

5. Courts, corruption and judicial independence

Siri Gloppen

A well-functioning justice system is crucial to address corruption effectively, which in turn is important for development. But judicial institutions are themselves corruptible. Surveys show that experiences with and perceptions of corruption in the courts are widespread (Afrobarometer, 2010; Latinobarometer, 2010; Eurobarometer, 2011; TI, 2011; GCR, 2012: 303; World Justice Project, 2012). In its 2011 Annual Report, Transparency International (TI) noted that, globally, almost half of those surveyed (46 per cent) perceived their judiciary as corrupt. According to the Eurobarometer (2012), around a third of Europeans think corruption is widespread in their judicial services (32 per cent). In Bangladesh, 88 per cent reported having experienced corruption when dealing with the courts (TI, 2012: 23), 85 per cent of Peruvians had little or no confidence in their judiciary (Latinobarometer, 2010), and in countries as diverse as Afghanistan, Bolivia, Bulgaria, Cambodia, Croatia, Ethiopia, Georgia, the Former Yugoslav Republic of Moldova, Morocco, Peru and Ukraine, the judiciary was seen as the most corrupt of all public institutions (TI, 2012: 19). Corruption and perceptions of corruption in the judiciary not only undermines the courts' credibility as corruption fighters. More generally, it erodes trust in the courts' impartiality, harming all the core judicial functions, such as dispute resolution, law enforcement, protection of property rights and contract enforcement. In addition, it harms the broader accountability function that the judiciary is entrusted with in democratic systems – upholding citizens' rights, securing the integrity of the political rules of the game, and sanctioning representatives of other branches when they act in contravention of the law.

While there is broad consensus that corruption in the court system is destructive and should be addressed, there are particular challenges involved in fighting judicial corruption. Anti-corruption efforts may jeopardize the independence of the judiciary and thus undermine judges' ability to fulfill their accountability functions. In fact, limiting judicial

independence may be the real motive behind such measures. So while we should care about corruption in the court system, we should also keep in mind that corruption charges and measures against judicial corruption may serve as a way to rein in bothersome judges.

The first section of this chapter explores different facets of corruption in the judicial sector and how this undermines real and perceived independence of the judiciary and threatens the very core of the judicial function, where trust plays a crucial role. The second section discusses governments' use of corruption charges and investigations as tools that now and then are misused in political power games. The third section presents common approaches to address corruption problems in the judicial sector and examines how they balance the need for increased accountability with respect for judicial independence.

5.1 IMPLICATIONS OF CORRUPTION FOR JUDICIAL INDEPENDENCE

Corruption is commonly defined as the misuse of public office or entrusted power for private gain. When we talk about judicial system corruption (judicial corruption for short) the paradigmatic image is that of judges taking bribes. Judicial corruption is a lot more, however. It includes *all forms of inappropriate influence* that may damage the impartiality of justice, and may involve any *actor* within the justice system, including lawyers and administrative support staff. The question of corruption is not only a matter of relations between judicial personnel and 'court users' (public and private parties in civil cases, prosecutors and accused in criminal cases); it is also about internal relations in the judiciary. The 'gain' need not be material. It can also be sexual favours, or the offered 'furtherance of political or professional ambitions' (TI, 2007: xxi), and may also take the form of avoiding something undesired, in the form of threats. Biased decision-making is thus not only a matter of the personal integrity of judicial personnel, but concerns the structural protection of judicial independence and the insulation of judicial decision-makers from illegitimate political and hierarchical influence.

5.1.1 Petty Corruption

Systemic petty corruption or bribery in the judicial system is a problem in many developing countries as well as in more developed economies. A 2006 survey asked people who had been in contact with the judiciary over the past year, whether they had paid a bribe. One in ten reported this

to be the case: including 21 per cent of Africans, 18 per cent of Latin Americans, 15 per cent in the Asia-Pacific region and the former Soviet Union, 9 per cent in South East Europe – but only 1 per cent in Western Europe (TI, 2007: 11). Bribes offered by users of the legal system may take many forms, including illegal ‘fees’ that court personnel levy to do what they should do anyway. Court users pay just to get their case through the system, to influence the outcome of a given case, or to delay it. Bribes may be paid to the judge, or to assistant staff or lawyers to remove files or get the case assigned to a particular judge.

Where petty corruption is prevalent it creates an additional barrier for ordinary citizens to access the justice system. For poor people the sums involved may be prohibitive. Even where it does not directly affect case outcomes (and even more so when it does), bribery adds to the class bias of the justice system and strengthens exclusionary patterns based on gender, race, ethnicity, caste and so on. Widespread bribery also erodes trust in the courts and distorts their ability to perform their functions as impartial arbiters of disputes, guarantors of contracts and enforcers of the law. Bribery is not only a problem in formal judicial institutions, but commonly also in alternative administrative and judicial institutions (variably termed informal, traditional, customary, community, or non-state) that most people in the developing world turn to for lack of access to or trust in the formal justice system (Golub, 2007; Nyamu-Musembi, 2007).

The share of respondents who report having experienced bribery when being in contact with the judiciary is alarming. Still, a much higher percentage perceives their judiciary to be corrupt (TI, 2007: 42). Media reports of high-profile corruption scandals and allegations of political bias among judges contribute to shaping citizens’ perceptions of corruption.

5.1.2 Undue Political Influence

Judges’ political bias and people’s perceptions of such undermines the role of the judiciary as protector of citizens’ rights vis-à-vis the state in its various manifestations. It leaves ordinary people without effective recourse to justice when the state is the offending party, and with scant protection when the state presses charges. The political bias is not necessarily consistent across all types of cases. It tends to tick in when the stakes are high, such as when the executive or other power-holders feel their position threatened. It is thus particularly damaging for the courts’ political accountability function, their ability to impartially

enforce the rules of the political system, for example in relation to election fraud (Gloppen et al., 2004; Gloppen, 2010).

Illegitimate political influence on judges take different forms, some are clearly illegal (bribes, blackmail, threats, violence/murder), while other forms of undue influence stem from the ways in which relations between the judiciary and other arms of government are organized, or reflect a legal culture where judges are expected to defer to political authorities.

Structural sources of political bias in the judiciary are related to procedures for *appointment* of judges and judicial leadership; terms and conditions of *tenure* for judges; and budgetary and *financial* regulations, including salaries and benefits:

Judicial appointments

Where the government is perceived to appoint deferential judges – or friends – to the bench, it damages trust in the judiciary, regardless of whether the judges are in fact biased in their rulings. In many countries the executive (is widely perceived to) decisively influence who are appointed as judges – even when there are rules and institutions in place to prevent this from happening. Judicial service commissions or other bodies designated a role in nominations, are often effectively circumvented – or themselves ‘packed’ and politically biased. Rules of ratification or confirmation by parliament have often limited effect, particularly in dominant party contexts. In some cases the executive, like President Museveni in Uganda, has explicitly expressed intentions to ‘appoint cadres to the bench’ (Gloppen et al., 2004; Gloppen and Kazimbasi, 2008; Gloppen, 2010). In South Africa, some have interpreted ANC government officials as having a similar intention when they pursue the (otherwise legitimate) aim of ‘transformation of the judiciary’ (DA, 2007; Molele and Makinana, 2012).

Terms and conditions of tenure

Where judges are appointed for limited terms, and particularly where the terms of service are renewable and short, judges have an incentive to rule with an eye on the interests and preferences of those for whom they depend for reappointment (or new employment after they finish their judicial tenure). The same is true where judges’ promotion/demotion depend on being favoured by their superiors, and where the security of tenure in practice is weak. Formal rules to protect tenure may not be sufficient to allay judges’ fears if experience show that they in practice risk losing their seat if they fall out of favour with the government, or when administrations change, as has been the case for example with supreme court judges in Argentina (Gloppen, 2010).

Regulation of finances, including of salaries and benefits

Control over the purse strings gives many governments a stronghold – if not a stranglehold – over the courts, by enabling them to strategically regulate not only judges' salaries and benefits, but also the running costs of the judiciary. This may lead to (perceptions of) bias, as illustrated in Zambia and Malawi, where the timing of hikes in judges' salaries and benefits repeatedly coincided with pending court cases involving high stakes for the executive, most notably presidential election petitions (Gloppen, 2010). While in Africa, the judiciary commonly depends on parliament both for budgetary allocations and for regulation of salaries and benefits most Latin American judiciaries automatically receive a fixed share of the budget as part of the apparatus for insulating the judiciary from undue influence.

5.1.3 Undue Influence via the Internal Judicial Hierarchy

In many cases, undue influence on judicial rulings comes not from politicians directly, but via the judicial hierarchy (Gloppen, 2010). Such influence may be the result of direct pressure from superiors; more subtle incentives based on judges' anticipation that a 'wrong' decision in an important case could have career consequences; or selective allocation of cases to judges who are likely to rule in a particular manner. Besides, internal procedures can be misused to limit individual judges' ability to voice criticism, for example by refusing dissenting judgments. Hence, where the judicial leadership – and in particular the chief justice – is (seen to be) close to the sitting regime, this can taint the entire judiciary. Even where judicial appointments are otherwise effectively regulated in ways that place them beyond executive influence, the executive often has a much stronger say over the appointment of the chief justice and judge presidents (Gloppen, 2010).

To sum up, corruption in the judiciary is undoubtedly widespread – and perceptions of judicial corruption even more so. There are many sources, both of bribery and undue political influence undermining judicial independence. Given the apparent scale and importance of this problem, it is essential to understand the mechanisms at play and examine efforts to address it. Efforts to reduce the challenges are many, but before turning to that, we will now consider how allegations of corruption among judges can be a powerful strategic tool. And disciplining systems ostensibly put in place to combat corruption may have the – intended – side effect of undermining judicial independence.

5.2 CORRUPTION CHARGES AND DISCIPLINING OF JUDGES AS A TOOL IN A POLITICAL POWER-GAME

Given that corruption in the judicial system is a problem in most countries, there is a need for systems to uncover irregularities, and discipline and dismiss corrupt officers. If misused, however, anti-corruption strategies become very effective tools for undermining judicial independence by ridding the judiciary of independent-minded judges that the authorities find bothersome, and scare others from following in their tracks. Examples are many. Below are some of the more recent investigations by the International Commission of Jurists (ICJ).

Due to concern for a high number of judicial dismissals in the Russian Federation, the ICJ, in May 2012, undertook a mission 'to assess the disciplinary procedure, grounds for disciplining and dismissals of judges and their potential effect on the security of tenure and the independence of the judiciary' (ICJ, 4 December 2012). They found that 'The threat of dismissal, and the uncertainty of the grounds on which a judge can be dismissed, affects the capacity of all judges to act independently', and that 'the threat of disciplinary action may hang over a judge for many years, since there is no limitation period for such action. This makes the judge susceptible to pressure from within the judicial hierarchy or from the executive.'

Similarly, the ICJ criticized Tunisia for summarily dismissing 70 judges: 'Instead of fulfilling the stated aim of eradicating corruption, the actions of the Minister of Justice undermine the independence of the judiciary in Tunisia and reinforce the previous practices of undue political interference in judicial matters' (ICJ, 6 August 2012). Criticism was also raised when Baltasar Garzón (the famous Spanish Judge who called for extradition of the Chilean dictator Pinochet) had criminal proceedings initiated against him for corruption and malfeasance as he was investigating the crimes committed by representatives of the Franco regime (ICJ, February 2012).

5.3 ADDRESSING JUDICIAL CORRUPTION

How can the risks of individual and systemic corruption in judicial systems be reduced without undermining judicial independence? As described, judicial system corruption is a diverse phenomenon and requires a range of responses. Simply put, the individual bribe or petty

corruption, which is only one part of the problem, needs systemic responses whereby judges are made more accountable to the rules. Corruption stemming from undue political influence may, on the other hand, require reforms that make judges less accountable to the rulers, for example by weakening the mechanisms that political power-holders (and the judicial hierarchy) can use to influence judges' rulings. In either case, solutions must be developed based on deep knowledge of the particular society and informed by the broader normative, socio-political and economic context.

A large number of public institutions, donor agencies (most notably the World Bank) and independent organizations (such as TI, ICJ, Judicial Integrity Group (JIG), International Bar Association) are engaged in developing strategies for advancing judicial integrity. Setting common standards and fostering professional communities where these are not only known, but also matter for peer recognition has been one aspect of this. The Bangalore Principles for Judicial Conduct (2006), developed from within the profession, has become an international reference point with regard to what judicial independence requires (JIG, 2010, 2012). Despite the diversity of actors, and their different focus and priorities, there is relatively broad consensus on what is required to address corruption without undermining judicial independence.

5.3.1 Addressing Petty Corruption in the Judicial System

Petty corruption and bribery has generally been addressed along four lines, the first two seek to reduce the motivation to engage in corruption, the third seeks to reduce opportunities to do so, and the fourth seeks to put in place effective sanctions.

1. *Improvement in material conditions* for judicial personnel and support staff, particularly in the lower judiciary where the lack of a living or socially acceptable wage is seen to be a significant driving factor for corruption.
2. *Normative change* in the attitude towards bribery, primarily within the legal professions, but also in society more broadly. Measures include training, codes of conduct for judges, lawyers and judicial support staff, and efforts to build a culture where these norms matter for professional recognition and standing, through national and regional judicial forums.
3. *Preventive procedural measures* undertaken to reduce opportunities for corruption take many forms. Increased transparency around different types of transactions (filing of cases, allocation of cases to

judges, and so on) and improved case management systems and procedures that reduce the scope for individual discretion reduces the opportunities for both judges and support staff to 'levy fees' or conveniently lose files. Where judges are required to declare assets this may help uncover excessive income.

4. *Disciplinary/accountability systems* for judges normally include complaint mechanisms where members of the public can report knowledge or suspicion of corruption, investigative measures, as well as a hearing or 'trial' mechanism for disciplining and dismissal of judges. International standards require that the disciplining bodies should be independent from the government, and that disciplinary or removal proceedings against judges 'must be determined in accordance with well-established procedures that guarantee the rights of judges to a fair and transparent hearing and to an independent review' (ICJ, 6 August 2012).

Evidence suggests that, particularly where governance generally is weak and corruption levels high, traditional, anti-corruption reform measures that rely on reducing incentives for corrupt behaviour (higher wages, improved case-handling systems and disciplinary measures) have little effect unless accompanied by attitudinal change (Matei and Matei, 2011).

5.3.2 Addressing Undue Political Pressure on Judicial Personnel

Following the discussion on undue political influence above, we can distinguish between measures aimed at reducing political influence on the selection and appointment of judges; on judges' tenure; and through budgets and finances. In addition, there are efforts to strengthen judges' resistance to pressure by enhancing their competence and strengthening professional norms. It should be noted, however, that this is a controversial terrain and part of a much broader discussion about how politically unfettered unelected judges should be and how to check abuse of judicial power.

1. *Reducing political – and particularly executive – influence on judicial selection* has been the focus of much attention. Recommendations run along three lines: increase the number of actors (veto-players) involved in the selection process; establish clear criteria; and increase the transparency of the process. Following these principles, most countries now have a (more or less) independent body – a judicial council or judicial service commission – tasked with vetting and nominating candidates for judicial

offices. Their composition varies, some consist mainly of representatives from within the legal profession, others have a majority of politicians or are appointed by the executive, yet others have representation from civil society. The understanding is that to reduce executive influence, political appointees should not be in majority. Equally important is how the process is conducted and the degree of transparency. With vetting and nominations behind closed doors (sometimes not even the final list is public), the scope for executive influence is significant. More transparent processes, with open calls for nominations/applications, open hearings, public interviews of candidates, and open ranking lists, reduce the scope for undue executive influence. Clear and relatively demanding selection criteria (for example a minimum of 10 years of legal practice or more for the higher positions) reduces the pool of qualified candidates and makes political appointments more difficult, particularly in developing countries with a limited legal profession (Gloppen, 2010). Once nominations are made, the appointing body should be limited to select among the nominated candidates, not (as happens) have a free choice also outside the vetted nominees. Most countries also have different bodies involved in the actual selection, for example appointment by the executive and ratification by the legislature. Where the ruling party has a legislative majority, confirmation may have little effect, however, and special procedures and majority requirements are needed for an effective check.

2. *Minimizing political influence on judges' tenure and conditions* is arguably even more important. Once a judge is in place, who appointed him or her is less important than who holds the key to a future career and wellbeing. It is thus crucial to minimize the executive's ability to influence judges' tenure and conditions. Judges should thus be appointed for life, or for long non-renewable terms, and conditions of service should be constitutionally guaranteed, with strictly defined impeachment criteria and procedures.
3. *Eliminating undue influence on judicial budgets and administration.* Administrative autonomy and budget independence for the judiciary prevent the executive from 'starving' the judiciary – or rewarding judges when important decisions are pending. Such problems are avoided where the judiciary receives a guaranteed share of the national budget. A related issue concerns the jurisdiction of the courts. This should be clearly protected to avoid situations, like in Uganda, where the government has encroached on the jurisdiction and authority of the judiciary by moving politicised

cases into the military courts (Gloppen and Kazimbasi, 2008; Gloppen, 2010).

4. *Increasing resilience by strengthening judges' competence and professional norms* has been an important area of reform. Unlike most of the measures discussed earlier, this does not depend on new legislation or cooperation from the political authorities. Training and resources that make judges more professionally secure and skilled, reduces risks of submitting to pressure. By creating forums – within each country, as well as regionally and globally – where judges meet, share experiences, give support and exchange recognition, professional norms develop and reputations matter more. This raises the 'reputational costs' of succumbing to undue influence and may contribute towards a stronger sense of social purpose. It may also create material incentives, if judicial integrity and professional competence are seen as factors in appointments to attractive positions – including to international courts.

5.4 CONCLUDING COMMENTS

When setting the standard for judicial recusal, Lord Hewart famously stated that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' (*R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233). This expresses why all forms of corruption and perceptions of such, whether in the form of bribery or bias, are so damaging to the judiciary. However, dilemmas arise in the work against judicial corruption since efforts to impose accountability may undermine the independence judges need to do their work. The discussion above shows how the two concerns interact, but also the challenges of getting from regulations to practice.

REFERENCES

- Afrobarometer (2010/11), www.afrobarometer.org. Online data analysis: institutions and leaders → courts and security → corruption: judges and magistrates. Available at: www.afrobarometer-online-analysis.com/aj/AJBrowerAB.jsp.
- Bangalore Principles (2006), Strengthening basic principles of judicial conduct (as endorsed through ECOSOC Resolution 2006/23). Available at: www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdfwww.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf.

- DA (Democratic Alliance) (2007), The DAs judicial review: judicial independence. Available at: www.da.org.za/docs/621/judicialpercent20review_document.pdf.
- Eurobarometer (2012), Corruption (Special Eurobarometer 374). Available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf.
- GCR (2012), Global Competitiveness Report 2011–12. World Economic Forum, Geneva. Available at: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf.
- Gloppen, S. (ed.) (2010), *Courts and Power in Latin America and Africa*. Basingstoke: Palgrave MacMillan.
- Gloppen, S., R. Gargarella and E. Skaar (eds) (2004), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*. London: Frank Cass.
- Gloppen, S. and E. Kasimbazi (2008), Elections in court: the judiciary and Uganda's 2006 Election Process. In J. Kiiza, S. Mahara and L. Rakner (eds), *Electoral Democracy in Uganda*. Kampala: Fountain Publishers, pp. 53–89.
- Golub, S. (2007), The 'other 90 per cent': how NGOs combat corruption in non-judicial justice systems. In TI (Transparency International), *Global Corruption Report 2007*. New York: Cambridge University Press, pp. 129–137.
- ICJ (International Commission of Jurists) (10 February 2012), The International Commission of Jurists condemns the conviction of Judge Baltasar Garzón to an 11-year ban from the office. Available at: www.icj.org/the-international-commission-of-jurists-condemns-the-conviction-of-judge-baltasar-garzon-to-an-11-year-ban-from-the-office/.
- ICJ (International Commission of Jurists) (6 August 2012), Executive control over judiciary persists in Tunisia. Available at: www.icj.org/executive-control-over-judiciary-persists-in-tunisia/.
- ICJ (International Commission of Jurists) (4 December 2012), Russia: disciplinary measures must not hamper the independence of judges. Available at: www.icj.org/russia-disciplinary-measures-must-not-hamper-the-independence-of-judges/.
- JIG (The Judicial Integrity Group) (2010), Measures for the effective implementation of the Bangalore principles of judicial conduct. JIG Meeting Lusaka, Zambia, January 2010. Available at: judicialintegritygroup.org/resources/documents/BP_Implementationpercent20Measures_Engl.pdf.
- JIG (The Judicial Integrity Group) (2012), The Record of the Seventh Meeting of the Judicial Group on Strengthening Judicial Integrity. JIG meeting Garmisch-Partenkirchen, Germany, October 2012. Available at: <http://www.judicialintegritygroup.org/resources/documents/JIG%202012%20MUNICH%20MEETING%20REPORT%202.pdf>.
- Latinobarometer (2010), at www.latinobarometro.org. Online data analysis: confidence in judiciary. Available at: www.latinobarometro.org/latino/LATANalyzeQuestion.jsp.
- Matei, A. and L. Matei (2011), Assessing the anti-corruption strategies. theoretical and empirical models. *Journal of Management and Strategy*, 2 (1), 23–40.

- Molele, C. and A. Makinana (2012), ANC sets its sights on the judiciary. *Mail and Guardian*, 17 February 2012. Available at: <http://mg.co.za/article/2012-02-17-anc-sets-its-sights-on-the-judiciary>.
- Nyamu-Musembi, C. (2007), Gender and corruption in the administration of justice. In TI (Transparency International) *Global Corruption Report 2007*. New York: Cambridge University Press, pp. 121–128.
- TI (Transparency International) (2007), *Global Corruption Report 2007*. New York: Cambridge University Press.
- TI (Transparency International) (2011), Global Corruption Barometer 2010/11. Available at: <http://gcb.transparency.org/gcb201011/results/>.
- TI (Transparency International) (2012), Transparency International Annual Report 2011. Available at: www.transparency.org.
- World Justice Project (2012), Rule of Law Index. Available at: <http://worldjusticeproject.org/rule-of-law-index>.

