

Part one

Comparative analysis of judicial corruption

1 Introducing the problem

Corruption within the judiciary: causes and remedies

Mary Noel Pepys¹

Corruption in a justice system distorts the proper role of the judge, which is to protect the civil liberties and rights of the citizen, and to ensure a fair trial by a competent and impartial court. It enables public officials and special interest groups engaged in corrupt practice to function with the confidence that their illicit acts will go unpunished, if exposed. In broad terms, corruption is the misuse of entrusted power for private gain. In the context of judicial corruption, it relates to acts or omissions that constitute the use of public authority for the private benefit of court personnel, and results in the improper and unfair delivery of judicial decisions. Such acts and omissions include bribery, extortion, intimidation, influence peddling and the abuse of court procedures for personal gain.

In corrupt judiciaries, citizens are not afforded their democratic right of equal access to the courts, nor are they treated equally by the courts. The merits of the case and applicable law are not paramount in corrupt judiciaries, but rather the status of the parties and the benefit judges and court personnel derive from their decisions. A citizen's economic level, political status and social background play a decisive role in the judicial decision-making process. In corrupt judiciaries, rich and well-connected citizens triumph over ordinary citizens, and governmental entities and business enterprises prevail over citizens.

While it would be foolhardy to assert that corruption is non-existent in certain judicial systems, it is fair to say that in some countries corruption is minimal, sporadic and the result of individual, unethical behaviour. In such countries, the system in place supports the professionalism of the judiciary and protects the judge from untoward influence. Procedures make the justice system transparent and hold police, prosecutors and judges accountable.

In many other countries, judicial corruption is a systemic problem and addressing ethics alone is not sufficient to tackle the problem. The judicial system may be structured to foster corruption. The external pressures on a judge to act unethically are greater, and the risks of being caught and punished are lower.

¹ Mary Noel Pepys is a US-based senior attorney, with a specialisation in the rule of law, specifically international legal and judicial reform.

The different causes of corruption must be carefully diagnosed and identified, otherwise the remedies employed to eliminate corruption will be misdirected and will fail. What follows are seven factors that contribute to judicial corruption and that can be remedied regardless of the type of legal system that exists.

Undue influence by the executive and legislative branches

Despite constitutional guarantees of equality between the three government branches (the legislature, which makes the laws; the executive agencies, which administer the laws and manage the business of government; and the judiciary, which resolves disputes and applies the law), the executive and legislature have significant control over the judiciary in many countries. Where the rule of law has been historically weak, the judiciary is frequently viewed as an acquiescent branch of government. Judges in weak judiciaries are deferential to politically connected individuals in the executive and legislative branches.

Often the president of the country or a politically motivated body (such as the Ministry of Justice or Parliament) has the power to appoint and promote judges without the restraints of transparent and objective selection procedures, or eligibility requirements may be vague, allowing for arbitrary compliance. Unless compelled by law, officials in the executive and legislative branches are averse to relinquishing their influence over the judiciary. This was true in Thailand where the judiciary was a part of the Ministry of Justice until 1997 when the courts became independent and subject to the control of the Supreme Court (see also 'Judicial independence and corruption', page 15).

Once appointed, judges may feel compelled to respond positively to the demands of the powerful in order to maintain their own status. Rather than act as a check on government in protecting civil liberties and human rights, judges in corrupt judiciaries often promote state interests over the rights of the individual. In many countries, the president has the power to reward judges who abide by his wishes with modern office equipment, higher quality housing and newer cars.

Social tolerance of corruption

In many countries social interactions are governed less by law than customary or familial codes of conduct. To regard as corrupt judges who support the interests of their relatives overlooks the notion that it may be more dishonourable for a judge to ignore the wishes of a family member than to abide strictly by the law. Nor is the rule of law as important in such countries as individual relationships. Government decisions may be based more on personal influence than merit. The strength of personal relationships is so great in some countries that all judicial decisions are suspected of being a product of influence.

In some countries, paying a bribe is considered an essential prerequisite for judicial services and, indeed, the only avenue for accomplishing results. In Kenya, the saying 'Why hire a lawyer, if you can buy a judge?' is common. In countries where court processes are laborious, court users prefer to pay bribes as a cheaper means of receiving quicker service. Court staff also demand bribes for services to which citizens are legally entitled. In some countries, the payment of fees for judicial services is so engrained that complaints arise not if a bribe is sought, but if

the requested bribe is greater than usual (see 'Judicial corruption in the context of legal culture', page 99, and 'Informality, legal institutions and social norms', page 306).

Fear of retribution

One influence that can lead judges to make decisions based on factors other than the facts and applicable law is fear of retribution by political leaders, appellate judges, powerful individuals, the public and the media.

Rather than risk disciplinary action, demotion or transfer, judges will apply a politically acceptable decision. It is interesting to note that recently in Egypt two senior judges, under the threat of disciplinary action, publicly determined that the 2005 multi-party election results were manipulated (see 'Egypt's judiciary flexes its muscles', page 201).

Death threats and other threats of harm against judges are powerful incentives to sidestepping the law in deciding the outcome of a case. Fear for one's safety, as with Kosovar judges immediately after the Kosovo war, caused many to rule in favour of Kosovar defendants even though the law supported the Serb plaintiffs. While international judges in Kosovo worked under UN protection, Kosovar judges had no such insurance.

In some countries, including Bulgaria, judges who correctly apply the law in controversial criminal cases can be vilified by the press even though the evidence failed to justify a conviction. Fearful of applying the correct, but unpopular, decision, inexperienced or insecure judges will modify their judgement in order to avoid public scorn. A member of a special court appointed to investigate Italian football managers and referees involved in rigging top league matches openly told a newspaper that its decision had taken into account Italy's victory in the 2006 World Cup, a spate of popular demonstrations and the support of some mayors of the cities whose teams were most implicated (see 'Culture and impunity in Italy', page 107).

Low judicial and court staff salaries

Judicial salaries that are too low to attract qualified legal personnel or retain them, and that do not enable judges and court staff to support their families in a secure environment, prompt judges and court staff to supplement their incomes with bribes. (See 'When are judges likely to be corrupt?' page 296 for an empirical analysis of possible determinants of judicial corruption, including salary levels.)

Although judges' salaries are not as attractive as those of legal professionals in the private sector, the security of the judicial position and the respect afforded to the profession should compensate for loss of earnings. In relation to other government employees judges should receive among the highest salaries. While the salary of a federal judge of a district court in the United States is not commensurate with what a judge might have earned in private practice, it is higher than most government employees and the prestige of the post makes it a sought-after position. The salary differential between different branches of government can be galling in some countries. Not so long ago, police in Uzbekistan received higher salaries than judges.

In addition to low salaries, judges often assume their positions with a significant financial burden. Judgeships in some countries are for sale and the cost can be many times the official

annual salary of a judge.² Judges who purchased their position have to recoup their investment by seeking bribes. Some Azerbaijani judges reportedly tolerate their court staff demanding bribes as they recognise that illicit payments are the only way they can achieve a moderate standard of living.

Countries such as Ecuador, Georgia, Nigeria and Peru have significantly raised judicial salaries in recent years in a bid to reduce the incentives for corruption. It is difficult to prove that an increase in salary is a causal factor in reducing corruption. Even where incidents of illicit payments to judges have clearly been reduced, the public continues to believe that corruption persists at the same level. In Georgia, judges' salaries have increased by as much as 400 per cent in the past two years, but perceptions of judicial corruption remain high and the prevailing view is that the nature of corruption has simply changed. Instead of selling decisions for bribes, judges are now perceived as succumbing to executive pressure. At the least, a respectable salary for judges and court staff enhances the public perception of the judiciary as an equal branch of government.

Poor training and lack of rewards for ethical behaviour

In some countries, judges who make decisions based solely on the facts and applicable law have no assurance they will receive a positive evaluation. Ethical behaviour is punished, rather than rewarded. In corrupt judiciaries, judges who make correct decisions can see their judgements routinely overturned by corrupt appellate judges, thereby giving the impression that the lower court judge is incompetent.

Court presidents, who have the power to assign cases, can punish an ethical judge by assigning a disproportionately heavy caseload, causing a major case delay that can be grounds for reprimand. In Sri Lanka, judges who have the courage to rule against the government's interests are allegedly ignored by the Chief Justice who has broad discretion concerning the composition of Supreme Court panels. Those judges who are resolute in their independence can be the subject of bogus charges or can face early retirement.

Collusion among judges

In countries where judicial corruption is rife, judges conspire to support judicial decisions from which they will personally benefit. In Zimbabwe the government allocated farms expropriated under the fast-track land reform programme to judges at all levels, from lower court magistrates to the Chief Justice, to ensure that court decisions favour political interests. In a criminal case where the stakes are high, judges from the first instance court to the highest appellate court will collude to exonerate the guilty or reduce the defendant's sentence in return for a payoff.

Inadequately monitored administrative court procedures

Where procedural codes are ambiguous, perplexing or frequently amended, as in transitional countries, judges and court staff can exploit the confusion. Without modern office systems and

² Author interviews with justice sector professionals in Azerbaijan.

computerised case processing, detection of the inappropriate use of case documents and files is difficult. Poorly trained and low paid court staff are enticed to use their discretionary powers to engage in administrative corruption since there is little accountability for their decisions. In Guatemala, for example, the disappearance of case files is a common source of extortion.

Remedies to corruption in the judiciary

It is possible to mitigate the factors that contribute to judicial corruption, but solutions must be tailored to national, or even sub-national, realities, and are successful when part of an integrated reform plan. Increasing judicial salaries will not, in isolation, stop judges and court staff from taking bribes, though coupled with additional accountability mechanisms it may lead to improvements. Also important to note is that while judges have an important role as the decision maker in a judicial process, they are but one part of a long chain of people with influence over a law suit; anti-corruption efforts need to encompass lawyers, police, prosecutors and the agencies responsible for enforcing judicial decisions.

Enhancing the independence of the judiciary

One of the major remedies to corruption is to improve the governance structure of the judiciary so that it has significant authority, if not control, over the administration and budget of the courts, and over the appointment and promotion process of judges. In corrupt countries, judges are often beholden to the president, Ministry of Justice and other governmental officials whose undue influence can detrimentally affect the quality of services.

Judicial councils can advance the independence of the judiciary by assuming responsibility for *selecting and promoting judges*. If composed of a majority of judges elected by their peers, rather than by individuals within the other branches of government, and if the appointment procedures are transparent and based on criteria that are not compromised by political considerations, judicial councils can enhance the integrity of the judicial appointment process (see 'Corruption, accountability and the discipline of judges in Latin America', page 44).

Assuming *control over the budgetary process* of the courts insulates judges from the deleterious influence that other branches of government have on the operations of the courts. According to international standards on judicial independence, a judiciary should be able to influence the amount of money the government allocates it and control its own budget and expenditures.

A related remedy is to ensure that *disciplinary procedures* for judges are rigorous, but fair and transparent. Judges cannot be removed from office for anything other than misconduct or incapacity to carry out their functions, including removal and prosecution for corrupt acts. Because security of tenure is so important the process for removing judges must carry exacting standards, and a decision to remove a judge must be based on a rigorous and fair investigation. Kenya, where the names of judges identified in an anti-corruption drive by the executive were published in the national media before they were even informed of the allegations against

them, provides a recent example of the risk of overzealous anti-corruption purges (see “Radical surgery” in Kenya’s judiciary’).

Another important set of remedies that increase the independence of judges and court staff, making it easier for them to resist external pressures, aims to *professionalise the judicial career*. A key step is to extend the term of a judgeship since judges who are appointed for a term of limited duration and who are not eligible for tenure have little defence against political pressure or societal expectations. Although life appointments are not essential, judges’ terms should be sufficiently long to reassure them that ignoring external influence will not impede their professional advancement. A number of experts on the independence of judges and lawyers recommend a term of 10 to 12 years, which should not be made subject to renewal, since towards the end of the term judges tend to tailor their judgements and conduct in anticipation of renewal.

In countries where judicial corruption exists, abuse of the *case-assignment system* is a major cause of improper influence. Where case assignment is not random, a court president who seeks to control the outcome of a case can readily assign a case to a compliant judge. If not randomly assigned, cases should be delegated according to criteria that take account of the subject and complexity of the case, the judge’s expertise and workload.

Also important is to *increase the salary* of court staff. Salaries should be commensurate with the responsibilities of judges and court personnel and the country’s cost of living. Salaries should be published to allow the public to monitor the lifestyle of judicial employees.

Finally, one of the best defences against improper influence is *full knowledge of applicable law*. Judges are often in no position to counter arguments presented by individuals seeking improperly to influence the outcome because, in many countries, they do not have ready access to current laws and their amendments. If they do, they may not fully understand them, particularly in transition countries where market-based principles are relatively recent. Systematic distribution of laws and amendments on a timely basis to all judges is essential to combating corruption. Training programmes for new judges and continuing education for sitting judges are essential to ensure that they understand their laws and applicable international treaties so that their rulings are legally unassailable.

Introducing accountability mechanisms

With independence comes responsibility, and a second set of remedies aim to increase accountability of the judiciary – the only non-elected branch of government in most democracies – to court users and the public. There are many aspects of accountability. Judges must be legally accountable by providing reasoned decisions and judgements that are open to appeal. Financial accountability ensures that the judiciary accounts for both the intended and actual use of resources allocated to it. The judiciary must also be accountable for the way it is run: structures and standards should be regularly evaluated and improved, and the judiciary should comply with codes of ethics and professional standards. Cutting across accountability mechanisms is the need for transparency: judges need to be and *appear to be* impartial, independent and beyond reproach.

Judges who live lifestyles in notable contrast to the size of their salaries generate perceptions of a corrupt judiciary. In many countries, laws require judges and other public servants to file a personal *declaration of assets* and one for their close relatives. Typically, asset declarations are filed prior to taking office, periodically throughout a judge's tenure and on retirement. Critics contend that asset declaration is a meaningless requirement since assets can be hidden under the names of distant family members or friends. An essential component of effective assets laws are procedures that allow for thorough verification, monitored on a regular basis.

Many judges believe that a *code of conduct* is unnecessary, not because they are trying to shield themselves from prosecution but because they believe judges are sufficiently well versed in ethical conduct. But codes of conduct strengthen the integrity of judges and improve public perception of the courts by clarifying the behaviour expected of judges. A code of conduct must cover not only aspects of impropriety but also its semblances, and must be vigorously enforced. Unless judges begin to prosecute their own for disregarding the laws they are expected to enforce, citizens will continue to view the courts with scepticism (see 'Judicial integrity: the accountability gap' on page 40).

An effective means in reducing corruption is the *publication of judicial decisions*. Although not a requirement in many countries where precedent does not prevail, the publication of judicial decisions can expose corrupt judges who are unable to justify their rulings by reasoned opinions, while protecting judges whose reasoning demonstrates that they have properly applied the law to the facts in a case. Published judicial opinions help the public to determine whether improper influence played a role in the decision reached. Where resources exist, verbatim transcripts of a trial assist the public and civil society to verify the accuracy of a decision.

It is not only individual judges that need to be accountable, but also the administration of the judiciary. To reduce opportunities for corruption in administrative processes, *court procedures must be simplified* and made comprehensible to the court user. They must be precise in order to minimise court staff discretion, and must clearly delineate responsibilities to enhance the accountability of each staff member. Developing a hierarchal structure, headed by a court administrator, and professionalising court staff will improve the quality of judicial service. They also reduce the administrative responsibilities of judges, allowing them to focus on their decisions. As a means of increasing the transparency of court administration, courthouses in Bulgaria were extensively reconstructed so that each staff member could be observed by other staff members and the public. This significantly reduced the ability of court staff to engage in the mishandling of case files.

A case-management system that allows for transparent tracking of case files enhances the effectiveness of court proceedings and ensures that cases are heard in a reasonably efficient manner. *Computerised case-management systems* with tamper-proof software allow attorneys and litigants to track cases, trace files and monitor the time requirements.

Finally, in many countries, the provision of an *alternative dispute-resolution* (ADR) mechanism, whereby the plaintiff and defendant attempt to reach a settlement outside the courtroom, can reduce the backlog of cases in the court. There is another compelling reason for instituting ADR mechanisms in countries with corrupt judiciaries. Citizens in such countries should have the opportunity to bypass the courts by engaging in a parallel structure for arbitration,

mediation and civil settlement, provided the process has the respect of both parties and mechanisms to ensure implementation of the resolution. ADR relies on more traditional leaders, who are often perceived as less corrupt, less expensive and more familiar than the formal justice system (see 'The "other 90 per cent": how NGOs combat corruption in non-judicial justice systems', page 129).

Enhancing competency of external controls

Many groups outside the judiciary work to curb judicial corruption by supporting the judiciary's demands for independence; by continuously monitoring judicial performance and uncovering incidents of corruption; and by providing judges with a platform to air concerns. Strengthening these groups and ensuring they have access to the information necessary to perform their monitoring role can contribute to the reduction of judicial corruption.

Judges in many countries have found a powerful voice by joining in an *association of judges* to represent the interests of all judges, particularly lower court and district judges, whose opinions are rarely heard. According to the Council of Europe's Recommendation on the Independence, Efficiency and Role of Judges,³ it is essential for judges to have a vital and effective voluntary association that will safeguard the independence of judges and protect their interests.

Bar associations, made up of lawyers, can also be catalysts for change. One role of a national bar association is to defend the independence of judges and lobby government to provide the support necessary to ensure their effectiveness. Bar associations are also supposed to enhance the ethics of their members. They should impose sanctions on members who engage in corruption and bring the profession into disrepute.

Journalists also have a role to play. Public perception of judicial corruption is often worse than the reality (see 'How prevalent is bribery in the judicial sector?' page 11) and part of the reason for this is inaccurate reporting. Intentionally or not, press reports often distort the truth about certain cases, in particular high-profile cases involving a serious crime by a well-known defendant, which often receive sensational coverage. To assist in more accurate reporting of cases of public interest, courts should provide briefings to the media. Allowing public access to courtroom proceedings can improve journalists' often shaky grasp on the legal ramifications of a case, improving public perceptions of the judiciary. In many jurisdictions the problem is not sensationalist reporting by journalists, but rather the obstacles that make it difficult for the media to report allegations of corruption (see 'The media and judicial corruption', page 108).

Finally, for public perception of the judiciary to improve, citizens must be encouraged to develop a better understanding of their legal rights and obligations, as well as the responsibility of courts to provide fair, effective and speedy justice. *Civil society organisations* can play a role in enhancing public awareness of legal rights and court procedures by devising and distributing legal

3 Council of Europe's Recommendation No. R (94) 12.

pamphlets. With such basic information, citizens can learn how to participate more directly in the judicial process, particularly in the areas that affect them most, such as tenant/landlord and employer/employee relationships. By monitoring the judicial process, civil society organisations can expose unethical judges and create pressure on the government for judicial reform (see ‘Civil society’s role in combating judicial corruption in Central America’, page 115).

How prevalent is bribery in the judicial sector?

Transparency International¹

The judiciary is facing a crisis of confidence in many parts of the world, as reflected in a specially commissioned edition of TI’s Global Corruption Barometer.² But is this level of mistrust

Table 1: Percentage of respondents who had interacted with the judiciary in the past year and had paid bribes

Region ³	Percentage of people who have had contact with the judiciary in past year	Percentage of those having contact who paid a bribe
Africa	20%	21%
Latin America	20%	18%
Newly Independent States	8%	15%
South East Europe	9%	9%
Asia–Pacific	5%	15%
EU / other Western European countries	19%	1%
North America	23%	2%

1 Kathie Barrett of Georgia State University, United States, helped with the analysis of the Global Corruption Barometer data.

2 TI’s Global Corruption Barometer, conducted annually since 2003, is part of Gallup’s Voice of the People Survey. A summary of the 2006 Global Corruption Barometer is reproduced in chapter 13, page 314.

3 The regional groupings used here are: Africa: Cameroon, Congo (DRC), Gabon, Kenya, Morocco, Nigeria, Senegal and South Africa; Latin America: Argentina, Bolivia, Chile, Colombia, Dominican Republic, Mexico, Panama, Paraguay, Peru and Venezuela; Asia–Pacific: Fiji, Hong Kong, India, Indonesia, Japan, Korea (South), Malaysia, Pakistan, the Philippines, Singapore, Taiwan and Thailand; North America: Canada and the United States; EU and other Western European Countries: Austria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and United Kingdom; South East Europe: Albania, Bulgaria, Croatia, Kosovo, Macedonia, Romania, Serbia and Turkey; Newly Independent States (NIS): Moldova, Russia and Ukraine.

warranted? Is it based on experience of petty bribery in run-of-the-mill legal cases, or on tales of grand corruption in the media? Between June and September 2006, 59,661 people in 62 countries were asked what they thought of the judicial system in their country, whether they or another member of their household had interacted with it in the past year and, if so, had they paid a bribe.

Of the 8,263 people who had been in contact with the judicial system recently, 991, more than one in 10, had paid a bribe. In Africa and Latin America, about one in five of people who had interacted with the judicial system had paid a bribe. In Bolivia, Cameroon, Gabon, India, Mexico, Morocco, Pakistan and Paraguay the figure was more than one in three court users.

How does this compare with perceptions?

In 55 out of the 62 countries polled, a higher percentage of people perceived extreme judicial corruption than had paid a bribe. In 33 of the 62 countries polled, a majority of respondents described the judiciary/ legal system of their country as corrupt.

There are major differences in popular perceptions of judicial corruption among regions of the world, as table 2 shows. Africa and Latin America are the regions with the bleakest perceptions of judicial corruption. A majority of people in all but one African country polled (South Africa) and one Latin American country (Colombia) perceive the legal system/judiciary to be corrupt. Trailing the table are Bolivia, Cameroon, Mexico, Paraguay and Peru, where 80 per cent or more of respondents described the judicial system as corrupt. The United States falls halfway down the table, with a majority of respondents describing the justice system as corrupt. In Canada one in three described the justice system as corrupt.

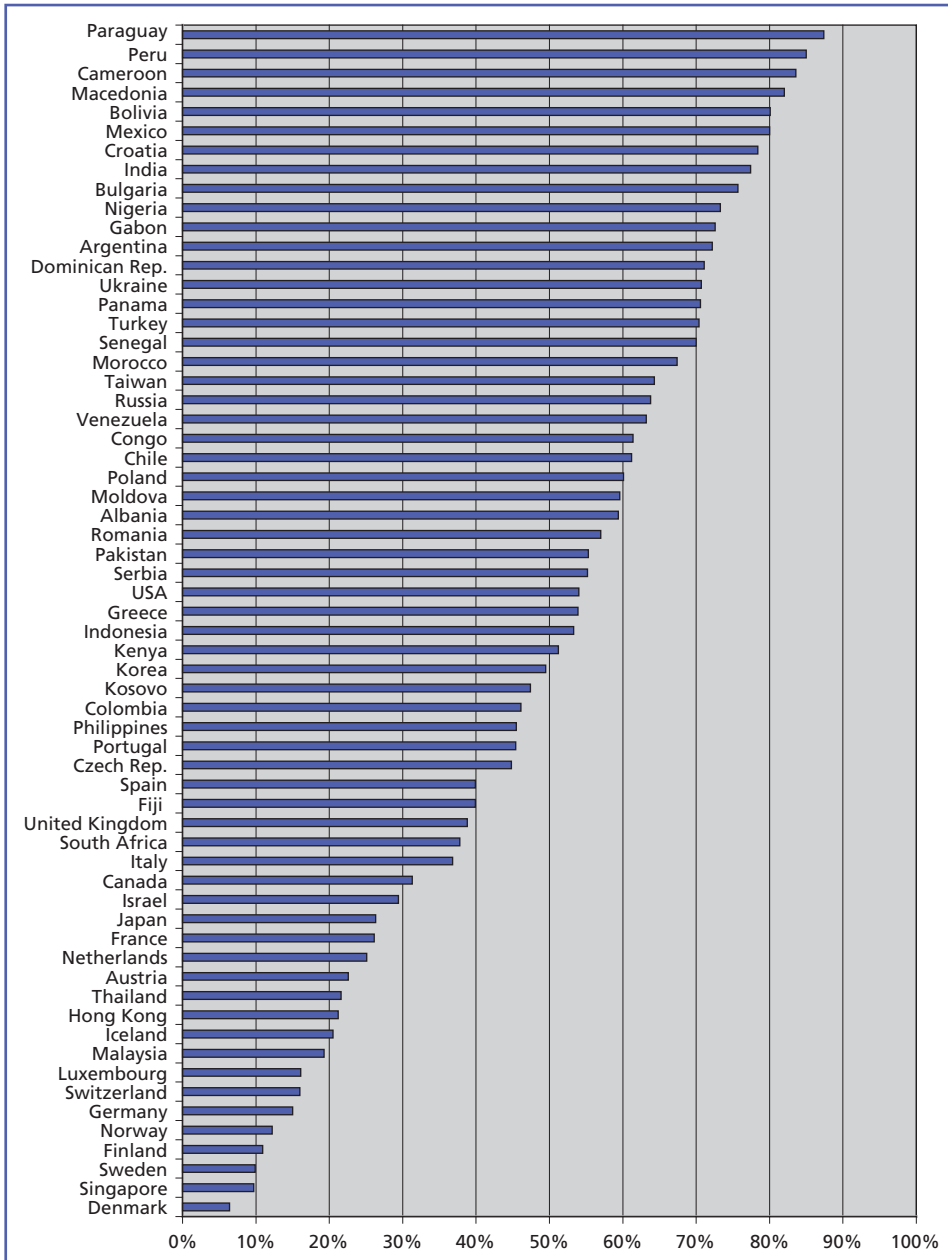
Within the Asia-Pacific region Singapore, Malaysia, Hong Kong and Thailand have relatively low levels of perceived judicial corruption. The judiciaries of India and Pakistan fare badly, with 77 per cent and 55 per cent of respondents in the two countries, respectively, describing the judicial system as corrupt.

There is a high degree of divergence among the 29 European countries polled. Eight of the 10 countries with the lowest levels of judicial corruption are European, led by Denmark, where 81 per cent of respondents perceive little or no corruption in the legal system/judiciary. In all former communist countries, 45 per cent or more of the people polled described the legal-judicial system as corrupt.

Are people talking about judges, the police or court staff?

Can judges and court staff take comfort from the hypothesis that respondents often think of lawyers and police when asked about judicial corruption, and not the actual arbiters of justice? According to this special edition of the Global Corruption Barometer, the answer is 'no'. In 35 countries, respondents singled out judges (from a list that also included: judge, police, prosecutor, lawyer, court staff, witness/jury and 'other') as the actors they most needed to bribe to obtain a 'fair' judgement. Judges were followed by lawyers (top of the list in 10 countries), police, and prosecutors.

Table 2: Percentage of respondents who described their judiciary/legal system as corrupt (i.e. gave it a score of 4 or 5 out of 5, when 1 = not at all corrupt and 5 = extremely corrupt).



The main variance by region arises in the group second most likely to be bribed. Overall, lawyers (42 per cent) were more likely to be bribed, but in Latin America and Africa police were most frequently identified as the second most likely to be bribed. In the Balkans, respondents said prosecutors were the second most likely to be bribed.

Conclusion

Levels of bribe paying are high in some countries that suffer systemic judicial corruption. But the public often views its judiciary as more corrupt than it actually is: more people around the world described their judiciary as 'extremely corrupt' than have personally been part of judicial corruption. The perception of corruption in the judiciary can be as insidious as actual corruption since both have the same effect of undermining public trust in the justice system. Judiciaries have much to gain by increasing transparency of their operations.