

Some Means of Addressing Judicial Corruption in Mongolia¹

Introduction:

Corruption has come to be recognized as a serious threat to economic development and democratization in many developing and transitional countries. There can be no doubt that Mongolia suffers from corruption. Its importance was recently emphasized by the 2002 Consultative Group Meeting (July 8-10, 2002 in Ulaanbaatar) where the US Ambassador said: " Rule of law² is weak, corruption is a nagging problem. The level of bureaucracy is too high, and there is a lack of transparency in making and enforcing rules."

The focus of the Mongolia Judicial Reform Project (JRP) is judicial reform. Therefore this paper focuses only on judicial corruption, however it is difficult to separate the corruption of judges from other corruption in the wider justice sector (police, prosecutors, bailiffs who enforce judgments, etc.), since they all frustrate the goal of achieving the Rule of Law. Corruption in the Justice sector is a keystone to corruption throughout society. Without an honest criminal justice system, the wealthy, including the corrupt, can avoid the consequences of their crimes. Such impunity reduces the perceived cost of corruption. The risk that corrupt activity will result in imprisonment and accompanying public humiliation is minimal. The gains from corruption are thus not discounted and there is little reason beyond personal integrity not to engage in corrupt acts. That this may be the case in Mongolia can be seen from the fact that there have been no convictions for judicial corruption in Mongolia since the transition began in 1991, and indeed only two corruption convictions, (involving MPs) in the last ten years.³ Reducing corruption in the justice sector would make it more likely that corrupt individuals in other sectors would be prosecuted and punished. This would raise the cost of corruption and discount the rewards. High profile convictions could alter the internal calculus of all Mongolian officials who are tempted to engage in corrupt activities. Thus, taking steps against corruption in the justice system should be a first step in dealing with corruption in society as a whole.

¹ This paper does not represent USAID policy. The author is solely responsible for its content.

² Rule of Law is a broad concept that includes freedom from political influence, cronyism and nepotism in the legal system as well as freedom from corruption.

³ There have been 456 criminal investigations of abuse of authority in the 2 years prior to 2002, of which 250 were taken to court and the rest dismissed. (Source: Interview with T. Sukhbaatar, Associate Prosecutor General, Head of Supervision of the Investigation Department, June 6, 2002.) Abuse of authority may involve corrupt acts, but does not require proof of bribery. Likewise, within the court system, there have been disciplinary actions against judges for "professional mistakes", which include decisions that are so obviously contrary to law that they may be the result of corruption. In 2000 and 2001, 37 judges had disciplinary cases filed against them: 9 resulted in a reduction of salary, 17 resulted in a warning, 3 resulted in a warning before other judges, and 8 were dismissed from their position. (Information from Damiransuren, Justice of the Supreme Court.)

Measurement of corruption

As a criminal activity, corruption is difficult to measure. The participants always hide their activity and will rarely admit to it, even in anonymous surveys. Anecdotal evidence is common in Mongolia, but suffers from the unreliability of hearsay. In all litigation there is a disappointed party who is often too sure of his own position, and likely to assume that the other side's victory must have been a result of bribery.

Public opinion survey is often used to measure the public perception of corruption. The most famous surveys of corruption, published by Transparency International ("TI"), rank countries by the perception of corruption.⁴ TI's recent surveys have not included Mongolia, but Mongolia ranked 43 out of 99 in its 1999 survey⁵. This put Mongolia above Poland, but several criticisms of the methodology mean that too much should not be made of small differences in the rankings.

In Mongolia, surveys on corruption have been undertaken repeatedly. In 1994 a survey was published by the Academy of Sciences and the Konrad Adenauer Foundation.⁶ The Mongolian Chamber of Commerce and Industry conducted surveys of corruption in 2000 and 2002⁷, and the JRP conducted a public opinion poll that included questions on judicial corruption in 2001. These surveys confirm a widespread public perception of corruption, especially in the judiciary. The courts were ranked the second most corrupt institution at the Soum level in the 1994 Academy of Science survey. In the 2000 Chamber of Commerce and Industry Survey Judicial Institutions were ranked the second most corrupt (after Customs) with 41.6% of respondents naming it the "most corrupt."⁸ Fifty percent of respondents rated legal institutions as "poor" or "very poor" in their attitude toward combating corruption in the 2002 Chamber of Commerce and Industry survey. In JRP's survey, 56% of respondents had "little" or "no" confidence in their local courts.⁹ It must be remembered that these surveys ask the public for their feelings about corruption, not hard evidence of it. These different surveys asked different questions, and may be capturing both bribery and improper influence by public officials on the courts.

Another problem with surveys is that they are based on the public's exposure to the institution. Thus, the public will have a higher perception of corruption in institutions that they deal with frequently, which are corrupt, than those to which they have little exposure. The Supreme Court was rated least corrupt of courts in the JRP survey¹⁰, but this may have to do with the greater public exposure to corruption in the lower level courts than with true comparative levels of corruption.

⁴ See <http://www.transparency.org>

⁵ See <http://www.transparency.org/cpi/1999/cpi1999.html>

⁶ Cited as "Tumur-Ochiryn Erdenebilig, Public Opinion on Corruption in Mongolia" by Jon S.T. Quah, Phd. In "National Anti-Corruption Plan for Mongolia" prepared for UNDP.

⁷ Attached as Exhibits __ and __.

⁸ Mongolian Chamber of Commerce and Industry 2000 survey, Annex 4, question 11.

⁹ Question 17: "How much confidence do you have in each institution?"

¹⁰ JRP survey question __.

For all of their difficulties, public opinion surveys of corruption do show important danger signs for a justice system. The public perception of corruption itself is a very significant part of the mechanism by which corruption undermines the Rule of Law and economic development. If the public perceives the courts to be corrupt, they will be less likely to take their complaints there for resolution. Even if the courts are not corrupt, if the public will not take cases of human rights abuse to the courts, or election fraud to the courts, the effect is the same, the Rule of Law is frustrated. If the public perceives the courts to be corrupt, they will be less likely to invest in instruments that rely on court enforcement as their ultimate guarantee. Thus, “cash and carry” transactions, and construction for personal uses, particularly homes and user occupied commercial buildings, can thrive. Long term investments, such as securities and lending, (except secured lending that does not require court enforcement, such as pawn) become too risky to attract investors, either foreign or domestic. Such long term investments are necessary to create better paid jobs and sustained economic growth. Since Mongolia’s current economic development suffers from the lack of exactly these kinds of long-term investments, it is fair to say that the public perception of corruption is impacting the Mongolian economy.

Assessment of how and why judicial corruption takes place.

Judicial corruption may be facilitated by a number of factors that make its detection difficult. Transparency to public inquiry is among the best weapons against corruption; while opacity allows it to flourish. Incentives for corrupt activity exist for those who can be tempted; but disincentives can be created.

Judicial discipline has in the past been initiated by chief judges and decided by fellow judges in the same court. This system, with its bias against punishing colleagues has been replaced under the new Law on the Courts. Under the old system, most punishments were for drunkenness and absence from the job, not issues related to corruption. The new system includes public participation in the disciplinary process and may promote transparency if properly implemented.

The inquisitorial procedures and attitudes of the judiciary mean that the judges involve themselves in cases more proactively than is customary in common law jurisdictions. As a result, judges have frequent *ex parte* meetings with parties and witnesses. These meetings provide an opportunity for offering or soliciting bribes and the transfer of payments. In discussions of the new Judicial Code of Ethics, judges overwhelmingly objected to provisions that would prohibit or limit *ex parte* conversations. The most frequently cited reason was that the judges needed them to get the real story. This may reflect continuing conflict over the role of the adversarial system and the inquisitorial system in Mongolia. The Code, as it was finally adopted contained no such prohibition or limitation. While, by the nature of illegal activity, it is difficult to document that *ex parte* conversations provide the venue for corruption, it is clear that they provide an opportunity for willing buyers and sellers of judicial integrity to meet unobserved. Some judges suggested that meetings with parties be held with other court employees present, it

has also been suggested that a second judge be present during such conversations. These suggestions were not adopted. They would be an improvement, if imperfect solution to the problems created by *ex parte* conversations. In the small communities in which most Soum, Inter-soum and Aimag courts exist, a prohibition on *ex parte* conversations cannot be expected to eliminate the opportunities for corrupt conversations, however, the universal use of such conversations in the justice system creates at least the appearance of impropriety. Taking some steps to limit them would send a useful message that judicial propriety is a societal value to be safeguarded.

Salary levels are a contentious issue with respect to corruption. It is clear that raising salaries by itself will not make dishonest judges honest. Yet, it is hard to dispute the proposition that salaries that do not allow a judge to meet the needs of his/her family will either drive honest judges out of the profession or tempt them to accept payoffs. An examination of TI's ranking of countries on the perception of honesty makes it clear that in general those with high perceptions of integrity also have high judicial salaries and those with low salaries tend to have perceptions of dishonesty. The correlation may not be equal direct causation, however, because economic development correlates with high judicial salaries as well as with middle class demands for integrity, a free press ready to expose abuses. These results of development may be the direct causal factors for judicial integrity. In Mongolia Judicial Salaries start from 108,429 to 165,553 tugregs a month and are supplemented by seniority increases and awards.¹¹ Whether this is "low" or not depends on what it is compared to. Compared to salaries available in most rural areas, these salaries are certainly as good or better than other salaries locally available. In Ulaanbaatar, such salaries are comparable to other government salaries, but below compensation available to well educated Mongolians in the private sector and in NGOs, diplomatic missions or international organizations. With the arrival of the free market economy, the salaries are miniscule compared to the amounts at stake in some civil cases in Ulaanbaatar. With respect to criminal cases, at least some Mongolians have achieved wealth that would allow them to place a price on their freedom from prison that would be significantly higher than judicial salaries. Thus, it is hard to evaluate the impact of salaries as a contribution to judicial corruption. Mongolians frequently site low salaries as a cause of corruption, especially when comparing corruption now to socialist times.¹² Not only were salaries and benefits sufficient to cover living expenses then, but because of greater equality and the inability to buy "conspicuous consumption status," there was less incentive to accumulate money. The Mongolian government seems eager to increase government salaries, and will undoubtedly do so as quickly as its finances allow. So there may be little in the way of donor recommendation that can or needs to be done with respect to this factor.

¹¹ Basic salaries for judges are established by Parliament Resolution No. 80, November 8, 2001 Judicial rank supplements are established in the "Rules On Mongolian Judicial Rank", approved by Parliament Resolution No. 48, June 7, 2001. Supplements for public service are established by Government Resolution No. 96, 1995.

¹² Interview with Sarav Ganbold, Head of Division for Combating corruption and economic crime, Criminal Police, June 6, 2002.

A cost/benefit analysis of judicial corruption, from the point of view of a judge subject to temptation, would weigh the benefits in terms of illicit income received against the cost of being caught and punished, discounted by the likelihood of being caught and punished. Since there have been no prosecutions for judicial corruption, the discounted “cost” of corruption must be close to zero. The disincentive for corruption is virtually not existent for a susceptible judge.

The failure to prosecute judicial corruption has been attributed to several causes. In 1993, responsibility for investigating corruption was transferred from the prosecutors office to the police.¹³ The police are both thought to be more corrupt¹⁴ and are a branch of the Ministry of Justice and Home Affairs, therefore possibly susceptible to political pressure, both to protect individuals and responsive to a lack of political will to deal with corruption. The Law on the Prosecutors Office coming into effect on September 1, 2002 returns responsibility for investigation of crimes (including corruption) in the judicial sector (judges, prosecutors and police) to the Procuracy. This office enjoys some independence, with the Prosecutor General appointed for a fixed term, but is troubled by public perceptions of corruption¹⁵ as well as a lack of training and resources.

Judicial corruption prosecutions in the United States have typically relied on measures such as recruiting corrupt attorneys to provide evidence by promising to suspend or reduce their sentences, and having them wear recording devices in conversations with judges where bribes are accepted. The “Greyford” investigation of the Cook County Illinois Courts (Chicago) is but the largest example of such an investigation of judges. Currently the use of such devices is allowed if investigators request it and the prosecutors office approves it. But the old Criminal Procedure Code limited the ability to treat the bribe giver more leniently than the bribe taker. This limitation seems to have been eliminated in the new code.

The police currently complain that their methodology for detecting corruption has not changed since Socialist times and are not suited to a market economy.¹⁶ When investigation responsibilities are transferred to the Prosecutors Office, this mismatch in methodology will be even more of a stumbling block, except that, perhaps, with new investigators, interest in adopting change will be greater.

Public acceptance of corruption is said to be a key to corruption. While surveys indicate that most citizens do understand that corruption destroys economic development and

¹³ Until 1993, the prosecutors office was responsible for investigating economic and official crime. The Law on Amendments to the Criminal Procedure Code (June 7, 1993) transferred the power to instigate and dismiss such cases was transferred to the Police.

¹⁴ In the 2002 Chamber of Commerce survey, 54% of respondents rated the police bad or very bad. p.6.

¹⁵ In the 2002 Chamber of Commerce survey 49.9% of respondents rated the procuracy as bad or very bad in dealing with corruption.

¹⁶ Interview with Sarav Ganbold, Head of Division for Combating corruption and economic crime, Criminal Police, June 6, 2002.

weakens the state,¹⁷ commentators report that honest police are berated by their wives for not taking bribes,¹⁸ and it is widely reported that people think that the best way to get things done in the courts is to pay a bribe.¹⁹

Possible solutions

Transparency is the best preventative for corruption. Court procedures and practices can do a great deal to either make the operations of the court transparent, or alternatively to keep the public from discovering how cases are handled, or mishandled. The Court Administration Specialist at the JRP has worked to introduce a number of procedural changes that enhance transparency.

Automation has the capacity to limit discretion and abuse of discretion in the courts. The assignment of cases to certain judges is a prime example. The power to assign a certain case to a judge who is known to be susceptible to a bribe, or who favors one of the parties is often a prime source of corrupt rents in the court system. The software installed on the computers that JRP has given to pilot courts allows for the random assignment of cases. While one Chief Judge embraced this feature, the other pilot courts have found different reasons not to use it. The legislation is not clear, with different formulas in the civil procedure code, criminal procedure code and law on the courts. A resolution of the General Council of the Courts could require random assignment of cases, or if necessary, amendments to make the different codes consistent. **Specific Step: require random assignment of cases.**

Chief Judges retain the power to reassign cases for pragmatic reasons such as the illness or over work of a particular judge. However, the new software allows the GCC to monitor such reassignments and identify those Chief Judges who routinely reassign cases to a particular judge. This would expose to inquiry the reason for such reassignments, and the possibility of inquiry alone should discourage abuse of this power. **Specific Step: Require regular analysis of case reassignment.**

The pilot courts have been required to dedicate one terminal as a public access terminal. This allows the public, the media, litigants and lawyers to find out what has happened in cases and what the schedule for hearings and deadlines is. This makes it much more difficult for a corrupt judge to “hide” a case until the time for appeal has run. This is particularly important in Mongolia where notice requirements are not strictly observed.²⁰ The pilot courts with public access terminals monitor their use and show promising

¹⁷ Chamber of Commerce 2002 survey: “Twelve. Corruption and Economic Growth”, “81.4% of respondents believe that corruption has decreased economic growth, 31.7% responded that corruption has greatly slowed down economic growth. p.7.

¹⁸ Interview with Sarav Ganbold, Head of Division for Combating corruption and economic crime, Criminal Police, June 6, 2002.

¹⁹ **Need citation for public acceptance of bribery.**

²⁰ Ag Bank, a leading Mongolian Bank has learned of some cases against it (which it had lost) only when it received notice that the Supreme Court had affirmed the judgment against it. (Interview with Peter Morrow, President of Ag Bank).

results.²¹ Once again, a resolution of the GCC could require all courts that receive automation to maintain and staff a public access terminal. **Specific Step: Require Public Access terminals for all automated courts.**

Specific Step: Expansion of basic automation with these features to all courts in Mongolia could significantly contribute to transparency and accountability and discourage corruption.

Every judge should be required to file annual financial disclosure forms. While these forms are required of some officials under current law, there is no penalty for failure to file them. For judges the forms should be open to the public, to allow discovery of conflicts of interest. Failure to file and erroneous filing should be grounds for dismissal. This could be accomplished through amendment to the Judicial Ethics Code by the Meeting of Chief Judges. **Specific Step: Special requirements for financial disclosure forms for judges and penalties in Judicial Ethics Code and random audits by GCC Ethics Committee.**

Ex parte conversations should be eliminated. This could be accomplished by amendment to the Judicial Ethics Code. Given the opposition of most judges, such a change would require education and pressure from domestic anti-corruption groups and foreign donors. **Specific Step: prohibiting *ex parte* conversations in the Judicial Ethics Code.**

The new Judicial Disciplinary Committee needs to be adequately staffed and funded. There are a great number of procedures it can undertake to combat corruption in the courts. Random audit checks of case files handled by a particular judge and questionnaires sent to all parties in a case should be conducted on a periodic basis. Any case file discrepancies or disparaging results from the party questionnaire should be investigated. The procedure for filing complaints against judges should be required to be prominently posted in the public area of every courthouse. Protection for the identity of the complainant should be provided. Training and procedures should be in place for the efficient investigation of every complaint, with written standards for dismissal of complaints, and the requirement that the reason for dismissal be explained to the complainant. **Specific Step: Train and provide equipment to Judicial Disciplinary Committee, on condition that it is adequately staffed and funded.**

The Prosecutor General plans to create a new department with a staff of 40 to handle the new responsibilities for investigation of justice sector crime, including corruption. This unit needs training and equipment to undertake “sting” operations of the type that proved successful in the “GreyLord” investigations in Chicago and elsewhere. Codes of ethics are vital so as not to abuse this kind of investigatory power. Training and equipment could be offered by JRP and other donors to make this office effective. Individual Prosecutors responsible for corruption site training as the greatest need in their office.²²

²¹ Both the Capital City Court and Songinohairkhan District Court report daily averages of 25 to 30 inquires. (Interview with Dagva, Capital City Court Administrator.)

²² Interview with T. Sukhbaatar, Associate Prosecutor General, Head of Supervision of the Investigation Department, June 6, 2002.

Specific Step: Provide training and equipment to the Prosecutors corruption investigation unit on condition that it is adequately staffed and funded.

An Independent Anti-Corruption office has been proposed for Mongolia in the past. The study of these agencies in Hong Kong and Singapore was a major proposal of the 1998 “National Anti-Corruption Plan for Mongolia” designed by Professor Jon S. T. Quah for UNDP. While a great deal of discussion has centered on this idea, opposition from the Office of the Prosecutor General, and powerful MPs have made this a political non-starter in Mongolia. While the idea may have merit, it seems useless to revive it. It would be more pragmatic to see if the Investigation office in the General Prosecutors’ Office could be made to resemble the best aspects of such an independent office.

Conclusions

Mongolia faces serious problems with respect to Judicial Corruption. It stands in the way of the countries ambition to establish the rule of law and a prosperous market economy. However, there are a number of concrete steps that can be taken to reduce the opportunities for judicial corruption and increase the chances of its exposure and prosecution. Successful prosecutions need not be numerous to have a wonderful exemplary effect. Seemingly small, but meaningful steps in court administration outlined above can make corruption easier to detect and prosecute. Changing the psychological factors in society that allow corruption will take time, it will also take time to raise judicial salaries to levels where all judges feel financially secure to a point that it would be irrational to risk that security for the sake of a bribe. Yet, real and measurable changes should be possible by following the steps that can be enacted immediately.