

Global Corruption Report 2007

Executive summary: key judicial corruption problems

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

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

Defining judicial corruption

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

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

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

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

The appeals process, ostensibly an important avenue for redress in cases of faulty verdicts, presents further opportunities for judicial corruption. When dominant political forces control the appointment of senior judges, the concept of appealing to a less partial authority may be no more than a mirage. Even when appointments are

appropriate, the effectiveness of the appeals process is dented if the screening of requests for hearings is not transparent, or when the backlog of cases means years spent waiting to be heard. Appeals tend to favour the party with the deepest pockets, meaning that a party with limited resources, but a legitimate complaint, may not be able to pursue their case beyond the first instance.

The scope of judicial corruption

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

The goals of corrupt behaviour in the judicial sector vary. Some corruption distorts the judicial process to produce an unjust outcome. But there are many more people who bribe to navigate or hasten the judicial process towards what may well be a just outcome. Ultimately neither is acceptable since the victim in each case is the court user. In the worst judicial environments, however, both are tolerated activities, and are even encouraged by those who work around the courthouse. TI's *Global Corruption Barometer 2006* polled 59,661 people in 62 countries¹ and found that in one third of these countries more than 10 per cent of respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a 'fair' outcome in a judicial case.

Types of judicial corruption

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

A. Political interference in judicial processes

A dispiriting finding of this volume is that despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around the world continue to face pressure to rule in favour of powerful political or economic entities, rather than according to the law. Backsliding on international standards is evident in some countries. Political powers have increased their influence over the judiciary, for instance, in Russia and Argentina.

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

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

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

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

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

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

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

B. Bribery

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional 'fees' to expedite or delay cases, or to direct clients to judges known to take bribes for favourable decisions. For their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply decide a case in a

certain way. Studies in this volume from India and Bangladesh detail how lengthy adjournments force people to pay bribes to speed up their cases.

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

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

Tackling judicial corruption

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

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

These points have been conspicuously absent from many judicial reform programmes over the past two decades, which have tended to focus on court administration and capacity building, ignoring problems related to judicial independence and accountability. Much money has been spent training judges without addressing expectations and incentives for judges to act with integrity. Money has also been spent automating the courts or otherwise trying to reduce court workloads and streamline case management which, if unaccompanied by increased accountability, risks making corrupt courts more efficiently corrupt. In Central and Eastern Europe, failure to take full account of the societal context, particularly in countries where

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

informal networks allow people to circumvent formal judicial processes, has rendered virtually meaningless some very sophisticated changes to formal institutions.

Recommendations

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

Judicial appointments

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

Terms and conditions

4. **Judicial salaries** Salaries must be commensurate with judges' position, experience, performance and professional development for the entirety of their tenure; fair pensions should be provided on retirement.
5. **Judicial protections** Laws should safeguard judicial salaries and working conditions so that they cannot be manipulated by the executive and the legislature to punish independent judges and/or reward those who rule in favour of government.
6. **Judicial transfers** Objective criteria that determine the assignment of judges to particular court locations ensure that independent or non-corrupted judges are not punished by being dispatched to remote jurisdictions. Judges should not be assigned to a court in an area where they have close ties or loyalties with local politicians.
7. **Case assignment and judicial management** Case assignment that is based on clear and objective criteria, administered by judges and regularly assessed protects against the allocation of cases to pro-government or pro-business judges.

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

8. **Access to information and training** Judges must have easy access to legislation, cases and court procedures, and receive initial training prior to or upon appointment, as well as continuing training throughout their careers. This includes training in legal analysis, the explanation of decisions, judgment writing and case management, as well as ethical and anti-corruption training.
9. **Security of tenure** Security of tenure for judges should be guaranteed for around 10 years, not subject to renewal, since judges tend to tailor their judgments and conduct towards the end of the term in anticipation of renewal.

Accountability and discipline

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

Transparency

17. **Transparent organisation** The judiciary must publish annual reports of its activities and spending, and provide the public with reliable information about its governance and organisation.
18. **Transparent work** The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgments, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.
19. **Transparent prosecution service** The prosecution must conduct judicial proceedings in public (with limited exceptions, for example concerning children); publish reasons for decisions; and produce publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions.
20. **Judicial asset disclosure** Judges should make periodic asset disclosures especially where other public officials are required to do so.

21. **Judicial conflicts of interest disclosure** Judges must declare conflicts of interest as soon as they become apparent and disqualify themselves when they are (or might appear to be) biased or prejudiced towards a party to a case; when they have previously served as lawyers or material witnesses in the case; or if they have an economic interest in the outcome.
22. **Widely publicised due process rights** Formal judicial institutional mechanisms ensure that parties using the courts are legally advised on the nature, scale and scope of their rights and procedures before, during and after court proceedings.
23. **Freedom of expression** Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed.
24. **Quality of commentary** Journalists and editors should be better trained in reporting what happens in courts and in presenting legal issues to the general public in an understandable form. Academics should be encouraged to comment on court judgments in legal journals, if not in the media.
25. **Civil society engagement, research, monitoring and reporting** Civil society organisations can contribute to understanding the issues related to judicial corruption by monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.
26. **Donor integrity and transparency** Judicial reform programmes should address the problem of judicial corruption. Donors should share knowledge of diagnostics, evaluation of court processes and efficiency; and engage openly with partner countries.

These recommendations complement a number of international standards on judicial integrity and independence, as well as various monitoring and reporting models that have been developed by NGOs and governmental entities. They highlight a gap in the international legal framework on judicial accountability mechanisms. TI draws particular attention to the Bangalore Principles of Judicial Conduct, a code for judges that has been adopted by a number of national judiciaries and was endorsed by the UN Economic and Social Council in 2006. The Bangalore Principles go some way towards filling this gap, though they remain voluntary. In addition, the UN Basic Principles on the Independence of the Judiciary should be

reviewed in the light of widespread concern that has emerged in the last decade over the need for greater judicial accountability.

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

Part two

Country reports on judicial corruption

Introduction

Transparency International

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

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

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

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

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

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

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

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Corruption in Sri Lanka's judiciary

Legal system: Common law, adversarial, plural (with elements of Islamic law)
Judges per 100,000 people: 1.4¹
Judge's salary at start of career: US \$4,038² *Supreme Court judge's salary:* US \$7,644³
GNI per capita: US \$1,160⁴ *Annual budget of judiciary:* US \$21.0 million⁵
Total annual budget: US \$8.2 billion⁶ *Percentage of annual budget:* 2.6
Are all court decisions open to appeal up to the highest level? Yes
Institution in charge of disciplinary and administrative oversight: Not independent
Are all rulings publicised? Yes *Code of conduct for judges:* No

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

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

Judicial structure

The Supreme Court is the highest court of the country, comprising between six and ten judges and headed by a chief justice. Among the Supreme Court's major jurisdictions are constitutional, final appellate and fundamental rights. Below the Supreme Court are the court of appeal, provincial high courts, district courts, magistrates' courts and primary courts. The Supreme Court has supervisory jurisdiction over all others.

Judges have fixed retirement ages of 65, 63 and 61 years in the Supreme Court, the court of appeal and high courts, respectively. Salaries are increased periodically and, although they earn less than lawyers in private practice, wages are adequate. Judges can only be removed by order of the president after an address in parliament based on proven misbehaviour or incapacity. Lower court judges, like other civil servants, retire at 55, subject to annual extensions to a maximum age of 60.

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

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

Integrity of chief justice an issue since 2001

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

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

A number of other measures were taken to block the appointment. Two parliamentary motions to impeach the new Chief Justice were submitted in 2001 and 2003 on charges of abuse of official power, case fixing for political interests, and

shielding subordinate judges and officials engaged in corruption. In both instances, Kumaratunga dissolved parliament before the motions could be examined. The allegations against the head of the judiciary led to great public dissatisfaction with the integrity of the institution.

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

Control of case listing sidelines experienced judges

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

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

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

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

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

A corruptible judicial system

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

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

Survey data from the Marga Institute⁴ is helpful in displaying the breadth and depth of corruption in the lower judiciary. An in-depth survey in 2002 of 441 legal professionals and litigants, all with experience with the judiciary, revealed that 84 per cent did not think that the judicial system was 'always' fair and impartial, and one in five thought it was 'never' fair and impartial. Among judges, lawyers and court staff, 80 per cent considered the judicial system was 'not always' fair and impartial. Among respondents as a whole, 83 per cent held that the judicial system was corruptible with a mere 17 per cent holding that it was never corruptible.

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

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

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

⁴ www.margasrilanka.org

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

Recommendations

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

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