

3 Accountability and competence of judges

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

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

Judicial integrity: the accountability gap and the Bangalore Principles

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

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

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

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

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

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

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

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

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

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

The Bangalore Principles

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

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

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

5 Available at www.cumbrejudicial.org

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

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

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

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

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

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

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

Recommendations

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

Corruption, accountability and the discipline of judges in Latin America

Emilio J. Cárdenas and Héctor M. Chayer¹

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

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

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

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

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

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

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

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

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

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

Argentina's politicians strengthen their grip on the judicial council

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

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

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

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

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

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

4 *Clarín* (Argentina), 1 March 2006.

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

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

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

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

Codes of conduct and ethical standards

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

Budgets and salaries

While it is difficult to draw a causal link between severe under-funding and judicial corruption, severe under-funding always has an impact on the judiciary as it seeks to supplement its needs from other sources. Under-funded judiciaries are unlikely to offer the salaries and benefits that will attract and retain high-quality and qualified candidates. 'You pay peanuts, you get monkeys,' President Lee Kuan Yew is quoted as saying³ when explaining why Singapore's judges are paid five times more than their US counterparts. In contrast to Asia's middle to high-income countries, the commitment of many governments (for example Bangladesh, Cambodia, Indonesia, Laos, Nepal, Pakistan, Philippines, Thailand and Vietnam) to ensuring adequate support for courts and their personnel has weakened, inviting corruption and undermining the rule of law.⁴

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

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

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

4 Ibid.

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

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

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

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

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

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

6 ADB (2003) op. cit.

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

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

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

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

Promotions

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

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

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

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

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

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

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

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

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

Education and training

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

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

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

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

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

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

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

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

Professional standards

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

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

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

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

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

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

Judicial training to fight corruption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professional qualifications of the judiciary in Italy, France and Germany

Carlo Guarnieri¹

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

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

Judicial corruption and trust

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

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

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

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

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

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

Popular perceptions have some correspondence with reality. Though systematic data are not available,⁷ no case of judicial corruption was reported by the media in Germany and France in the 2001–05 period⁸ and researchers concur that cases of corruption seem to be non-existent in Germany and rare in France.⁹ In the same period in Italy a number of significant cases were reported that were publicly linked in the press to the then prime minister, Silvio Berlusconi. Recently, the court of cassation adjudicated one of the cases, convicting one former cassation judge and several lawyers.¹⁰ Although the data should be taken with caution,¹¹ in their own terms they might suggest that Italy exhibits a higher level of judicial corruption compared with Germany if not France. On the other hand, the Italian judiciary – and, to a lesser extent, the French – achieved improved guarantees of independence in the second half of the 20th century with the result that today they are stronger than those enjoyed by German judges (and by most European ones). Perhaps judicial independence cannot be isolated as the most important determinant of judicial corruption. Guarantees of independence protect judges from outside pressures and reduce the probability that they will accept corrupt exchanges,¹² or show less zeal in prosecuting administrative and political corruption.¹³ But their impact on corruption is ambiguous because corruption also depends on other factors:

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

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

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

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

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

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

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

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

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

Significant factors affecting corruption

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

Direct controls on judges in the form of disciplinary proceedings are necessary, but can impinge on judicial independence. If entrusted to executive officials, external independence will be put at risk. If in the charge of senior judges, the internal gradient of independence may be damaged. To avoid collusion, controllers should not be dependent on those they control. This is why entrusting the task to an elected body can lead to factionalisation: that is, a situation in which the way controls are performed is influenced by the groups prevailing in that body¹⁴ and the likely result is inaction due to mutual vetoes. In fact, there are generally more disciplinary proceedings against judges in Italy (107 in 2002) than France (10). But in Italy only 22 of these (21 per cent) resulted in sanctions against the judge, compared with nine in France (90 per cent).¹⁵ It goes without saying that oversight by public opinion – broadly conceived – can play a crucial role in controlling corruption. Though not without flaws – accusations can be exaggerated or baseless – it is less obtrusive from the point of view of judicial independence.

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

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

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

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

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

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

Comparison of cases

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations

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

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

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

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

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

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

The international dimensions of judicial accountability

Zora Ledergerber, Gretta Fenner and Mark Pieth¹

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

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

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

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

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

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2 Max Katta, ‘Examining the National Anti-Corruption Strategy in Relation to the Sierra Leone Judiciary’, *The Monitor* (Official Newsletter of the Sierra Leone Court Monitoring Programme, vol. 11, March 2006). See www.news.sl/drwebsite/publish/article_20052124.shtml

3 UNODC, ‘Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces, Technical Assessment Report’, March 2006.

4 ‘Towards the Elimination of Corruption and Executive Control of the Judiciary in Asia’, First Consultation for the Asian Charter on the Rule of Law, Hong Kong, 16–21 February 2006. See www.article2.org/mainfile.php/0501/220/

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

Repatriation of assets and the role of local judiciaries

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

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

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

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

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

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

5 UN, 'Preventing and combating corrupt practices and transfer of assets of illicit origin and returning such assets to the countries of origin: Report of the Secretary-General', www.ipu.org/splz-e/unga06/corruption.pdf.

6 UNODC *Perspectives* 2, 2005, www.unodc.org/newsletter/200502/page008.html#_ftn1

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

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

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

Case studies

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

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

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

⁷ *Global Corruption Report 2004*.

⁸ *The Jakarta Post* (Indonesia), 1 July 2006.

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

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

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

Conclusion

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

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

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