of the contents of the code would not be appropriate for this meeting. It was suggested that a small group of experts be formed to collate materials on various codes of conduct from around the world, ensuring that codes from different legal traditions are analysed. This group could then develop a code to act as an example for judiciaries in the process of drafting and adopting their own



national codes. This model international code of conduct might then be adopted by the UN and become an international standard for judicial conduct. The CIJL and the UN Commission on Human Rights Special Rapporteur on the *Independence of judges and lawyers* also indicated their support for such an initiative.

The majority of the discussion focused on the actual scope of the contents of the code, considering whether it should include types of conduct that may already be subject to the criminal law or whether it should just include recommendatory rules to guide judicial conduct. It was recognised that it would be difficult for the code to contain sanctions for a breach of a provision, if the instrument was not to be enacted in a manner so as to give it binding legal force. Involving the parliament in the process concerned some participants, as such participation could lead to a perversion of the process for political ends and unnecessarily threaten the independence of the judiciary. One solution suggested was that rather than the legislature enacting the code after initial drafting by the judiciary, which might enable amendment to some of its provisions, it would be possible for the legislature to enact legislation mandating that a judicial body draft a code, the provisions of which would have binding effect. Alternatively, legislation could be enacted that gives binding effect to decisions with respect to a breach of the code and the sanctions imposed.

There was also debate about the extent of the provisions of the code. Many forms of corrupt activity are already covered under the ordinary criminal law in various countries. The provisions in the criminal law regarding the illegality of taking or offering bribes, for instance, would generally be applicable to the judiciary unless otherwise excluded. It was therefore accepted that such criminal conduct need not be prohibited by the code, as long as it were covered adequately elsewhere. Other less serious conduct should not be subject to criminal actions, but governed by the code. A breach of a rule, which is considered to be of sufficient gravity, may be sanctioned through disciplinary, administrative or other non-criminal procedures. The code of conduct can also include provisions that guide the conduct of judges, but do not require the imposition of a sanction in the case of a breach.

With respect to enforcing compliance with the code, it was agreed that the process should be controlled by the judiciary, *i.e.*, a self-monitoring mechanism. Suggestions were made that the public may not accept such

a commission completely controlled by the judiciary. Thus, it would be appropriate to have an independent commission which has a broad cross section of representation, including judges, academics, lawyers and representatives of civil society.

One final issue that arose was whether the code should be applicable only to the higher judiciary, or also to the lower ranks. To a great extent, the answer will depend on the structure of the judiciary within an individual country. In countries where the higher judiciary exercises supervisory control over the lower judiciary, that power of supervision should be left in the higher judiciary. However, in countries where the lower judiciary is not subject to this supervision or where it is subject to other supervision, either executive or legislative, the code of ethics should govern its activities. The definition of judge contained in the code in this circumstance could be altered to fit the existing conditions.

## **VI. National or International Legislation?**

The introduction to the session on national or international legislation was provided by Maurice Copithorne. He argued that neither national nor international legislation, although useful in the fight against corruption, would provide a single fix for the problem of corruption. In the national context, some countries already have legislative provisions concerning corrupt acts on the part of the judiciary. Canada, for example, has a provision targeting judicial officials and a separate provision for judicial support staff. However, in states that do not have a provision criminalising basic acts of corruption, such as bribery, it is necessary that they enact such legislation. With regard to countries that do criminalise the corruption of ordinary public officials, the question must be asked as to whether a judge is covered by such a provision, as members of the judiciary may not be considered to be public officials. Other forms of improper conduct by members of the judiciary should be covered by a code of conduct.

With respect to international legislation, Mr Copithorne raised several questions that he believed needed to be answered before a decision is made to pursue the aim of an international convention. The level of consensus on the basic concepts involved must be assessed, as must the question as to whether it is a politically opportune time to address the

question. It would be preferable to avoid the promulgation of a convention that simply represents “the lowest common denominator.” If a convention is not feasible, then other international routes are available, such as drafting a document which is subsequently approved in the form of resolution in the General Assembly of the United Nations.

### *Discussion*

The need to take some form of national and international legislative action on judicial corruption was accepted, and the group generally agreed with the contents of the introduction presented by Mr. Copithorne. An international code of conduct would be a useful tool for indicating “best practices” to national judiciaries. At the national level, legislative action should be taken to ensure that traditional acts of corruption, such as bribery, are covered by the criminal law.

The importance of considering regional initiatives in the area of judicial corruption was stressed. The drafting of conventions at the regional level may be more feasible, considering the greater similarities between countries participating in many regional groups.

The question arose as to whether judges constitute public officials. As highlighted in the introduction by Mr. Copithorne, in many countries there exists legislation that criminalises corruption involving public officials. Also, in international conventions, such as the OECD Convention on International Bribery, the term public officials explicitly includes judges. The question was whether judges should be covered by such provisions. To a great extent, the answer would depend on the situation in a particular country. Some members of the group agreed that it would be better if corruption in the judiciary were addressed by an individual legal provision, which would be consistent with status of the judiciary as the third arm of government and would recognise the principle of judicial independence. However, others felt that this approach would single out the judiciary and facilitate attacks on their independence, as well as undermine public confidence in the judicial process.

## **VII. Is there a need for a Separate Investigative Body for Judicial Corruption?**

The background paper for the session on investigative bodies was prepared by a former Supreme Court Justice of Nigeria, Justice Eso. According to Justice Eso, the investigation of judicial corruption is vital for the maintenance of public confidence and the appearance of an impartial judiciary. Judicial corruption usually is the product of a generally corrupt state, but the existence of judicial corruption is the most serious form of corruption because it directly undermines the rule of law. However, the investigation of judicial corruption can be a difficult process, due to its secret nature and the unwillingness of parties to come forward to report incidents of corrupt activity. An investigative body is therefore essential to ensure that adequate information on incidents involving corrupt practices is obtained and that those who supply information are protected.

In many countries, investigative bodies already exist to investigate allegations of corruption. These bodies also usually deal with allegations involving judicial officials. However, the importance of the independence of the judiciary requires the formation of a separate judicial investigative body to ensure that the investigation of corruption does not become a means to launching of attacks on the judiciary. The body should be established by legislation, be controlled by the judiciary and consist ideally of retired judges of the highest reputation. Retired judges are preferable, as difficulties often arise when sitting judges have to investigate corruption amongst their colleagues.

This body would have multiple functions. It would be responsible for the screening of every candidate for appointment and for confirming that a nomination has merit. The body would monitor the integrity and moral behaviour of the judge during his or her tenure. If it were to discover corrupt activities it would be required to inform the appropriate bodies of its findings and recommend measures to be taken. Therefore, the body would be responsible for monitoring the character, and the activities of appointees to the bench, prior to and following an appointment. An allegation of a persistent reputation for corruption should be sufficient for the commencement of investigative proceedings against a particular judicial official. However, it is essential to be alert to any attempts to blackmail the judiciary, by members of the executive or by litigants.

### *Discussion*

The group agreed that complaints of corruption should necessarily be investigated by a properly constituted body independent of the executive. This body ideally should consist of retired judicial officials, representatives of the legal profession and lay people to ensure that the decisions of the body are generally accepted. The question was raised as to whether this investigative body should be a separate entity from other judicial institutions or exist as part of an overall judicial body responsible for a wide variety of functions. If the body were a separate institution, then it could potentially be used for political purposes. The potentially *ad hoc* nature of such a body was considered to be inimical to judicial independence. The executive or dissatisfied litigants could use the formation of this body as a means of undermining public confidence in the judiciary. It was therefore agreed that the investigative body should be part of a permanent overall judicial body responsible for appointments, transfers, promotions, investigations, discipline and the maintenance of appropriate standards of conduct for the judiciary.

A substantial portion of the discussion focused on the approach a investigative body should take in situations where there are allegations of widespread corruption. There was concern that a regular judicial investigative body would not be an appropriate mechanism to investigate endemic corruption and that another body should be specially constituted to deal with this situation. The general belief, supported by experience from other countries, was that these bodies are not more successful at addressing endemic corruption. More often than not they are used by the executive to purge the judiciary and undermine its independence. This often results in the "good" judges being removed, as opposed to the corrupt members of the judiciary. It is also important in this situation that the requirements of the rule of law and due process are followed in each allegation of corruption. That the problem seems insurmountable or requires urgent action does not justify mass dismissals or the lack of an appropriate investigation and a fair hearing. Therefore, a permanent judicial body was required.

It was further emphasised that in situations of apparent endemic corruption, it is not sufficient only to seek to remove judicial officials that have been allegedly engaging in corrupt activities. The mass dismissal of judges, apart from usually occurring in a manner contrary to the rule of

law, is problematic for several reasons. First, it is difficult to determine by whom they might be replaced. Secondly, dismissal might not stop the occurrence of corruption. A successful campaign against corruption must target the conditions that caused corruption to occur initially. Although some individuals may be inherently bad, the majority of corruption results from the failure of the system to adequately provide resources and safeguards for the judiciary. The removal of judges and their replacement, without addressing the causes of the corruption, will simply expose the newly appointed individuals to the same conditions that helped to corrupt the previous judges.

The investigation of corruption, as noted, should take place with proper respect for due process and the rule of law. Due to the difficulties associated with proving the occurrence of judicial corruption, the group considered that in certain limited situations the burden of proof should be reversed to rest upon those accused of corruption. For example, in a situation where there is evidence of an increase in the wealth or assets of a judge disproportionate to his or salary or conditions of service, then it is incumbent on the judge concerned to explain this increase in wealth. If in the circumstances the judge is unable to prove the source of this wealth, it can be considered to have resulted from corrupt activities.

Justice Eso had raised the question of situations wherein there was a persistent reputation for corruption with respect to a particular judge. The participants felt that such a standard should be considered with caution. It was generally agreed that a persistent reputation was a sufficient ground for the commencement of an investigation, but that it could not amount to proof of corruption or a disciplinary offence by itself, nor or would it enable the burden of proof to be reversed with respect to an allegation.

### **VIII. Strategies for the future**

The seminar concluded with a discussion concerning the strategies that would be appropriate to ensure that action is taken upon the policy framework and that steps are taken to start the process of developing an international draft code of conduct. It was emphasised that the policy framework must achieve a wide dissemination, as soon as possible, amongst the various actors in this area. Regional groupings of judges, or

lawyers, or legal associations would be particularly important in facilitating implementation. These groups should disseminate this document among their members and undertake discussions concerning how the provisions could be implemented in their national jurisdictions. If these regional groupings do not yet exist, efforts should be made to encourage their formation. It was also emphasised that action should be taken upon this document from a wide variety of legal traditions and if possible translated into several languages. This would ensure its global applicability and consideration.

International lending institutions should also be involved in the consideration of this document and implementation of its contents. Some of these institutions already look at the issue of judicial corruption and this policy framework can be useful in guiding their future activities. Ideally, the United Nations should adopt the finalised document as a standard for judicial accountability. In this process the Special Rapporteur on the Independence of judges and lawyers would be of assistance. The United Nations was also suggested as a useful organisation to facilitate the development of working groups to draft and to encourage the implementation of the code.

## THE LEGAL CONCEPT OF JUDICIAL CORRUPTION

*Robert D Nicholson<sup>1</sup>*

The starting point for examination of the legal concept of corruption is the meaning of that word in common parlance. In English the word means in the relevant sense “change for the worse of an institution, custom...a departure from a state of original purity”.<sup>2</sup> The related adjective “corrupt” is defined to mean “influenced by bribery; perverted from fidelity”.<sup>3</sup> In Australia the word “corruption” is understood to include the meanings of “perversion of integrity” and “bribery”.<sup>4</sup> The related adjective “corrupt” is there understood to mean “dishonest; without integrity; guilty of dishonesty, especially involving bribery”.<sup>5</sup> These understandings of the word are reflected in the description of “corruption” given in the Oxford Companion to Law as “the perversion of anything from its original pure state, used particularly of accepting money or other benefit in consideration of showing favour to or benefiting the donor...”.<sup>6</sup>

It is instructive to consider the ways in which corruption is addressed in various statutory provisions. Some of these relate specifically to the instance of judicial corruption. More commonly they address corruption of public officials, corruption in relation to the police service and corrupt practices in relation to elections. The Oxford Companion to Law lists as corrupt practices, provided for in relation to interference with the liberty of an individual to freely exercise his or her right to vote at an election as including bribery, treating, undue influence, personation, making a false

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1 The Honourable Justice Robert D. Nicholson, Federal Court of Australia.

2 The New Shorter Oxford English Dictionary (Clarendon Press, Oxford, 1993) vol. 1 at 518.

3 *Id.*

4 The Macquarie Dictionary (The Macquarie Library Pty Ltd, 1992) at 402.

5 *Id.*

6 David M Walker, The Oxford Companion to Law (Clarendon Press, Oxford, 1980) at 295.



declaration as to election expenses and incurring certain expenses without the authority of the election agent.<sup>7</sup> What is absent from these provisions is a core concept of corruption in relation to which particular offences are created in varying circumstances. Rather, the concept of corruption appears to act as an umbrella under which are grouped a number of criminal offences and other conduct not attracting a criminal sanction. To illustrate the character of the statutory provisions concerned, I turn initially to enactments of the Australian Federal and State legislatures.

### **Statutory definitions**

It is appropriate to start with the provisions of the federal *Crimes Act 1914* (Cth), which in Pt 3 contains provisions concerning offences relating to the administration of justice. Section 32 in that Part provides:

“32. (*Judicial corruption*)

*Any person who:*

*being the holder of a judicial office, corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, or any other person, on account of anything already done or omitted to be done or to be afterwards done or omitted to be done by him in his judicial capacity; or*

*corruptly gives, confers, or procures, or promises or offers to give, confer, procure, or attempt to procure, to, upon, or for, any person holding a judicial office, any property or benefit of any kind on account of any such act or omission on the part of the person holding the judicial office;*

*shall be guilty of an indictable offence.*

Penalty: Imprisonment for 10 years”

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7 *Id.*

There is a related provision in s 33 concerning official corruption in relation to offences by a judge or magistrate not acting judicially and others. Then follows a further section which extends the offences relating to the administration of justice and the attainment of impartiality in relation to it, but not under the concept of "corruption". It reads:

"34. (Judge or magistrate acting oppressively or when interested)

*Any person who:*

*being a judge or magistrate and being required or authorised by law to admit any person accused of an offence against the law of the Commonwealth to bail, without reasonable excuse, and in abuse of his office, requires excessive and unreasonable bail; or*

*being a judge or magistrate, wilfully and perversely exercises federal jurisdiction in any matter in which he has a personal interest;*

shall be guilty of an offence.

*Penalty: Imprisonment for 2 years."*

The federal offence of judicial corruption in s 32 derives from and is paralleled by state offences to the same effect.<sup>8</sup> For example, the Criminal Code of Western Australia contains such a provision in s 121, which carries a maximum term of imprisonment of 14 years. The *Criminal Practice Rules 1969* (WA) contain the following form of indictment for an alleged offence under s 121 of the Criminal Code (WA):

"(1) Being a Judge (*etc. state the judicial office held by the accused person*), corruptly asked [*or received or obtained or agreed (or attempted) to receive (or obtain)*] from one M.N. certain property, namely, \$200 (*or as the case may be*), [*or a certain benefit, namely, (state it shortly)*], for himself [*or for one Q.R.*], on account of the said A.B having, in his judicial capacity aforesaid, given [*or in consideration that he the said A.B., in his judicial capacity aforesaid, would give*] judgment

8 Eg: *Criminal Code Act 1899* (Qld), s 120.

in favour of the said M.N. [or one O.P.] in an action between the said M.N. [or O.P.] and one R.S. (or as the case may be, state the act done or omitted or to be done or omitted).

(2) Corruptly gave [or conferred or procured or promised (or offered) to give (or confer or procure or attempt to procure)] to [or upon or for] one M.N., then being a Judge (state the judicial office), on account of the said M.N. having, in his judicial capacity aforesaid, given [or in consideration that the said M.N. in his judicial capacity aforesaid, would give] (etc as in (1)).”

It will be observed that the section and consequently its application are very much governed by the concept of corruption as limited to the receipt of property or benefit.

Section 121 is used as the lynch-pin for defining the range of allegations which can be made to the Anti-Corruption Commission in Western Australia concerning conduct of a holder of judicial office. Such allegations cannot be received or initiated by the Commission unless relating to the commission or attempted commission or incitement or conspiracy to commit an offence under s 121 of the Criminal Code.<sup>9</sup> Subject to that, allegations may relate to corrupt or criminal conduct and serious improper conduct of a judge. Corrupt conduct refers to allegations that a judge has:

“(i) corruptly acted or corruptly failed to act in the performance of the functions of his or her office or employment; or

(ii) corruptly taken advantage of his or her office or employment as a public officer to obtain any benefit for himself or herself or for another person.”<sup>10</sup>

The most apparently comprehensive legislative definition relating to corruption in Australian legislation is that which appears in the *Independent Commission Against Corruption Act 1988* (NSW). For the purposes of that Act “corrupt conduct” is defined as any conduct which falls within

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9 *Anti-Corruption Commission Act 1988* (WA), s 13(3).

10 *Id.*, s 13(1)(a).

the description in either or both of subss (1) and (2) of s 8 of the Act, but which is not excluded by s 9.<sup>11</sup> The former subsections provide:

“(1) Corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
- (b) bribery,
- (c) blackmail,
- (d) obtaining or offering secret commissions,
- (e) fraud,
- (f) theft,
- (g) perverting the course of justice,
- (h) embezzlement,
- (i) election bribery,
- (j) election funding offences,

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<sup>11</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 7(1).

- (k) election fraud,
- (l) treating,
- (m) tax evasion,
- (n) revenue evasion,
- (o) currency violation,
- (p) illegal drug dealings,
- (q) illegal gambling,
- (r) obtaining financial benefit by vice engaged in by others,
- (s) bankruptcy and company violations,
- (t) harbouring criminals,
- (u) forgery,
- (v) treason,
- (w) homicide or violence,
- (x) matters of the same or a similar nature to any listed above.”

The exclusionary provision is contained in s 9 which relevantly reads:

“(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament – substantial breach of an applicable code of conduct.”

“An applicable code of conduct” is defined to include a ministerial code of conduct or a code adopted by resolution of a Parliamentary House for the purpose of the section.<sup>12</sup> ‘Public official’ is defined as an individual having public functions or acting in a public official capacity and includes “a judge, magistrate or holder of any other judicial office”.<sup>13</sup> “Conduct” is defined to include neglect, failure and inaction.<sup>14</sup>

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<sup>12</sup> *Id.*, s 9(3).

<sup>13</sup> *Id.*, s 3(1).

<sup>14</sup> *Id.*

In *Greiner v Independent Commission Against Corruption*,<sup>15</sup> Priestley JA said of s 8:

“By far the greater part of conduct specified in the two subsections involves a criminal offence of some kind... However, this is irrelevant to the main purpose of the Act; its prime aim is plainly to bring a broad area of conduct, detrimental to the public interest, within the investigative reach of the commission. The concern is the public interest, irrespective of technical categories.”

In *Woodham v Independent Commission Against Corruption*,<sup>16</sup> Grove J said of the approach in ss 8 and 9:

“It is important to emphasize that “corrupt” is used in the legislation in an expanded sense to include a range of potential activity which would never fit that description in the usage of that word in the language – ancient or modern. The power of the legislature to impose artificial meaning upon a word for the purpose of its statute cannot be doubted. The choice of a word conveying a common meaning which is pejorative and vituperative but which, by force of statute, can be attached to conduct which is not of that character with the resultant licence for uninhibited public repetition is open to criticism. I respectfully commend the consideration of selection of more apt language to describe whatever is sought to be effected by the statute. In the present case senior counsel for the defendant acknowledged that no assertion was being made of “corrupt” conduct other than in the artificial sense in which the word appears in the ICAC Act.”

The State of New South Wales has also enacted the *Judicial Officers Act 1986* (NSW), which establishes the Judicial Commission whose functions include receipt of complaints about a matter that concerns or may concern “the ability or behaviour of a judicial officer”.<sup>17</sup>

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15 (1992) 28 NSWLR 125 at 183.

16 (1993) 30 ALD 390 at 394.

17 *Judicial Officers Act 1986* (NSW), s 15(1).

Turning to another common law jurisdiction, in Canada the offence of bribery of judicial officers in the Criminal Code provides:

“119. (1) Every one who

- (a) being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, corruptly
  - (i) accepts or obtains,
  - (ii) agrees to accept, or
  - (iii) attempts to obtain,any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity, or
- (b) gives or offers, corruptly, to a person mentioned in paragraph (a) any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”

No proceedings against the holder of a judicial office can be instituted under this section without the consent in writing of the Attorney-General of Canada.<sup>18</sup> This offence is bilateral, punishing both a donor and recipient. It relies on the concept of their actions having been done “corruptly”.

### **“Good behaviour” and “proven misbehaviour”**

These definitions of judicial corruption need to be viewed against the background that many judges in Australia are appointed “during good behaviour” with the power to remove them being upon an address to the relevant Parliament.<sup>19</sup> The Australian Commonwealth Constitution

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17 *Judicial Officers Act 1986* (NSW), s 15(1).

18 Canada, *Criminal Code*, s 119(2).

19 For example, *Supreme Court Act 1935* (WA), s 9(1).

provides for the Commonwealth Parliament to have the power to remove Federal judges on “proven misbehaviour.”<sup>20</sup> By the *Parliamentary Commission of Inquiry Act 1986* (Cth), a Commission was established to inquire into and advise the Parliament upon whether any conduct of a particular judge of the High Court of Australia had been such as to amount, in its opinion, to “proved misbehaviour” within the meaning of s 72 of the Constitution. The Commissioners were required to rule on their understanding of the word “misbehaviour”. Commissioner Sir George Lush considered the word was used in its ordinary meaning and not in the restricted sense of “misconduct in office” and nor was it confined to conduct of a criminal nature.<sup>21</sup> Commissioner Sir Richard Blackburn was of the opinion that “proved misbehaviour” means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.<sup>22</sup> Commissioner Andrew Wells QC said the word “misbehaviour” extended to conduct of the judge in or beyond the execution of his or her judicial office that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he or she will continue to do his or her duty under and pursuant to the Constitution.<sup>23</sup> In the course of his reasons, Blackburn J referred to a memorandum from the Judicial Committee of the Privy Council in England to the Secretary of State for the Colonies in 1870 on the subject of removal of colonial judges. The memorandum was drawn up and laid on the table of the House of Lords.<sup>24</sup> In addressing the causes of removal of a member of the judiciary, their Lordships used the phrases “grave misconduct”, “gross personal immorality or misconduct”, “corruption”, “irregularity in pecuniary transactions”, and “a cumulative... case of judicial perversity, tending to lower the dignity of... office, and perhaps to set the community in a flame.” In a separate memorandum Lord

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20 Commonwealth of Australia Constitution, s 72; cf for example *Constitution Act 1934* (SA), s 74; *County Court Act 1958* (VIC) 59.

21 Commonwealth of Australia, Parliamentary Commission of Inquiry, Special Report, 5 August 1986, Parliamentary Paper No. 443/1986, at 18.

22 *Id.*, at 32.

23 *Id.*, at 45.

24 6 Moo. P.C. 9.



Chelmsford used the phrases “judicial indiscretion or indecorum”, “ebullitions of temper and intemperate language”, “leading continually to unseemly altercations and undignified exhibitions in court”, “grave charges of judicial delinquency, such as “corruption, immorality or criminal misconduct”.<sup>25</sup> Corruption is thus seen as part of a pattern of judicial misbehaviour, some of which may be criminal and some of which may be non-criminal.

### **“Entrenched” and “systemic” corruption**

It is perhaps instructive to consider the examination of corruption in a recent Royal Commission into the New South Wales Police Service. There, corruption was taken to comprise “deliberate unlawful conduct (whether by act or omission) on the part of a member of the Police Service, utilising his or her position, whether on or off duty, and the exercise of police powers in bad faith”.<sup>26</sup> It was regarded as including participation by a member of the Police Service in any arrangement or course of conduct, as an incident of which that member, or any other member was expected or encouraged to neglect his or her duty or to be improperly influenced in the exercise of his or her functions, fabricates or plants evidence; gives false evidence; or applies trickery, excessive force or threats of other improper tactics to procure a confession or conviction; or improperly interferes with or subverts the prosecution process; conceals any form of misconduct by another member of the Police Service, or assists that member to escape internal or criminal investigation; or engages himself or herself as a principal or accessory in serious criminal behaviour. In each case, the relevant conduct is considered to be corrupt whether motivated by an expectation of financial or personal benefit or not and whether successful or not. The Commission said that without being exhaustive, this approach embraced well-known forms of corruption, such as the receipt of bribes; green-lighting, franchising, protecting

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25 Special Report, *supra* note 20 at 31.

26 Australia, New South Wales, Royal Commission into the Police Service, Final Report, vol 1, May 1997, at 25.

or running interference for organised crime; releasing confidential information and warning of pending police activity; ‘gutting’ or ‘pulling’ prosecutions; providing favours in respect of bail or sentencing; extortion; stealing and recycling of drugs, money and property obtained during the course of otherwise legitimate police operation; various forms of direct participation in serious criminal activity, the commission of which is facilitated by virtue of the office held; and the deliberate misuse of office to procure an advantage or disadvantage in matters of promotion, discipline, transfer and the like, through patronage, friendship or personal prejudice.<sup>27</sup> The Commission said the approach which it took embraced conduct known as ‘process corruption’, whereby unnecessary physical force is applied, police powers are abused, evidence is fabricated or tampered with or confessions are obtained by improper means.<sup>28</sup> It said that in determining whether corruption was of an ‘entrenched’ or ‘systemic’ kind, it took the view that these terms should be understood as follows:

‘entrenched’ corruption should be equated to the presence of corruption of such a nature and to such an extent, that it is firmly established within the Police Service and capable of being defended by its adherents or of resisting efforts for its eradication; [RCPS, First Interim Report, February 1996, p. 33.]

‘systemic’ corruption is taken to be the form of corruption which has become accepted as part of the way of life or ethos of the Police Service, and which a significant proportion its membership either pursues or tolerates at some stage of their police careers. [*ibid.*.]”

In some respects this approach of the Commission addresses many matters beyond any concept of judicial corruption. However, the approach exhibits the conceptual approach of using the term “corruption” to embrace a wide range of unlawful conduct, as well as the need to consider the additional concept of whether corruption is entrenched or systemic. This latter consideration is one which may also arise in consideration of judicial corruption.

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27 *Id.*, at 25 - 26.

28 *Id.*, at 26.

## Reconceptualising corruption provisions

In England and Wales the *Public Bodies Corrupt Practices Act 1899* applies broadly to councils and boards. The *Prevention of Corruption Act 1906* creates misdemeanours in respect of agents corruptly accepting any gift or consideration as an inducement or reward for action. The *Prevention of Corruption Act 1916* creates a presumption of corruption where it is proved that any money gift or other consideration has been paid or given to or received by a person in a public body. None of these would appear to be applicable to a member of the judiciary in respect of whom corruption is controlled by the common law offence of bribery. It was held in *R v Whitaker* that it is a misdemeanour at common law for a public officer, whether judicial or ministerial, to accept a bribe that is inducement to him (or her) to show favour or forebear to show disfavour to any person towards whom an impartial discharge of the officer's duty demands that he (or she) should show no favour or that he (or she) should show disfavour.<sup>29</sup>

The concept of corruption has recently been re-thought by the Law Commission for England and Wales. The Commission identified four major defects in the present provisions.<sup>30</sup> First, it pointed out that the present English law on corruption is drawn from a multiplicity of sources, including many overlapping common law offences and at least eleven statutes. Secondly, it said it was dependent on a distinction between public and non-public bodies which created difficulty because of the uncertainty in characterisation of the former, particularly when privatisation had occurred. Thirdly, it drew attention to the difficulty in ascertaining to whom the present legislation was applicable and, in particular, whether it applies to judges falling within a relevant definition of an agent. Fourthly, it considered the justification for the provision in the English law for a rebuttable presumption of corruption under s 2 of the *Prevention of Corruption Act 1916* required re-examination in the light of other provisions in the law and the European Convention on Human Rights.<sup>31</sup> The Commission's recommendations were designed to address

29 [1914] KB 1283.

30 The Law Commission, *Legislating the Criminal Code: Corruption*, 3 March 1998, pp 1 - 2.

31 cf. Vinod Pavarala, *Interpreting Corruption: Elite Perspectives in India* (Sage Publications, New Delhi, 1996), at 60 - 63.

the systematic development and reform of the law relating to corruption in the context of a modern criminal code.

The Commission also referred to the difficulties arising in relation to the meaning of the term “corruptly” used in each of the principal corruption acts. As a consequence of two competing strands of judicial interpretation of the term, it had been used, on the one hand, to describe an act which the law forbids as tending to corrupt and, on the other, to mean a dishonest intention to weaken the loyalty of an agent to his or her principle.<sup>32</sup> As a result of its consideration of these issues, the Law Commission recommended that the common law offence of bribery and statutory offences of corruption should be replaced by a modern statute.<sup>33</sup>

The scheme recommended by the Law Commission was to replace the *Prevention of Corruption Act 1899 – 1916* and the common law of bribery with a modern statute creating four offences, namely:<sup>34</sup>

- “(1) corruptly conferring, or offering or agreeing to confer, an advantage;
- (2) corruptly obtaining, soliciting or agreeing to obtain an advantage;
- (3) corrupt performance by an agent of his or her functions as an agent; and
- (4) receipt by an agent of a benefit which consists of, or is derived from, an advantage which the agent knows or believes to have been corruptly obtained.”

The Commission described as concepts crucial to these offences the following.<sup>35</sup>

- “(1) the relationship of “agency” (which is given a specially extended meaning for this purpose) and the functions that an agent performs as an agent;
- (2) “conferring an advantage”, and its mirror-image “obtaining an advantage”, and

32 *Law Commission, supra* note 29, at 19.

33 *Id.*, at 20, par 2.33, recommendation 1.

34 *Id.*, at 51.

35 *Id.*, at 52.

- (3) conferring an advantage *corruptly*. Where a person confers an advantage, the question whether he or she does so *corruptly* would, under our recommendations, depend on his or her intention in respect of the conduct of the agent in question, and his or her assessment of the likelihood of the agent acting in the desired way (if at all) *primarily in return for* the advantage conferred.

The concepts of *obtaining* and *soliciting* an advantage corruptly, and corrupt performance of an agent's functions, are defined by reference to the central concept of corruptly *conferring* an advantage. The offence of receiving a benefit derived from an advantage corruptly obtained is in turn defined by reference to the offence of corruptly obtaining an advantage."

A considerable portion of the Commission's report analyses and considers the content of these concepts and the meaning of the word "corruptly". The recommendations of the Commission are reflected in a draft Corruption Bill. The Commission's report in both its thinking and detail is at the forefront of present analysis of the concepts applicable to "corruption". However, it has been said that "any new offence emerging from the Commission's work might be unduly complex and risk under-inclusion".<sup>36</sup>

### **International influences on definition**

An international influence on domestic legislation relating to corruption has been the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997. Article 1.4.a of the Convention defines "foreign public official" to mean any person "holding a legislative, administrative or judicial office

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<sup>36</sup> G R Sullivan, "Reformulating the Corruption Laws – The Law Commission Proposals" (1997) *Criminal Law Review* 730 at 739.

of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation". Article 1.1 provides:

"1. Each party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

Pursuant to Article 12 of the Convention, reviews have been completed of the implementation of the Convention in OECD member countries. Because the reach of the Convention extends to a person holding judicial office in a foreign country, the reviews have necessarily examined the applicability to that office in member countries. For example, the review in the case of Australia indicates that the Convention was implemented through amendments to the *Criminal Code Act 1995* and that other existing laws include the *Proceeds of Crime Act 1997*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Extradition Act 1988* and the *Corporations Law*, all of which contain provisions relevant to obligations under the Convention.

There are additional international influences on the development and examination of the concept of corruption as it applies to the judiciary. The United Nations, through its Centre for International Crime Prevention, is conducting a global program against corruption. A judicial group on strengthening judicial integrity held its first meeting in Vienna on 15 – 16 April 2000. The Centre for the Independence of Judges and Lawyers convened an expert workshop in February 2000 which resulted in preparation of a "policy framework for preventing and eliminating corruption and ensuring the impartiality of the judicial system". The World Bank, the Asian Development Bank and others have been an influence on compelling re-examination of the concept in relation to the judiciaries of many countries of the world. Some of these developments are examined in other papers in this Yearbook.

Transparency International has defined corruption as “the misuse of public power for private profit”.<sup>37</sup> It emphasises that it cannot be assumed that corruption always means the same thing or has the same impact or motivation - what it maintains is necessary is a model of how corruption works in particular instances.<sup>38</sup> However, the definition of Transparency International has been said to have had three questionable features. Firstly, it focuses on the behaviour of public office-holders and impliedly excludes others. Secondly, “private profit” suggests direct or indirect gain to the office-holder. Thirdly, the definition assumes a sharp “public” / “private” divide.<sup>39</sup>

## **Towards further analysis**

The materials examined in this paper could be multiplied many times by reference to statutory and other definitions in the laws of additional countries. Nevertheless, the examination of the concepts inherent in “corruption” as exemplified in the above materials has made apparent the following. The first is that there is a wide diversity of provisions which in one way or another may be described as addressing the concept of corruption, particularly as it applies to the judiciary. Secondly, the development of conceptual analysis in relation to the concept of corruption is a very recent occurrence, best exemplified by the Law Commission. This has been commented on by an English law professor in the following terms<sup>40</sup>:

“discourse on bribery and corruption is just the kind of area that requires the attention of a new kind of general analytical jurisprudence: corruption is perceived to be an important transnational problem; it relates to all levels of legal ordering, it involves interdisciplinary analysis and cross-cultural sensitivity; to talk about it in general terms requires precise

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37 JJ Senturia, 7 enc. soc sci (1993) cited in the Transparency International Source Book.

38 TI Source Book, chapter 1.

39 Professor William Twining, “The Province of Jurisprudence Re-examined”, the Inaugural Julius Stone Address, 31 August 2000, at 23 – 24.

40 *Id.*, at 27.

concepts and coherent underlying assumptions. Here analysis involves focusing not on single abstract concepts, but rather on complex discourses or conceptual schemes; and it raises very puzzling questions about generalizability that challenge both universalists and cultural relativists. Conceptual clarity is often a precondition for other kinds of analysis.”

This paper does no more than identify some of the concepts involved in the topic of corruption and highlight the appropriateness of greater attention being given to legal analysis in that area. Such analyses would serve as a forerunner of the conceptual clarity now sought in the area to which it is applicable, including that of judicial corruption.



## STRENGTHENING THE JUDICIARY AGAINST CORRUPTION

*Petter Langseth and Oliver Stolpe<sup>1</sup>*

### **I. Introduction**

This article is an outgrowth of the successful outcome of the Workshop of the Judicial Group on Strengthening Judicial Integrity, convened by the Centre for International Crime Prevention (Global Programme against Corruption), at its Headquarters in Vienna, in April 2000, in cooperation with Transparency International. It was hosted by the Centre in conjunction with the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Workshop, in which eight Chief Justices and senior judges from countries of Africa and Asia participated, was conducted under the chairmanship of former World Court Judge Christie Weeramantry, with Justice Michael Kirby of Australia acting as Rapporteur.

The Judicial Group considered means by which to strengthen the judiciary through strengthening judicial integrity. In the view of the authors, the unique approach to the subject matter taken on that occasion is one most likely to yield the best results in terms of combating judicial corruption. Some important lessons, which might help overcome the impasse in the fight against corruption, were learned during this meeting. The unusual partnership based on mutual trust, exemplified by the Group, and the self-evaluative and remedial, or, "indigenous" nature of the recommendations of the justices themselves demarcate the road to progress and future effectiveness in combating judicial corruption. This is a promising approach to assessment and remedy as a forerunner to the transfer of

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1 Prepared by: Petter Langseth, Ph.D., Programme Manager and Oliver Stolpe, Associate Expert, United Nations Global Programme against Corruption, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention, United Nations Office at Vienna, 20 December 2000, for CIJL Yearbook, 2000. The views expressed herein are those of the authors and not necessarily those of the United Nations.

such judicial know-how among senior judges of different parts of the world.<sup>2</sup> In fact, the insightful and practical recommendations made by the participating justices highlighted the importance of involving senior practitioners of the sector, which is a target of reformative action.

In focussing on ways and means by which to strengthen judicial integrity against corruption, the authors point to the many challenges that should be met. One such challenge has to do with a *process* which must necessarily involve all stakeholders in order to have ultimate success. Designing and launching such a process would change (mis)perceptions about corruption that may be deeply entrenched in the public consciousness and the political life of a State, yet is contrary to the public interest and a great burden to the State. *One such misperception is that public figures have license to dispense favours and feel they are above others before the law.*

Key issues, which the authors will address in this article, are the following:

**Rule of law (as part of good governance):** The rule of law has become one of four critical variables for sustainable development and poverty alleviation.

**Evidence- based change:** It is not possible to strengthen the integrity and capacity of the criminal justice system without an independent assessment of corruption levels and performance of the judiciary.

**Involvement:** Successful changes of the integrity and capacity of the judiciary requires involvement of: (a) the judiciary itself; and (b) the court users both in developing a change programme and in the monitoring of the implementation of that programme.

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2 The findings and recommendations of the first meeting of justices, documented by Michael Kirby, can be accessed on the web page of the Centre ([http://www.ODCCP.org/corruption\\_judiciary.html](http://www.ODCCP.org/corruption_judiciary.html)).

## II. Judicial Corruption - A Development Issue

It has now become clear that corruption is one of the main obstacles to peace, stability, sustainable development, democracy, and human rights around the globe.<sup>3</sup>

The “quality counts”<sup>4</sup> discussion amongst economists has recently concluded that the key to reducing poverty is to undertake an integrated approach to development - one that addresses quality growth, including environment, education, health, and governance. Good governance, in its crosscutting nature, is the key determinant among these elements. It requires, among other things, trust between the State and the people, integrity, transparency, rule of law, checks and balances, co-ordination among agencies, and increased involvement of *all* other key stakeholders.

International and regional human rights instruments recognise as fundamental the right of everyone to due process of law, including to a fair and public hearing by a competent, independent and impartial tribunal established by law. The importance of this right in the protection of human rights is underscored by the fact that the implementation of all other rights depends upon proper administration of justice. An essential element of the right to a fair trial is an independent and impartial tribunal. Another inherent element of a fair trial is the procedural equality of parties, the so-called “equality of arms”. If the judicial system is corrupt, no such elements will exist. Judicial corruption influences unduly access to and outcome of judicial decisions. The decisions will remain unfair and unpredictable and consequently the rule of law will not prevail.

If one of the parties has bribed the judge or other court official and obtained access to documents to which the other party has no access, or caused documents to disappear, there can be no equality of arms. A judge who has taken a bribe cannot be independent, impartial or fair. When a party to judicial proceedings offers a bribe to a judge or other officials, and the bribe is accepted, that party immediately acquires a privileged status in relation to other parties who have not offered, or are not in a

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3 *The Lima Declaration against Corruption*, 8th International Conference against Corruption, September 1997, Lima, Peru.

4 Nihal Jayawickrama, *Strengthening Judicial Integrity*, unpublished paper presented at the Workshop, April 15/16 Vienna.

position to offer, a bribe or inducement. The preferential treatment secured and the resulting discrimination, then, obliterates objectivity and neutrality from the judicial process. A legitimate aim is not being pursued. The fundamental precepts of human rights are violated rather than upheld.<sup>5</sup>

Judicial integrity and capacity must therefore be dealt with squarely in any reformatory action. There is increasing evidence of the infiltration of corruption into all branches of Government charged with the safeguarding of the rule of law. Particularly insidious in this regard is judicial corruption. A corrupt judiciary means also that the legal and institutional mechanism designed to curb corruption generally will be handicapped. The judiciary is the public institution that is mandated to provide essential checks on other public institutions. A fair and efficient judiciary is the key to anti-corruption initiatives.

But there are also more practical considerations suggesting that initiatives to strengthen the integrity of the institutional framework should initially focus on the judiciary. Because of its independence, the judiciary typically holds a comparatively strong position inside the institutional framework. While police and prosecution are often susceptible to political interference, the judiciary has only to face the issues of insufficient capacity and integrity inside its own institution. The judiciary tends to be the smallest of the justice system institutions. Technical assistance, addressing both integrity and capacity-building, can easily reach a critical mass of judges and magistrates and is therefore more likely to have an impact. If efforts are initially concentrated on law enforcement institutions, there is an additional danger that cases will be brought to trial, and expectations will be raised and ultimately destroyed, once the courts do not rule according to the law. Such a scenario easily leads to frustration within police and prosecution agencies and by the general public. It ultimately confirms, and upholds, the notion that corruption pays off.

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5 Buscaglia/ Dakolias, Legal and Judicial Reform Unit, Legal Department, The World Bank, *An Analysis of the Causes of Corruption in the Judiciary* (1999) at 2.

### III. Judicial Corruption - A Global Problem

Judicial corruption appears to be a global problem. It is not restricted to a specific country or region. Yet manifestations of corruption seem to be at their worst in developing countries and countries in transition. According to the Geneva-based Centre for the Independence of Judges and Lawyers, of the 48 countries covered in its annual report for 1999, judicial corruption was “pervasive” in 30 countries.<sup>6</sup>

In a service delivery- survey conducted in Mauritius, between 15 and 22 per cent of the interviewees stated that “all” or “most” of the magistrates were “corrupt.”<sup>7</sup> According to a similar survey conducted in Tanzania in 1996,<sup>8</sup> 32 per cent of the respondents who were in contact with the judiciary had actually paid “extra” to receive the service.<sup>9</sup> In Uganda, a similar survey yielded even higher values. Over 50 per cent of those who came into contact with the courts reported to have paid bribes to officials.<sup>10</sup> Even more telling, perhaps, are the statements recorded in the focus groups on judicial corruption in Uganda. These are the following:

*Issues raised about the courts in Uganda in Focus Groups held at the village level*

If you do not cough (pay a bribe) something, the case will always be turned against you and you end up losing it.

6 Centre for the Independence of Judges and Lawyers, *Ninth annual report on Attacks on Justice*, March 1997 February 1999.

7 *Building an Island of Integrity, Proceedings of a Workshop on National Integrity Systems in Mauritius*, Presented by the Office of the Attorney General in collaboration with TI (Mauritius), Transparency International, and the Economic Development Institute of the World Bank with financial support of the Government of Norway and Mauritius (February 1998).

8 Presidential Commission of Inquiry against Corruption, *Service Delivery Survey, Corruption in the Police, Judiciary, Revenue and Land Services*, CIETinternational & Worldbank, Tanzania (1996).

9 *Ibid.*

10 The Inspectorate of Government, Uganda, *Building Integrity to Fight Corruption to Improve Service Delivery* (1999).

*Mbale, Site 4, Men*

The clerks won't allow you see the magistrate unless you have given in some money.

*Lira, Site 4, Men*

The magistrates keep on adjourning cases until they are bribed.

*Kamuli, Site 1, Men*

Source: CIET international, National Integrity Survey in Uganda, 1998

In Asia, the situation might be seen as equally discouraging. In a survey carried out for the World Bank in Cambodia, 64 per cent of the interviewees agreed with the statement "the Judicial system is very corrupt", and 40 per cent of those who had been in contact with the judiciary had actually paid bribes. Corruption in the judicial system was ranked among all factors as the most significant obstacle to using the court system.<sup>11</sup> A recent national household survey on corruption in Bangladesh revealed that 63 per cent of those involved in litigation had paid bribes either to court officials or to the opponent's lawyer and 89 per cent of those surveyed were convinced that judges were corrupt.<sup>12</sup> In the Philippines, 62 per cent of the respondents believed that there were significant levels of corruption within the judiciary and 57 per cent that many or most of the judges could be bribed.<sup>13</sup>

In a similar study conducted by the World Bank in Latvia, 40 per cent of the respondents who had dealings with the court system reported that bribes to judges and prosecutors were frequent. Moreover, 10 per cent of the businesses and 14 per cent of the households having had contacts with the court system received indications of the necessity of paying a

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11 World Bank, *Cambodia, Governance and Corruption Diagnostic: Evidence from Citizen, Enterprise, and Public Official Surveys*, (Prepared at the Request of the Royal Government of Cambodia) (May 2000):

<http://www.worldbank.org/wbi/governance>.

12 Transparency International, Bangladesh Chapter, *Corruption in Bangladesh Survey*, <http://www.transparency.ca/Readings/TI-F01.htm>.

13 Philippine Country Management Unit East Asia and Pacific Region, *Philippines, Combating Corruption in the Philippines*, World Bank, Report No. 20369-PH (May 2000).

bribe.<sup>14</sup> In Nicaragua, 46 per cent of those surveyed who had dealings with the court system stated that there was corruption in the judiciary; 15 per cent had actually received indication that the payment of a bribe was expected.<sup>15</sup> In Bolivia, 30 per cent of the respondents to a service-delivery survey were asked for a bribe upon contact with the judiciary, and 18 per cent actually paid a bribe.<sup>16</sup>

The above-mentioned surveys suggest that corruption is far from being the only reason that individuals are dissatisfied with the judiciary. These and other surveys indicate that, in many countries, individuals are also dissatisfied with the cost, accessibility and fairness of justice. They are dissatisfied with the delays. They are dissatisfied with the cumbersome and daunting procedures involved in going to court. In Colombia, the backlog of cases has exceeded four million and about 70 per cent of a judge's time typically was consumed by paperwork. In a number of countries, governments do not hesitate to ask judges to undertake non-judicial work, such as sitting on commissions of inquiry, sometimes with a political favour, and the judges concerned rarely decline to do so. These might be seen as indicators of judicial systems in a perpetual state of crisis.

#### **IV. Causes and Indicators of Judicial Corruption**

The few studies conducted suggest that the causes of judicial corruption vary significantly from State to State. Some of the possible causes include low remuneration and the administrative nature of the roles of judges, far reaching discretionary powers and weak monitoring of the execution of those powers. Factors which engender judicial abuse of power also create an environment where whistle blowing is unlikely, given the extensive power and authority of the individuals involved. The lack of transparency and the absence of comprehensive and regularly

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14 World Bank, *Corruption in Latvia*, Survey Evidence, (December 1998).

15 Comit Nacional de Integridad-Banco Mundial-CIETinternational *Encuestat Nacional Sobre Integridad y Corrupcion en la Administracion publica*, Nicaragua (August 1998).

16 CIET international, *Popular Perception of Corruption in the Public Service*, Key Findings of the first National Integrity Survey in Bolivia, (April 1998).

updated databases further worsen the effects of corruption in the judiciary. Such situations easily lend themselves to inconsistencies in the application of the law and make it much more difficult to identify patterns, trends or individual cases in which incorrect or anomalous results suggest the possibility of corruption. Inconsistencies might arise not only with regard to the substance of court decisions, but also with respect to court delays, fostered by the absence of time standards and their close monitoring. The lack of computer systems is one of the main causes for inconsistencies, according to Latin American lawyers and judges.<sup>17</sup>

Indicators of corruption, as perceived by the public, include: delay in the execution of court orders; unjustifiable issuance of summons and granting of bails; prisoners not being brought to court; lack of public access to records of court proceedings; disappearance of files; unusual variations in sentencing; delays in delivery of judgements; high acquittal rates; conflict of interest; prejudices for or against a party witness, or lawyer (individually or as member of a particular group); prolonged service in a particular judicial station; high rates of decisions in favour of the executive; appointments perceived as resulting from political patronage; preferential or hostile treatment by the executive or legislature; frequent socialising with particular members of the legal profession, executive or legislature (with litigants or potential litigants); and post-retirement placements.

## **V. United Nations Initiative to Combat Judicial Corruption**

Legal provisions, at the national and international levels, continue to emphasise the independence of the judiciary. Technical assistance projects mainly deal with the building of professionalism and capacities within the judiciary. The challenges of *strengthening integrity through increased accountability of judges and the development of methodologies to clean up a corrupt judicial service remain neglected*. This is where the Centre for International Crime Prevention and Transparency International intend to make a difference. Even though judicial integrity is critical, only a few international institutions are currently focussing on this issue.

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17 Buscaglia/ Dakolias, Legal and Judicial Reform Unit, Legal Department - The World Bank, *An Analysis of the Causes of Corruption in the Judiciary* (1999) at 7.



Where this issue is dealt with, the typical approach has to do with reforming the judiciary from the outside, through the executive and/or focus on capacity, rather than the integrity of the judiciary. Uniquely, the approach presented in this article has managed to attract the support of some key chief justices and high court judges from developed and developing countries. Trusting each other, the justices have joined in partnership for an international cause. With vast experience and expertise on the matter, they also have demonstrated their willingness to be self-critical and openly address highly sensitive issues. In this regard, they have focused upon the question of integrity of their own institution, the judiciary, for the benefit of strengthening the judiciary across legal systems against corruption.

Corruption in the judiciary is a complex problem and needs to be addressed using a variety of approaches. In Venezuela, where 75 per cent of the population reportedly distrusts the judicial system, a US \$120 million reform programme aims at, *inter alia*, eliminating corruption by opening up the system, with public trials, oral arguments, public prosecutors and citizen juries. However, in many countries where these are standard features of the system, the judiciary is nonetheless perceived to be corrupt. Elsewhere, consequent to donor-driven reform initiatives, more and better equipped courts have been established and judges' salaries have been increased, but the public continues to consider the judges corrupt. The phenomenon of corruption in the judiciary needs to be revisited. A right balance needs to be achieved between autonomy in decision-making and independence from external forces on the one hand, and accountability to the community on the other.

Any approach to judicial integrity must also contain measures to restore public trust and the credibility of the judiciary. Eliminating judicial corruption alone is not enough if courts and judges are still seen as corrupt or incorrect by litigants and the general population. Public credibility is essential to eradicate corruption, because people will not come forward or speak out until they trust the system to protect their interests.

The Workshop of Chief Justices and other senior/high-level judges that was convened by the Centre considered the formulation of a programme to strengthen judicial integrity. Having regard to recent attempts by some development organisations to reform judiciaries in Latin America and

Eastern Europe which were not particularly successful, principally due to their failure to recognise the existence of different legal traditions in the world, the Workshop decided to focus, at this pilot stage, on the common law system. The Group was formed exclusively by common law Chief Justices or senior judges of seven Asian and African countries.<sup>18</sup>

The objective of the programme was to launch an open and client-driven action learning process at the international level, in which the Chief Justices involved would identify possible anti-corruption policies and measures suitable for application in their own jurisdictions. They would test them at the national level, share their experiences in subsequent meetings at the international level, refine the approach and trigger the adoption of those measures by their colleagues that had showed the most promising results. Consistent with the global “action learning” approach, which they generally adopt, neither the Centre nor Transparency International pretend to know all the answers and do not come to countries seeking to impose off-the-shelf, ready-made solutions. They try not to approach the programme with any pre-conceived notions. Instead, they work with relevant institutions and stakeholders within each country, to develop and implement appropriate methodologies and submit, on a continuing basis, any conclusions to scrutiny by specialist groups. The entire project is based on partnership and shared learning.

The objectives of the first meeting were to *raise* awareness regarding: the negative impact of corruption; the levels of corruption in the judiciary; the effectiveness and sustainability of an anti-corruption strategy consistent with the principles of the rule of law; and the role of the

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18 The preparatory meeting was held in Vienna on April 15 and 16, 2000, under the framework of the Global Programme Against Corruption and in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders. It was attended by the Honorables M. L. Uwais, Chief Justice of Nigeria; Pius Langa, Vice-President of the Constitutional Court of South Africa; Hon. F. L. Nyalali, Former Chief Justice of Tanzania, B. J. Odoki, Chairman of the Judicial Service Commission, Bhaskar Rao, Chief Justice of Karnataka; Latifur Rahman, Chief Justice of Bangladesh, and Govind Bahadur Shrestha, Chief Justice of Nepal. The Hon. Sarath Silva, Chief Justice of Sri Lanka could not attend, but conveyed his fullest support to the group. The meeting was chaired by the Hon. Christopher Weeramantry, Former Vice-President of the International Court of Justice and facilitated by the Hon. Dr. Giuseppe di Gennaro, Former Judge of the Italian High Court, and Dato Param Kumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers. The rapporteur was the Hon. Michael Kirby, Judge of the High Court of Australia.

judiciary in combating corruption. Furthermore, the meeting would *formulate* the concept of judicial accountability and devise the methodology for introducing that concept without compromising the principle of judicial independence. A final objective was to *design* approaches which will be of practical effect and have the potential to impact positively on the standard of judicial conduct and raise the level of public confidence in the rule of law.

The following issues were discussed, recorded and adopted by the Group:<sup>19</sup>

Public perception of the judicial system.

Indicators of corruption in the judicial system.

Causes of corruption in the judicial system.

Developing a concept of judicial accountability.

Remedial action.

Designing a process to develop plans of action at the national level.

The participating Chief Justices concluded that the causes of judicial corruption or the perception of judicial corruption involve not only first hand experiences of actual corruption, but also a series of circumstances which are all too easily interpreted as being caused by corrupt behaviour, rather than the mere lack of professional skills and a coherent organisation and administration of justice.

The Chief Justices agreed, however, that the current knowledge of judicial corruption was inadequate to provide a basis to establish remedies. Even in those countries where surveys had been conducted, the results were not sufficiently specific. Generic questions about the levels of corruption in the courts do not reveal the precise location and causes of the corruption and will therefore be easily rejected by the judiciary as grounds for the formulation of counter measures and policies. They agreed that there was a strong need for the elaboration of a detailed survey instrument that would allow the identification not only of the levels of corruption, but also the types, causes and locations of corruption. They were convinced that the perception of judicial corruption was caused to a

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19 GPAC Working Paper No 3, Integrity in Judiciary, Vienna (May 2000).

large extent by the malpractice within the other legal professions. Experiences from some countries show that the court staff or the lawyers pretend to have been asked for the payment of a bribe by a judge in order to enrich themselves. Surveys in the past did not sufficiently differentiate between the various branches and levels of the court system. Such an approach inevitably had to lead to a highly distorted picture of judicial corruption, since the absolute majority of contacts with the judiciary were restricted to the lower courts. Survey instruments used so far seem not to take into account that the perception of corruption might be strongly influenced by the outcome of the court case. In particular, where lawyers try to cover up their own shortcomings, the losing parties often presume that the opponent paid a bribe to the judge, which caused their defeat.

Service-delivery surveys usually rely exclusively on the perceptions or experiences of court users and do not try at all to use insider information, which easily could be obtained by interviewing prosecutors, investigative judges and police officers. Existing instruments also seldom try to further refine the information obtained in the survey by having the data discussed in focus groups and/ or by conducting case studies.

The Judicial Group agreed that a set of preconditions, mostly connected to the attraction of the judicial profession, must be put into place before the concrete measures to fight judicial corruption can be applied successfully. In particular, low salaries paid in many countries to judicial officers and court staff must be improved. Without fair *remuneration*, there is not much hope that the traditional system of paying “tips” to court staff on the filing of documents can be abolished. However, adequate salaries will not guarantee a judiciary free from corruption. Countless examples of public services all over the world prove that regardless of adequate remuneration, corruption remains a problem. An adequate salary is a necessary, but not sufficient condition for official probity.<sup>20</sup> Moreover, an excessive workload will hinder the judge in ensuring the quality of his work, which eventually will make him lose the interest in his job and thereby more susceptible to corruption. In addition to the remuneration, improving service conditions might increase the attractiveness of the judicial career.

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20 Moskos, *Upholding Integrity among Justice and Security Forces*, in A Global Forum against Corruption, Final Conference Report at 63.

But “extras” and salaries must be well balanced. Examples from some developing countries show that States tend often to provide a great part of the remuneration in the form of housing, car, personnel, etc., while the salaries paid hardly cover the costs of these “extras”. Such a situation can have an extremely negative effect, since the state suggests the adequacy of a living standard far beyond what the judge would be able to afford if he would be only paid his salary. Consequently, the judge gets used to a living standard which he will not be able to maintain once he retires. Such a situation may, as a matter of fact, contribute to the temptation to adopt corrupt practices, since the judge might desire to accumulate sufficient resources to preserve his social status also during retirement.

In order to come up with a realistic, focussed, and effective plan of action to prevent and contain judicial corruption, the Judicial Group recommended, first of all, to develop a coherent survey instrument allowing for an adequate assessment of the types, levels, locations and remedies of judicial corruption. The Group also saw a need to establish a mechanism to assemble and record such data and, in appropriate format, to make it widely available for research, analysis and response. It was felt that more transparent procedures for *judicial appointments* were necessary to combat the actuality or perception of corruption in judicial appointments (including nepotism or politicisation) and in order to expose candidates for appointment, in an appropriate way, to examination concerning allegations or suspicion of past involvement in corruption.

The Judicial Group concluded furthermore that there is a need for the adoption of a transparent and publicly known (and possibly random) procedure for the *assignment* of cases to particular judicial officers. The purpose of such a change would be to combat the actuality or perception of litigant control over the decision-maker. Internal procedures should be adopted within court systems, as appropriate, to ensure regular change of the assignment of judges to different districts. This rotation would be effectuated with due regard to appropriate factors, including the gender, race, tribe, religion, minority involvement and other features of the judicial office-holder. Such rotation should be adopted to avoid the appearance of partiality.

In order to ensure the correct behaviour of judicial officers, the Judicial Group urged the adoption of *judicial codes of conduct*. Judges must be instructed in the provisions established by such a code and the public

must be informed about the existence, the content and the possibilities to complain in case of the violation of such a code. Newly appointed judicial officers must formally subscribe to such a judicial code of conduct and agree, in the case of proven breach of the code, to resign from judicial or related office. Representatives from the Judicial Association, the Bar Association, the Prosecutor's office, the Ministry of Justice, the Parliament and the Civil Society should be involved in the setting of standards for the integrity of the judiciary and in helping to rule on best practices and to report upon the handling of complaints against errant judicial officers and court staff. Moreover, rigorous obligations should be adopted to require all judicial officers publicly to *declare their assets* and the assets of their parents, spouse, children and other close family members. Such publicly available declarations should be regularly updated. They should be inspected after appointment and monitored from time to time by an independent and respected official.

As another pressing field of intervention, the Group identified widespread *delays* causing both opportunities for corrupt practices and the perception of corruption. Therefore, practically tenable standards for timely delivery must be developed and made publicly known. In this context it should be noted, however, that reducing court delays has proven extremely difficult even in countries where the mobilisation of human and financial resources is far less problematic than in countries in the developing world. For example, the United States delay reduction programme, even though generally referred to as a success, did not manage to reduce court delays significantly. What the programme did achieve was to increase the amount of cases concluded by a court decision, since more litigants were willing to sit through lengthy court proceedings, seeing the light at the end of the tunnel.<sup>21</sup>

Practical measures should be adopted, such as *computerisation of court files*. Experiences from Karnataka State in India suggest that the computerisation of case files helps not only to reduce immensely the work load of the single judge and to speed up the administration of justice, but also helps to avoid the reality or appearance that court files are "lost" to require "fees" for their retrieval or substitution. The Group also supported the notion that *sentencing guidelines* could significantly help in

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21 Messick, *Reducing Court Delays: Five lessons from the United States*, The World Bank PREMnotes, No. 34 (Dec. 1999).

identifying clearly criminal sentences and other decisions which are so exceptional as to give rise to reasonable suspicions of partiality.

Furthermore, it was felt that making available systems for *alternative dispute resolution* would give the litigants the possibility to avoid actual or suspected corruption in the judicial branch. A study carried out for the World Bank on the development of corruption in the Chilean and the Ecuadorian judiciaries seems to confirm this assumption.<sup>22</sup>

The Group also noted the importance of proper *peer pressure* to be brought to bear on judicial officers, and that this practice should be enhanced in order to help maintain high standards of probity within the judicature. Establishment of an independent, credible and responsive *complaint mechanism* was seen as an essential step in the fight against judicial corruption. The responsible entity should be staffed with serving and past judges and be given the mandate to receive, investigate and determine complaints of corruption allegedly involving judicial officers and court staff. The entity, where appropriate, should be included in a body having a more general responsibility for judicial appointments, education and action or recommendation for removal from office.

In the event of proof of the involvement of a jurist in corruption in relation to activities as a member of the legal profession, appropriate means should be in place for investigation and, where such misconduct is proved, *disbarment* of the persons concerned.

Procedures that are put in place for the investigation of allegations of judicial corruption should be designed after due consideration of the viewpoint of judicial officers, court staff, the legal profession, users of the legal system and the public. Disappointed litigants and others should establish appropriate provisions for due process in the case of a judicial officer under investigation, bearing in mind the vulnerability of judicial officers to false and malicious allegations of corruption.

It should be acknowledged that judges, like other citizens, are subject to the criminal law. They have, and should have, *no immunity from obedience to the general law*. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences

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22 Buscaglia/ Dakolias, Legal and Judicial Reform Unit, Legal Department, The World Bank, *An Analysis of the Causes of Corruption in the Judiciary* (1999) at 10.

on the part of judicial officers and court staff, such investigations should take their ordinary course, according to law. An *inspectorate* or equivalent independent guardian should be established to visit all judicial districts regularly in order to inspect and report upon any systems or procedures that are observed which may endanger the actuality or appearance of probity. The inspectorate should also report upon complaints of corruption or the perception of corruption in the judiciary.

The role and functions of *Bar Associations* and *Law Societies* in combating corruption in the judiciary should be acknowledged. Such bodies have an obligation to report to the appropriate authorities instances of corruption which are reasonably suspected. They also have the obligation to explain to clients and the public the principles and procedures for handling complaints against judicial officers. Such bodies further have a duty to institute effective means to discipline members of the legal profession who are alleged to have been engaged in corruption of the judicial branch.

In order to assure the transparency of court proceedings and judicial decisions, systems of *direct access* should be implemented to permit litigants to receive advice directly from court officials concerning the status of their cases awaiting hearing. *Workshops* and *seminars* for the judiciary should be conducted to consider ethical issues and to combat corruption in the ranks of the judiciary and to heighten vigilance by the judiciary against all forms of corruption. A judge's journal should, if it does not already exist, be instituted and it should contain practical information on all of the foregoing topics relevant to enhancing the integrity of the judiciary.

Judicial officers, in their initial education and thereafter, should be regularly assisted with instruction in binding decisions concerning the *law of judicial bias* (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality. In order to achieve accountability, there is a need that both *civil society and the judiciary* recognise that the judiciary operates within the civil society it serves. It is essential to adopt every available means of strengthening the civil society to reinforce the integrity of the judiciary and the vigilance of the society that such integrity is maintained. In order to assure the monitoring of judicial performance, the explanation to the public of the work of the judiciary and its importance, including the importance of maintaining high standards of



integrity, needs to be explained. The adoption of initiatives such as a *National Law Day* or *Law Week* should be considered.

It was agreed that the role of the *independent media* as a vigilant and informed guardian against corruption in the judiciary should be recognised, enhanced and strengthened by the support of the judiciary itself. Courts should be afforded the means to appoint, and should appoint, *media liaison officers* to explain to the public the importance of integrity in the judicial institution, the procedures available for complaint and investigation of corruption and the outcome of any such investigations. Such officers should help to remove the causes of misunderstanding of the judicial role and function.

## **VI. Conclusion**

Like other entities involved in the “business” of development, the United Nations Global Programme against Corruption has experienced a steep learning curve with regards to understanding the negative impacts of corruption and devising means of curbing it. After almost seven years of governance work, Member States, development agencies and international organisations have realised that the problem of corruption is one of the big challenges to quality growth. Corruption within justice administration has been underestimated. A clear-cut global strategy or approach to the situation is only now emerging.

The approach described in this paper is based on the following premises:

- At national and international levels, a coherent and independent assessment of the levels, causes, locations, effects and costs of corruption is a necessary precondition for the formulation of effective remedies;
- Evidence-based planning is only possible where the data has a high level of credibility with regards to the sample size, the methodologies used to allow cross checking (focus groups, case studies), the specificity of the information obtained and the independence and professionalism of the entity responsible for the data collection and analyses;

- Assessment must be repeated regularly to allow independent impact-monitoring of anti-corruption work;
- The findings of the assessment should be disseminated widely in the relevant local languages;
- Although important, conducting the assessment is only a part of a far more comprehensive process. The bigger challenge is to improve the quality of decision making and the accountability of the decision-makers by utilising the assessment as a basis for the development, the implementation, the monitoring, the reviewing and impact evaluation of a broad based action plan;
- Eradication of corruption from the justice system is a joint task involving not only judges and members of the legal profession, but literally all stakeholders, including all branches of Government, the media and the civil society;
- The entire process should be monitored by an independent and credible body with members selected on the basis of professional integrity and competence.

The authors are convinced that past reform initiatives often could not achieve the expected impact because efforts were made primarily in the formulation of the objectives and little or no importance was given to the *processes* of developing and implementing these objectives, such as a broad-based ownership, transparency, and accountability. Goals were not accomplished because: (i) the implementation strategy remained unclear; (ii) the objective itself was not capturing the problem to be addressed or remained unrealistic; (iii) there were few incentives for the involved parties to implement the plan; (iv) there were no accountability or disincentives for not implementing the plan; and (v) there was no public expectation or pressure from key stakeholder groups to implement the plan.

The challenge is to come up with an integrated, evidence-based approach that balances process and substance to ensure a more coherent and realistic formulation of objectives, but also create the necessary ownership among stakeholders. This is crucial to establishing transparent

accountability and monitoring and keeping implementation progressing as planned.

# THE MULTILATERAL DEVELOPMENT BANKS AND JUDICIAL CORRUPTION

*Linn Hamnergren<sup>1</sup>*

## Introduction

When first asked to address the theme of the Multilateral Development Banks' (MDBs) role in combating judicial corruption, my inclination was to declare it minimal and so end the discussion. While the Banks and other international agencies (bilateral and multilateral donors) have been involved for years in judicial reform programs around the world, it is fair to say that none of them has yet developed a distinctive, let alone effective, judicial anti-corruption strategy, in general or in individual country programs. On a related theme, a recent exercise by the US Agency for International Development (USAID), asking in-country experts what donors had done to advance judicial independence in their own nations,<sup>2</sup> brought a general response of "very little." While this is probably accurate, the exercise itself is indicative of one major contribution. In the case of independence, like that of corruption, the fact that donors now address the topic openly is in itself an important element; it is a big change from the situation even a decade ago, when one might well have been asked to excise any reference to corruption from donor-sponsored evaluations and appraisals.<sup>3</sup> The tide has turned so

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- 1 The World Bank. The opinions expressed in this paper are those of the author and in no way represent any official position of the World Bank.
  - 2 The results of this study, which includes far more information on factors affecting judicial independence (and corruption), will be published through the Global Democracy Center, USAID. It is being carried out by the Institute for Electoral Studies (IFES), a Washington based NGO.
  - 3 I speak from experience. In 1986, when I wrote an initial diagnostic for USAID, as preparation for a country level program, I was asked to remove a single reference, buried far into a 20-page report, mentioning only that public beliefs about judicial corruption reduced faith in the courts. Ten years later, as a USAID participant in an evaluation of a Bank project in another country, I was able to write not only about beliefs but also the forms corruption was likely to take.

that in a recent global conference,<sup>4</sup> the World Bank devoted one of its thirteen panels to the topic of judicial corruption, and has included questions on the theme in its anti-corruption surveys conducted in countries around the world.

With a little more thought, it becomes apparent that despite the absence of specific anti-corruption strategies, the MDBs have not only recognised the problem, but in many of their conventional judicial reform programs they are promoting measures which may well help to correct it. We could probably do better, but for corruption as for many other issues, a direct, frontal approach may not be the most effective strategy. In addition to recognition of the issue, there are thus numerous activities which may have an impact on corruption. These include:

- Sponsorship of specialised surveys and public opinion polls to increase knowledge of public concerns and of the areas where court users have encountered corrupt behaviour
- Sponsorship of conferences, workshops and publications where judicial corruption figures as a theme
- Provision of mechanisms whereby judiciaries may increase their ability to monitor members' behaviour and thus combat abusive actions
- Promotion of new appointment and career systems to decrease vulnerability to corruption and to improve overall human resources
- Training programs to increase competence and to address themes like judicial ethics directly
- Sponsorship of drafting of ethics codes
- Promotion of programs to increase the transparency of judicial actions and to encourage outside observers to monitor them

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4 Washington D.C., June 5-7, 2000.

The following exposition reviews MDB programs, as well as those of certain other donors, in these and other areas. Because of my own background, I will focus on those programs in relation to Latin America. However, as substantial international support to judicial reform first arose in relation to Latin America, programs there have shaped those in other regions as well. Thanks to the above referenced USAID exercise on judicial independence, and input from other colleagues, I will also extend the discussion to a select number of examples from outside my region of choice.

## **Understanding Judicial Corruption**

In dealing with judicial corruption, as with corruption in general, it is well to start with some definitions and distinctions. In the most summary fashion, corruption can be defined as the abuse or misuse of public resources for private benefit. Material resources, like funds and equipment, and more abstract ones, like power, decision-making authority, and position, might be the object of such corruption. Corruption usually, but not always, involves the participation of at least two actors, one in the public sector and one outside. It can also occur only among public sector actors, be wholly conducted by a single public employee, or involve complex chains of interactions among public and private agents. Where two or more actors are involved, the private gain is mutual: resources are diverted to support the interests of one actor in return for some *quid pro quo* to the other, *i.e.* the public official who is able to effect that diversion. A bribe is the quintessential act of corruption, involving a payment to the public official who diverts the resource. In other types of corruption, the public actor may be motivated by a sort of negative gain (the removal of threats) or by anticipated future favours, either from the direct beneficiary or from some third party (family, friends, or the political or business associates of the initial recipient).

Common forms of corruption include kickbacks on contracts, payments made for receiving public office (occasionally as a percentage of the eventual salary or of the fruits of the employee's own corrupt acts), payments or bribes for favourable decisions or laws, payments for overlooking infractions, "speed money" for processing transactions, and a variety of other actions giving differential access to public employment, public property and

facilities, and privileged information. In countries where public employees receive part of their compensation in kind (as housing, vehicles or school vouchers) or where even such normal staples as offices and equipment are awarded on a case-by-case basis, an internal network of corruption may be organised around their distribution. Questions as to whether a specific act constitutes corruption or some other type of unethical or illegal behaviour thus hinge both on the unequal access or treatment awarded and on the motives of the party making that situation possible. Unless one takes a purely formalistic approach (*i.e.*, corruption occurs when the law defines an act as such), there is a margin for debate, especially when the benefit to or motive of the actor affecting the diversion is not explicit.<sup>5</sup> Cultural differences also pose complications. For instance, when is a gift a bribe and when is it just a normal attention?

Contrary to the forms of corruption most of concern in other public agencies, discussions of judicial corruption usually focus on the misuse of abstract resources: the judge or court officials are able, by virtue of the position held, to shape judgements or to otherwise alter the outcome of a case (*e.g.*, by losing case files, refusing to accept motions or evidence, or accepting that which should not be allowed). However, judicial corruption can also more closely resemble that in the rest of the public sector, when it involves the misuse of more concrete resources. Judiciaries that control their own budgeting and appointment systems may indulge in selling appointments or awarding them to friends, family or other associates, accepting bribes for contracts, or the misappropriation of funds. One of the negative consequences of a tendency to increase judicial independence is that many judiciaries can now indulge in this kind of corruption by virtue of their new control of resources formerly managed by other bodies. For judges of easy virtue, this may just be too great a temptation, but even for others, sheer inexperience may lead to improper choices. Finally, judges who are not used to having anyone second guess their judgements may not understand that financial management and

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5 There is a tendency here, comparable to one found in discussions of independence, to equate corruption with any kind of bias, thus avoiding the problem of establishing the public actor's intent. However, I think this inflates the concept and poses its own problems of detection and enforcement. A judge who is prejudiced against women, certain social classes, racial or ethnic groups may make unfair decisions without indulging in corruption, as in such cases there is no implicit or explicit pay-off.

staff appointments are matters for which it is not *la conviction intime*, but rather compliance with bureaucratic rules that counts.

While those concerned about judicial corruption may give short shrift to this administrative variation, it can be equally destructive to public trust, and in some sense is easier for the public to identify. A finagled contract, a conscious overpayment for supplies, or the award of positions to family and friends may be more readily perceived as corruption by the lay person than are questions about ex-parte conversations or biased applications of a complicated law. In the late 1980s, Costa Rican judges, whose vulnerability to outside influences is usually not questioned, found themselves under scathing criticism when it developed that each had a sizeable representation-al fund at his or her disposal, for the use of which they claimed they owed no one any explanation. Similar questions were raised about the awarding of training monies to Supreme Court Justices and their reputed ability to collect full salaries and training stipends simultaneously.

An understanding of judicial or any form of corruption requires more than attention to its individual elements. It also requires knowledge of the structural characteristics of corruption vis-à-vis the organisation or environment in which it occurs. Here, following the suggestions of Mexican specialists<sup>6</sup> writing on the public sector in general, it is useful to distinguish along two dimensions: the extent to which corruption is an isolated or systemic phenomenon (systemisation) and the extent to which it occurs spontaneously or is the product of an organised internal network (systematisation).<sup>7</sup>

As regards the first dimension, systemisation, corruption can either occur as an occasional, opportunistic event or be so structured into the organisation as to be an intrinsic part of how the latter operates. For example, because of who they are and what they do, judges will inevitably be offered bribes and some may accept them. However, this is quite different from a situation where “speed money” is routinely required to move documents along or where cases are habitually sold to the highest bidder.

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6 Juan Octavio Lopez Presa, coordinator, *Corrupcion y Cambio*, Mexico: Fondo de Cultura Economica (1998) at 195.

7 I am changing the terminology. Lopez Presa and his fellow authors speak of the first dimension as frequency (from occasional to systematic) and organization (from simple to complex). Here I am also distinguishing systemization from frequency or pervasiveness.



The second dimension, systematisation, refers to the amount of explicit organisation behind the corrupt act or acts. Even very pervasive, systemic corruption may occur without such organisational backing, as everyone knows is done, but the corrupt activity does not require explicit control. On the other hand, isolated acts or sporadic incidents may have more than one individual behind them or be related in fact to some sort of internal network, possibly, but not necessarily, including the topmost leadership. Both dimensions, it should be stressed, are variable rather than dichotomous, and may occur to different degrees in any given organisation. It is also possible that the structural characteristics of specific types of corruption in a single organisation, will differ. Petty “grease” money demanded by clerks and other administrative staff may be systemic, but non-systematic, and may coexist with less systemic but more systematically organised sale of sentences.

Schematically, the dimensions can be organised as a four box matrix:

**CHART: A SCHEMATIC REPRESENTATION OF FOUR STRUCTURAL TYPES OF CORRUPTION**

|                        |             | <b>Low</b>   | <b>High</b>  |
|------------------------|-------------|--|--|
| <b>Systematisation</b> | <b>Low</b>  | Occasional corruption, usually for substantial stakes. E.g. individual judge sells a sentence; staff member accepts money to alter the record, lose documents. | Occasional, high stake corruption organised among an inner group of participants. E.g. internal network to shift cases to “friendly courts” or fix contracts for services.   |
| <b>Systematization</b> | <b>High</b> | Corruption becomes the grease for making the system work. E.g. standard petty corruption, speed money, and fees for processing documents out of order.         | Centralised control of networks of corruption with the big benefits going to the higher ups. E.g. court users habitually contact high-ranking judges or political elites to arrange for outcomes of cases at all levels. |

A final consideration has to do with the level of corruption, *i.e.*, how pervasive it is within an organisation.<sup>8</sup> Were it possible to measure accurately pervasiveness, which at present it really is not, we might assign a single aggregate figure for the entire organisation and individual measures for different types (*e.g.* bribery, kickbacks on contracts or on employment, purchase of sentences). We might also assess structural variations (*e.g.* high level of systemic, non-systematic corruption and a low level of sporadic, systematic forms). Given our inability to assign such a measure objectively, most efforts to do so rely on popular or informed perceptions. This may be a good approximation, although such public opinion polls or informed “guesstimates” inevitably skew the results. They often serve to overgeneralize the phenomenon and tend to over report the forms most often encountered. For obvious reasons, the lay person, or even an informed expert, is less likely to have knowledge of some of the more dramatic types, especially those which are sporadic rather than systemic. Still, where citizens or court users believe a judiciary is corrupt, that is a fair sign that something is amiss and a reason for remedial action.

## Elements for Addressing Corruption

Over the last decade, the formula for combating corruption has been neatly summarised in the equation  $C = M + D - T$ , where C is corruption, M is monopoly, D is Discretion and T is Transparency.<sup>9</sup> Contrary to majority opinion, I would suggest that this is not very helpful, for addressing corruption in general or for corruption in the judiciary in particular. First, while monopolies do distort prices, it is unclear whether they induce corruption as well; in fact, this would appear unnecessary. In any case, certain public services, among them many provided by the judiciary, are natural

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8 Systemic corruption is by definition more frequent than nonsystemic forms, but it also has degrees of pervasiveness. For example, it may involve all actors and acts, or be limited to certain key players, types of cases, or events within them.

9 The formula was devised by Robert Klitgaard in his book *Controlling Corruption*, (1990).

monopolies, meaning that little can be done to affect that characteristic.<sup>10</sup> As for discretion, this is an extremely slippery term. In the day of result-oriented bureaucracies and calls for less formalistic judicial decisions, the notion of trying to introduce more rules, and thus less discretion for bureaucrats or judges, has a certain element of upstream swimming.

One exception for the judiciary may be the case of administrative and financial management. Here, as noted, where judges have gained an ability to handle their own budgets, appointments or contracting, it would be beneficial that they understand that they are subject to the same rules and standards as the rest of the public bureaucracy. However, this is what we might term a minimum amount of reduction of discretion. The notion implicit in the formula, that further reductions would be a good thing, is truly contestable in a postmodern, non-Weberian world. That leaves transparency, where more may generally be better, but this alone would hardly seem to solve the problem.

In contrast to the formula, a more practical approach to combating corruption might instead start with the elements discussed in the prior section: the absolute amount, the types of behaviours involved, and the way it is organised or structured. The first two elements are essential for estimating the significance of the problem, the types of damages it works, and the interests and parties most affected. The last one is critical because the structural characteristics are a good indicator of the type of remedial strategy required.

Non systemic corruption, whether systematic or not, is generally most conducive to treatment as an ordinary crime. An emphasis is thereby placed on detection, investigation and prosecution, both to remove the culprits from the scene and to deter those who might be tempted to follow suit. As with

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10 Lawyers are another case, and the emerging consensus that their natural monopoly does run up the costs of justice as well as unnecessarily complicating its delivery, has led to suggestions that ways need to be found to create competition for the guild. Such means could include allowing pro se representation, establishing alternative services, and permitting other professions and paralegals to perform some of their functions. However, no one has suggested that a monopolistic organisation has made lawyers either more or less corrupt than they might otherwise be. In fact, there is some indication that it is high levels of competition among lawyers that may encourage some forms of corruption. In Latin American, there has emerged the phenomenon of the so-called *chicaneoros*, the mass of nonelite lawyers who are scrambling to make a living by any means possible.

ordinary crimes, the more specific details of this “disciplinary” strategy will also hinge on whether these are individually perpetrated events or there is a network behind them. Should any network involve the uppermost levels of the judiciary, a real problem arises, as the members are hardly likely to be interested in the effort’s success. The Greylord<sup>11</sup> investigations of the Chicago judiciary in the mid-1980s present a good example of how such an investigation takes place in situations where there indeed exists a network, but not one involving topmost leadership. There, simply catching individual judges would have been far less effective than trying to dismantle the network, but the latter effort took far more time and involved its own very complex organisation. Treatment of nonsystemic corruption may also include educational and preventive measures to increase awareness of the problem and its importance, to eliminate points of vulnerability, and to elicit cooperation from citizens in identifying the guilty.<sup>12</sup> These, however, are generally secondary strategic elements.

Where corruption is systemic, the strategy is different, requiring a far more complex mix of educational, preventive, and purely disciplinary tactics. Here, to the extent corruption has been institutionalised, it is only through institutional or organisational change that it can be successfully attacked. In effect, an anti-corruption strategy in these circumstances is really an organisational development program. Incentive structures must be changed, points of vulnerability eliminated, organisational members given new models of behaviour and good habits substituted for bad. In these circumstances, it is tempting to shift to a strategy emphasising only apprehending and punishing the guilty, *i.e.*, the approach recommended for nonsystemic corruption. This strategy is unlikely to be effective in that it does not get at the underlying causes and at most might put a few people in jail and drive other culprits underground for a time. In several countries which have attempted this approach, such appears to have been the result. It is also typically tempting to attack only the most visible forms of corruption, generally those associated with low ranking staff, and often in a very unsystematic manner. This

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11 See Special Commission on the Administration of Justice in Cook County, *Final Report* (September 1998).

12 For example, in Peru in the mid 1990’s, the Judicial Investigation Office publicized its efforts to induce citizens to report attempted bribes and thus allow a fairly effective sting operation to be mounted.

resolves part of the problem and may even improve the judiciary's public image. But by leaving the more organised forms, often those associated with higher ranking organisational members, untouched, it is likely to backfire in the end.

This second temptation may be heightened by political considerations, especially if the more systematic forms of corruption involve higher level leadership. Outside agencies may fear to tread here, but they may find judicial leaders quite willing to work on the lower level problems. In judiciaries, as in other public agencies, this rampant petty corruption is really a product of an earlier era, when it often was the glue which held the organisation together, or at least could not be effectively eradicated because of insufficient monitoring tools. Today, with automated management information systems, internet, and better transportation and communication, judiciaries and other public institutions need no longer tolerate these widespread, but minor abuses. The costs of doing so may be far higher than the meagre benefits, and in the end, the really substantial pay-offs now derive from opportunities monopolised by a small network of key institutional actors. These opportunities are also a recent development; they emerge as judiciaries begin to be involved in issues of interest to big business, foreign investors, and high-level government officials. A final caution, then, is that the gradual disappearance of "speed money and other traditional systemic corruption cannot be taken as a sign that corruption is on the wane. We may instead be witnessing a universal shift from systemic, unsystematic forms (diffuse petty corruption) to those of a nonsystemic, systematic (opportunistic and organised) character. The latter, because it is less frequently experienced and so less visible, may be less destructive of the organisation's public image, but it may have still higher costs in terms of equity, efficacy, and other public goods.

### **The Contributions of the MDBs and other International Agencies: Fighting Nonsystemic Corruption**

International agencies have included both types of strategies and all four major structural combinations in their judicial reform support. However, they have tended to do less with the nonsystemic problem, for a variety of fairly obvious reasons:

- The disciplinary strategy tends to be more politically intrusive, as it usually means catching individual culprits.
- For the MDBs, until very recently, the fact that a disciplinary strategy clearly involved criminal justice put it outside their mandate, as they interpreted it. This interpretation has now changed, but a lack of experience in the area still discourages entry.
- This type of corruption is far harder to document and measure, once more because it has to be individualised. It is far easier to speak about vulnerabilities and prevention than to address actual cases where corruption has occurred.
- Judiciaries themselves may be far more reluctant to receive this kind of aid, out of self-protection and also because it requires admitting the existence of a real, rather than a potential problem.
- International agencies which get involved in this kind of program have often been less than diplomatic, thereby increasing resistance.<sup>13</sup>

Finally, it is questionable how much of this strategy can really be regarded as development work, as its emphasis is directed to immediate action rather than institution building.

Despite these reservations, international agencies have made some contributions in this area. Sponsorship of seminars, studies, courses, national and international meetings, and support to various civic groups have all helped to call attention to the problem and to put pressure on judiciaries and governments to address it. The World Bank Institute's (WBI) national integrity seminars, held in various countries around the world, often produce a mandate from participants to act on judicial reform in general and judicial corruption in particular. As noted, preliminary assessments conducted prior to

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13 For example, in the early 1990s, the head of the UN observer mission in El Salvador (ONUSAL) arrived at the Supreme Court to call for the removal of several dozen judges who were "known to be corrupt or to have abused human rights." The move was not well received and, as it came with no further suggestion as to how the dismal should be carried out, provoked no immediate action.

negotiating a project, or as a first step in implementing one, are now allowed to mention corruption, although they generally still bury the issue far into the document and almost never mention specifics. A new diagnostic tool, the Institutional and Governance Review, being developed by the World Bank, has included, in some cases, sections discussing the prevalence, forms and roots of judicial corruption. And in particular cases where World Bank projects were put into redesign (Venezuela) or terminated (Peru), concerns about a failure to address corruption or related issues played at least a minor part.

The donor community, consisting of bilateral assistance agencies and the United Nations, which now work largely through grants rather than loan programs, has been more active than the MDBs in supporting the development of mechanisms which more directly attack the problem. This flexibility arises largely because the donor community can be more overtly political. The creation of judicial inspection units in a number of Latin American countries have formed a key component of this strategy. However, the MDBs have also supported various ombudsmen, which may include complaints about judicial performance, including corruption, among their functions. As regards technical assistance to such agencies, the bilateral donors may also be better placed because they can draw on their own national resources: personnel associated with police, prosecution, or other bodies specialised in the detection and investigation of corruption and other white collar crimes.<sup>14</sup> The Banks are clearly at a disadvantage here, although recently they have begun to look to national agencies as a source of expertise. Still, the risks of becoming party to the foreign policy agenda of the respective parties are a major disincentive.

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14 One example, although not one focusing on judicial corruption, is the Argentine Anti-Corruption office, which has signed agreements with the US Government Ethics Office (OGE) and various inspector generals units. It has looked to the World Bank as a potential source of funding for the travel expenses of personnel from these units.

## **Contributions of the MDBs and Other Agencies: Institution Building Approaches to Combating Systemic Corruption**

Even as the MDBs have become involved in the above activities, they should probably be regarded more as adjuncts to the second type of strategy, that aimed at reducing systemic forms of corruption as part of an overall institutional development program. This is an area where the MDBs have had the most impact and where their potential for effecting real improvements is most marked. Furthermore, in many countries where the MDBs work, this arguably is the most relevant tack to be taken. Here they are more likely to encounter judiciaries where corruption is an ingrained part of normal operating procedures, rather than a sporadic opportunistic event, and where addressing it outside the context of overall institutional development may in fact not be terribly effective. Whereas nonsystemic corruption can be attributed to normal human failings, the systemic variety is structured into the judiciary. Thus, catching a few, or even many, culprits is unlikely to resolve the problem, which instead requires reengineering the institution itself.

In doing this reengineering, the banks and the donors have usually not aimed to address the problem of corruption, but rather to improve the overall quality of performance. Nonetheless, to the extent they succeed in this latter goal, corruption should diminish as well. There is a logic here, which while not explicit, coincides with much of what we know about changing behaviour. A focus on the negative (“don’t do this”) is less effective than the presentation of a positive model (“this is what a good judge does”). Of course, the model alone is of little use unless the rest of the institutional environment supports its adoption. The judge who resolves her cases in a timely fashion, in accordance with the law, and without ceding to outside influences needs to be recognised and rewarded; those who behave otherwise should receive some sanction or simply be dismissed. The same should be true of the judge as administrator or of the ordinary administrative staff. Virtue may be its own reward, but that reward loses value if the non-virtuous receive the more concrete prizes: promotions, higher salaries, or just the ability to retain their ill-gotten gains.

The principle is simple, but it does require that institutional leadership endorse it and has a means to distinguish the model players from the others. This means first setting standards, and, here, the support by the banks for



the introduction of improved judicial selection, evaluation and career systems is an important step. It is, however, one where far more can be done. Simply endorsing the adoption of a merit career system is important, but this activity may constitute so many empty words unless translated to concrete terms. The banks could provide more technical assistance in this area and pay more attention to what is developed, reaching some agreement with the participating countries on minimal standards. Otherwise, merit may become a façade behind which the old network of influence operates unchanged. More attention also needs to be paid to external input to the process, in particular to the views of citizens and clients on the desired and real performance of candidates or seated judges. Judiciaries often resist this idea as a threat to their independence and a channel for vindictive attacks. However, these risks can be minimised, and the perspective of the user is invaluable in keeping track of how judges and administrators are actually performing.

Bank and donor programs have generally paid less attention to setting standards and introducing career systems for courtroom and other administrative staff, although it is widely recognised that support personnel are often the source of various types of petty corruption, sometimes in league with judges and sometimes on their own.<sup>15</sup> Major impediments are the frequent reluctance of the judiciary to devote their own or project funds to this purpose, the staff's own ability to undermine any such program,<sup>16</sup> and the vested interests of whomever (individual judges, the judicial governing body, or a Ministry of Justice) normally controls administrative appointments. These interests may themselves shelter certain forms of corruption or simply represent a source of power the holder does not wish to relinquish. Judges often believe

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15 In conjunction with one World Bank sponsored study of judicial administration, the consulting team charged with the task claimed to have been offered a substantial bribe to eliminate recommendations about the Director of Administration's reporting responsibilities, and was then threatened upon refusing the offer. Whether true or not, the example is indicative of the large sums of money at stake, and thus the incentives for their misuse, in running even a modest sized court system. It also warrants mention that MDB and donor programs enhance the temptation by adding whole new sources of funding.

16 In addition to the example cited in the above note, there are numerous cases where staff has organised to combat the judiciary's own efforts to control their actions. An extensive investigation of court clerks conducted by the Lima (Peru) Superior Court in the mid-eighties had to be shelved when the staff association got wind of it and started calling on their political patrons.

that the ability to name their own staff gives them more control over the latter, although their exercise of that control is usually not very effective. As with the institution as a whole, where even the most arbitrary power over subordinates is combined with inadequate oversight mechanisms, there is usually ample opportunity for the latter to engage in all manner of illegitimate activities.

The last point raises a second issue, that of improving the ability of the judicial leadership to track performance. Here the contribution of the banks has been to introduce various kinds of management information systems, to let individual judges get a better handle on what is happening in their courtrooms and judicial leaders understand what is happening in the system as a whole. This, rather than the usual and somewhat dubious claim that they will reduce delay,<sup>17</sup> may be the most important and most immediate benefit of computerisation programs and related efforts to rationalise courtroom procedures. Where such mechanisms have been introduced on a pilot basis, they have often produced dramatic improvements in the overall quality of services and have helped to eliminate many forms of petty corruption. Even something so simple as changing the physical location of courtroom staff may speed up procedures and reduce the opportunity to extract irregular fees from court users.<sup>18</sup> Where automated or manual information systems allow judges to track the status of individual cases, or assist their superiors to determine overall case movement, it becomes much more difficult for professional and administrative personnel to engage in many of the most common forms of corruption. In Argentina, for example,<sup>19</sup> the federal courts have begun to collect and publish the awards made for civil damages. The initial

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- 17 There is an ongoing debate on the utility of these systems, most of it focused on their undemonstrated ability to reduce delays. However, the debate seems to skip a step, that of giving judicial leadership the information needed to monitor systemic performance. If the leadership has that ability, and are willing to use it, then a variety of problems, including delay, can be attacked.
- 18 This is one argument behind the common technique of introducing pooled staff, who work in a central office to support several judges, rather than being assigned to individual courtrooms. However, there are even simpler examples. As one consultant noted, the person who sits by the door is the one best positioned to demand bribes, and thus one may want to reconsider who is put in that location.
- 19 Elena I. Heighen, Carlos G. Gregory and Gladys S. Alvarez, *Quantification de Danes Personals, Publicized de Los Precedents, y Posibilidad de Generar un Baremo Flexible a los Fines de Facilitar Decisiones Homogeneas y Equilibradas*, unpublished paper provided by the authors, Buenos Aires, Argentina, (2000).

purpose of the exercise was to encourage extrajudicial settlements, based on what could be anticipated in the courts. Participants also believe it has discouraged efforts to influence judicial decisions, as any unusual awards will be automatically noticed.

To date, few of these automated systems have been fully implemented. There is an increasing concern that even once that step is completed, the systems may not be fully utilised as a source of information on judicial behaviour and misbehaviour. A major obstacle is the fact that implementation and any further training in use of the system is usually left in the hands of an outside contractor, which may regard its mandate as simply installing the computers and software. Once installed, actual use depends on the imagination and motivations of the judiciary itself. Shortcomings with respect to either or both dimensions can mean that word processing, inputting of standard forms, and generation of illustrative statistics for the end-of-year report constitute the extent of utilisation. Moving judiciaries beyond this minimal use to exploiting the full potential of their new capability may require both further technical assistance and some additional pressure. Contracts may have to be rewritten to make this part of the terms of reference for the outside firm, and conditionality added to the loan or grant to encourage a more proactive stance. Part of this conditionality may require that statistics be made available to outside monitoring groups to compensate for a suspected lack of resolve in the judiciary itself.

Aside from providing judiciaries with the ability to detect internal problems, the banks have also contributed with a variety of mechanisms aimed at providing independent assessments of the quality of judicial performance. Some of these focus on citizen consultations, including but not limited to the kinds of surveys and workshops mentioned above. While these consultations often fall short of identifying all problems or their underlying causes, they still provide a very potent instrument for registering citizen dissatisfaction and encouraging judicial bodies to respond to it. Support to international organisations, like Transparency International, in performing this type of work is also worth mentioning. While it is hard to say whether a judiciary will be more affected by a national survey in which 90 percent of citizens express a lack of faith in judicial honesty, or an international ranking which places the nation's courts at the low end of the reputational scale, both types of findings have had some impact on increasing the resolve to change of work culture. Surveys have also been used to assess the impact of judicial

performance on economic growth, asking entrepreneurs how much they might invest, or what other actions they might take if they had more faith in judicial integrity.<sup>20</sup> The methodology has been criticised for conceptual weaknesses,<sup>21</sup> but the results may provide one more impetus for change. For example, 36 percent impact on the rate of growth has been hypothesised for Argentina.

In addition to this survey work, the World Bank in particular has begun to conduct research on the judiciary's handling of specific kinds of cases. Called "user research" because of the guiding question of who uses the judiciary and to what end, it has begun to provide judiciaries and Bank planners alike a more precise idea of where problems are located and what lies behind them. Often the explanations point beyond the judiciary. Problems include the tendency of the private bar to use judicial weaknesses or client ignorance to subvert due process; the failure of police and prosecution to support enforcement of judgements or do their part in the investigation and prosecution of criminal actions; and problems with administrative staff or auxiliary personnel, the bailiffs in particular.<sup>22</sup> Such studies may also be helpful in identifying particular issues or types of cases where judicial corruption itself is more prevalent, as well as the forms and places in proceedings where it is more likely to occur. While the banks, like other donors, have routinely required assessments prior to planning a reform project, these new studies provide a level of detail not normally allowed by the more general overviews.

Once problems are detected, the next step is to resolve them. The specific resolution to be adopted hinges on the causes identified. The banks have pro-

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20 Horacio Lynch, *El Impacto de la justicia sobre la economia argentina*, paper presented at the Jornadas sobre Reforma Judicial y Crecimiento Economico, Madrid, Instituto de Credito Oficial (October, 2000). The paper summarizes work done by various authors. See also, Robert M. Sherwood, Geoffrey Shepherd and Celso Marcos de Souza, *Judicial Systems and Economic Performance*, 34 *The Quarterly Review of Economics and Finance* (1994) at 101-116.

21 As critics have noted, it places considerable faith in respondents' ability to predict their actions in the face of a hypothesized "better" justice system.

22 Many of these problems cannot be called corruption. Still, an on-going study in Mexico has revealed that unless extra payments are made to the police and bailiffs, neither one is likely to do its part in supporting the attachment of goods in debt collection cases or, in the case of the police, arresting parties who resist the proceedings.

vided a number of potentially important tools here, including, but not limited to, training programs; studies to determine adequacy of salaries and other benefits or to identify negative incentives or areas of vulnerability; support for new governance mechanisms intended to reduce political influence on the designation of judges' administrative and financial management and other internal affairs; drafting of new procedural and substantive codes, organic laws and ethics codes; and support to NGOs which, among their other roles, may help monitor specific abuses. As regards improvements in overall performance and elimination of corruption in particular, most of these methods have so far fallen far short of their potential. However, the experience has provided numerous lessons as to how their impact might be reinforced.

Training, where most funds have been invested, has been a particular focus of criticism for failure to produce significant change. Two problems stand out here: inadequate organisation of the training itself and a failure to link it to other organisational changes which might encourage trainees to utilise new skills and approaches. As regards the training programs themselves, the emphasis largely has been placed on imparting knowledge and skills, rather than on changing behaviour. It has thus been suggested that starting with the initial training needs assessment, the focus be shifted to resolving real problems. These problems may only partly be linked to what judges don't know and, even when they are knowledge based, are best attended by focusing on a smaller number of specific topics. However, even the best organised training program will only have an impact if participants, once returning to their courtrooms, confront an incentive system which rewards the new behaviours. For a variety of reasons, training programs have tended to be organised in semi-isolation from the rest of a reform effort. The two exceptions are some limited training, usually restricted to how to use the equipment and software, when computer systems are introduced and reforms linked to new legal procedures, such as the introduction of new criminal or civil procedures codes or more specific substantive laws.

Code and law drafting, while a less expensive undertaking, has also featured in foreign assistance programs. New laws are obviously intended to change what is done in the courts, but they usually incorporate intended attitudinal changes as well and often are seen as a means of eliminating habitual forms of or opportunities for corruption. To the latter end, they frequently emphasise oral proceedings; simplified, and thus less vulnerable, procedures; shortened timeframes, to eliminate the opportunities for various types of

malffeasance provided by intended or unintended delays; or new principles on which decisions are to be based. For a variety of reasons, the new laws have been less effective than promised, either in improving overall performance or in eliminating specific forms of misbehaviour. In some cases, such as the rewriting of entire legal frameworks in Eastern Europe and the former Soviet Union, the reason appears to be an excess of new laws, many of which are arguably poorly suited to the environments in which they will have to operate. However, even where the target has been a single code or law, the impact has often been limited by surrounding institutional weaknesses, inadequate preparation of organisational actors, and a failure to otherwise anticipate how new procedures will be carried into practice. These are, nonetheless, important lessons, and are already influencing on-going efforts to use legal change to alter performance. From the standpoint of corruption, it is increasingly recognised that poorly implemented legal change actually may aggravate the problem. The change may serve to increase confusion as to what the law really is, force legal actors to choose between formalistic compliance or slightly "illegal" deviations that seem more in the spirit of the new laws, or provide more opportunities for dilatory and diversionary tactics.

A special note is warranted for the drafting of ethics codes, often proposed as the most direct means of combating judicial corruption. The banks along with the entire international community have sponsored such activities, but they arguably have been the least effective component of the reform programs. One problem is that they are commonly drafted with minimal consultation. Although the drafter, whether a foreign or national expert, may be well versed in the problems requiring attention, the codes have so little local investment that they are never enacted, or if enacted, remain a statement of aspirations rather than a real guide to conduct. In regions such as Latin America, where this is a traditional view of the purpose of laws, a new ethics code may encourage more citizen cynicism as to the sincerity of its proponents. If in the United States, the best way to dispose of an inconvenient idea is to form a committee to study it, in Latin America, enacting a new law seems to perform a comparable function.

An additional consideration is that in many of these countries, the activities included in an ethics code are already illegal, and so new legislation gives rise to further cynicism. More important than an effort to develop a law covering all possible forms of questionable behaviour may be a broadly based,

longer term, public discussion about a few key areas where habitual behaviour does invite corruption. Candidates for such discussion include *ex parte* conversations, political activity of judges, employment of relatives and associates, conflict of interest, judicial employment coterminous with or on leaving the bench, and “improper” social contacts. Local standards as to what is acceptable or feasible do vary, but changing social conditions and the shifting role of the judiciary frequently warrant a re-examination of the usual practices. Absent such discussion, a new law may well not alter what is always done, because participants, *i.e.*, judges and court users, are not convinced of its necessity or do not realise its significance.

Another area where the banks and other donors have focused attention, most often as part of a policy dialogue, is the introduction of new governance mechanisms intended to decrease susceptibility to political influence. The dialogue supports a trend toward giving judiciaries or external judicial councils control over administrative, financial and personnel issues formerly exercised through executive or legislative bodies. Most observers now agree that faith in the efficacy of these new mechanisms has been excessive, either because the political influences have succeeded in penetrating them or because extreme judicial independence can produce its own set of vices, one of which may well be new forms of corruption. Two lessons, now shaping support to reforms, are that more attention is required to the content, as opposed to the structure, of the targeted functions and that whoever exercises them should also be accountable for their performance. More concretely put, the criteria by which judges are named may be more important than who names them, and, however this is done, the process should be fully transparent and subject to outside review.

The issue of external review and accountability introduces the final aspect of these institution-building strategies, that of creating effective means for detecting and sanctioning transgressors. Despite the emphasis on institution building and the creation of positive models for organisational members, it is evident that credible sanctions are an essential part of the overall strategy. Because this once more gets into the formerly prohibited criminal justice arena, the MDBs’ actions here have largely been limited to the monitoring and management information systems discussed above and some work with civic organisations. Presumably, the theme would also be incorporated in career and evaluation systems promoted under reform efforts, but neither the counterparts nor the banks have singled it out for special attention. Similarly,

as noted above, the banks have generally not included the formation of or even discussions about disciplinary units in their programs. Whether or not they directly support such units, they clearly might contribute to discussions of the various alternatives to ensure that what is adopted has a better chance of making a productive impact. Here too, work with NGOs, which has usually focused on their provision of complementary services such as legal aid and information programs, might be expanded to include generally monitoring of reform progress and of judicial performance. However, because they work with government-to-government loans, the MDB programs do confront the problem of obtaining governmental approval of this use of funds. Unfortunately, where such mechanisms are most needed, the government and the judiciary may be most reluctant to include them.

### **What More Could be Done?**

While the banks have done more than might be expected in the area of combating judicial corruption, they clearly could improve upon their contribution. A first step would be a more explicit recognition that corruption and the overall quality of judicial performance are significant problems and that they must be addressed head-on. Here, outside agents cannot afford to wait until a judiciary recognises it has a problem. Rather, they must take their own action to determine conditions on the ground, including, but not limited to, consultations with a variety of other stakeholders. For the Banks in particular, this is a radical departure from past practice. However, if they are seriously interested in improving judiciaries, they cannot simply assume that the desires of judicial or government leadership represent the needs and demands of the citizens they serve.

A second step is to ensure that the discussions of these problems are made part and parcel of pre-project negotiations and that their solution is incorporated in the resulting agreement, either as conditionality, or as part of the project itself. This also means that international organisations must pay greater attention to what constitutes effective solutions and to tracking their realisation on the ground. In general, the following measures may be recommended to strengthen on-going reforms and to enhance their ability both to improve judicial performance and to combat corruption:



- Make identification and diagnosis of judicial corruption an intrinsic part of pre-negotiation assessments;
- Where problems are identified, make a discussion of their resolution a part of project negotiations;
- Make specific steps to address the problem part of the project or a condition for its approval *and* continuation;
- Be prepared to halt projects where advances in these areas are not satisfactory;
- Involve groups outside the judiciary and outside the government in the monitoring of progress;
- In all projects, put more emphasis on techniques and elements useful in combating corruption. These include the introduction of judicial inspection offices and ombudsmen; systems to monitor various aspects of judicial performance; improved selection systems, compensation, and terms of employment (especially some guarantee of employment stability, whether until retirement or for some reasonable term); publication of judgements and statistics on judicial operations; statistical and case tracking systems; improved court administration; detection and elimination of vulnerable points in normal judicial and administrative procedures; strengthening of judicial administrative systems and of mechanisms for accounting for results (publication of budgets, contracts, appointments and results of audits);
- In addition to emphasising these mechanisms, provide technical assistance and other project financing to improve their development. If a judiciary wishes to implant an inspection office or a merit selection system, it can do so more effectively if provided with guidance. For those who are less sincere in their aims, this external guidance may enhance the chances of their making significant changes and will also help external partners determine whether the results comply with the formal commitments;
- Encourage various kinds of judicial outreach and popular legal education to involve citizens in discussions of problems and increase their ability as informed consumers of judicial services;

- Include attention to the private bar in all projects, to involve them in reform, encourage self-policing efforts, and provide effective means for citizens and judges to register complaints about their behaviour.

The common element in all these suggestions is that their implementation takes more time, broader consultations, and more intensive dialogue and supervision than the MDBs have often been prepared to invest. It is highly debatable whether any kind of judicial reform program can be advanced through the quick disbursing, structural readjustment loans which threaten to become the instrument of choice for the MDBs and their national clients. Most of these large loans feature conditionality which must be met within the first 12 to 18 months. That time frame is barely sufficient to plan, let alone implement a judicial reform program. Some recently developed alternatives, such as budgetised loans and long term sectoral support programs, resolve the time problem, but are extraordinarily open-ended as regards precise objectives, the means for reaching them, or the technical inputs to be utilised. As various bilateral donors have also noted, based on their own experience, it is highly desirable that efforts to improve judicial performance involve the permanent, in-country presence of very qualified technical assistance. This is because many of the specific measures to be adopted require expert knowledge of implementation alternatives, continuous adaptation to local conditions, and an on-going dialogue with local authorities and other stakeholders.

If the banks are to take a more active role in combating corruption in the judiciary or any other public sector institution, they will have to consider redesigning their projects accordingly. Otherwise, they can promote change by calling attention to problems, asking that solutions be designed, and funding investments which a dedicated judiciary may use to implement its own reforms. Even here, effectiveness requires a better understanding of the nature and causes of the underlying problems and some attempt to establish and enforce benchmarks of progress. Reducing corruption, like any kind of institutional change, does not lend itself to a blueprint design. Agencies which insist on treating this project as though it did are likely to be disappointed by the results, unless they are so far removed from reality that they do not even see them. The MDBs are recognising this problem. The question remains as to whether their own institutional constraints will permit the internal adjustments necessary to deal with it.

## PROFESSIONAL AND PUBLIC CONTROL OF JUDICIAL CORRUPTION

*Dalmo Dallari*<sup>1</sup>

### **1. Public Authority controlled: request by the democratic and constitutional State**

The subject of the control of judicial corruption implies much more than a problem of morality in a section of public administration and goes beyond the specific interests suggested in judicial debate. Judicial corruption has serious social and political implications, and to have a clear idea of its significance, its consequences and its gravity, it is necessary to examine the roots of the modern democratic state. The type of political organisation that predominates in the world today, including judicial organisation, has its roots in the fight against absolutism, which lasted several centuries and culminated in the creation of the Democratic State of Law.

One of the fundamental reasons for the fight against absolutism was the need to establish precisely control on the exercise of political power, to anticipate and to correct abuse and to protect the rights and the liberty of individuals and nations. Absolute power is power without control; it is power free from responsibilities. The classic expression of Lord Acton should be recalled: "Power corrupts and absolute power corrupts absolutely" or, as some prefer, "absolute power tends to corrupt absolutely." The eminent English politician and historian had no doubt that power, when absolute, is the forerunner to corruption. Corruption, in its wider sense, is a question not only of economic and financial misconduct, where someone has appropriated public money, but also corruption of the system, corruption of customs, and corruption of social life.

Revolutions have been incited for all these reasons and for the abuse of absolute power, the consequences of which are often more tragic. These have

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been called bourgeois revolutions, because they have been led by the bourgeoisie, but they received very strong support from liberal thinkers in the seventeenth and eighteenth centuries. In this way, at the end of the eighteenth century, the problem was very clearly set out: limitation and control of power had to be established. It should not be forgotten that unlimited and uncontrolled power before this time was the customary practice during the period of absolutism and in the Old Regime in France, as well as in England, until nearly the end of the seventeenth century. Power not subject to control was arbitrarily practised so as to advantage certain people or privileged social groups.

It is important to recall the theoretical developments which attempted to give absolutism a foundation by trying to reconcile unlimited power with the need for control. There were many theoreticians supporting absolutism, but the theory of Thomas Hobbes has special significance, especially as explained in his most famous book, *The Leviathan*. Hobbes, an English thinker of the seventeenth century, who was a tax collector for the Prince of Wales and a defender of the conservation of the unlimited power of the kings, did not formally defend power without control. However, he speaks of self-controlled power: the king ought not to be controlled by Parliament or by any other institution. Rather, he should establish his own control, imposing limitations which he believes to be in the interest of the people.

What the history of humanity has shown, without exception, is that self-control is no control. The holder of power is a human being and, as such, is subject to the same weaknesses as all human beings. He may have the best intentions, but there will always be present a series of influences of many types bearing on his decisions and on his actions, starting with the influence of his own emotions. Therefore, there will always be the risk, as has been shown in practice, that deviations and voluntary actions which contradict justice and public interest will arise, constituting a form of corruption.

For all these reasons, and for others linked to the inevitable evils of uncontrolled power, the bourgeois revolutions of the seventeenth and eighteenth centuries were unleashed, culminating in the Glorious Revolution in England in 1688 and 1689 and the French Revolution, which peaked in 1789. These revolutions established special forms of limitation and control of political power, inspired by the work of notable political philosophers, from Aristotle, Neapolitan Gravina, Machiavelli, Locke and Rousseau and, finally,

Montesquieu. The latter warned of the risks, the injustices and the practical disadvantages of accumulating all power in the hands of one person or a small number of people, without limitations or control.

A fundamental point in this evolution is the conclusion that no one and no institution should participate in public activity without controls and limitations. From this point, the next question that arises is how to establish forms of control while respecting the freedom of individuals to carry out their ordinary roles.

## **2. From “Judicial Power” to “Judicial Authority”: a weak controller and no control**

To guarantee liberty, the system of separation of powers was introduced, starting with the Constitution of the United States of America in 1787. That instrument not only limited powers, but also established the reciprocal control of powers, giving more power of State to the judiciary and attributing to it a controlling role, as a matter of priority. It is important to note that there is an enormous difference between the practice in North America and that in France. Although it originated from a similar theoretical inspiration, the French system has considerably reduced the possibility of control of public authority, especially as the judiciary has been placed in an inferior position. And this system has had the greatest influence on political organisation in other states that have been inspired by the same theoretical sources. This weakness of the judiciary was brought to the fore in the text of the first French Constitution, passed by the National Assembly in 1791, and became even more serious with the “legalistic absolutism” of Napoleon Bonaparte, who took power several years later.

There are several factors that help to explain the reasons for the basic difference between the North American system and the French system. The first is that the French Assembly did not trust judges. Why this distrust? This was because during the final years of the Old Regime, France privatised the judiciary, with quite unfortunate results. In reality, the position of judge was exclusive to nobles and could be passed on through inheritance, sale or gift. One vivid example of this type of judge was the political philosopher Montesquieu, who supported the division of power to avoid the evils of the

concentration of power in one pair of hands or in the hands of a few. Montesquieu inherited a judicial position, and rarely practised, as he soon concluded that it was not a position that suited his temperament and was not appropriate to his plans for life. He preferred to study, to travel and to devote himself to reading. Moreover, while Montesquieu needed money, he did not have the temperament to make money as a “seller” of justice by profiting from his position and extorting from people, as was the custom. For this reason he sold his position.

We are told by historians of the French judiciary, that judicial practitioners habitually sold justice at a high price and abused the system in other ways, by seizing a substantial part of an inheritance which was under dispute and that they should have resolved. They operated beyond control and, as owners of the practice, they had total independence and their power was limitless. It was, above all, this behaviour which caused the objections towards the judges, which were displayed in the Assembly of 1791. Subsequently, it was established in an ambiguous way, that the judiciary should be independent. So the competence of the judiciary would be strictly established in law, there would be a Court of Cassation, at a high level “close to” the legal profession, in other words, as an appendix to legislative power.

So that the judges remained under some control, it was stipulated that apart from the legal limitation of the position, which, among other things, did not allow judges to “disrupt in any way the process of legal bodies nor to summon administrators in front of them because of their administrative role”, the judicial system would also be democratised, above all, by the election of judges. The judge would have a mandate of short duration, so that the population would exercise control over the judges. A bad judge would not stay for long in his position, as he would not be re-elected.

This model, established in the Constitution of 1791, was not put into practice as, soon afterwards, new Constitutions were drawn up, in 1793 and in 1795. The establishment of new Constitutions failed to create a political and judicial standard. In 1795 the Directorate was created, a form of government not anticipated in the Constitution. In 1799, Napoleon Bonaparte launched a coup d'état, introducing a dictatorial government that later resulted in the assumption of imperial power. A very important development linked to the Napoleonic system was the creation of a new type of judiciary, which, to a great extent, is still present in many countries. A new concept of the position

of the judiciary was introduced in public organisation. The role of the judiciary in regard to the law was also modified.

Very cleverly, Napoleon used the judges for his own ends, above all, to strengthen executive power and to legitimise the judicial order, established by the legislature. The new judicial system contained an ambiguity, which was very convenient and gave the government a democratic image. It was also convenient for the judges, who were more concerned about the prestige of the judiciary and about the guarantee of the personal benefits than with justice and the legitimacy of the law. Napoleon Bonaparte had transformed the magistrates into employees of the State, enveloping them in great pomp and solemnity to bring out the ceremony and accentuate the prerogatives of the members of the tribunals, but with the strict request that the judges were to remain absolutely loyal and partisan to the government. The judges would not be able to control the government and so, directly and indirectly, they would be controlled by the government.

Another important fact to be mentioned is that soon afterwards, at the beginning of the nineteenth century, some important events took place regarding the judiciary and its position in public organisation that accentuated the essential difference between the North American judiciary and the European judiciary. In reality, and from a practical point of view, European justice, from the time of Napoleon through the influence which he had inside and outside France, would always be a second-rate power or a function of the State, not recognised as an instrument of power of the State. In this way the judiciary would have no real independence and would not control the legality of public activities.

The evolution was different in the United States. The circumstances and the theoretical and political considerations which, from the beginning, led to the recognition of the North American judiciary as one of the powers of the State is a very interesting topic, but it would not be appropriate to the objectives of this work to explore it here. It is enough to remember, because of its exceptional importance, the controversy between Thomas Jefferson and John Marshall, Supreme Court Judge, on the extension of power of the judiciary. The thinking of Judge Marshall was recorded in a famous decision of the Supreme Court of 1803, in the case of *Marbury versus Madison*. Through this decision, the highest tribunal of the United States definitively affirmed the independence of the judiciary from the other powers, as well as its

competence to control the constitutionality of the actions of the Legislature and of the Executive. The courts affirmed that judicial power is part of political power, at the same level as the other powers.

In addition, at the same time that the power of the judiciary had been assured of control over the other powers in the United States, the control of judges by different methods was also established. Judges are controlled by the legislature, which can go as far as decreeing the impeachment of a member of the Supreme Court or of any other federal judge, and even as far as removing them from practice. The prosecution can take the step of bringing charges against the judge so democratic control is not compromised. With this aim, the system of selecting judges was established through popular elections. However, although judicial elections of state judges is still conducted in several states of the United States, popular election has never been used as the method to select federal judges. North American theorists generally do not consider election a good method for selecting judges, as they do not recognise the efficiency of this method in reassuring people that they can exercise control over them.

In short, one might say that the problem of control over judges, including the control of corruption, is especially important in constitutional systems in which the place of the judiciary in political power, and also the definition of the role of judges in society, has been inspired by the French model established by Napoleon Bonaparte. In such systems, judges have almost ceased to be in control of public activities and, by way of compensation, they have remained without control, since they do not disrupt legislative power and executive power.

### **3. The Judiciary in disharmony: the corruption of judges as a relevant subject**

In its basic form, the judicial system, as we have defined it, lasted until the start of the nineteenth century. No substantial criticism was launched against it until the second half of the twentieth century. Since then, the system has been questioned, with increasing frequency, culminating in the last ten years with a series of criticisms, including the accusation of corruption. There have been no significant changes to the workings of the judicial system, the inter-



nal disciplinary system, or the recruitment methods of judges which indicated a diminution in the qualifications of judges. Thus, several hypotheses should be considered. The first possibility is that there has, in fact, been an increase in corruption. Another explanation is that the corruption now exposed existed before, but has simply begun to receive more attention and to be taken more seriously. The third hypothesis is that judges no longer respect the limitations imposed on them by the Napoleonic system and they have started to assume attitudes inconvenient to the traditional political, economic and social elite, from whom the accusations of corruption have started to emanate. It is also possible that the three hypotheses are concomitantly valid.

In reality, since the proclamation of the Universal Declaration of Human Rights in 1948, the lower social classes have increasingly rejected legalised privileges favouring the elite. The poorest people, organised and supported by Non Governmental Organisations, have become conscious of their rights and have begun to take action to defend and give effect to them. Constitutions formed in the second half of the twentieth century, generally, place great emphasis on human rights, not only by proclamation, but also by defining responsibility and identifying the means to protect the rights.

One of the signs of the new trend is the increase in the power of judges, regarding acknowledgement and interpretation of rights, as well as the considerable increase of the requests for judicial protection. These two positive facts have been mentioned several times, in good or bad faith, as signs of a "crisis of the judiciary" in the negative sense. Errors and difficulties in the judiciary are reported; the judiciary has been denounced as being unprepared for their new responsibilities. Conflicts, which began to appear in the judicial organisation about half a century ago, have increased in intensity. On the one hand, there exist judges who are traditional and want to maintain their privileged position. They tend to be very well paid by the State, enjoy extensive privileges, do not work strenuously and do not demand that the public authorities respect the Constitution, the rights of the individual, or community groups or of the nation. These judges are not concerned as to whether they are serving justice well. On the other hand, there are an increasing number of judges who do not accept the role of legitimising legalised injustices and who are trying to exercise control over public authorities and to demand respect for constitutional principles and legal norms.

The reality is that the judiciary, almost the world over, still maintains the organisation and the traditional methods of the work. It has been unprepared when faced with the new demands and new responsibilities resulting from constitutional innovations. There are undeniable and serious inadequacies in the organisation and the procedures of judicial institutions, partly related to the formalistic and complicated procedural system, but mostly due to the formal arrangement of the judiciary. Excessive deference has been paid to the legislature and to the executive, while the judiciary has kept its distance from the people.

This predominantly formalistic orientation in the judiciary has never been subject to strong criticism, because this arrangement has always been convenient to the upper classes of society, who have operated in the sphere of legislative power and defined their privileges as "rights". Based on the argument of "political neutrality", judges have given a judicial cover to this deceit by applying ceremony to laws, without reviewing the contents or considering their compatibility with the demands of justice and formal or inherent political principles of the Constitution. In reality, this behaviour has favoured the neutrality of judicial power, but at the expense of their role as guardian of the Constitution and controller of the other powers. This neutrality has been confirmed in the way in which the judges have been chosen for the high courts. Except in rare cases, persons seemingly connected to dominant political groups, or those who had never challenged the unjust content of the laws in force have been selected.

There is also no doubt that members of the judiciary have taken refuge in well protected strongholds by succumbing to ethical weakness and refusing to carry out the duty inherent in their role established within legal norms and by corrupting the role of the courts, without risk of punishment. Even in a case where there is scandalous evidence of an error, a culture of corporate complicity has predominated. This is the same complicity mentioned by Thomas Jefferson in the eighteenth century as an inherent risk to the independence of the judiciary. This complicity has been revealed through actions or omissions of the directors of the courts, who have counted on the protection of their peers acting in concert and obscuring the failure to fulfil their duty. It has also been revealed through obscure illegal acts of judges, conducted with the excuse that publicity would demoralise the judiciary and so ensure the impunity of the negligent or corrupt people. Those charged with

correction or internal discipline, in the higher courts, carry out their oversight only of the high court judges.

By way of illustration, an intensively debated subject at the moment in Brazil is the control of the judiciary. There are several suggestions as to the type of instruments of control that should be created. These include the participation of judges as well as people outside the judiciary, such as representatives from the Bar Association and from legislative power and executive power. Members of the judiciary have already held angry demonstrations against the suggestions, as they consider what they term "external control" unacceptable and support the need for "internal control", carried out by representatives of the judiciary itself, so as to respect the independence of judges. "External control" is not an appropriate expression, because what is implied is control by a mixed panel, consisting both of judges and non-judges. But without entering into the merits of the suggestions, it may be established that mixed or external control would not have been proposed if there had been an effective internal control system already in place.

The fact remains that a new situation obtains in which the judiciary has a responsibility that it has never had before, that of controller of powers of state and guarantor of the respect for judicial order and basic rights of human and social groups, including the poorest classes of the population. For this reason, *the question of corruption ought to be considered more seriously*, because the corrupt judge does not only affect isolated cases or simply the respect for certain formalities. The corruption of judges in the current situation carries serious social consequences and could affect political relations, as corruption could upset or negate the benefits of a judicial ruling that encourages social justice by contributing to the compromise of faith in the law as an instrument of protection and advancement for people born in inferior economic and social conditions.

In addition, to understand the current problems of the judiciary, one has also to consider the other state powers, especially executive power, which are traditionally used to enforce the submission and complicity of the judiciary. These institutions may react as if betrayed and fail to comply when the judges demand respect for the Constitution and the laws, and they wrongly and illegally protect the offended parties (judges). This explains many attacks on the judiciary made by politicians, made very public thanks to the collusion of the most important mass communication media, traditionally

linked to the dominant classes of society. Nevertheless, this does not justify the unconditional defence of judges or a cessation of demands to fight against corruption in the judiciary.

#### **4. Identification of corruption and the different types of corruption**

As already indicated, in a democratic and constitutional state, which is the modern ideal for the protection of freedom and human dignity and the guarantee of the supremacy of the law, judicial power holds a place of extreme importance in public organisation due to the political and social effects which stem from its decisions. Moreover, it has to be considered that judicial power receives a considerable portion of public money, and is able, generally, to organise its own activities and to establish its own priorities with regards to expenditure. All this is done in the name of the people and with financial resources provided by the people. Thus, in a system that is described as democratic, these activities should be brought under some sort of control. It is appropriate to remember that the courts have an important administrative and disciplinary role, which may give rise to illegality and abuse. This is another reason as to why some form of control should be established over the judiciary.

Corruption in judicial power, no matter how widespread or in whatever form, is always undesirable, because it introduces imperfection into an institution that is essential for the promotion and protection of fundamental values of the human being. Precisely because the judiciary is socially and politically important, the most serious corruption is institutional corruption resulting when the judicial organisation is used to pursue objectives that are contrary to its *raison d'être* and to its nature. Historically, from the end of the eighteenth century, when the existence of judicial power was defined, several examples of institutional corruption have been described. The Napoleonic system was the first case of corruption of this scale, because Napoleon placed the whole of the judicial organisation in the service of the government and for the benefit of the economically and socially superior classes. Another case of institutional corruption was the use of the German judicial organisation to serve Nazism, as described by several judges in the Nuremberg trials.

In the same vein, one recalls the use of judges to silence political militants in French Algeria, which gave the inspiration to Albert Camus to write that the French judicial system was "a legal way of promoting injustices".

There are now many situations that constitute institutional corruption of judicial power. This corruption is present when judges and courts are accommodating to wealthy criminals and, by contrast, they severely punish those criminally accused who are poor or who belong to a section of society which is discriminated against. Such is the case with African Americans in the United States, as we know that many suffer the imposition of the death penalty, even though their guilt may be in question. Another example of institutional corruption is the use of judicial power to support illegal decisions of the government or to protect officials accused of corruption, as happens today in some Latin American countries.

To make a very general synthesis, given the specific aspects of each case, the many forms of corruption which may occur can be divided into two types: There is the situation of corruption of judges or courts in fulfilling their administrative roles, and there is also the instance of corruption which occurs while administering justice in a court of law. The second type is sometimes difficult to characterise because, in almost all cases, judicial power itself, through its superior institutions, ought to be able to pronounce upon corruption. To be more precise with regards to the types of corruption, as well as to find out the most efficient way to combat them, it would be interesting to examine certain hypotheses which hold that the more corruption occurs the more it is denounced.

The use of public money can give rise to several forms of corruption, starting with the decisions on how the money received should be spent. The available resources must be used honestly, but also carefully, and with the knowledge that priorities should be established based on common sense and justice. Insurance should be made that the priority is in serving the public interest and with consideration to the fact that it is public money being spent.

One type of corruption, for example, is the use of financial resources for unnecessary expenditures, such as the construction of luxurious buildings to house the members of the courts or to equip places to an extremely high level of luxury or sophistication. This has happened at times during which other sections of the judiciary have not had sufficient resources to improve

the quality of the basic installations and equipment and have needed support to provide the minimum conditions of comfort for the users of the services.

Another form of corruption connected to expenditure of financial resources is the dishonest practice of favouring certain service providers or suppliers based on friendship or in exchange for favours or personal advantages for the heads of the courts, while ignoring or minimising considerations of public interest. Corruption may also involve the use of financial resources such as in the practice of nepotism or by favouritism. Unnecessary expenditures or increases in expenditures may be made remunerating or granting exceptional benefits to the family or to friends or other favoured parties, in contravention to the rules of administrative ethics.

One particular form of corruption also seen in the judiciary is linked to the role of the internal control of judges. Such control involves the power to take decisions regarding the position of a judge as a civil servant, such as whether to grant or deny benefits and advantages; whether to approve promotion and whether to impose sanctions on judges for omissions in the fulfilment of their duties. In respect of all these examples, there is the risk of privileged personal treatment or injustice. Corruption may be present when purely subjective criteria are adopted in decision making, when different criteria are used for the same situation or when the punishment or the conferral of advantages, benefits or preferences is decided without reference to objective information.

One dangerous practice is that of holding secret sessions between higher members of the courts to take decisions that involve the interests of judges. Such practice encourages corruption which can be easily concealed. The practice may serve to punish or hinder access to higher roles of independent judges, to attack those who do not obediently accept the leanings of case laws of the higher members of the courts, as well as to prejudice or to favour judges who contradict or systematically encourage the interests of the higher echelons of executive or legislative power. This behaviour is a form of political and administrative corruption that could compromise the independence and the impartiality of judges, and consequently affect the execution of basic functions of the contemporary judiciary.

In addition, there exists a form of corruption, which is now aided by the considerable increase in the number of people who are looking to the

judiciary for a solution to judicial uncertainty or for the protection of rights. The inadequacy of the judiciary to give rapid and effective solutions to a great number of demands has prompted interested parties to consider illegal means to resolve the problem or to obtain favour with the judge, outside legal rules. In certain countries, the practice of this type of corruption is notorious, with the concession of personal advantages conveyed to a judge in exchange for a favourable ruling. Lawyers who are party to this practice speak discreetly and assert that they are outraged. However, either because it is more convenient to adhere to this corruption or because they fear reprisals, they do nothing about it. Although individual cases of corruption are involved, it is obvious that the entire judicial system is demoralised and, in the final analysis, faith in the law and in justice and in democratic order is compromised.

## **5. Professional and public participation in the fight against corruption**

Modern constitutions set principles and include standards that aim to guarantee public morality, requiring respect for the law by establishing, deliberately and implicitly, the responsibility of all people when carrying out a public occupation. It is obvious that these requirements also apply to judges and courts in many countries that still have laws that deal specifically with judicial organisation by attaching responsibilities and making provision for penalties.

Moreover, it can not be denied that concern about corruption in the judiciary has increased over the last few years. This trend can be seen in the regularity with which legislation appears and the emphasis placed on this subject in books and scholarly articles, as well as in the issues raised in legislatures and seminars about contemporary judicial problems. It is also important to remember that over the last several years the organisations for the defence of human rights have identified and denounced a number of cases in which corruption has distanced judges from their objective of maintaining justice. Obviously, the enactment of laws that deal with this matter is positive. On the other hand, it is perfectly possible to use a legal format to practice or hide corruption.

To combat judicial corruption effectively, it is essential to consolidate existing activity, beginning with the creation of special groups responsible for permanent control of the activities of judges and courts, relevant to barristers, the prosecution, law schools, groups representing civil society and the mass media. A list could be drawn up of means and responsibilities that should be considered for the control of corruption in the judiciary. The following, *inter alia*, could be included in such a list :

- **The creation of a superior collective body** for the permanent control of individual and collective judicial groups, with the participation of judges. Obviously, these controls should be drawn up with absolute respect for the independence of judges and courts. The body would not have the capacity to criticise the content of judicial decisions. The controls should be carried out on the administrative activities of the members of the judiciary, but the body should also be able to consider the decisions of the courts of law in the case of a well-founded denunciation of partiality or corruption. These bodies should integrate judges and members of the court, because, due to their experience, such people can identify cases of corruption more easily. Moreover, they are obliged by their function to take precautions to ensure the upkeep of ethical values in the domain of the judiciary. Judges, in the final analysis, are personally interested in the fight against judicial corruption in order to preserve their prestige and their image, and therefore, the participation of judges in the control of corruption is necessary and appropriate.

Control bodies of this type already exist in several countries, where there is often a superior council of the judiciary, but in many of these groups only members of the higher courts are integrated, which considerably reduces its effectiveness. Often these bodies are omitted either through condescension or lack of discipline among the members of the upper courts, even when these omissions are obvious and denounced by the press. Obviously, lack of control is total with relation to the actions of the directors of the court. There is considerable evidence to show that the corporate solidarity that Thomas Jefferson feared has proven that self-control does not work. One clear example of this solidarity is present now in the Supreme Federal Court of Brazil. One of the members of this court, Judge Nelson Jobim, was a member of the National Parliament and then Minister for Justice in the government of Fernando Henrique Cardoso, who nominated him for the Supreme Court. This judge uses parliamentary deception in the court, stops certain decisions, does not keep to the time limits and protects the interest of



the President of the Republic in a scandalous manner, to such a degree that the press often refers to him as "the leader of the government in the Supreme Court". These facts show a serious irregularity, but this has been happening for several years without any incentive from the court to stop this irregularity and to impose punishment on a judge who is behaving inappropriately.

For these reasons, it is essential that an independent control body include judges of all levels and highly qualified people who are familiar with judicial activities and, especially, lawyers prosecutors, and law school faculty, and the most representative associations of society. This managing group should have the power to access all necessary information, as well as the power to charge those implicated in corruption and it must have the power to punish those who are proven to have acted corruptly and to determine changes in the procedures that encourage the practice of corruption. These control bodies should not be allowed to interfere in the function of the law courts, because it is absolutely essential to maintain and protect the independence of judges. But independence is essential for the judge to make an impartial and just decision and should not be used by the managing groups or any of the members of the courts as an excuse for irresponsible behaviour.

The participation of judges at all levels in the selection process for the members of the managing group for the courts should be ensured when forming a special body in the control of judicial corruption. It is sensible that the high level management of judicial organisations should be carried out by members of the high courts, who are assumed to have long experience and well tested merits. Nevertheless, this should not give rise to a form of judicial aristocracy, where the voters are the members of a small group of eligible people. This retention of power encourages the formation of internal groups in the courts, which are linked one to the other by an unconditional solidarity, which encourages corruption by ensuring impunity.

- **The participation of lawyers:** For obvious reasons lawyers are most aware of the existence of corruption, the methods used and the people involved. Nevertheless, although they disagree with these practices and are frequently injured by them, lawyers rarely formally denounce corruption or accuse those that are responsible, as they are afraid of reprisals that could seriously damage their professional activities. For this reason, lawyers ought to be able to take individual initiatives against corruption, but they ought also to be able to do this through representative organisations like the Bar

Association, the unions and the representative associations of the profession of lawyers. At the same time, the possibility of the punishment of lawyers who have taken part in judicial corruption should be anticipated.

- **The participation of the prosecution:** Due to the type of work they do, members of the prosecution actively participate in judicial activities and they are able to detect corrupt practices and identify the person responsible. As they are not acting in their own name, but as part of an institution, the participation of members of the prosecution in control groups should be undertaken through representative groups, as should their accusations and their requests for enquiries. For this participation to be most efficient, it should be an autonomous body, which is not part of the judiciary. This model has already existed in Brazil for many years and it has proved to be very advantageous for the independence of the prosecution and for the improvement of its efficiency.

- **The participation of other public entities:** Legislative and executive power have their own specific roles, but as part of the same system of political and administrative power, they have the right and a duty to contribute to the control of corruption in all sectors of public organisation. In order to do this, they must collaborate, unreservedly, with the group formed specifically for the control of judicial corruption, to which the other institutions have to send denunciations. The enquiry, along the same lines carried out by legislative power into corruption in judicial power, as in Brazil currently, has proven to be ineffective for several reasons. The treatment of the problem has been more political than judicial, which is almost unavoidable when the enquiry is led by an eminently political group. Alongside some positive results, the parliamentary enquiry produced several negative effects, such as the conflict between two powers of the Republic. Several enquiries into the same event can give rise to the risk of making impunity easier for the corrupt parties. Consequently, unity of procedure ought to be established, which does not stop nor reduce the possibility of active participation of legislative and executive powers in the control of corruption in judicial power. The possibility that members of other branches may be punished when they participate voluntarily in corrupt judicial practices should be anticipated.

- **The participation of the people:** The people, in the final analysis, are the main victims of judicial corruption and, for this reason, they must be able to actively participate in its control. This participation should be maintained

by giving citizens the right to present their denunciations and to bring forward their enquiries. Evidently, members of the public fear and run a real risk of reprisals, which is why it is necessary to enable citizens to participate directly in the control or via associations and permanent and legally organised representative entities.

- **The participation of mass communication media:** The extraordinary development in the last few years of communication by technical methods, making the receipt and transmission of information more efficient, has significantly increased the possibility of intervention by mass media in the control of political and social activities. Although there is always the possibility that this may be used maliciously to hide or alter facts by protecting criminals and giving a false impression of guilt, it is very convenient for society to have the collaboration of the press to carry out control of judicial corruption. Despite the risks, it is useful to make denunciations and enquiries accessible to the mass media. It is necessary to behave discreetly and responsibly without concessions, and to establish the identity of any person responsible for transmitting frivolous accusations or distortion of the truth.

In conclusion, there are several fundamental considerations that justify the need for control of judicial corruption, as well as showing the means of control that could bring effective results. The existence of permanent control over the professional activity of the judiciary and of the management groups for judicial organisation is essential for democratic judicial order, human dignity and justice, so that the judiciary regularly fulfil the inherent duties of their high level activity with independence, impartiality and honesty. This control must be carried out absolutely objectively and transparently, with total respect for rights, dignity and the independence of judges so that judgement can be made with impartiality and justice according to their conscience.

The members of regulating bodies, chosen by democratic means, ought to be those who, due to their professional occupation and their life history, have shown their belief in the judiciary as the guardian of the constitutional order, as protector of basic human rights and, in the end, as an instrument of justice and an essential requirement for the establishment of peace.

## TOWARDS AN ETHIC TO CONTROL JUDICIAL CORRUPTION

*Richard J. Scott*<sup>1</sup>

As recently noted by the United Nations, corruption, in varying degrees, is a universal problem, afflicting both developing and developed states.<sup>2</sup> The judiciary is not immune to this corruption and, indeed, in a number of countries judicial corruption has been identified as among the most of pressing national problems.<sup>3</sup>

One way in which a number of countries have begun to confront the issue of judicial corruption, and its negative effects on judicial independence and impartiality, is through a statement of principles of judicial ethics or a code of conduct. This paper will outline the specific reasons as to why a statement of uniform ethical standards can be an effective tool in combating the corruption that is, unfortunately, endemic in many countries. This paper will also touch upon the informal methods of judicial discipline that remain a common, and often effective, response to instances of judicial misconduct or corruption.

To begin our discussion, by way of background, perhaps the most important hallmark of a system of impartial justice is that of judicial independence.<sup>4</sup>

- 1 The Honourable Richard J. Scott, Chief Justice, The Manitoba Court of Appeal, Canada. This paper was prepared with the assistance of Michael E. Rice, Senior Research Lawyer, The Manitoba Court of Appeal.
- 2 U. N. Commission on Human Rights, *The Realization of Economic, Social, and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations* (Economic, Social and Cultural Rights), U.N. Doc. E/CN.2/Sub.2/1997/8 at 71-80 (1997).
- 3 Tim Johnson, *Venezuela's Path to Justice: Hundreds of Judges Ousted*, MIAMI HERALD, May 1, 2000. The article notes that the number of judicial complaints required for suspension was, in fact, reduced or the government would have "had to boot out nearly 100 percent of the judiciary". Online at <http://www.rose-hulman.edu/~delacova/venezuela/ousted.htm>
- 4 Robert Stevens, *A Loss of Innocence?: Judicial Independence and the Separation of Powers*, 19 Oxford Journal of Legal Studies 365(1999).

Judicial independence supports the rule of law and forms an element of social control in a democratic society.<sup>5</sup> The elements of judicial independence were described by one justice of the Supreme Court of Canada in the following manner:<sup>6</sup>

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

Judicial independence thus characterizes both a state of mind and a set of institutional and operational arrangements.

The former is concerned with the judge's impartiality in fact; the latter with defining relationships between the judiciary and others.<sup>7</sup>

Impartiality in the judiciary is directly related to the subject of corruption as impartiality, by its nature, requires that cases be decided only according to evidence and the law. Any other influence on the decision making process, therefore, constitutes corruption.<sup>8</sup>

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5 Elizabeth Handsley, *Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power*, 20(3) Sydney Law Review 183 (1998) at 195.

6 Valente v. The Queen, [1985] 2 S.C.R. 673 at 687, per, LeDain J. Judicial independence has also been recognized as a universal human right. Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217, 1948 reads:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

7 *Ethical Principles for Judges*, a publication of the Canadian Judicial Council, Catalogue No. JU11-4/1998E, commentary at 8. See, also, the discussion of operational independence in the Honourable Justice Thompkins *The Independence of the Judiciary*", New Zealand Law Journal 285(1994).

8 *Final policy framework for preventing and eliminating corruption and ensuring the impartiality of the judicial system*, Centre for the Independence of Judges and Lawyers, March 15, 1999.

While judicial independence forms an important guarantee against impartiality and non-partisanship, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behavior, including corruption.<sup>9</sup> Thus, while the need for judicial independence remains paramount, there must also be judicial accountability to safeguard against corruption.<sup>10</sup>

As touched upon above, one method of fostering impartiality and accountability is through a statement of judicial ethics or code of professional conduct. Using the Canadian ethical principles document as a representative example, the fundamental statement of purpose, found in Chapter 1, indicates that the purpose of the document is to provide “ethical guidance” for federally appointed judges.

Ethical guidance, of course, can fall under a number of headings including, *inter alia*, judicial integrity, diligence, equality and impartiality. In a separate chapter on impartiality, for example, the Canadian ethical principles document indicates that judges should organize their personal and business affairs so as to minimize the potential for conflict with their judicial duties.<sup>11</sup>

As the central function of an independent judiciary is to maintain the utmost integrity and impartiality in decision making, codes or statements of judicial ethics should be read with that function in mind. In this regard, codes from various jurisdictions indicate that they should be interpreted and applied in accordance with the principles of judicial independence. Typical

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9 Maria Dakolias and Kim Thachuk, *Attacking Corruption in the Judiciary: a Critical Process in Judicial Reform*, 18 Wis. International Law Journal 353 (2000) at 361.

10 Judge R.L. Young, *Judicial Independence and Accountability in New Zealand* Fed. Law. 40 (1998).

11 *Supra*, footnote 7 at 41. The publication goes on to review a number of question a judge facing a conflict of interest should ask himself or herself including: (1) what constitutes a conflict of interest? (2) in which circumstances should a judge disclose circumstances which may constitute a conflict of interest? (3) in what circumstances will consent of the parties obviate the need for the judge to be disqualified? and (4) in which circumstances will it be necessary for a judge to preside even though there is an apparent conflict of interest?

of the wording is that of the Michigan Code of Judicial Conduct.<sup>12</sup> Canon 1 reads:

**Canon 1 - A judge should uphold the integrity and independence of the judiciary**

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. *The provisions of this code should be construed and applied to further that objective.*

Codes of conduct, however, are not codes of misconduct. They should not be interpreted as a code or a list of prohibited behaviors, nor do they set out standards defining judicial misconduct.<sup>13</sup>

While the purpose of a code of judicial conduct is to establish standards for the ethical conduct of judges, the provisions must be applied in a manner which is consistent with constitutional requirements, statutes or other court rules, prior decisions of the court, and in the context of all relevant circumstances. Accordingly, a number of jurisdictions have specifically indicated that the rules from a code of judicial conduct or statement of judicial ethics

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12 Adopted by the Michigan Supreme Court effective October 1, 1974, incorporating amendments effective through January 18, 1994. Online: <http://www.michbar.org/directory/code.html> (date accessed October 10, 2000). The codes of many other states similarly indicate that the provisions should be applied to further the principles of judicial independence. See, for example, Canon 1 of the *Iowa Code of Judicial Conduct*, Iowa Judicial Branch Homepage, online: <http://www.judicial.state.ia.us/judges/conduct.asp> (date accessed, September 5, 2000) and the Advisory Committee Commentary to Canon 1 of the *California Code of Judicial Ethics*, 'Electric Law Library's Stacks', online: <http://lectlaw.com.com/files/jud32.htm> (date accessed September 15, 2000), which reads:

The basic function of an independent and honorable judiciary is to maintain the utmost integrity in decision making, and this Code should be read and interpreted with that function in mind.

13 *Supra*, n. 7 at 3.

must not be construed so as to impinge on the essential independence of judges in making judicial decisions. In Canada, for example, the limitation is described in the following manner:<sup>14</sup>

Nothing in these Statements, Principles and Commentaries can, or is intended to limit or restrict judicial independence in any manner. To do so would be to deny the very thing this document seeks to further: the rights of everyone to equal and impartial justice administered by fair and independent judges.<sup>15</sup>

Codes of judicial conduct, then, can play a crucial role in preventing or eliminating corruption in that they explain the ethical aspects of appropriate conduct to judges, court officers and the public at large. As some commentators have noted, however, caution must be exercised in the drafting of any code. Mr. Justice Thomas, for one, has observed as follows:<sup>16</sup>

The framing of principles, whether or not called a code, would not be easy. Those who have studied professional codes know that they are either so general that you tell you little about practical application, or they are so detailed that they become impossibly descriptive so that they get honest people into trouble while the smart ones drive through the gaps.

As judicial independence depends, in large part, on the public confidence in the judiciary as a fair, just and honest body, a well publicized judicial code of conduct can also benefit the public itself in that it allows them to better understand the judicial role.<sup>17</sup> With a well informed public, for example,

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14 *Ibid.*

15 See, as another illustrative example, the *Arizona Code of Judicial Conduct*, approved by the Arizona Supreme Court as rule 81, Rules of the Supreme Court, June 15, 1993. The pertinent extract reads:

The canons and sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The code is to be construed so as not to impinge on the essential independence of judges in making decisions.

16 A.M. Thomas, *Judicial Ethics in Australia* 5 (1977).

17 Judge Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives* 28 Cal.W. Int'l L.J. 341(1998).



there may be more pressure on the judiciary to carefully structure its internal supervision to assure the public that the judiciary is taking care of its own problems of corruption. Simply, public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. Public education with respect to the judiciary and judicial independence thus becomes an important function, for misunderstanding can undermine public confidence in the judiciary.<sup>18</sup>

There remain, however, many unresolved questions surrounding the drafting and adoption of a code of judicial conduct and this, in turn, can affect the ability of the code to combat corruption. In India, for example, the Chief Justices' annual 1999 conference adopted a resolution that the judiciary would be bound by its own code of ethics known as the "restatement of values of judicial life".<sup>19</sup> According to the Times of India, in the opinion of many experts the resolution of the conference was a possible effort to preempt the Union government's move to evolve a code of ethics for the judiciary through the proposed national judicial commission.<sup>20</sup>

The India experience raises the thorny issue of the division of powers between the legislative, executive and legal branches of government. The very principle of the separation of powers, of course, was developed in an effort to avoid an overwhelming concentration of power in a single branch of government. Each branch can then serve as a check on the other two branches with the purpose of avoiding corruption and despotism.<sup>21</sup>

Whether or not the separation of powers is best served by a code of ethics drafted by the judiciary or by some other branch of government has not been uniformly considered. The judiciaries in many Latin American countries

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18 Ethical Principles for Judges, *supra*, n. 7, citing B. Nolan, *The Role of Judicial Ethics in the Discipline and Removal of Federal Judges*, in Research papers of the National Commission on Judicial Discipline & Removal, Volume 1 (1993) at 867-912.

19 *The Times of India*, (December 7, 1999) online: <http://www.timesofindia.com/071299/07home2.htm> (date accessed September 6, 2000).

20 *Ibid.* Specifically, the Prime Minister had told a gathering of judges, jurists and lawyers on November 26, 1999 that "we shall soon set up a national judicial commission which will recommend judicial appointments in the superior courts and draw up a code of ethics for the judiciary."

21 *Supra*, n. 9 at 360.

historically have not acted as significant institutional counterforces to legislative and executive abuses of power for a number of historical, political and structural reasons.<sup>22</sup> Accordingly, the argument can be made that judges, who understand the judicial role, are best suited to draft a code of conduct, one of the goals of which is to limit corruption.

Let us now touch upon, in a more specific manner, the need to have ethical standards to control corruption in some important areas facing all judges. To begin our discussion, the issue of money and personal finances is one that affects every judge, no matter what country they work in or the level of their court. Every judge must earn a living, save, shelter, and invest and/or retain funds for the benefit of themselves and their families. Finances relate, as well, to the subject of the personal independence of judges, in that judges must have secure and adequate salaries.

In terms of corruption, illegal monetary transactions, perhaps in the form of a bribe, can affect the fundamental requirement that a court's opinion be consistent and predictable. It becomes difficult, if not impossible, for a litigant to calculate the risk of losing a potential lawsuit, thereby causing decisions respecting settlement or compromise to be dangerous and fraught with speculation.

A decision that is grounded in corruption can also adversely impact future decisions by reason of the principles of precedent. This has a negative effect on society in general, and not merely on the particular litigants involved in the case before the court.

While bribes are perhaps the most recognized form of behavior associated with corruption in the judiciary, monetary corruption can take many other forms, such as passive investment, favor seeking and trading, and/or charitable promotion. The United States decision in *Re Yaccarino*<sup>23</sup> serves as one illustrative example of passive investment. Briefly, in that case, a trial judge engaged in extended *ex parte* communications with litigants and used confidential information garnered during those meetings to develop an interest in real property that was the subject of the litigation. The judge attempted to purchase the property at an unreasonably low price and even pressured one

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22 *Ibid.* at 362.

23 502 A.2d 3 (1985).

of the litigants to approve of the sale. Ultimately, the judge was removed from the Bench for judicial misconduct. The *per curiam* judgment of the court reads:<sup>24</sup>

The inevitable appearance of an informed person is that respondent exploited his judicial position as the judge responsible for the determination of the disputes between the parties by seeking to obtain the Sea Girt property at an unreasonably favourable price ... Respondent thus involved himself in personal financial or business dealings that compromised his fairness, objectively and impartiality. Moreover, respondent's conduct generated an absolute and impermissible conflict of interest that could not be rectified or overcome by disclosure and waiver.<sup>25</sup>

Another area of possible abuse concerns family members who appear before the judge as a party. The principles of impartiality require that the judicial office must not be used as a vehicle for promoting family interests. Additionally, of course, if a judge presides over cases involving a family member, then public confidence in the judiciary may be diminished. Even when a relative is a victim involved in a case before a judge, a judge should avoid the appearance of impropriety and disqualify himself or herself. An illustrative decision is that of *Matter of McKinney*.<sup>26</sup> In that case, a reviewing court found that it was improper for a judge to issue an arrest warrant where his daughter was the only affiant, and where the daughter received a payment from the person arrested. Later, to cover up his actions, the judge showed a willingness to mislead a probation officer.

In removing the respondent judge from judicial office, the Board of Commissioners on Judicial Standards observed:

Respondent's records are misleading and inconsistent. This, combined with the evidence showing not only Respondent's awareness of Lawson's [his daughters'], demand but the use of his judicial office to advance her interests, makes any professed

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24 *Ibid.* at 25.

25 See, also, as another representative example, *In Re Yandell*, 772 P.2d 807 (Kan. 1989), which held that it was improper for a judge to preside over cases involving banks that held the judge's defaulted loans and bad checks.

26 478 S.E. (2d) 51 (S.C. 1996).

legitimacy of such payments untenable. Particularly appalling is Respondent's professed willingness to mislead a probation officer to advance a family member's interest. *Furthermore, from Respondent's own testimony it is clear that he has no understanding of certain basic fundamentals of judicial practice and procedure, the purpose of bond and the prohibition on ex parte communications being but two of them.*<sup>27</sup>

Perhaps, if the judge in the above case had ready access to written principles of judicial ethics or a code of judicial conduct, such knowledge may have helped him avoid the conduct that ultimately led to his dismissal.

Turning to the issue of informal methods of judicial discipline, such methods, in conjunction with a recognized ethic, can prove effective in controlling instances of misconduct, including judicial corruption. As noted by one author, in the United States, the derivation of informal action by chief judges in response to episodes of judicial misbehavior may be more firmly rooted in tradition than in a grant of statutory authority.<sup>28</sup> The nature and extent of informal action in the face of misconduct was more fully described as follows:<sup>29</sup>

There is a general consensus among judges, legislators, and academics that informal action has been and remains the judiciary's most common response to episodes of judicial misconduct. The chief circuit judge questionnaire corroborates this conclusion, identifying informal actions by chief circuit judges as the most frequently used of the eight mechanisms studied. Explanations for the popularity of this mechanism vary. One chief judge explained the virtues of informal action in an interview with Barr and Willing: "The advantage of proceeding informally is that you deal with the problem without compromising the Article III status

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27 *Ibid.*, at 54.

28 Gardner Geyh, *Informal Methods of Judicial Discipline* 142 U.Pa.L.Rev. 243, 279(1993). See, also, Jules Deschenes, *Masters in Their Own House*, Ottawa, Canadian Judicial Council, 1981, and his comment that a chief justices power rests, in large part, "on tradition and their influences comes from moral persuasion" *Ibid.* at 189.

29 *Ibid.*, at 280.

of the judges. You deal with the problem while keeping the judge insulated from outside pressures. You deal with it informally without headlines and newspaper stories.” Said another chief judge: “It’s always better to do it informally. You get the right result without unnecessarily humiliating or degrading anyone.” Yet another judge explained:

“The informal process is a teaching mode, not a disciplinary mode. I can talk to a judge without the judge getting defensive. I can get real corrective action, not mere grudging changes. I see the formal process as what I must use where I have failed in the informal process.”<sup>30</sup>

Universal principles in relation to corruption, therefore, need not always be enforced by an established disciplinary body. Rather, an informal process, based upon those same principles, may be effective in redressing the misconduct involved.<sup>31</sup>

## Conclusion

As a general statement, there appears little doubt that recognized principles of judicial ethics and practice can assist in combating corruption within the judiciary. Whether these principles take the form of a statement of judicial ethics, or a code of professional conduct, they can serve to foster judicial independence and accountability, as well as increase public confidence in the administration of justice.

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30 See, also, Irving Kaufman *Chilling Judicial Independence* (1979), 88 Yale L.J. 681, 709, writing that “[F]ew judges would long withstand the united importunings of their peers. Even if the judge is slow to accept the suggestion of his brethren, this method is sure to accomplish his ouster faster than a formal procedure. Peer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law”.

31 An informal process, however, is not without limits. See, for example, *Reilly v. Alberta (Provincial Court, Chief Judge)*, [2000] A.J. No. 1029 (Alta. C.A.), wherein the Court found that a chief justice did not have the authority, for either administrative or disciplinary reasons, to order a judge to change his residence and hear cases in another jurisdiction.

A statement of judicial ethics or code of professional conduct must, of course, be applied in a manner that is consistent with constitutional requirements, statutes or other court rules, and in the context of all relevant circumstances. They should always be interpreted and applied in accordance with the principles of judicial independence. In addition, a written code can be of assistance when an informal response to complaints of judicial misconduct is more appropriate, a method that remains the judiciary's most common method of managing instances of judicial discipline.

The question as to who should draft the appropriate ethical document remains open. In my view, judges, who fully understand the judicial role, are in the best position to draft a code.

## **POLICY FRAMEWORK FOR PREVENTING AND ELIMINATING CORRUPTION AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM**

*A group of 16 distinguished experts convened by the Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) met in Geneva - Switzerland from 23 to 25 February 2000. The meeting aimed at formulating a policy framework to prevent and combat corruption in the judicial system.*

*The participants came from Australia, Bangladesh, Canada, Egypt, France, India, Indonesia, Malaysia, Nigeria, Palestine, Senegal, Sri Lanka, Uganda, and the United States of America. They included the UN Special Rapporteur on the Independence of Judges and Lawyers, former and current high judicial officials, distinguished lawyers, and representatives of international financial institutions.*

*The meeting agreed to the following policy framework:*

The integrity of the judicial system is central to the maintenance of a democratic society. Through the judicial system the rule of law is applied and human rights protected. Without an impartial judiciary the democratic character of society will be destroyed. To adequately fulfil this rule, the judicial system must be independent and impartial.

The independence of the judiciary is the cornerstone for ensuring that exercise of judicial power is impartial. Impartiality in the judiciary requires that cases be decided only according to evidence and the law. Any other influence on the decision-making process constitutes corruption.

The research carried out by the Centre for the Independence of Judges and Lawyers (CIJL) indicates that out of the 48 countries covered by its 9<sup>th</sup> annual report, *Attacks on Justice*, on the harassment and persecution of judges and lawyers between March 1997 and February 1999, judicial corruption is pervasive in 30 countries while in 6 countries the problem does not appear to be widespread. The CIJL did not have adequate information on 13 countries.

Recognising the negative effect of corruption on the maintenance of the rule of law and the legal protection of human rights, the CIJL organised this meeting with the aim of elaborating policies that could actively prevent and combat corruption in the judiciary. This policy framework addresses the judicial system and process as a whole with the intention that it would include judges and all other persons exercising judicial power, as well as all court staff. Court staff are included because they play an important part in creating and maintaining the conditions necessary for judicial impartiality. Further, while the focus of this policy framework is on corruption in the judicial system, it recognises that action in this area has to be related to other plans to control corruption generally both in government and in private enterprise.

## **Objectives**

This policy framework aims at:

- preventing and eliminating the corrosive effect which corruption has on the achievement of impartiality and so increasing the accountability of the judicial system as the foundation of its independence;
- encouraging consideration of the corruption of judicial systems as an impediment to the protection of human rights;
- providing the judiciary, policymakers and others with a process by which to combat corruption of the judicial system and to ensure its integrity and impartiality;
- encouraging international, national and local organisations, including bar associations, to assist in preventing and eliminating corruption of the judicial system;
- increasing public awareness and providing encouragement to the public to participate in the process of exposing, preventing and eliminating corruption in the judicial system, and so to increase public confidence in the judiciary; and,
- creating a culture of intolerance to corruption of the judicial system.



## **Acts Constituting Corruption of the Judicial System**

The judicial system is corrupted when any act or omission results or is intended to result in the loss of impartiality of the judiciary.

Specifically, corruption occurs whenever a judge or court officer seeks or receives a benefit of any kind or promise of a benefit of any kind in respect of an exercise of power or other action. Such acts usually constitute criminal offences under national law. Examples of corrupt criminal conduct are:

- bribery;
- fraud;
- utilisation of public resources for private gain;
- deliberate loss of court records; and
- deliberate alteration of court records.

Corruption also occurs when instead of procedures being determined on the basis of evidence and the law, they are decided on the basis of improper influences, inducements, pressures, threats, or interferences, directly or indirectly, from any quarter or for any reason including those arising from:

- a conflict of interest;
- nepotism;
- favouritism to friends;
- consideration of promotional prospects;
- consideration of post retirement placements;
- improper socialisation with members of the legal profession, the executive, or the legislature;
- socialisation with litigants, or prospective litigants;
- predetermination of an issue involved in the litigation;
- prejudice;
- having regard to the power of government or political parties.

These acts may be the subject of various sanctions ranging from criminal law, to law relating to conflict of interest, bias, discrimination, abuse of power, judicial review or may be governed by codes of ethics.

For judicial corruption to occur, it is not necessary to establish that the judicial decision was made on the basis of a corrupting act. It is sufficient that an independent, reasonable, fair minded and informed observer is likely to perceive the judicial act as having been determined by the corrupting act.

## **Facilitating Public Awareness**

Public participation in reporting and criticising corruption of the judicial system is a vital element in combating corruption. This requires the public to be informed concerning the deleterious effects that corruption and loss of impartiality in the judicial system have on them. Civil society coalitions, by a synergy of effort, have the potential to effectively combat and eliminate instances of corruption of, and loss of impartiality in, the judicial system. The judicial system should therefore assume the responsibility, together with other arms of government where possible, of keeping the public informed in a way which enables it to identify and expose corruption.

The role of an independent and responsible media in increasing awareness is vital.

The judiciary should therefore formulate proposals for keeping the public, including the media, informed and educated concerning the operation of the judicial system.

## **Indicators of Corruption of the Judicial System**

Public perceptions of the existence of corruption and loss of impartiality in the judicial system are important as indicators of a serious condition requiring attention. Firstly, they are damaging to the whole judicial system even if formed only in respect of particular persons. Secondly, they may suggest good reason to investigate the extent of alleged corrupt conduct. Social science provides some methodologies to investigate that conduct and identify appropriate indicators. Such methodologies may not yield exact measurement of the dimension of corrupt conduct and may not yield measurement according to legal standards of proof. Nevertheless, as indicators of public

perception they can be important in motivating governments and judicial systems to reform. They can also be important in developing and mobilising public opinion against corruption of the judicial system.

## **National and International Legislation**

International and regional recognition of the need for states to criminalise or discipline all forms of corruption of the judicial system will encourage the prevention and elimination of such acts. This could be achieved through ensuring that multilateral treaties addressing corruption in relation to the legislative and executive branches of government also cover corruption in the judiciary. International recognition could also be achieved by initiatives through the United Nations system.

National legislation should:

- criminalise conventional acts of corruption;
- require the disclosure of assets and liabilities of judges and other officers in the judicial system which is then independently monitored;
- provide for disciplinary or other proceedings against judges, in respect of a breach of a code of ethics, carried out by the judicial system; and
- provide for disciplinary or other proceedings against court officers consistent with any laws relating to their service.

The CIJL will examine present national legislative provisions with a view to identify acts beyond traditional criminal acts of corruption which have been criminalised.

## **Eliminating Contributing Causes To Corruption**

Creating the proper framework and conditions for an impartial judicial system is an essential factor for preventing and eliminating corruption of the system. This requires that the selection and promotion of judges is based on

merit and protects against appointments or promotion for extraneous reasons or improper motives. This necessitates that the independence of the judiciary be strengthened.

Improving the overall conditions of service in the judicial system will also help to bring change in individual conduct. The judicial system requires adequate funding by each state. Such funding must be determined following consultation with the judiciary and be a matter of budget priority. It should take the form of an overall amount allocated directly to the judicial system, which shall be responsible for its internal allocation and administration.

## **Statements of Judicial Ethics**

A statement of judicial ethics, such as in the form of a code, can play an essential part in preventing or eliminating corruption of the judicial system. Such a code may explain the ethical aspects of appropriate conduct to judges and court officers, encourage informed public understanding of the judicial system, and inspire public confidence in the integrity of the judicial institution.

Consistently with the need for independence in the judicial system as a means of protecting impartiality in decision making, a code of judicial ethics should not be drafted by the legislature or executive. It should be drafted and revised by the judiciary with such advice as may be appropriate. In some countries it may be appropriate that the task be assumed by an independent national judicial commission which includes lay representation.

The imposition of sanctions for conduct in breach of a code may require legislative authority. This is particularly the case where the sanction requires the removal of a judge from office. It will then be appropriate for the imposition of the sanction to take place in accordance with any constitutional or legislative provision for such removal.

In the case of non-judicial persons in the judicial system, the imposition of any sanction will need to be consistent with the laws relating to their service. Any breach or failure to act in accordance with such laws should be sanctioned as well.

The development of domestic codes of judicial ethics could be assisted by the development of an international best practice model based on a survey of existing codes, a project that the CIJL will undertake.

## **Investigation**

**Complaints of corruption against individual judges or court officers should, consistently with the rule of law, identify the person concerned and specify the alleged conduct. However, complaints based on allegations of a persistent reputation of corruption should warrant investigation, even if specific incidents of corruption are not identified. Such complaints must be dealt with in accordance with due process.**

Allegations of widespread corruption of the judicial system should be investigated, but not be dealt with by ad hoc measures such as wholesale dismissals of judges or court officers. Consistently with the rule of law, each case should be investigated individually and should be dealt with according to due process of law.

Where there is no existing independent mechanism or body to investigate complaints, an independent judicial commission of general jurisdiction in relation to judges, dealing with other matters such as selection, appointment, promotion and education, may be utilised. The commission should be supported with necessary resources, means and powers to enable it properly to investigate complaints. Most importantly it should have the power to ensure informants, complainants and witnesses are not victimised. For the purposes of the determination of a complaint, the commission or commission panel considering the complaint may include retired judges of good standing and proven integrity. It should also include lay members of standing.

The law should require disclosure of assets and liabilities of judges and other officers in the judicial system upon their appointment and annually thereafter so that unexplained acquisitions of wealth could shift the burden of proof in investigation and at the hearing of the complaint.

## **Legal Education**

Legal education plays an important role in creating an understanding of the ethical dimensions of the law and the judicial system. Basic legal training should include the teaching of ethics.

Orientation and continuing legal education for judges and court officers should include ethical issues relating to the judicial system.

It is equally vital that associations of lawyers as well as academic institutions discuss and address ethical issues through measures including publications and continuing legal education.

## **Legal Profession**

Lawyers have a crucial role to play in protecting judicial impartiality. Under no circumstances should they engage in or assist corruption in the judicial system. Their duty at all times is to prevent clients from engaging in corruption, to report allegations of corruption and to assist the public in reporting allegations of corruption. Their duty also is to be faithful to their clients and not to falsely charge the judicial system with corruption as an explanation for unsuccessful litigation. They cannot accept instructions from a client to act as his or her agent in furthering execution of any acts of corruption.

Bar associations should provide strong and effective professional mechanisms and sanctions against any such conduct by members of the legal profession.

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Finally, it should be recalled that the common form of judicial oath requires judges to exercise the judicial power without fear or favour, affection or ill-will. That guarantee of judicial impartiality is the universal expectation of all persons who access or appear before a court. Without it there will be no rule of law and the democratic quality of society will fail. Therefore it is essential that the above policy be widely supported and implemented.

The Centre for the Independence of Judges and Lawyers (CIJL) was created by the International Commission of Jurists in 1978 and is co-located at the ICJ Secretariat in Geneva. Its mandate is to promote world-wide the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers. The CIJL organises support for judges and lawyers who are harassed or persecuted, it sends observers to the trial of jurists, missions to examine the state of the independence of the judiciary and the legal profession throughout the world, and issues two periodic publications. *Attacks on Justice* analyses legal structures and their effect on the independence of the judiciary in more than 50 countries of the world and documents cases of jurists who are harassed or persecuted for carrying out their professional activities. The *CIJL Yearbook*, is a legal journal devoted to discussing issues related to the independence of the judiciary and the legal profession.

***Centre for the Independence of Judges and Lawyers***  
***of the International Commission of Jurists***

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