

GLOBAL CORRUPTION REPORT 2007



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Global Corruption Report 2007

TRANSPARENCY INTERNATIONAL



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Diana Rodriguez
Editor, *Global Corruption Report*

Preface

Huguette Labelle, Chair of Transparency International

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

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

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

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

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

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

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

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

Foreword

By Dr Kamal Hossain

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

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

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

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

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

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

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

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

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

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

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

Executive summary: key judicial corruption problems

Transparency International

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

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

Defining judicial corruption

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

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

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

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

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

The scope of judicial corruption

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

The goals of corrupt behaviour in the judicial sector vary. Some corruption distorts the judicial process to produce an unjust outcome. But there are many more people who bribe to navigate or hasten the judicial process towards what may well be a just outcome. Ultimately neither is acceptable since the victim in each case is the court user. In the worst judicial environments, however, both are tolerated activities, and are even encouraged by those who work around the courthouse. TI's *Global Corruption Barometer 2006* polled 59,661 people in 62 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

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

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

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

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

The key to preventing this type of corruption is constitutional and legal mechanisms that shield judges from sudden dismissal or transfer without the benefit of an impartial inquiry. This protection goes much of the way toward ensuring that courts, judges and their 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 that prevent the media and civil society from monitoring court activity and exposing judicial corruption.

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

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

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

Recommendations

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

Judicial appointments

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

Terms and conditions

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

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

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

Accountability and discipline

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