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Upendra Baxi[1]

Prefatory Remarks

Theory-based conversations and impassioned politics of social action and movement talk concerning corruption vary a great deal in their assumptions and their approaches. Most movement folks remain, at times willingly, 'illiterate' in theory-based approaches; likewise most theory folks remain little-versed in the paralogics of social protest. No doubt, the activist and movement folks may be stunned by some questions that developmental and new institutional economists raise: the former, for example, suggesting that some levels of corruption may be 'functional' to development and the latter even wondering 'why levels of corruption are not even higher'[2]! Even so, the question of beneficial side- effects is a serious theoretical thematic; even as I write this, I come across an article speaking to us about the 'developmental' effects of Somali Piracy[3]. Activists who disdain such explorations as 'justifying' corruption need still to be aware of the limits of a moralizing politics just as 'rational choice' theory folks need to reconceptualise the 'costs' of corruption as singularly experienced by the worst victims of 'corruption' in ways that give dignity to their voices of suffering. Someday, if indeed the day ever comes, this divide may be more imaginatively addressed and even perhaps redressed.

Corruption theory is not by any means a unified field. Disagreements persist about what sorts of conduct and behavior should be counted as 'corruption'; the ways of measurement of the levels of corruption; appropriate law/policy regimes entailed in countering corruption; methods of comparative and historical study of corruption and their pertinence; and the causes of corruption. The only areas of agreement are: (a) corruption-free society is impossible; (b) it is best to engage address governance corruption as a matter of highest priority.

In contrast, and at rate as I read the narratives of popular anti-corruption movements, movement-folks regard the ideal of a engagement with governance corruption–free society as attainable and further suggest that any excessive engagement with

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2 See, *The New Institutional Economics of Corruption* (London, Routledge, 2005) at 3 (Johann Graf Lambsdorff, Markus Taube and Matthias Schramm, Ed.)

3 See, Anja Shortland, " 'Robin Hook': The Developmental Effects of Somali Piracy". Economics of Security Working Paper 54, Berlin: Economics of Security'' www.economics-of-security.eu (visited 15 October 2011.)

governance corruption ignores the pervasive domains of social conduct, inclusive of state-like actors, so varied and different as the wielders of economic and religious power on the one end of the spectrum and agents of counterpower including resistance and even insurgent movements.

Further, many an anti-corruption crusade in the Global South, and movements against the state bureaucratic socialism which birthed the formation of a post-socialist societies, remain imbued with an ethical approach – which irritates the knowledge producers of corruption theory. This approach transforms the terms of discourse: corruption emerges not merely as a political evil, but an ethical one constituting a quintessential perversion of human autonomy, always grounded in the idea of the performance of one's obligations towards the others. In this view, the moral life of individuals as well as the forms of associational life, each one of us remains infinitely obligated to regard the other an end in 'itself' and never to regard the other as means to one's own agency. This perspective stands articulated variously – whether expressed in terms of a Kantian 'Categorical Imperative' or the languages of Emmanuel Levinas as an infinite obligation towards the 'face' of the suffering, even vulnerable, others[4].What poignantly stands contrasted here is a distinctive 'political economy' type approach that regards 'corruption as an 'order of things' inherent or even endemic to governance practices.

These are broad images of contrasting styles of thought and action that I must indeed mention, even when I may not, within the constraints of this paper be able to directly address. Allow me, then, to start with the caution that Susan Rose-Ackerman struck[5] in saying that 'good ideas' are in themselves not enough in combating governance corruption Allow me also, some reader-unfriendly yet environmental – friendly acronyms that I here filly deploy!

Good ideas are those then which can be put to work-a-day use in combating the menace especially of governance corruption. In no field, the pragmatist counsel—truth is the cash value of an idea--- seems more pressing than in combating and controlling corruption [CCC, hereafter.]

CCC discourse and action agenda does not deny the importance of a multidimensional understanding of 'corruption'; yet has limited use for historical, cultural, and anthropological understandings; excluded thus also are (to borrow a striking metaphor from Perry Anderson) the 'lineages of state' and utopic discourses envisioning 'post-politics' aiming at the elimination of corruption. It remains wary of any distraction from the tasks at hand; understandably, culture or history based forms of understanding that generate some 'justificatory' strategies such as the practices of 'ethno-clientism' (in some African societies and states, though not surely exclusively at these sites) are of no use for CCC. Not fully understandable is the dread of the 'J' word: the notion that systemic governance corruption—SGC,

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4 See, Upendra Baxi, 'Judging Emmanuel Levinas? Some Reflections on Reading Levinas, Law, Politics,' *The Modern Law Review,* 72(1): 116-129(2009.)

5 See, her magisterial work, *Corruption and Government: Causes, Consequences, and Reform* (New York, Cambridge University Press, 1999.)

hereafter-- is inherently offensive to deeply held notions of justice in bounded societies; notably also remains conspicuous by its absence the nascent discourse of approaches to global justice[6].

What emerges as paramount then is a specific regime of global social policy (GSP) discourse. Its subtexts reveal an epidemiological approach, yielding preeminently diagnostic and therapeutic tools and programs of action. Understandably, then, SGC emerges as a cross-border problem; governance corruption is thus no longer apperceived as a necessary evil but rather as a threat to 'our common future.' GSP constructs an ever-widening scope for intergovernmental and inter-institutional networks of common global social cooperation fashioning CCC strategies. In this sense, the pandemic of 'failed states' (or rather States *made to fail* differentially by the actions of global hegemonic powers) emerges as a serious GSP concern.

Well-developed remains in GSP/CCC discourse articulate visions and versions of common/public goods. Governance transparency and accountability emerge not just as stratagems of CCC but as global public virtues. So does the idea of development, human and social, that gets corrupted itself by SGC; GSP also shares complex, languages of 'good governance. Further, it insists on providing a level- playing field for the communities of multinational corporations and direct foreign investment regarded as engines of national, regional, supranational, and global development. In privileging overall the discourse of economic theory and policy sciences, GSP approach to CCC as developed by networks of international, supranational, regional institutions and organizations and actors is however not concerned to develop any explicit meta-ethical framework.

Various actants (to evoke Bruno Latour's actor-network phrase regime) also contribute to the shared objectives of GSP/CCC. I refer here to the infinite routine labors of assortments/assemblages of human rights and the 'new' social movements and also to the various avatars of the 'New Sovereign'--- people's movements against SGC, a most resplendent example here provided by the 'Arab Spring.'

At play and war here are two different genre of public reason: human rights and social movement/activist discourse participates in public reason highlighting the costs of SGC (and corruption generally), and fostering the tasks of CCC in many different ways. In one register, the activist discourse manifests the variegated histories of affect named as 'indignation entrepreneurship[7].' These histories are the diverse roles in which the activist discourse contributes to the shaping of the CCC

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6 See, generally, for the dread of the 'J' word, Upendra Baxi,' The Place of the Human Right to Health and Contemporary Approaches to Global Justice: Some Impertinent Interrogations,' in John Harrington and Maria Stuttaford (ed) *Global Health and Human Rights* (London Routledge, 2010).

7 See Edna Ullmann-Margalit and Cass R. Sunstein, 'Inequality and Indignation,' *Philosophy & Public Affairs* 30: 4, pp. 337-362 (2001).

strategies and polices, not as fully as one may wish 'integrated' in the GSP/CCC discourse.

The variances are as important as the commonalities between GSP and activist discourses. Common to both remain of course the insistence of governance transparency and accountability. Even so, the differences remain significant. Many a Global South social and human rights movement engages SGC as joint production of national governing elites and the forces of neoliberal technoscientific global capital. More than the pale reference to the ways in which SGC distorts-- and miscarries- anti-poverty programs (now stylized in a neoliberal gesture as 'inclusive growth'), these movements foreground the scale and depth of human and social suffering thus produced. They thus protest the GSP version of common public good (free flows of global capital investment across, marking an advent of deregulation as a form of regulation) in the languages of state capture very differently than available in policy sciences/economist approaches. At stake, then, are radically different acts of authorship of the CCC strategies. In my recent work[8], I demonstrate why is important to take these acts of authorship seriously: put another way, I believe that suffering humans and communities of resistance remain always the first authors of contemporary human rights values, norms, and standards. In the CCC context they articulate a radical impulse urging us to take seriously the SGC forms of human and social suffering as way of taking human rights seriously.

It is no part of my intention to offer any critique of the GSP approach, at least in so far as I grasp this. If at all, this must remain a conversational task for another day! Rather, all I wish to bring to the table is the question why taking seriously the Idea of human rights may *not* be good enough as contributing to the current wave of global concern about SGC. There is no doubt that human rights elements are often apperceived in GSP discourse as 'counterproductive' to controlling it, if only because these often escalate transaction costs via stringent due process type requirements that evoke the standard entailments of presumption of innocence, problems arising from the evidentiary standards, protracted trial processes, the constitutional legality of asset control/confiscation, and the vagaries of adjudicative process. While anti-corruption strategists and advocates do not deny the importance of due process rights, at least some of these urge minimalist deference and call for an effective re-tooling, if not restructuring of, legal orders.

In general, CCC is thought in the main as a set of regulatory mechanisms providing a variety of disincentives to SGC. Here, the focus is on understanding structures of governance corruption in terms of markets whose economic rationality needs to be enfeebled incrementally and progressively by regulatory policies. The enunciation of a specific, as well as a universal human right to immunity from SGC which I here urge in some detail may be regarded as complicating, if not enervating, the objectives and strategies resulting from GSP/CCC goals of fostering common social cooperation among states and international organizations. Articulation of a new human right complex of norms and standards seems often thought as constituting entirely avoidable set of impediments to a programschrift of a global

8 See, Upendra Baxi, *The Future of Human Rights* (Delhi, Oxford University Press, 3rd Ed, 2008).

anti-corruption action agendum conceived almost entirely as an affair of GSP. GSP-oriented broad based consensus is thought to provide a superior option than any that any be eventually provided by human rights based approaches.

Towards an Enunciation of a New Universal Human Right

I still wish to suggest the *intrinsic* importance of a new enunciation of a universal *human right to immunity from SGC* [shortly put hereafter as 'new human right, or NHR.] Many questions arise, of course. *First*, what would be the normative content of this new right – the content question? *Second*, how may this enunciation relate to the 'family' of existing human rights, whether in terms of the binary distinction between 'civil and political rights on the one hand and on the other 'social, economic, and cultural' human rights, or those of 'generations' of human rights—the 'juridical' question? Should such a normative enunciation proceed as an emanation from the extant 'soft'/'hard' law regimes of human rights or emerge autonomously of these? *Third,* the scope question: who would be the addresses of this new Right? And how may this enunciation help or hinder the existing GSP regimes? *Fourth,* the implementation question: How may be such a right implemented /enforced within and across states?

A general remark justifying any advocacy of this new human right is necessary though clearly not sufficient. The need for an explication of a NHR arises, if only because SGC forms and grammars often militate against the exercise, enjoyment, and realization of internationally enshrined human rights values, norms, and standards, and contributes to regimes of repression entailing both human *abuses, and human rights, violations.* Given this, how may we understand the fact that international enunciations/instruments do not codify immunity from governance corruption as a human rights value?

Even as late as 2009, the International Council on Human Rights and Transparency International Report entitled *Corruption and Human Rights: Making the Connection* has to invoke, rather heavily, a demonstration of how 'corruption' (articulated broadly) results in violations of severally enshrined human rights values, norms, and standards. Important as all this remains, the Report does not go so far as to commend the translation at least of SGC into an autonomous human right to immunity from SGC. Much the same may be said about the overall stance of the 2010 Report *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities.* These remain conseuentialist arguments, and for that reason no less crucial. Yet, I believe that an articulation of new human rights values, standards, and norms remains equally imperative.

Further and as far as I know, this GSP-fostered reluctance seems also shared by the ongoing labors of the International Law Commission, and the UN Human Rights Treaty-Bodies. The former even pursuing its task of progressive codification of international law—especially of the law of state responsibility – and the latter in its pursuit of international state parties to human rights treaties – singularly fail to articulate norms and standards facilitating progression towards an enunciation of this 'new' human right. To offer yet another striking example, the ICC Rome Treaty thus fails to name SGC as an element of 'crimes against humanity.'

Understanding this lack entails some Foucault-like genealogical labors, as yet not in sight. Further, GSP discourse accentuating SGC criminalization, it may be argued, remains far 'superior' than any human rights based regard. If so, the jury remains out, as it were, on this question. Put another way, it is not clear why the two approaches should remain inherently incompatible, rather than mutually reinforcing.

All this then raises the question of value-addition. What may be, put another way, be 'gained' and 'lost' in this translation from GSP to human rights languages? The several and serial, major concerns thus already framed earlier demand a close attention. I visit here some of these concerns.

The Normative Content Question

Unlike some eminent human rights scholars (notably Ndiva Kofele-Kale[9]), I do not here advocate any individual and collective human right to a '*corruption -free society*.' My reason for this, far from constituting any disagreement with this ideational postulate, relates to the stark fact that the dominant GSP/CCC discourse remains impervious to any full recognition of these struggle-based utopic ideals, fully scared of the tasks of its translation.

Perforce, I attempt the next best via some translations into the forms of contemporary human rights languages, which dares to present NHR as persuasively prefigured in the pre-existing sources of international law, whether customary, treaty-based, or the exponential growth of 'soft law' standard. Put differently, what we have here is an inherently- struggle based instantiation and postulation of a NHR proselytized by the' New Sovereign' and the activist discursive agents. These, in turn, remain beings who seek to affirm the practices of sentimental moral public reason, as well as insurgent public reason, fully contesting the unreasoned reason of globalization often schematized by some arch- practitioners of *avant-garde* corruption theory. At sake then is the prerogative of translation into those of NHR.

My plea for a universal human right for immunity from SGC is based on its necessity in a postliberal world and its deniability as well as feasibility. A threshold problem of course remains analytical: How may 'we' operationalize the constitutive elements of the difficult category of SGC? It would be as cruel as carrying MIC to Bhopal, as it were, before so learned a peer group, for me to delineate these elements. Yet, this remains a primary task.

First, as a juridical (not moral) right the new human right (NHR) presents itself is an individual and collective human right to *immunity* from 'kleptocracy,' a most comprehensively pernicious SGC manifestation. Put another way, SGC occurs in its most obnoxious form when the Head of a government and his/her regime siphon-off community resources for their own personal gain/greed. As Kofele-Kale reminds us this state of affairs includes 'acts of indigenous spoliation where there is only a taker, a corrupted individual but no givers or corruptors,' in turn disrupting

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9 'The Right to a Corruption –Free Society as an Individual and Collective Human Right: Elevating Official Corruption as Crime under International Law,' *The International Lawyer* 34:1, pp.149-178(2000).

the binaries of demand and supply side governance corruption, or the active versus passive 'bribery.' I believe that the proposed NHR more adequately addresses this catastrophic SGC form.

Second, and in this sense this NHR is a direct negation of a sovereign right of *impunity* claimed by kleptocrats, whether sovereign- state actors/ networks, or their normative cohorts—the sovereign-like state transcendent entities/networks (see, as to this, the discussion under the 'scope' question.)

Third, the NHR that I propose is an aspect of the '*right to have rights'* (to adapt a fecund phrase-regime of Hannah Arendt.) It entails many specific component rights – sets of human rights to right to information, access to equitable and effective procedures and institutions enabling complaints against governance corruption without victimization (such as whistleblower protection and more crucially the right against enforced disappearance caused by state militarism), the right to access to constitutional remedies, including effective witness protection, among others.

Fourth, SGC often assumes governance forms/grammars of 'state – sanctioned' or 'state-protected' corruption resulting in near-total impunity. What may these terms mean (or be made to signify)? As concerns 'state-sanctioned' SGC, we may say that it occurs/ results 'when committed as part of a plan or policy'(borrowing from the language of Rome Treaty (Article 3); or when 'committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group' that results in results in seriously disadvantaging a part of the population' (to borrow elements of Article 18 of the UN 1996 Draft Code Concerning Crimes Against Peace and Security of 'Mankind').

Fifth, the second descriptive term—'state-protected corruption- remains problematic, absent an international consensus about the core elements of SGC. In my view at least this at least entails a NHR enunciation to a right to an adequate SGR policy and law regimes. These may often lead, in net effect, to various practices of state–protected SGC. Immunity of incumbent elected officials from criminal prosecution provides one example; equally important remain some self-legislated immunity for deposed/superannuated heads of states/governments. Further, many anti-corruption polices and laws, especially the postcolonial, effectively immunize invigilation and prosecution of SGC actors by the requirement of prior official sanction, all too often not forthcoming, nor bound by the due process type entailments for the exercise of governmental discretionary powers. As concerns bureaucratic actors , the requirement of prior sanction for prosecuting SGC feats is based on : [1] the protectionist argument -- the apprehension that in particular business and industry interests (as well as the NGOs) may impale 'conscientious' bureaucrats by way of SGC indictment, and [11] an epistemological argument suggesting that only higher-level officialdom remains best poised in terms of sensibility, knowledge, and disinterested expertise to determine whether a prima facie indictment of corrupt acts by public officials in the due, and diligent, discharge of their public powers. At least as concerns the Indian experience, I have critiqued this argumentative set exploring both the jurisprudence of corruption and the

corruption of jurisprudence[10] . I believe – beyond authorial vanity-- that this critique remains pertinent to the formation of a NHR.

Sixth, however, related difficulties stand posed by the bleeding heart of democratic/representative political systems. As Ackerman, among significant others have labored to demonstrate, political 'representation' poses some terminal limits for CCC/GSP discourse. The concern here invites some Sisyphean-labors drawing stable, as well inherently fluctuating, bright lines between, and across, licit and illicit campaign funding. When may massive corporate funding of political parties –a genre of the First Amendment human right of corporate legal persons— blur this line of control, so as to amount to SGC? This first–order concern stands enshrined as early as the Universal Declaration of Human Rights (UDHR) that urges us to take serious the notion that 'Everyone has the right of equal access to public service in his country' via 'periodic and genuine elections which shall be by universal and equal suffrage' (Article 21.) Thus envisaged 'suffrage' speaks to us not just about the coequal right to vote but also addresses an equal right to contest in 'free and fair' elections for public office. Unregulated corporate electoral funding practices generate vvarious forms of politics of exclusion. It remains unnecessary for me to further invoke the newly found fascination with Article 28 UNDHR which insists that: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'

The CCC discourse seeks to operationalize these values by a series of second order concerns, and for that reason no less crucial, of course. It makes necessarily a distinction between 'legal' and 'extra-legal' sources for campaign funding. Indeed, as Ackerman insightfully points out '… strict rules on legal campaign donations may simply drive contributions underground into a corrupt netherworld.' Outside a radical restructuring of voting systems, the task of controlling SGC invites us to the next best option: the maintenance of a 'valuable… distinction between legal donations from wealthy interests and illegal, secret gifts.' Important as this distinction remains I think that any articulation of NHR takes us much further at least in terms enhancing people's movements towards its further articulation than GSP/CCC talk and action?

The *'Juridical'* Question

It remains possible to derive this new right from extant customary, treaty-based, and 'soft law' regimes (the latter especially in terms of the development of the right to development[11].) I also believe that it remains hermeneutically possible to derive this new right from a combination of existing international and regional anti-corruption conventions, from comparative constitutional interpretation of basic human rights, and GSP enunciations such as the UN Millennial Development Goals and Programs of Action.

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10 See, Upendra Baxi, *Liberty and Corruption: The Antulay Case and Beyond* (Lucknow, Eastern Book Co.,1990)

11 See, as to this, Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* 124-196 (Delhi, Oxford University Press, 20

However given the specificity of the NHR here urged, it is best to regard it as an exercise in autonomous rights enunciation. The NHR is not all about facilitating level-playing fields for commercial competition among Euroamerican state and market actors; rather, it aims to establish standards for minimally decent political governance safeguarding the human rights of the worst-off SGC affected humans everywhere, or more fundamentally their right to *be*, and to *remain*, human. Its norms and standards, and questions of scope and implementation, thus open to participatory global discussion will contribute to innovation of a new range of shared strategies to combat catastrophic SGC feats. Equally importantly, all this would enable us to grasp more fully the much–neglected linkages between considerations of global justice, human rights and GSP enactments.

The Scope Question

The NHR extends to all states and state-like (state-transcendent) entities. As concerns states, the NHR crates a corresponding human rights responsibility to enact appropriate sets of national legislative, institutional, and policy measures including those outlined in the preceding section. Further, as some GSP/CCC discourse suggests but this time round reiterated in terms of the NHR obligations all states have a duty (as an aspect of international state responsibility) not to allow kleptocrats—the deposed heads of the state, and their cohorts, regulating the current state of 'safe havens' for deposed state predators to benefit from 'indigenous spoliation.' Put differently, NHR entails assets confiscation that aims and results into repatriation of stolen national resources/wealth to the peoples of the countries of origin.

A more difficult 'scope' question stands presented by acts of complicity and connivance with SGG by MNCs, and related communities of direct foreign investors. Exemplary here remains the UN Draft Code concerning human rights responsibilities of MNCs and related business entities. Article 21 extends to transnational enterprises and other business enterprises. As defined generically by Article 21, these in all myriad forms, any and all business entities that include: 'any business entity, regardless of the international or domestic sphere of its activities, including a transnational corporation, contractors, subcontractors, suppliers, licensee, or distributor; the corporate partnership, or other legal form to establish the business entity; and the nature of business entity.' And Article 23 subjects all these entities and stakeholders to a new disciplinary regime of human rights by the prescription civil, political, cultural, economic, political, and social rights as set forth in the International Bill of Human Rights, as well as the right to development, and rights recognized by international humanitarian law, international refugee law, international labor law, and *other relevant instruments adopted within the United Nations system'* [emphasis added.] In particular, Article 3 enjoins obligations that forbid these from benefiting from 'war crimes, crimes against humanity, genocide, torture, forced, or compulsory labor, hostage taking, extra judicial or summary or arbitrary executions, other violations of international humanitarian law, and other crimes against the human person as defined by international law, in particular

international humanitarian law.' I refrain here from further detailing the NHR-type obligations this arising, which I have analyzed elsewhere more fully[12].

Of course, this normative audacity of the Draft Code presents many a problem; yet it scarcely invites an early remark of UN Special Rapporteur Jonathan Ruggie remark that the Draft Norms do not even deserve 'the dignity of a third class funeral!'With his work, we are back again to a familiar articulation of human rights corporate governance voluntarism.' Space-constraints forbid a critique of the determinate labors of Ruggie-type normative reversal and affront, especially when the nexus between corporate governance and state repression via SGC remains writ large.

The Implementation Question

On the international register, once a treaty-based NHR stands enshrined, a new UN Treaty-Body will have the custodianship of its interpretation and implementation.

Already, however, some exemplary acts of Global South Apex Court adjudicatory leadership suggests ways in which SGC may be brought to book. I may here speak about the Indian example that I know best. The Indian Supreme Court has continually reinforced the autonomy, and the authority, of the constitutionally – ordained device of relatively autonomous national election commission to superintend corrupt electoral practices. The Court has gone beyond: its suggestive jurisprudence has led eventually to a Right to Information Act, and it constant replenishment. In the face of Parliamentary reluctance, the Court has successfully legislated detailed asset disclosure by candidates in the electoral fray as a constitutional human rights norm and standard. Further, in some justifiable outpourings of judicial activism the Court has variously asserted its supremacy in prescribing strict constitutional standards of integrity in appointment of the Central Vigilance Commission; taken over the executive functions of the day-today monitoring of SGC high profile cases; and even appointed specialist investigative teams/committees to assist the Court. It has also transformed the quotidian rules of evidence to allow 'sting journalism' video recordings as prima facie evidence of SGC[13].

The Court's doings fly in the face of the universalization of prescriptions for judicial role and function – the USA stylized discourse about the 'anti-majoritarian' dimensions of adjudicatory leadership. Without engaging the complexity of adjudicatory leadership role legitimation, the short point here is just this: when representative institutions continue to conflate 'legal' and 'extra-legal' electoral funding practices, a NHR type judicial activist orientation contributes mightily in re-drawing (at least as the Indian experience reveals) some bright-lines. In the context of this deliberative Bellagio moment, the concern is just this: How the ways of apex adjudicatory leadership may reinforce a sensibility towards a NHR, marking a

12 Upendra Baxi, *The Future of Human Rights*, Chapter 9.

13 See also, C. Raj Kumar, 'Corruption and Human Rights: Promoting Transparency in Governance, and the Fundamental Right to Corruption-Free Services in India,' 17 *Colum. J. Asian L*. 31(2003-2004.)

formation contributing towards future itineraries of human rights oriented collective growth of sentimental public reason militating against SGC, and also contributing to the prowess of GSP/CSS movement?

It needs noting that adjudicative Indian leadership has proceeded via a remarkable responsiveness to activist initiative, often to point of converting the Apex Court into the visages of a New Social Movement. Similar stories abound for South Asian Apex Courts (outside Burma) and much of the Global South.

By way of a conclusionary word, all I may say with utmost brevity is just this: the practices of activist discourse of resistance and the voices of the new insurgent Sovereign in Global South speak to us clearly and compellingly about the decisive importance of a new universal human right to immunity from SGC. Perhaps, then, GSP/CCC discourse may anxiously consider the task of translation of voices of human and social suffering into the languages of human rights values, norms, and standards?

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Like Chameleons: Civil Servants and Corruption in Malawi[14]

*Gerhard Anders

In the civil service you have to know how to manoeuvre.
Senior civil servant in Malawi

The making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing, and unmaking of rules in which people seem almost equally engaged.
Moore (2000:1)

In many tales and myths of Malawi's past the chameleon figures as a morally ambiguous and cunning character (Schoffeleers and Roscoe 1985:17-38). The acclaimed poet Jack Mapanje (1981), who was imprisoned without charge or trial between 1987 and 1991, used the image of the chameleon to describe survival strategies during the days of Kamuzu Banda's authoritarian regime when persecution and detention of so-called "confusionists" and "separatists" was the order of the day. Like chameleons, adopting the colours of the background to outwit their predators, people had to veil their criticisms of the regime to avoid detention. Since the introduction of multi-party democracy in 1994 the chameleon is used as a metaphor to describe the opportunism of politicians who sell their vote to the highest bidder (Dzimbiri 1998, Englund 2002). Civil servants in Malawi resemble chameleons in many ways. In order to manoeuvre successfully in the civil service they have to negotiate the often-conflicting claims and expectations from colleagues, superiors and kin. During President for Life Kamuzu Banda's authoritarian regime between the country's independence from Britain in 1964 and the introduction of multi-party democracy in 1994 civil servants behaved like chameleons in Jack Mapanje's sense whilst since 1994 many seem to take advantage of the new liberties to use the public office for personal gains.

Malawi, known until the 1990s for relatively high levels of integrity and diligence among the country's civil servants, seems to have caught up with the rest of Africa although the situation is a far cry from countries such as Angola or Nigeria where corruption is rampant. Since the introduction of multi-party democracy corruption appears to be on the rise and is hotly debated in the media and the political arena. Generally my interlocutors stressed that corruption was virtually unknown in Malawi until 1994 and expressed sentimental feelings for the "good old time" under the rule of Kamuzu Banda and the Malawi Congress Party (MCP), the only legal party till 1993. It was striking how popular discourse drew a clear line

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14 This is a revised version of a text published in Blundo, G. & P.-Y. Le Meur, eds. 2009. The Governance of Daily Life in Africa: Ethnographic Explorations of Daily Life in Africa. Leiden: Brill: 119-141.

between the period between 1964 and 1994 with little corruption, on the one hand, and the time since 1994 with widespread corruption and nepotism, on the other.[15]

This perceived increase in corruption since the 1990s has several reasons.[16] First of all it is now official policy to talk about it openly. Since 1994 media and people have enjoyed more leeway to talk about corruption than in the past. Newspapers, for example, mushroomed and although most of them were only short-lived a range of professional national newspapers survived. In 2002, three national newspapers were available in the urban areas and many trading centres: The Nation, the Daily Times and the Chronicle, an investigative weekly. These papers reported extensively on corruption scandals among politicians and public servants in spite of occasional harassment from the government. This is something unheard of under Banda's rule when strict control and arbitrary arrests of alleged dissidents created a culture of paralysis and fear. In those days any critical remark could lead to one's arrest or interrogation and the only newspaper, the Daily Times, primarily functioned as the mouthpiece of Kamuzu Banda and the MCP.

The changes in attitude and policy are to a large degree attributable to the keen interest the "donor community", led by World Bank and IMF, has been taking in the improvement of governance since the 1990s. The democratically elected government's alleged susceptibility to corruption has been in contrast with its publicly announced policies to curb corrupt practices. In 1995 parliament passed the Corrupt Practices Act and in 1998 the donor-funded Anti-Corruption Bureau became operational. This policy is a direct product of the promotion of "good governance" by the World Bank, the IMF and the international donor community (e.g. World Bank 2000a, 2000b). This is in stark contrast to the time under authoritarian rule. In the past practices nowadays perceived to be corrupt were simply part of the political system. In fact, there existed no boundaries between Kamuzu Banda's personal property, the ruling and only legal party MCP, and the state institutions. As a retired district commissioner put it: "when the district officer of the MCP wanted to borrow your tractor you couldn't refuse, could you?" This has changed considerably since 1994 and in recent years politicians and functionaries have often been accused of and have been accusing each other of corruption (Englund 2002). Corruption accusations are now routinely used to get rid of political rivals and often it is hard to tell what motivates an official investigation into the conduct of officials and politicians.

Finally, it should be noted that many civil servants cite the dire economic situation as explanation for the apparent increase of corruption. Malawi has been in the grip of economic decline since 1982, which has turned into a full-blown economic crisis since the early 1990s, when free-market reforms were being implemented by the World Bank and the IMF. Inflation has constantly eroded civil

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15 Anthropological fieldwork was carried out between November 1999 and November 2000, and February 2002 and March 2002 in Lilongwe and Zomba.

16 This article only addresses the perceived increase in corruption since there is no reliable data on the phenomenon either before or after 1994. The only thing that can be safely said is that the *talk* about the phenomenon has increased since 1994. The various corruption indices only present a very incomplete picture reflecting the current obsession with corruption rather than its actual extent.

servants' salaries: in 1992 the real value of basic salaries was about 50 per cent below the levels of 1982 (World Bank 1994:37-39). Due to currency devaluations and high inflation rate this trend has intensified since 1994.[17] Poverty is widespread, endemic illnesses such as HIV/AIDS and malaria produce staggering mortality rates and civil servants are not only confronted with their own social decline but also by more demands on their resources from impoverished relatives and friends. Furthermore, there is growing discontent about the glaring income differences between them and functionaries of donor agencies and NGOs who often do the same job and have the same qualifications but who earn several times the salary of a civil servant.[18] Consequently, civil servants often refer to their meagre salaries as a justification and explanation of corrupt behaviour.

The socio-political context, which I could only sketch here, provides the background for the analysis presented in this article. It takes the ambivalence of vernacular conceptions of practices labelled as corrupt as point of departure. Behaviour violating official rules and regulations that can be justified on moral grounds is often secretly condoned by colleagues and superiors. This article argues that the ambivalence towards practices officially labelled as "corrupt" is the consequence of the existence of alternative normative orders justifying and regulating corrupt practices. Continuously switching from one normative code to the other while negotiating their course between expectations from dependants, patrons, colleagues and superiors civil servants resemble chameleons as a case study of a civil servant will exemplify. The case study is followed by an analysis of the different sets of rules either prohibiting or justifying certain forms of corruption.

Corruption in the vernacular

The introduction of multi-party democracy and anti-corruption policies since the 1990s has had a considerable impact on popular discourse. During my fieldwork people used the English word "corruption" quite frequently in everyday conversations in Zomba and Lilongwe but in a very broad lay sense, covering corruption in the legal sense of the term, i.e. bribery, and all kinds of illicit practices like fraud, theft, embezzlement, etc. In everyday conversations, newspaper reports, official documents and statements by politicians "corruption" was invariably condemned as something poisonous that had to be eradicated or stamped out. However, this general rejection of "corruption" did not imply a clear and unequivocal rejection of practices considered to be corrupt.

In many conversations people used the Chichewa word *katangale*. *Katangale* denotes any kind of illegal, dubious or shady deal or practice connected to the place of work or the office in the formal sector. *Katangale* also covers nepotism and

17 And indeed salaries are generally quite low: in 2002 most junior grades like security guards, gardeners and messengers earned about US $ 20 per month. Extension workers and primary school teachers earned between US $ 25 and US $ 30 per month. Even officers with higher qualifications, like a diploma or a bachelor's degree, rarely earned more than US $ 50 per month: junior professional officers as secondary school teachers, for example, had a monthly salary of $ 40. The highest grades, in the so-called Superscale, earned roughly US $ 100 per month.

18 Excluding European and US consultants hired by the World Bank who earn several hundred US $ a day.

patronage since the two practices are often connected. *Katangale* is a very ambivalent concept. Whilst people usually express strong disapproval when they use the English word corruption they tend to regard *katangale* as an excusable way of making do. Although people rarely approve of it explicitly they often talk about it in a rather ironic fashion thereby acknowledging the fact that it is an intrinsic aspect of formal employment. *Katangale* is not so much an individualist action but rather an aspect of "the system". According to the popular perception *katangale* does not constitute an act of a person's free will but something he or she is drawn into; " it is the way how things are done around here", a system that does not really leave an alternative way of doing things. This denial of agency is a common register used to justify corruption, as Blundo and Olivier de Sardan (2001) point out.

Two other words were also used to refer to corrupt practices: *ziphupu* and *madeal. Ziphupu* is a minor act within the meaning of *katangale* and denotes activities associated with theft or embezzlement. *Madeal* is also a practice that falls under the term *katangale* and is derived from the English word "deal". The word describes illegal and semi-illegal deals and transactions between two or more people. *Katangale* has strong redistributive connotations and is often linked to the notions of "allocating" and "sharing", *kugawira* and *kugawa*. If others benefited from *katangale* and no one was harmed – except for the state of course – people tended to consider corrupt behaviour as acceptable and morally right.

Of course, these are very general observations and often *katangale* was also criticised as being harmful and anti-social. Lwanda (2005), for instance, draws a linguistic distinction between *katangale* and *ziphupu*. According to Lwanda, the original meaning of *katangale* refers to the custom of selling food from a basket. He argues that this distinction became blurred between 1999 and 2004 when "neo-*katangale*" and a "culture of we are all corrupt" became entrenched (Lwanda 2005:53). In spite of his criticism of "neo-*katangale*", he also draws attention to the positive connotations associated with the term *katangale* used to justify behaviour considered to be corrupt by the law.

Katangale was clearly differentiated from ordinary theft, *kuba*. Theft was an individual act for one's own benefit. *Kuba* did not evoke the redistributive associations of *katangale. Kuba* was always strongly rejected as a wrongful act. Theft was legally and morally wrong and could not be justified as *katangale*. For example, in the markets it was common practice that a thief who was caught red-handed was subjected to spontaneous mob-justice that often resulted in severe physical punishment or the death of the thief. These observations regarding the concept of *katangale* indicate that the attitude towards the use of the public office for "private" ends was more complicated and multi-layered than simplistic notions of African "primordialism" suggest.

Corruption and normative pluralism

The moral ambivalence of katangale indicates a more complex normative landscape than the public denouncements of "corruption" suggest. In Malawi, as elsewhere in Africa, certain expectations and obligations arising from kinship relations and other social norms co-exist with the law of the state. Often these are

invoked when the transgression of official rules requires justification. Corruption usually is justified in moral terms if it serves altruistic ends as the term katangale indicates. The phenomenon of multiple normative orders co-existing in the same social field or pertaining to the same domain of social life is known as legal pluralism in the legal anthropological literature (Benda-Beckmann and Strijbosch 1986, Griffiths 1986, Melissaris 2004, Merry 1988, Snyder 1993, Woodman 1998). Such a conception of legal complexity harks back to legal sociologist Eugen Ehrlich's (1967) notion of "living law", the adherence to practical norms in a society where the scope of state law is limited.

Studies of the African state also note the existence of multiple normative orders. Olivier de Sardan, for example, points out that "what is considered to be corruption from the perspective of official norms is not, or seldom, viewed in the same light from the perspectives of practical norms and actual practices." (Olivier de Sardan 1999:263). This contradiction is more than a discrepancy between norms and practices but should be analysed in terms of a contradiction between different sets of norms (Médard 1995, Olivier de Sardan 1999:263).

Of course rules as such are abstract and do not interact by themselves. Rules are instantiated and only conflict with each other through human interaction. Civil servants are very adept in picking their way through the normative plurality. They suffer and profit at the same time from conflicting norms. On the one hand, they often are caught in catch-22 situations since whatever they do will result in a violation of a rule: if you help your brother you might have to violate official regulations but if you do not help him you run the risk of undermining kinship solidarity. On the other hand, civil servants use their position as brokers as a resource always ensuring that they get their share, either by profiting themselves or improving their status and position in their respective networks. The following case study of petty corruption nicely exemplifies the possibilities and constraints offered by normative complexity in Malawi.

A chameleon in action

While conducting fieldwork in Malawi I was able to gather quite comprehensive ethnographic data about corruption in the civil service in spite of the well-known methodological difficulties the anthropology of corruption is confronted with. One of the most complete cases is presented here. It is an account of events that occurred in December 1999 at a civil servant's house where I was staying at the time. The name of the civil servant is fictive to protect his identity and place names, the department or any other information, which might reveal the identities of the people involved, are not disclosed. It concerns a relatively minor transgression of office rules and regulations concerning the use of government vehicles for the transport of deceased civil servants and their family members. The unauthorized and illegal use of government property is known in French as "perruque" and is a very common form of corruption in Africa (cf. Blundo and Olivier de Sardan 2001a).

Mr. Mashanga was a senior civil servant. In his early forties he was at the height of his career. It was amazing to see how he handled his superior officers, subordinates, relatives, clients and all kinds of relationships including that with a

European PhD-student who had taken quarters in his compound. Like a chameleon he switched effortlessly between codes and environments, talking a very learned and bookish English at one moment and within a split second putting a subordinate or client at ease with a funny remark in Chichewa. He had contacts everywhere, from the patrons of seedy bottle-stores in town to the highest officials in the civil service. He could arrange almost anything and his subordinates would react on the wink of a finger. Everywhere he was greeted with respect and although he did not belong to the highest echelons of power he could mobilise an impressive network and certainly had a high social status.

He lived in large house provided by the government. His wife, who had also been a civil servant, had passed away a year ago and he lived together with his son and a number of relatives and dependants, some of them in the main house, others in servants' quarters. Two of the younger ones attended school in town. All of them depended on him for accommodation, school fees, food and hoped to find employment through his contacts in the civil service. Mr. Mashanga had enjoyed a good education at a Catholic missionary boarding school and had graduated from the University of Malawi in 1985. His father had been a primary school teacher and had made quite an effort to ensure that his son would get a good education. Mr. Mashanga had joined the service in the late 1980s as a junior professional. Later he had served on different posts where he distinguished himself as able administrator and a good leader who enjoyed both, the respect of his superior officers and the loyalty of his subordinates. Swiftly he had moved up the promotional ladder to the post he held during the events described below.

Mr. Mashanga employed a housekeeper who lived together with his wife, children and mother in one of the servants' quarters on Mr. Mashanga's compound. Although the housekeeper worked in the household and was paid wages it would be inadequate to describe their relationship only in terms of an employment contract. As is common in Africa their relationship could best be described in terms of that between patron and client. They were very close; the man had worked for Mr. Mashanga for more than ten years. One day in December the housekeeper's mother died unexpectedly of malaria. He turned to Mr. Mashanga, his patron or bwana (literally master), for support. This came as no surprise to Mr. Mashanga since he, as bwana, was expected to help his dependants in situations like this. His client had no one else he could turn to because he and his family were poor and the home village far away. The housekeeper was sure Mr. Mashanga would help him because he had a reputation of helping his widespread circle of clients in times of need.

Mr. Mashanga really wanted to help the man who was very distressed and very dear to him, 'like a relative' as he stated. Yet, he faced several difficulties in helping the housekeeper. First of all, he needed vehicles to transport the corpse and the funeral guests to the village where the funeral was supposed to take place. His own car had been grounded for a couple of months. The engine had broken down and the necessary spare part was not available in Malawi and anyway, he could not afford a replacement at the moment since the spare part would cost him at least two months salary. Prices for spare parts had rocketed in the past months due to the high inflation rate of more than 30 per cent. But even if his car would have been running

it would not have been really suitable for the transport of the corpse and the family members attending the funeral in the home village. To rent a pick-up truck was out of the question because it was far too expensive for Mr. Mashanga. Instead he turned to his office for help and arranged two government vehicles with drivers.

This entailed the violation of official rules and regulations. According to the Malawi Public Service Regulations (MPSR) (Supplement 1:192.1, 192.2) the government provides a coffin and vehicles to transport the body and the guests to the place of burial only for the civil servant him- or herself or a civil servant's family member living at the service station. Despite their apparent rigidity even official regulations leave some leeway since they do not exactly define who qualifies as a family member living at the service station. In a typical civil servant's household, where relatives often stay for weeks or months, this border is often difficult to draw. Stretching the meaning and with a little bit of goodwill even a nephew or cousin on an extended visit could be considered to be a "family member living at the service station" as long as there was some kin relation with the civil servant and the relative died at the service station. In Mr. Mashanga's case the situation was a little bit more complicated. Although his housekeeper had worked for him a long time and was considered by Mr. Mashanga to be a relative, abwale, neither he nor his mother would qualify as family member in terms of the MPSR, which does not recognise fictive kinship.

Mr. Mashanga was well aware of the violation of the MPSR, which he held in high regard. According to him "everything concerning the civil service is in there [i.e. the MPSR]" but in cases such as the funeral of his housekeeper's mother it was necessary to circumvent official regulations that "existed only on paper" as he pointed out. The following day he had arranged two government vehicles with drivers who transported the corpse and the funeral guests from town to the village at approximately 60 km distance. After the funeral in the village the drivers had stayed overnight in a trading centre nearby since it was already too late to return to town. By using government vehicles, Mr. Mashanga was able to keep the costs for his personal burse very low. In the end he only had to pay condolence money which was about 10 percent of his monthly salary, still a considerable sum of money. This money was used by his housekeeper to cover the other costs of the funeral such as food and drinks for the guests. His housekeeper and the funeral guests praised Mr. Mashanga and many expressed their gratitude for his support during and after the funeral as I was told.

Whilst the use of the government vehicles amounted to an arguably minor violation of civil service regulations all involved took utmost care to respect official procedures in order to cover up the illicit use of the cars. Mr. Mashanga submitted a request for the vehicles, the superior officer signed the transport order, the executive officer countersigned it and the drivers filled in their logbooks. With regard to the justification for the allocation of the government vehicles an alternative set of rules was invoked. At the office everybody fully understood that he had to fulfil his social obligations and the impossibility to refuse the request by referring to official regulations. As patron the employer has a responsibility not only for the employees but also for family members. A civil servant denying access to the state's resources

would appear selfish and heartless, ubombo. Although employers often complain about this often quite costly obligation, it is virtually impossible for them to reject such a request on their resources since funerals have the highest priority in social life and anybody who appears to have no empathy in such a matter would be threatened by ostracism and witchcraft attacks.

Mr. Mashanga's case exemplifies the moral ambiguity of katangale. The circumvention of official regulations was justified by the moral obligations arising from the relationship with his housekeeper. Brokerage on behalf of his client had consequences for the social networks at the office: he became indebted to his superior officer, the drivers and in a more indirect way to his colleagues at the department who knew about the improper use of the vehicle. Mr. Mashanga's ability to arrange two cars within a day for a trip far away gives testimony to his high status and influential position within the department. Furthermore, considering the ease with which he was able to arrange not only one but two cars with drivers indicates also that there might have existed a debt on the part of his superior officer and other colleagues stemming from earlier acts of katangale committed by them. This web of indebtedness at the office indicates the existence of a certain modus vivendi, a set of unofficial rules providing some guidance in situations where the law in the books is considered too far removed from the predicaments of real life.

The relative ease with which Mr. Mashanga was able to circumvent the restrictions of the civil service regulations does not imply that the official regulations were irrelevant or not applied. On the contrary, they were applied - albeit in a selective manner. As Mr. Mashanga's case shows it can be very easy to circumvent official rules and regulations. In the unfortunate case, however, that a citizen has no relationships with functionaries who could pull a few strings official rules and regulations are usually applied to the very letter - with often Kafkaesque consequences.

Three sets of rules intertwined

The central question that arises from Mr. Mashanga's story is whether his actions were corrupt or not. It could be argued that they were corrupt since he violated official regulations for his personal advantage. On the other hand, it is clear that the people involved considered his actions to be morally right. Therefore we can understand his story as an example of a chameleon's careful manoeuvring between mutlitple normative orders with conflicting rules. Three sets of rules can be distinguished in the case study. First, there are official rules and regulations, then there are the social norms regarding Mr. Mashanga's obligations towards his housekeeper and, last, there is a set of informal and clandestine rules and principles regulating behaviour at the office Mr. Mashanga is able to invoke.

Official rules and regulations

African bureaucrats are famous for their often mind-boggling formalism. Comaroff and Comaroff (2006), for example, comment on the excessive legal formalism and the meticulous care for procedures, stamps and documents in the postcolony, which they describe in terms of a "fetishism of the law". Malawi is no exception in this regard: There is an array of legal instruments regulating the conduct

of government officials. The primary code is the MPSR regulating salary scales, conditions of employment, and rights and duties of all government employees. Therefore, they are commonly referred to as "the bible of the civil service" by civil servants. This body of rules is supposed to regulate exhaustively the conditions of service.

The MPSR contains a chapter on conduct and discipline sanctioning for example the use of information for personal gain, the use of public monies or property for private purposes, activities which conflict with the interests of the government or are inconsistent with a civil servant's official duties, etc. There have been only two editions, in 1978 and 1991. Since then the provisions have been altered, updated and supplemented by a vast number of circulars, which are usually issued by the Secretary of the President and the Cabinet and the Secretary of the Human Resource Department. In spite of these amendments the rules, the terms of service and the structure of the civil service have basically remained the same since British colonial rule (cf. Skinner 1963, World Bank 1994). These regulations are supplemented by the penal code prohibiting theft and fraud by civil servants, and in 1995 Parliament enacted the Corrupt Practices Act, a consequence of conditions set by the World Bank and the IMF for their financial support. In addition, numerous circulars of the Secretary of Human Resource Management address specific problems such as the misuse of government vehicles. Several agencies have the task to deal with wrongdoings of public officials. Since colonial times the Auditor General's Office has been the primary department controlling the ministries' accounts. This institution has been joined by the Anti-Corruption Bureau (ACB), the Department of the Public Prosecutor and the Public Accounts Committee of Parliament in the late 1990s.

Thus, state legislation and institutions are not a homogenous system but in itself a rather heterogeneous mix with different genealogies determined by changing geopolitical constellations. From independence in 1964 until 1994 Malawi was under the paternalistic autocratic rule of Kamuzu Banda, since 1971 President for Life, and the MCP, the only legal political party. Kamuzu Banda retained and even strengthened the highly hierarchical and centralised structure of the colonial civil service since it suited his interests. This started to change when a new government under Bakili Muluzi was elected in the first multi-party elections in 1994. The new government had a reformist agenda and implemented a number of reforms to transform the service into a "performance-driven", "transparent" and "accountable" provider of public services controlled by democratic institutions and the general public under guidance of the World Bank, the IMF and bilateral donors. As a result of these demands the government has implemented a civil service reform programme. In Malawi the World Bank adopted the so-called "enclave approach" to governance reform. Hereby new agencies are established that are supposed to function as motors of reform (Dia 1993). So far these reforms have not been very successful in transforming the civil service and structures inherited from the period of British colonial rule uneasily co-exist with newly established agencies with the task to promote institutional reforms.

In spite of the scope of official rules and legislation the actual risk of discovery and punishment for corrupt civil servants is very low. Of course the President and the ministers are eager to point out that corruption is an evil and that no one stands above the law. And indeed in recent years several high-profile scandals involving ministers and high officials have led to temporary arrests, transfers and suspensions although only one conviction. Control by these institutions and the notoriously understaffed Auditor General's Office is incidental at best and enforcement of the various statutes and official regulations seems to be rather restricted to a few isolated cases that are supposed to have a deterrent effect or serve political purposes of political rivals. Furthermore, the rivalry and unclear mandates of these institutions have counter-productive effects hindering rather than enhancing anti-corruption measures.

Under Kamuzu Banda's and the MCP's regime discipline was strictly enforced in the civil service. Most senior civil servants were completely dependent on Kamuzu Banda. He had appointed them to their positions and he had provided them with tobacco estates. The loans for the purchase of the estates were granted by the state-owned Commercial Bank that was also controlled by Kamuzu Banda. Compliance to official rules was further ensured by arbitrary arrests of suspected "confusionists" and "separatists". This "culture of fear", as it was called by my informants, guaranteed compliance to official rules: any misstep could lead to one's dismissal and arrest. The Malawi Young Pioneers (MYP), the paramilitary youth wing of the MCP, had spies and informants everywhere and sudden unexplained wealth would always lead to inquiries. Thus it seems that the reportedly low levels of corruption Malawi used to be famous for prior to the 1990s depended on Kamuzu Banda's system of brutal oppression rather than the rule of law.

Social norms and the ideology of sharing

In Malawi, as in the rest of sub-Sahara Africa, social networks are vital in regard to people's sense of self, status and welfare. A person's status is defined to a large degree by the number of personal relationships he or she entertains and how much of one's wealth is redistributed among kin and clients. Due to the absence of universal and substantial social welfare services people in general have to rely on their networks with kin, colleagues and neighbours for their social security. Most writers emphasise the role of informal or traditional networks with regard to the widespread corruption in Sub-Saharan Africa (Blundo and Olivier de Sardan 2001a, Médard 1982:172; 1995; Olivier de Sardan 1999:256, 257). Civil servants act as brokers and patrons within a web of interdependent social networks transcending the sphere of the public office. This position makes them receptive for the temptation of corruption. For many it is almost impossible to refuse the demands of a relative, a friend or an old schoolmate to assist, even if it means they have to circumvent official rules. Of course, not all demands will be treated equally, a relative's request for support might be subject to different considerations than that of a friend and a superior's demand certainly is treated differently than that of one of equal social status.

Generally in Malawi there is a strong moral obligation to redistribute, kugawa or kugawira, i.e. to share, accumulated wealth with kin. The generous patron enjoys

considerable status among his clients. In turn, the connection with a powerful patron enhances the social status of a client. The achievement of an individual is always seen as a collective achievement by a potentially wide circle of relatives, which will grow to the same extent as one moves upward the social ladder to the extent that the senior civil servant or the successful businessman will be visited by "relatives" he didn't even know existed. Social control within these networks is usually tight and the implicit threat of witchcraft, ostracism and gossip functions as a sanction inducing conforming behaviour.

The strength of solidarity networks should not be confused with an idealised picture where all corrupt behaviour by public officials is a logical consequence of demands for support. Blundo and Olivier de Sardan (2001b) rightly draw attention to the fact that social or moral norms often merely serve to justify corrupt practices. Civil servants are active agents, brokers who continuously negotiate the terms of their social relationships, making sure that they get their share of the cake. Often civil servants themselves point out that it is no wonder that other officers (of course it were always others) are corrupted when they are confronted by the obligations of extended families and the limitations of low salaries eroded by inflation. This is often not more than an excuse for corrupt behaviour; not everybody is the same: some were not corrupt, others were manipulating and circumventing official rules under severe circumstances only, like Mr. Mashanga, and some were downright corrupt without the pretext of social obligations and solidarity, using the gains from corruption for hedonism and escapism. The numerous civil servants who can be encountered in the bars and night-clubs of the urban and peri-urban areas where they spend a month's salary in one night give ample testimony of this selfish and anti-social aspect of corruption.

Civil servants maintain diverse social relationships with neighbours, colleagues, old schoolmates and fellow members of the church congregation. Especially in an urban environment networks based on residence, social status and church membership are very important. Often these relationships are described in terms of fictive kinship, especially in regard to solidarity. Yet one should be careful to lump all social relationships and personal exchanges under one header as many authors seem to suggest (Ekeh 1975, Médard 1982, Olivier de Sardan 1999, Scott 1979). Civil servants themselves often made a distinction between kin and friends. Of course, relationships with neighbours, colleagues and people from the same congregation can be under strain from demands for support but most civil servants I met stressed the pressure from relatives who expect them to provide support as a major issue of their existence. With regard to friends my informants often stressed that a friend could put less strong claims on their resources. In spite of these complaints their attitude towards expectations by kin is often ambiguous: on the one hand, exaggerated expectations are perceived to be a burden in an environment characterised by severe economic crisis and loss of real income; on the other, the status that comes with the role of a broker and patron is very tempting and kin relations are seen as insurance, a potential asset which has become increasingly important in recent years under the impact of economic crisis.

It would be misleading to represent the rules regulating informal social support as a normative system of defined rights and obligations. It constitutes rather a cluster of basic principles, which order the sphere of personal relationships. Instead of speaking of rights and duties it seems more appropriate to talk about expectations and feelings of obligation. Nevertheless, the latter tend to be felt strongly and people devise the most complicated schemes to avoid or at least to control the demands from their relatives. Exchanges are often never fully consumed to maintain a sense of indebtedness, which leaves open the possibility to ask for favours or services at a later point of time. Parallel, terms and conditions of exchanges tend to be implicit and vague, thus leaving space for changes in interpretation and a continuous process of negotiation. For example, the responsibility of the employer is not limited to his employee. As employer Mr. Mashanga is expected to support his employees and their families in times of distress. The employer is generally expected to arrange for or to pay the funeral and costs of transport of the deceased's body to the place of the funeral, usually the home village. There is no clear rule since it is neither in the interest of the employer nor that of the employee to define more precisely who would benefit from the employer's support. Thus both parties have the possibility to negotiate the conditions of help in the light of the specific circumstances of the situation. A more precise definition would be considered undesirable by both, the employer who wants to avoid to give the impression that he or she is keen to limit his obligations and the employees who have an interest to have as little as possible restrictions on support from the bwana.

This sketch of principles ordering social relationships in Malawi seems to correspond with Ekeh's concept of the "primordial public realm" as opposed to the "civic public" associated with colonial rule, which is devoid of moral imperatives.[19] He seems to suggest that a homogenous set of moral imperatives operates in the "primordial public" and influences the private sphere. In my view, this conceptualisation is misleading: in general the idea of a primordial realm is anachronistic at best and seems to be inspired by a search for authenticity rather than social realities in modern Africa. In present-day Malawi there exists not one universal morality but rather a patchwork of different moralities. Often the differences are negligible, as for example between different ethnic groups who have similar moral imperatives, but sometimes they are considerable. This is certainly the case in regard to Christian morality and kinship morality, which are often at odds and give rise to tension and conflict. Ekeh's concept of the "primordial public" in Africa, which he primarily associates with kinship and ethnicity, ignores the profound influence Christian missionary activities have had on society in Malawi (McCracken 2000, Ross 1996, White 1987).

Often civil servants who are devout Christians, especially the rising number of "born-again" or "charismatic" Christians, have high moral standards in regard to

19 Ekeh points out that there exist two public realms in the postcolonial state: on the one hand, the "primordial public" realm associated with traditional kinship relationships, which is "moral and operates on the same moral imperatives as the private realm" and, on the other, the "civic public" of the state's institutions based on the ideology of the colonial administration, which is "amoral and lacks the generalised moral imperatives operative in the private realm and in the primordial public" (1975:92).

an individual's personal conduct. Christian ethics differ in important aspects from kinship-influenced moral imperatives: Charity, for example, is a moral duty for Christians but unlike solidarity between kin with strong social pressure applied by members of the group the obligation is based on the belief in god and the hereafter where good deeds will be rewarded or bad deeds will be punished. For the major Christian denominations corruption and katangale constitute sinful behaviour and for some charismatic churches the devil himself tries to seduce the believers from the path of god by tempting them to act wrongly. This strong rejection of illegal acts, which can be traced back to the acknowledgement of secular power in all Christian churches,[20] differs from kinship solidarity, which does not recognise the distinction between public office and private sphere. Differences between charismatic Christian ethos and kinship morality, however, do not imply that charismatic Christians are less prone to corruption than other denominations or non-believers. I merely suggest here to replace the notion of a "primordial public" by conceptualising a mix of alternative moralities which may have conflicting elements.

The parallel social order in the bureaucracy

All bureaucracies know informal arrangements or codes of conduct at the shop-floor level. In Africa this parallel order appears to be particularly strong and well-developed. Beneath the layer of statutes, regulations and organisational charts a complex web of interpersonal relationships seems to amount to a parallel structure within the state apparatus running mainly along the lines of patron-client relationships. This phenomenon is variously described as "neo-patrimonial state" (Médard 1982), "rhizome state" (Bayart 1993), "shadow state" (Reno 1995, 2000) or even "criminalization of the state" (Bayart et al. 1999). In Malawi this parallel order does not amount to a "shadow state" in Reno's (1995, 2000) sense who describes a much more institutionalized parallel system in Sierra Leone, where formal structures had been hollowed out completely during the civil war, but a parallel office mores is easily discernible in the Malawian state apparatus.

The parallel social order or office mores is best described in terms of a set of basic moral principles and an unofficial code of conduct based on the principle "respect for the master", *ulemu kwa bwana,* that guide the interpretation of official regulations and prevail over them in case of conflict. This system soon emerged after independence and constituted one of the main instruments used by Kamuzu Banda and the MCP to ensure absolute control over the state since all civil servants owed loyalty to the party and Kamuzu Banda personally. After the introduction of multi-party democracy the parallel order was transformed into a source of patronage for senior civil servants and politicians who took advantage of the crumbling discipline and the end of one-party rule. Systematic misuse of the public office started among the top cadres of the civil service and spread quickly down to the junior grades who imitated their superiors in an attempt to benefit from the political turmoil of the mid 1990s. Being freed from the constant fear to be disciplined senior officials and politicians of all parties seized their chance to establish themselves as patrons in their

20 Of course there are differences between the various Christian churches. Protestant churches have a more pronounced tradition of being apolitical and recognising secular power than the Catholic Church. Yet, most churches recognise secular laws and adhere to the private/public distinction.

own right and appropriated the resources they controlled. In contrast with Kamuzu Banda's system in which only a small circle around the autocrat appropriated the resources of the state one can speak of a democratisation of appropriation with regard to the transition to democracy in the 1990s. The democratisation of appropriation was often seen in the context of the new democratic dispensation and many informants cynically perceived of human rights as a regime that allowed one to exploit the new freedom for personal enrichment or as "the right to grab as much as you can" as one interlocutor wryly put it.

Social relations within the bureaucracy have two central features: asymmetric power relations and the maintenance of indebtedness. Junior civil servants usually drew a sharp line between "the bosses" and themselves who depended on the protection afforded by their superiors. Without the intervention of a patron or friend it was almost impossible to get a salary advance, the permission to attend a workshop, to get a promotion or even to get a job in the first place. For example, in many government departments it was understood that civil servants had to pay a "commission" to their superior officer if they wanted to get a salary advance. Indebtedness was the other important aspect of relationships within the civil service. Mr. Mashanga's story shows how personal relationships at the office produce and reproduce indebtedness thus spawning *katangale.* The production and maintenance of indebtedness were desirable for both, debtor and creditor. The interest of the creditor was obvious: he or she gained influence over the debtor. Often full return was not in the interest of the creditor who preferred to maintain a degree of leverage on the debtor. But even the debtor often perceives of a debt as an asset. If it is not possible to become a creditor the next best thing is the status of a debtor. To have a debt constitutes a means to establish a social relationship with someone who might develop a sense of obligation towards the weaker party and assume the role of a patron.

The production and reproduction of webs of indebtedness is central to the understanding of the parallel order of social relationships in the civil service. By making other accomplice to corrupt and dubious practices loyalty is ensured. In Mr. Mashanga's case the boss authorised the private use of government vehicles because he owed him a favour or wanted to create a debt. The protection afforded by the *bwana* is vital for the junior officers and usually people are discharged or prosecuted because of corruption when their master removes his protection. The reasons for such a move by the patron may vary. Often a client is sacrificed in order to stay out of the line of fire when the patron is threatened by investigations, often on the instigation of a rival. Sometimes protection is removed because of violations of the office mores by a client who failed to pay proper respect.

According to the junior civil servants I talked to during my fieldwork "respect for the boss" is the most important virtue in Malawian government institutions. "Respect for the boss" overrules the official regulations, the MPSR. One informant pointed out that "we have laws but we also have by-laws". The superior officer "knows that there is some government regulation but he may divert" whereas the junior civil servant has to obey, "in the office you cannot challenge a senior officer, if you do that he can transfer you" as a junior civil servant put it. My interlocutors

often alluded to the office mores as "know how to manoeuvre" or the "rules of the game".

Obviously there exist differences between different departments and sub-units like offices and schools. According to the old adage that the fish stinks from the head, the conduct of superior officers and managers heading a sub-unit usually sets the tone for the rest of the staff. Opportunities for corruption also depend on the functions of a department: the Fisheries Department, for example, differs from a primary school and police officers or accountants tend to have more opportunities than clerks or messengers. Nevertheless there is a set of basic informal rules and codes, which can be found to some extent in all ministries and departments down to the smaller units such as police posts, health posts and schools.

The central principle of "respecting the boss" was only countered by the principle of sharing and allocating resources with dependants and clients mentioned above. The patron who violates this principle often faces silent resistance or even revenge, in the form of corruption allegations for instance. Junior officers tend to tolerate or even condone corruption by the superior officers as long as it is *katangale*, a system of redistribution in which everybody involved benefits. This attitude of junior civil servants is nicely illustrated in the song *Ndiphike Nyemba* by Charles Nsaku that was very popular in early 2002. A driver accuses his boss of being selfish, "I am your driver, we left Lilongwe together the previous day coming here to the field to work, there you are with money boss, food you are just eating alone, while your driver ate two days ago". These accusations of being selfish or *ubombo* are not something to be taken lightly in a society where the obligation to share is a central principle of conduct. In the song *Njoka mu udzu* by Lucius Banda the junior officer compares his boss to a snake lacking basic human qualities: "You are like a snake in the grass, when passing us by you smile, deep down in your heart you harbour bad feelings towards us, what is that you are missing boss?" He also warns his boss that one day he might have to depend on his subordinates since "life is like a card game, today we are working for you but your children might be employed by us".

Conclusions

"Good governance" policies in Africa are informed by a reductionist culturalism that blames African "primordialism" or "patrimonialism" for corruption and underdevelopment. There is a tendency to represent state institutions as alien transplants "unrooted in local culture" (Dia 1996:30) harking back to notions like the "primordial public realm" (Ekeh 1975). The imagined disconnect between institutions imported by the colonial powers and African society or culture is seen as the cause of "weak states" and "failed states". The ethnographic evidence presented in this article shows that these simplistic dualisms do not account for the normative complexity in Malawi, arguably a stronger state than the usual suspects commonly cited, where several sets of rules co-exist in the same social field. Civil servants in Malawi are well aware of the existence of official rules and regulations governing their conduct and they incessantly develop ways to get around them justifying their transgression with moral obligations and the impracticability of codes existing "only on paper" as Mr. Mashanga pointed out. His case study shows the careful

manoeuvring of a chameleon continuously switching normative codes depending on the situation. It is correct that civil servants in Malawi tend to justify corrupt behaviour with the strong expectations of kith and kin to grant access to public resources and Mr. Mashanga's case illustrates this very well but it would be naïve to assume that corruption in Africa is always a consequence of social pressure.

Mr. Mashanga's is a quite harmless and common case of petty corruption but it aptly illustrates the ways corruption works in Malawi. He invoked his moral obligations as a patron towards his dependant to justify his misuse of government property. His superior and colleagues accepted this and condoned the misuse of government property in this specific case thereby abiding to the strong ideology of sharing and caring in Malawi. The idiom of kinship solidarity, however, competes with and is influenced by other moralities such as Christian values. It would be, therefore, misleading to assume the existence of a homogenous African morality. A third set of rules, an informal modus vivendi, exists at the office that facilitates and regulates violations of official rules and regulations that are considered to be too far removed from real life to be always applicable. The existence of a parallel social order at shop-floor level is not peculiar to Malawi or Africa but due to its specific history it has structured corruption in the civil service since 1994.

It is important to remember that civil servants are active agents exploiting ambiguities and gaps resulting from normative pluralism. Even the lowest civil servants occupy a relatively privileged position in relation to the population at large. This makes them important brokers in their social networks and constantly people try to make claims on them by reminding them of their social obligations. Thus, civil servants experience a tension between official rules and their everyday lives. Mr. Mashanga's case illustrates this virtuous playing with different sets of rules to maintain his position both in the office and the "private" sphere.

An analysis that takes indigenous concepts such as katangale and kugawa into account transcends the simple public/private, legal/illegal dichotomies abounding in non-anthropological treatments of the phenomenon. The recognition of normative plurality in the bureaucracy of Malawi reveals alternative dichotomies such as selfish/altruistic and different ideas of conformity and deviance that make it more difficult to believe in the potential of universalistic concepts such as the rule of law and "good governance" to curb corruption. We would be better advised to have a closer look at the alternative sets of rules and moral ideologies for guidance in approaching a phenomenon that is neither inherent to African society nor the symptom of a mere dysfunctionality of an inefficient bureaucratic machine.

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Corruption in Pakistani Courts in the Light of Local Cultural Context: The Case Study of the Pakistani Punjab

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Abstract:
This paper analysis corruption in Pakistani courts especially in the criminal justice. The data comes mainly from my fieldwork in Misalpur a village in central Punjab and its responsible police station and district courts. Following hermeneutic strategy corruption has been analyzed as a cultural system. In other words corruption has been explained in the light of cultural values of the Punjabi society.

My assumption is that corruption is the result of difference between the local cultural values and the philosophy of the state. Theoretically Pakistan is a legal state. The basic values of the state law of Pakistan enshrined in the basic rights which are part of the Pakistani Constitution are equality and justice. The basic values of the Punjabi society are its kinship base and hierarchy of the social status. In other words this means that the society is dominantly organized on kinship lines i.e. absolute and unquestioned loyalty and commitment to relatives. Similarly according to the local culture people are not equal in their social status. Owning to the first characteristics relatives help each and as a result of the second justice is not absolute it is according to the status of the disputants. Summarized it can be said that corruption is the price that is paid for making the official system of justice function according to the values of the society. The real problem therefore is not bribery but safarish (nepotism, patronism especially intervention on behalf of a relative). This draws from the fact that the primary responsibility of person is towards her/his relatives and not the state and its laws.

Achieving corruption free Pakistan (Punjab) is not possible merely by making and implementing strictly laws. It has to accompany uniform and universal state socialization i.e. school education. In the long run values of the society have to be replaced by the values of the state.

Almost everybody in Pakistan says that corruption is its biggest problem. It is considered the root cause of all its problems. Poverty, illiteracy, terrorism, shortage of electricity, food, lack of governance, etc. have there origin here. To make matters worse, corruption in Pakistan has been continuously on the rise. For example, according to Transparency International's Corruption Perception Index, in 2010 Pakistan was ranked 34th compared to 2007 when it was ranked 42nd. Corruption is

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found in almost all the departments and institutions of the government. According to the National Corruption Survey conducted by Transparency International in 2002 and in 2006, the three most corrupt government agencies were the police, the political sector, and the judiciary. The same survey noted that "100 percent of the respondents who had any type of contact with the police over the previous year were confronted with corruption". In spite of the gravity of problems it causes, almost no serious attempt has been undertaken to understand corruption. This paper is an attempt to explore the ways and reasons of corruption in Pakistan. The criminal justice system, i.e. the police and the courts, is especially focused upon in this paper.

The Geertzian interpretative paradigm is used as a theoretical framework for this paper. Ethnography for Geertz is "an elaborate venture in (…) thick description", which is about "thinking and reflecting" and "the thinking of thoughts" (Geertz 1973: 6). He elaborates further that "doing ethnography is like trying to read (in the sense of 'construct a reading of') a manuscript (…)" (Geertz 1973: 10). This attempted reading according to Geertz's view is "intrinsically incomplete" (Geertz 1973: 29). Following this approach he defined law as "local knowledge", i.e. "(….) vernacular characterizations of what happens connected to vernacular imaginings, stories about events cast in imagery about principles (…) and not placeless principles" (Geertz 1983:215). In other words, for Geertz law has to be embedded in the local cultural context for "giving particular sense to particular things at particular places" (Geertz 1983: 232). This he has also called "law as culture system" Lawrence Rosen, a lawyer turned anthropologist from USA and a student of Geertz, applied this approach to the study of law courts in Morocco. He noted that courts reflect the cultural characteristics of the broader society comparable to the way a monastery, a market centre, or a men's club does.

> "When, therefore, a case actually comes up for a hearing, the mode of fact-finding and the form of judicial reasoning employed by the *qadi* reveal that they are closely related to the patterns of thought and action found in culture at large" (Rosen 1989: 309).

Hence corruption in Pakistani criminal justice, following this approach, can be seen as the functioning of the Pakistani state law embedded in the Pakistani culture. Since the data mainly comes from the Punjab we will analyze it as a case study of the Punjab. Let me start by concentrating on two main values of Punjabi culture:

I its kinship base: The single most dominant and determining social relationship in the Punjab is kinship, so much so that one can call it a kinship-dominated society.

II the hierarchical nature of social relationships: in other words, the structure of human relationships in the Punjab is hierarchical.

The two most basic values of the state law of Pakistan enshrined in the fundamental rights which are part of the Pakistani Constitution are equality and justice. The Pakistani State is supposed to be a legal state, i.e. based on the rule of law. In the following I want to argue that Punjabi society and the Pakistani State are based on two different sets of values and philosophies. In a society organized purely along kinship lines the central value is absolute and unquestioned loyalty and

commitment to relatives, to the agnates for example – the central principle being the nearer a relative the more cohesion, solidarity and claims of favor, something based on the principle known in anthropological literature as fission and fusion. In a purely 'legal state', on the other hand, it is the rule of law. These rules are supposed to be logical, i.e. they have a scientific base and are above all the same for all. The state is run by bureaucrats who are selected to their posts by fair rules, and it is their duty to implement laws impartially. They are accountable for whatever they do and above all can be removed from their position in accordance with prescribed rules. The primary commitment and loyalty of the bureaucrats is to the state.

These may be called the two ideal models. Most of the societies of the world are mixed societies. There are some societies that are predominantly kinship based, and there are others that are nearer the rule of law model. Pakistani Punjabi society is a kinship-dominated society. Nobody can imagine refusing the request of close relatives like one's father, mother, or brother for example. There is social pressure on relatives to help each other. It is on relatives that people depend or can fall back on in case of any emergency, and problems including the quarrels, fights, crimes, and the like. Bureaucrats in general work more as protectors of their families and kinships and not as the implementers of the rules of the state. The police, judges, lawyers, or others serving in the court have as their first priority the commitment to their families. Villagers go to the police and courts in the form of groups mainly consisting of relatives. The first questions asked after reaching the police station, the court, etc. are the names of the *biradari* (patrilineage), relatives, families and villages of the people in question. A whole net-work of who's who of the concerned officials is traced. This is done to find common relatives and friends who can support the claimants.

The English expression corruption can be translated by two Urdu/Punjabi words combined: *rishwat* and *safarish*. *Rishwat* (bribery) means the paying/receiving of a sum of money or something of valuable for doing or getting something done illegally or dishonestly. In *safarish* payment of money or valuables is replaced by the use of social relationships to achieve something illegal. It is important to mention here that *safarish* and *rishwat* in Pakistan is not required for doing only something illegal or dishonest; almost nothing functions without it, and it is also required for doing and getting rightful and legal services. The basic problem in my view is not *rishwat* but *safarish*. *Safarish* seems to be the most 'normal' and 'natural' way of doing things in Pakistan. People do not even realize that they are doing anything wrong. It is actually the other way round; a person who does not entertain the *safarish* of his relative or does not do *safarish* for her/her relatives is generally considered an arrogant and an asocial type and hence is in the wrong. You can find any number of examples of this in everyday behavior. In cases of a conflict the close relatives, particularly, and other relatives, generally, are on the same side by default irrespective of the question of right or wrong. Commitment to relatives, especially close ones, is unquestioned. Members of a *biradari* will support each other against the members of other *biradari* even when there are minor disputes within the member's *biradari*. A Punjabi saying goes: "the thinnest blood is thicker than

water"[21]. If a choice has to be made between a relative and a friend, it is almost exclusively the relative chosen. That the kinship is the most fundamental of all the social relationships in the Punjab is also evident from the fact that kinship terms are used to express all other relationships. In the village all people older than the speaker are addressed by kinship terms like uncle, grandfather, mother's sister, father's sister, etc. for example. If a person wants to express a special bound with an unrelated person he will be called a brother/sister. Fast friends are declared sisters by women and brothers by men.

The underlying principle behind social status and hierarchy, which I have named as the second basic value of rural Punjab life, is that human beings are not considered equal in the eyes of the society. This aspect has been well documented in the relevant ethnographic literature on the Punjab (Chaudhary 1999 and 2006, Saghir Ahmad 1977, S. M. Lyon 2004, Hamza Alavi 1972, Huma Haq 2000). The population of the Punjab in general and the village population in particular are divided into a number of *biradaris* that have different positions on the hierarchy scale. *Biradari,* literally translated means brotherhood, could be defined as a group consisting of people who trace a common ancestor; in short it is a patrilineage. *Biradari*, as has already been stated above, is perhaps the single most important determinant of all the types of social relationships (marriage, death, gift exchange, etc.) in the rural areas. The most important characteristics of these *biradari*s are said to be equality and fraternity within the same *biradari* but hierarchy and inequality between them.

The clearest manifestation of the hierarchical division of Punjabi *biradari*s is between *zamindar* (farmers) and *kami* (artisan). There are no opposing opinions about the lower social status of the *kami*s. There is for instance no commensality between the farmers and artisan groups in the village. *Kami* will prepare the smoking pipe of the farmer but cannot smoke it in the company of the farmers. The village household servants who are as a general principle *kami* have their own separate eating utensils. There is no marriage between zamindar and kamis, especially between zamindar females and *kami* males (hyper-gamy being the rule in the Punjab). There may, similarly, be differences of opinion about which of the village's farmer *biradari* stands on the top of the social ladder, but the general consensus seems to be that even the different farmer *birdaris* are not equal in status. Similarly there is hierarchy among the different *kami biradari*s. The very first question a Punjabi asks a person he's just met is: *Tusi kaun hunde ho* (literally translated: who are you? In actuality it is an enquiry about the family and *biradari* of the addressed person). This question is neither meant nor taken as an insult. The speaker wants to fix the status and position of the new contact so as to behave accordingly. Misunderstandings could be embarrassing for both sides. It is significant to mention that money and resources are not the sole indicator of the social status of *biradari*s.

This comes perhaps from the Hindu past of Punjabi society. One of the basic characteristics of Hindu culture and religion is its caste system. These castes are

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21 The original Punjabi sayings: *"Khoon patla bhie howay tee pani naloon ghehra honda aee"*. The second similar proverb is: *"Apna mar ke bhie shan which sit da aee"*.

hierarchically ordered, and people born into them inherit their status.Cohn, a British legal Anthropologist who did fieldwork in India, wrote: "(…), men are not born equal, and they have widely differing inherent worth. (…) The Chamar (cobbler) knows he is not equal to the Thakar (landlord)" (Cohn 1967: 155). This hierarchical character of the Punjabi society is directly related to the law. Geertz wrote, for instance, about the Hindu caste system being equally relevant for the Punjab:

> "What distinguishes the Indic legal sensibility from others is that right and obligation are seen as relative to position in the social order, and position in the social order is transcendentally defined" (Geertz 1983: 198).

If we consider law as a reflection of the culture in which it is implemented, the customary law practices in Punjabi rural areas are clear evidence of the hierarchical nature of relationship in the Punjab. I have, therefore, called customary law of the Punjab as a 'relative justice' (i.e. justice according the status and position of the disputants) in my previous publications. There were a number of very clear demonstrations of this in the village in which I conducted my fieldwork. In one case the daughter of a farmer eloped with the son of a tailor. According to Punjabi marriage rules (hypergamy), a woman cannot be given in marriage to someone of a lower social category. There was a full-village gathering, called *kath,* outside of the village. The family of the tailor had already fled the village. Their house was burned down, and it was decided to give the family when found, especially the boy, an exemplary punishment. In official law, if a woman and man want to marry they can do so irrespective of their *biradari*. According to the local customs it is the responsibility, on the one hand, and the privilege, on the other hand, of the parents/family to arrange the marriages of their children, especially of their daughters. A woman deciding to run away with a man (called *nikal jana* in Punjabi), or a man taking away a woman (known as *kad ke le jana* in Punjabi), are ideally both to be killed, with the minor difference that in the first case both the man and the woman are punished and in the second case only the man. It also depends upon the *biradari* of the woman and the man. In case of an elopement of a *kami* woman with a man of the farmer *biradari,* even her abduction may not lead to any punishment. There were countless examples of sexual relations of the farmers with *kami* women, but no one bothered about them. In another case, the house of a village smith cum carpenter was broken into by youth of the zamindar. They intended to teach a lesson to their smith, who in their view had become arrogant and had stopped taking an interest in his customary work of repairing the agricultural tools of the farmers based on the *sepi* system (payment at the end of cropping season). Everybody in the village, including the smith himself, knew who broke into the smith's house, but nothing happened as a result. The smith did not even go to the police.

Though the focus of this paper is not the functioning of the traditional system of justice, giving it the focus I have demonstrated how local culture effects and reflects local practices of justice. Moore, an American legal anthropologist who did fieldwork in India, noted about an insight about the functioning of the so called traditional system: "In the village council, a dispute is seen as part of the environment from which it grew. The individuals, their families, the community and

the histories that led to the discord are on trial". (Moore 1985: 6). No *rishwat* is paid out, but what is paid homage is kinship; *biradari* and the social status of the disputants are taken into consideration at the time of making a decision.

It may be interesting to note that complaints of false oaths and cooked up stories by witnesses in the village are very rare. If someone does this s/he will become notorious for this. No one will trust such a person in the future. There is a general tendency to avoid taking an oath when making a statement such as swearing by the holy Quran, or swearing in the mosque, for example, even if one is telling the truth. I have reported in an earlier publication (2006) that a man named Aziz was blamed for stealing irrigation water. The *panchayat* decided that either Ali Ahmad, an uncle of Aziz, or his eldest brother living in Islamabad, should give a *nian* (swearing by entering the mosque or specified otherwise on somebody's behalf) for Aziz that he had not stolen the water. If the *nian* was not provided, Aziz would have to pay ten thousand Pakistani rupees (the equivalent of 140 dollars) as a fine. The matter was resolved when the eldest brother of Aziz came and straight away paid the ten thousands rupees (so opposed the family to providing a *nian*, but as he did so he called down the punishment of God on the accusers. He said in a loud and clear voice: "God be my witness if my brother had stolen the water this money should be good for them, and if my brother is innocent, which I have made sure he is, then this hard earned money should destroy the accusers". Having said this he left. The other family was so terrified that they immediately returned the money.

Cases of telling lies in the *panchayat*s are rare, perhaps because in a village everybody knows everyone's business, almost everything that happens I would add that there is no need of false testimonies in local councils because their decisions are anyway compromises arrived at according to the local values of kinship and inequality. The situation is very different in the courts and with the police however. Moon, a colonial administrator, wrote in the beginning of the 20th century of his experiences with the courts: "(…) Indian magistrates daily spent hours in their courts solemnly recording word for word the evidence of illiterate peasants, knowing fully well that 90 percent of it was false. Even if the events described had actually occurred the alleged eye-witnesses had not seen them." (Moon 1930: 51).

This statement is as true today as it was at that time. As has been mentioned above this is such a contrast to the practices in the village where people seldom if ever tell a lie after invoking the Quran or other holy objects. Important to mention is that in the courts too witnesses have to swear not to tell a lie. Moon has reported at length of a murder in a village where an innocent person was hanged due to false eye-witness accounts. All this had happened in spite of the fact that the magistrate knew this as well as also all the people of the village. (1930: 44-51). The Law Reforms Commissions also made no secret of this problem in their reports. I have already written in detail how the magistrates, judges, lawyers, serving staff, police accept money.

The police may be called one of the most corrupt departments of the Pakistani State. The Law Reform Commissions formed by governments of Pakistan wrote:

> "…, police station is the main centre of corrupt activities (…). A case is not registered or an F.I.R. is not accepted nor is sufficient interest shown in the investigation unless the complainant gives a handsome gratification to Officer-in-Charge of the police stations or Station House Officers. If the accused party is more generous, the scales are invariably tipped in its favour. Both the parties are often kept equally satisfied by a clever investigating officer who sends the cases up to the Court of Magistrate with such lacunae therein that the accused may make capital out of them." (Law Reform Commission 1967-70: 414).

The first necessary step in the criminal justice is the registration of a so called FIR (First Investigation Report), which is not written without *safarish* and *rishwat* as has been noted in the quotation above. Though, theoretically, an FIR is just a verbatim report of the grieved party written by the police scribe, called a *muharer*. But in practice villagers who cannot pay the bribe or lack the backing of an influential relative or patron are denied this right. The police in general are very crude and use foul and abusive language. Among the villagers fear of the police is immense and so most simple and honest people avoid contact to them.

When two goats of G. Mustafa, son of Hamid, a farmer from the village, were stolen one night he did not even consider going to the police. As soon as he discovered that his goats had been stolen he told his father, brothers, neighbors, and friends. The thieves had also broken into the house of a neighbor who lived a few houses away and stole some sacks of wheat from their adjacent shop. Two *khojees* (trackers) from the neighboring village were called in to track the thieves, and they tracked the footprints of one of the thieves to the house of Ummar Draz who lived in the same village as Mustaf. Umar Draz was a *mussali* – in English known as Muslim sheikh: traditionally servants of the farmers who are at the bottom of the social hierarchy in the village. Umar Draz and his sons herd sheep and goats. Aziz the younger brother of Mustafa had beaten up a son of Umar Draz for damaging the crops by letting animals into the crops in spite of being repeatedly warned not to do so. Umar Draz had the backing of Gulzar, another fellow villager who belonged to a strong family and had old scores to settle with Hamid and his sons. In a village *panchayat* (council of village elders) Umar Draz, with the backing of Gulzar, refused to cooperate with *khojees*'s trial. The case shifted from the village to the police.

Mustafa knew that the cheapest, easiest and perhaps most pragmatic approach would be to forget about the two stolen goats and go back to routine life. He was aware of the fact that he was never going to see his stolen goats again. Asking for police assistance and starting a court case would mean wasting of a lot of time and money, much more than the stolen goats were worth. But then he pointed out that the thieves may take this as an easy ride and steal other animals or goods in future. Besides that he would loose his honour in the eyes of his fellow villagers, especially because Umar Draz, a mussali, had challenged him. For Gulzar, if Umar Draz looses it wouldn't be such a loss of honour because he was only indirectly involved. In a win Gulzar wins, but in case of a loss Umar Draz would. It would not be a big deal for Umar Draz himself because it wouldn't be such a loss of honour to lose to a farmer.

Two months had gone by since Mustaf's goats were stolen, and he had been running from pillar to the post, and an FIR had yet not been registered.

FIRs are generally denied, delayed, exaggerated and falsely constructed for money and *safarish* (nepotism). Every police station has a scribe called *muharer* whose is responsible for writing an FIR, but it is not written until ordered by the Station House Officer (SHO). Both parties try their level best to get an FIR registered or to obstruct it. The amount of bribery depends upon the nature of the case and the parties involved. There are touts in every village, and at the police station some of them are junior and retired police officers. Registration of an FIR itself is celebrated as a great success. In case of its denial it is a great achievement for the opponents. The police are happy with every case and with crime in their area generally because it brings them money. Not a single job, however small, is done by the police without a certain fee or *safarish* – even for attesting the character certificates necessary for a job or a passport. At the police station the policemen do not hesitate asking the complainants to bring cigarettes, tea, food, telephone cards, paper and pen for writing, etc. In case of arresting an accused person the complainant is asked to come very early in the morning with a car, arrange food and refreshments, and the like. It is not a wonder that a vast majority of villagers dream of their children becoming *thanidars* (generally meaning SHO). But again, all this is required if there is no *safarish*.

Gulzar is an influential farmer who is often in touch with the police. His brothers work in the nearby town. The present SHO is known to them. When Mustafa went to the police station he was accompanied by Asghar, an ex-policeman from the village and also a very distant relative. Mustafa was asked to pay ten thousands for an FIR, which he refused to do. Hamid contacted Murtaza, the son of his sister living in Islamabad. Murtaza is a rather well connected person. In his office he entertains and helps his friends, colleagues and juniors. One of his close friends is working in the Ministry of Interior at a senior position. He called the relevant District Police Officer (DPO) on behalf of Murtaza and asked him to help his friend. The situation changed completely. The case was shifted from the police station to the district headquarters, and an assistant superintendent of police (ASP) was given charge of the case. Mustafa nominated the important members of the other side, and they were asked to give a *nian* (declaring with one hand on the Quran) swearing that the accused is innocent. The nominated people refused, and Umar Draz seemed to be in trouble.

Arif bought a second hand Toyota Corolla 1986 model from Hameed and Yousaf khichy, an occasional customer at his brother's shop. About one week after the purchase it was discovered that it was a stolen car. Arif filed a court case against the police and the proclaimed car owner for a so called stay order. Arif and his brothers, through a far relative, approached the police officer in charge of the car lifting cell. This police officer found a very interesting legal solution. The police officially took away the car from Arif (as it was a stolen car), but then they gave it back to Arif through the process of the court pending the court's final decision. The police got five thousand Pakistani rupees for this. In the court Arif hired one of the best lawyers, who in a very clever way had the case linger in court for a very long time. The other party lost hope and gave up following the court case. The court

decided in favor of Arif and his family because the other party was absent. It was definitely a fake (stolen) car, as this was also proved by a laboratory test. The head of the car lifting cell said privately that there are gangs of thieves who operate with the help of the police. The end of the story is even more interesting. One evening when the car was parked at a public place, the officers of excise came and confiscated the car claiming that no taxes have been paid on it. Arif tried to pay the bribe, but the price was higher than the actual price of that car, and so he didn't pay the bribe.

In another case involving a man named Khuram, his new car, a Suzuki Khyber, was stolen from outside his house one evening. An FIR was written after hectic efforts to obtain one. In the first few days he visited the police station every day, then every second day, and finally he gave up the hope. In the meantime friends and acquaintances told him about people in the tribal areas who buy original papers of stolen cars or sell cars with tempered chassis numbers. The brother-in-law of Khuram had links to the commissioner of that district. The commissioner asked one of his juniors to help Khuram. This gentleman told him to get a car on "*spurd dari*" (custody) from the cars at the police stolen car lot. Instead of this Khuram paid fifty thousand Pakistani rupees (around six hundred dollars) and got a car from the stolen car lot which had some similarities to his own stolen car. The police had already destroyed most of the identity marks of car, like the chaises number, etc. The police off course justified the charging of money on the grounds that they spend money from their own pockets to chase criminals because of the lack of funds for such purposes.

About corruption in the courts Hoebel wrote:

> "Below the level of the High Courts all is corruption. Neither the facts nor the law in the case have any real bearing on the outcome. It all depends on who you know, who has influence and where you put your money." (Hoebel 1965: 45)

One big problem at the courts is delay. All people who are related to criminal justice like the lawyers, the judges, the police, the legal process serving staff, etc. all are responsible for the delay. The Law Reform Commission noted:

> "There is a wide-spread complaint that criminal cases are generally delayed inordinately by some magistrates with a view to extracting illegal gratification. …, 'oiling of the wheels' is necessary make even the judicial machinery run smoothly and with speed at this level." (Law Reform Commission 1967-70: 414-15).

The same report records 54 adjournments in one case and 29 adjournments in another case (1967-70: 186). At another stage the Law Reform Commission wrote:

> "(…) we were surprised to find that services of a senior lawyer practicing mainly in that court could not be effected for about a year on the plea that he was not available even though he was attending the

> court almost every day and appearing in cases occasionally even before the judge-in-charge of the Nazarat." (Law Reform Commission 1967-70: 415)

It is not only judges, lawyers and police that are corrupt; all those who are affiliated with courts and or have anything to do with the courts work either after charging money or having been approached by friends, relatives or influential people.

> "…, corruption among the subordinate officials and process-serving staff as well as among the investigating staff is rampant with the result that no action is taken by them unless the parties involved approach them and tender some extra-legal consideration. …, 'papers move only on golden or silver wheels'." (Law Reform Commission 1967-70: 414-15).

It is perhaps not out of place to mention that almost identical corrupt practices have been observed in India by anthropologists and jurists who have written on this issue (for comparison see Helmken 1976, Cohn 1967, Moore 1985, 1993). The similarity is so striking that if only the names of places and the country are switched it would be difficult to differentiate between the two countries. Another observation to mention in this regard is that corruption did not start after partition. It started almost the same day as the British-styled system of justice was introduced in the sub-continent. Moon's small book is a very good record of corrupt practices in Indian courts during the British colonial rule. Moon wrote:

> "It was amazing (…) that anything so unsuited (…) as the English law should even have been foisted upon India (…) a monstrous injustice that Indians should be subjected to laws designed for quite different social conditions (…) (Moon 1930: 52-4).

He wrote further:

> "(…) people had become habituated to systematized perjury, had been corrupted by unscrupulous lawyers, had been taught to flock to the law courts and to revel in the tainted atmosphere of bribery and chicanery that surrounds them. Litigation had become a national pastime and the criminal law a recognized and well-tried means of harassing, imprisoning and even hanging one's enemies" (Moon 1930: 52-4).

We do not see any difference between the pre-partition situation described by Moon and the post partition situation in India and Pakistan described by so many authors. Cohn and Moore explained corruption in the courts as follows: "The way a people settle disputes is part of its social structure and value system. In attempting to introduce British procedural law into their Indian courts, the British confronted the Indians with a situation in which there was a direct clash of the values of the two societies; " (Cohn 1967: 154) Moore wrote likewise: "The British system, (…) examines one distinct dispute under 'laboratory conditions'. (…) In theory, the

disputants lose their social status and are viewed equals before the law" (Moore 1986: 6). But the situation on ground is that "(…) men are not born equal, and they have widely differing inherent worth" (Cohn 1967:155). As a contrast, "In the village council, a dispute is seen as part of the environment from which it grew. The individuals, their families, the community and the histories that led to the discord are on trial." (Moore 1986: 6).

Summary of my argument is that human beings have an inherent unequal worth in the Punjabi culture. While making decisions at local institutions this worth which may also be called status and position locally known as izzat (honour) is kept in mind. In other words, laws are not same or laws are applied by keeping in mind the position of people involved. There is no corruption in the sense of payment of money at this level. The official justice system theoretically follows the ideals of equality i.e. same laws for all and all are equal before law. The implementers of law (police and court officials) are part of the Punjabi society and culture. These officials believe in local culture rather than follow the laws. As a matter of fact money is received and above all paid which influences the implementation of law. The result is that the official justice system as it is practiced produces results which are similar if not same as the traditional system. Therefore, I say corruption is paid to achieve the 'justice according to the status of the parties involved' which is traditional system.

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Afghanistan: Corruption and Injustice in the Judicial System[22]

*Antonio De Lauri

Abstract:
The Afghan judiciary currently lies in tatters. This statement can serve as the starting point for a series of considerations. A modernized state justice system is emerging and is at a crucial and troubled stage of establishment that will determine its future effectiveness as an institution that provides the Afghan citizens with access to justice.

This article focuses specifically on the phenomenon of corruption inside the judicial institutions, which I see as arising from a structural condition in the state justice system. I argue that in Afghanistan, the phenomenon of corruption can be read in terms of "double institutionalization" whereby mechanisms of exchange and compensation, affirmed at the level of social practice, find a possibility of reaffirmation (of re-institutionalization) in the legal system.

My ethnographic work shows that the ongoing process of legal modernization (as part of the project of democratization) plays a fundamental role in re-institutionalizing corruption and radicalizing it. I adopt a non-legalistic perspective to explore some of the effects of corruption on the work of judges and the access to justice.

Key words: Afghanistan; corruption; legal reconstruction; judicial system.

Introduction

If it were not for corruption, people would not even know what tribunals are[23].

The reflections in this article developed out of the field research I carried out in Afghanistan between 2005 and 2008 to examine the process of legal reconstruction by the international community after the military operation Enduring Freedom in 2001. During this period I was able to directly observe twenty court cases (both criminal and civil) and follow the work of some prosecutors[24] in order to study the ordinary daily practice of law. I also conducted several meetings and interviews with police officials, NGO experts, and members of the Ministry of

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22 For helpful discussions and comments on previous drafts of this article, I am grateful to David and Tori Rosen, Monica Fagioli, Philippe Gagnon.

23 A carpet seller in Shar-e-now (Kabul, March 2008).

24 The ethnographic work took place in the Court of the Second District, in the Prosecutor Office of District 11 and in the Provincial Office.

Justice. Their respective point of view emerged as being crucial to understanding the "life" of judicial institutions and the implications of the legal reconstruction process.

The primary goal of this article is to show that the phenomenon of corruption is intrinsic to the process of legal modernization embodied today in the "reconstruction project". This process of legal modernization is ongoing, though it has a long history, with roots dating back to the early 19th Century. The expression "legal modernization" in this paper refers to two interconnected phenomena: the affirmation of a "global rule of law"[25] and the process of institutionalizing and centralizing justice as a function of the state.

Undoubtedly, the term "corruption" does not lend itself to one univocal definition, since it can refer to different causes, contexts and social dynamics. In Latin languages, the term derives from the verb *rumpere* (to break, to alter). The verb *corrumpere* (*cum – rumpere*) implies that with the act of corruption something is broken, and that the thing being broken can be the moral integrity of a person, a code of moral rules or, more specifically, administrative laws. In Dari, one of the two official languages in Afghanistan, the term *fesad* (which derives from the Arabic word *fasad*) is generally used to indicate corruption. The term *reshwa* has a more specific meaning, similar to "bribery" in English. In the courthouses of Kabul, the term *bakhshish* is heard often. It can be translated into "gift," "present," or "favour." *Bakhshish* can be the gift a father gives his son for having obtained good results at school. But it can also be used as a synonym for *reshwa*[26]. While one can make an ambiguous inference with the term *bakhshish*, or an inference can be made from this term in such a way that "one means an act of corruption without using an expression that is too harsh", as *reshwa* it has a negative connotation[27]. Certainly the term *bakhshish* is not limited to the sphere of the judiciary but rather to a larger criticism of government and other activity that involves this kind of practice.

Studies[28] on the phenomenon of corruption have traditionally been linked to the analysis of social mutation, the role of the state and its institutions, and political

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25 Mattei and Nader explained that "the expression 'rule of law' has gained currency well outside the specialized learning of lawyers, where it displays a long pedigree, having been used at least as far back as the time of Sir Edward Coke in late sixteenth-century England. In recent time, however, it has reached political and cultural spheres, and entered everyday discourse and media language. Pronounced in countless political speeches, it promenades on the agendas of private and public actors, and on the dream-lists of many activists" (2008: 10). As outlined by Ehrenreich Brooks: "In an increasing number of places, promoting the rule of law has become a fundamentally imperialist enterprise, in which foreign administrators backed by large armies govern societies that have been pronounced unready to take on the task of governing themselves" (2003: 2280).

26 Conversation with a member of the Afghan Women Judges Association (28 September 2006).

27 *Supra* note 4.

28 Raffaella Coppier explained that the phenomenon of corruption can be studied both at the level of the system in which it develops and at the individual level. The first is the *functionalist* approach and the second is the *Political Economy* approach. The first refuses to see corruption as a pathological phenomenon, or as an obstacle to economic development, but considers corruption as having structural roots, such that it should be explained in the context of the historical and economic development of a country. From this point of view, corruption is "functional disfunction". This approach, which was dominant during the 50s and 60s, has subsequently suffered from significant criticism, especially for its view that the role of corruption is not

and economic bargaining – issues that have highlighted the social and political relevance of corruption rather than relegating it to the sphere of deviance.

Syed Hussein Alatas has posited that there are three diverse phenomena linked to the term "corruption" including graft, extortion, and nepotism. In general, one can associate a series of characteristics to corruption: a) at least two persons have to be involved; b) secrecy is generally implicit; c) elements of reciprocal interest and mutual obligation are implied; and d) those who practice acts of corruption try to disguise them using some form of legitimization (1999: 6-8). In the specific context of a state bureaucratic organization, additional elements are involved, including the use of institutional functions, and the relationship between citizens and state institutions.

Some elements emerge from an examination of the complex of structural conditions, "individual carriers" and contingent factors in Afghanistan, which can be considered the roots of the phenomenon of corruption: exchange, gift, and return mechanisms; forms of patrimonialism; and structures of nepotism and clientelism.

Practices linked to the exchange of "soaps" (favours and circuits of "friendship" connections), which are spreading through all levels of the Afghan judiciary, make the problem of corruption a constitutive reality of the state apparatus, rather than a residual aspect that can be eliminated through a more rigid system of sanctions. This evokes the possibility of an even deeper radication in the process of reconstruction.

To examine the controversial issue of corruption in the bosom of Afghan justice, I will use four interconnected levels of analysis: legal reconstruction and corruption; narratives of corruption; judicial practice and "poetic of the compromise"; and inaccessible pluralism.

Legal reconstruction and corruption

Shortly after the military operation Enduring Freedom, the international community, led by the United States, launched a process of reconstruction of Afghanistan, with the (apparent) objective of "democratizing" the country[29]. However, such reconstruction has revealed itself as a political-humanitarian intervention with the primary objective of ideologically supporting a political-economic expansion functional to a specific geopolitical structure[30]. The reconstruction process has consequently only marginally been able to give a new impetus toward stability to a country tormented by war and endemic poverty.

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necessarily negative, and for the idea that corruption could simply disappear spontaneously as a country moved through the evolutionary phases of economic and political development. The functionalist approach has mainly given way to the methodological individualism of the economic approach of *Political Economy* which sees corruption as the result of a rational calculation that weighs costs and benefits (2005: 25-26).

29 See for example the speech of Colin Powell on the 23 March 2004, www.9-11commission.gov

30 Afghan scholar M. Jamil Hanifi spoke about an "American neocolonialism in the Middle East and Central Asia" (2004: 296).

In the sphere of justice in Afghanistan, the language of legal modernization has been used as the frame for attempting to standardize and institutionalize justice at the state level. This process, however, has not been able to overcome the dyscrasia between laws in force, the Constitution of 2004 and the values recognized by the Afghan social fabric (Ahmed 2007). To further complicate the picture, the presumed convergence between Islamic law and rule of law has not yet been translated into a defined judicial procedure.

Eradicating corruption from the judicial system is one of the primary objectives of the international community, represented by foreign governments, international agencies and non-governmental organizations. From their perspective, the judiciary is the arena apparently most deeply affected by systemic corruption (ARGO 2008).

The international community, and consequently the Afghan government, has identified the problem of corruption as a degeneration of state institutions: a crime resulting from the absence of "public discipline"[31]. The governmental and international rhetoric has taken on tones of condemnation towards the corrupted and has linked the phenomenon of corruption to a counter-governance dimension. The Vice President of Afghanistan himself, Mohammad Karim Khalili, affirmed before the London Conference of 2006 that one of the most urgent issues to confront should be "the fight against corruption"[32]. This anti-corruption rhetoric firstly ignores the fact that, in Afghanistan, the system of corruption can be seen as a modality of governance[33]. It also fails to consider the profound social dimension of a system that is moulded by a concatenation of socio-cultural factors linked to dynamics of power, of privilege and responsibility and to exchange mechanisms such as reciprocity and economic bargaining.

Internationally, in the recent past, the ideology of post-war reconstruction has been the external trigger for the fight against corruption in countries receiving international "aid". In many post-war contexts, the result has been a system of interlinked processes combining political, economic and legal expansion of certain countries to the detriment of others[34]; the establishment of anti-corruption agencies (de Sousa 2010, Passas 2010) is the most evident sign of such mixture.

Certainly, the economic havoc triggered in 2001 did not adjust well to the governmental and international rhetoric of anti-corruption. In recent years the cost of living in Kabul increased exponentially. Many judges I interviewed underlined the

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31 In comparative terms, see Hasty 2005.

32 unama.unmissions.org

33 As observed by Thomas Barfield "Corruption that perverts justice is condemned by all, but payments made to keep the process working fall into a class of less objectionable practices that are considered inevitable in all dealings with government officials. As one such official once explained to me thirty five years ago, 'A corrupt official accepts money not to do his job or to do it wrongly, a good official accepts money to do what he is supposed to do anyway, but to do it for you and do it now.'" (2012)

34 As outlined by many scholars (i.e. Shahrani 2002), the political instability that reigns in Afghanistan is not a unique and isolated phenomenon. Rather, it must be understood within a transnational network concerning recent transformations in post-colonial countries.

impossibility of meeting their day-to-day expenses with the stipend they earned. The dislocation of the economic system is also due, among other things, to the strong economic impact of the presence of agencies of the international community. The sudden and non-regulated influx of humanitarian agencies, non-governmental organizations, and intergovernmental and private companies has generated an unsustainable increase in rent in the capital city, a twist in stipends, an increase in the cost of certain primary goods, and the creation of a parallel economic system. For those who manage to enter (temporarily, as is typical for humanitarian agencies) the grassroots of the international system, economic conditions improve substantially; for all the others – the great majority – poverty becomes more extreme.

Another effect of this economic havoc is that a competent judge is able to leave his lower salaried job to become a consultant to an international organization committed to the implementation of the rule of law in Afghanistan. (For judges, this means going from a monthly wage of approximately $60 to a salary of at least $500). This phenomenon, in the long run, contributes to the weakening of judicial institutions that are already structurally devastated.

These economic conditions become gangrenous inside the actual political system, which is unable, among other things, to manage the international interference and govern the process of reconstruction. Moreover, the political system is "invaded" by warlordism[35] and becomes enslaved to nepotistic mechanisms.

Finding a disconnect between anti-corruption rhetoric and the creation of an economic system that is favourable to corruption is not rare in a reconstruction context such as that in Afghanistan. But there is more to the story. It must be emphasized that frequently, in the humanitarian-international language, the fight against corruption becomes a founding element in the attempt to export/import the Western rule of law[36]. The fight against corruption can be seen, in other words, as a *dispositif* of legitimization of movements of legal expansion[37] carried out in the context of the particular geopolitical structure that, in Afghanistan, showed its most violent face[38].

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35 In 2004, among twenty-seven ministers, four were warlords or heads of factions: Mohammad Fahim, Mohammad Mohaqeq, Sayyed Hussain Anwari, Gul Agha Shirzai. At least another three where in some way linked to the *warlords* system: Mirwais Saddiq (son of Ismail Khan, first undisputed leader in Herat, then governor of the same city and ultimately Minister of Energy), Yunus Qanoni, and Abdullah Abdullah. Out of thirty-two governors nominated in 2002, at least twenty were commanders inherited from civil war. At the administrative level the situation mirrored that of high ranks, with persons without competence who covered posts, more or less important, only because affiliated to this or that personality (Giustozzi 2004).

36 See for example Wiler, Katzman 2010. In comparative terms, see *"Combating Corruption for Development: The Rule of Law, Transparency and accountability"* (United Nations Public Administration Network, 2002).

37 The expression refers to "the enduring influence of legal systems introduced by powerful nations into nations or regions subjected to colonial control or strong economic penetration during the past five centuries" (Schmidhauser 1992: 221).

38 From this perspective, transnational expansion of the rule of law can be read as a further sign of the process of reconfiguration of the sovereignty of the nation state; a process that is governed by specific relations of power on a planetary level (Escobar 2004) in relation to which state institutions are restructured.

The culture of rule of law (Kahn 1999; Ehrenreich Brooks 2003) is seen as an anti-corruption culture, which proposes again the dominant legalistic discourse that posits law and corruption as antithetical. However, it has been observed on several occasions that the two are, in fact, linked and indeed reciprocally constitutive (Anders, Nuijten 2008), and that the corruption system becomes intelligible when understood in its tight relationship to the practice of law. The current judicial reform in Afghanistan has been accelerated since 2001, but its roots go far back to the early 19th Century. It is important to point out that the imposition of the Western rule of law by overdetermining the relation between socio-normative procedures and the ideology of legalism contributes to the structuring and institutionalization of certain forms of socio-normative re-adaptation. Trying to re-write the relation between the individual and the social group on the basis of monopolistic exigencies of the state over the law (Grande, Mattei 2008), the order imposed by the rule of law aims at releasing the subject from the system of practices and values in which he/she recognized him/herself, and in its place establishing an apparatus of justice that embodies an international set of standards of rights. However, this hegemonic apparatus immediately appears to be inefficient in being able to satisfy the sense of justice invoked by the citizens, and so bends itself to reaffirmation practices of compensation and abuse of power. In these circumstances the phenomenon of corruption takes root, through a process that, to borrow Bohannan's expression (1965), we could define as "double institutionalisation": that is, exchange procedures, social hierarchies and practices of the exercise of power that are affirmed at a level of social practice, find again, in the judicial system, a possibility of reaffirmation (of re-institutionalization) assuming a legal connotation.

Narratives of corruption

In Kabul, it is almost impossible to hold a conversation with someone regarding the judicial system without repeatedly hearing the word "corruption" (in its various declinations). Stories about corruption, it could be argued, dominate the discourse on state justice.

As Akhil Gupta reminded us, the phenomenon of corruption cannot be understood outside the narratives of corruption. The experience of corruption takes place in a space over-determined by stories linked to corruption, stories whose repetition allows the social actors to make sense of their experience inside the social drama in which they are involved (2005: 6). The narratives of corruption can even assume an importance that Turner calls "religious" but which could perhaps be more appropriately defined as "occult"[39] "in the sense that they operate with concepts of secret powers controlling the material world" (2008: 128). Narratives of corruption articulate themselves on various levels, from rumours to international rhetoric[40]. Thus, they have a strong influence both on ordinary practices and on institutional politics. The power of the stories of corruption has, for example, pushed my friend

39 From the Latin *occultus* (hidden), referring to the knowledge of what is hidden, not visible.

40 The rhetoric of anti-corruption can at times reach a level of exasperation: socio-biological programs, for example, are actually formed that promote the hiring of more women in public institutions because it is believed they are more apt to act ethically (see Alhassan-Alolo 2007).

Basir[41] to affirm "*Een qazi fased ast*" ("This judge is corrupt") at the moment in which a judge of the Second District refused to let us attend the hearings he chaired.

In a hearing on 22 October 2007, at the Court of the Second District, after having heard the involved parties in a dispute related to land, the judge Sayed[42] stated:

Mr Faid presented many documents. But I recommend Mr Faid, do not give anybody money to try to close this case. If anyone asks you for money tell me who it was. Here we represent the law and whatever we do we do in front of God, and then we will answer Him, and how will we justify our dishonesty?

With the intent of informing all those present (including the researcher) that what is normally done in tribunals in that case would not have been tolerated, the judge reasserted in an institutional site the widespread occurrence of an illicit practice. Thus, narratives of corruption permeate the judicial discourse even when, at least in appearance, such practice is not accepted. The presence of an "external figure" (myself) apparently played a relevant role in pushing the judge to take a position about the dialectic "corruption *versus* anti-corruption".

This climate of corruption seems to expand rapidly and runs through not only the judiciary, but all the state institutions. The following statement, made to me by judge Sayed in a conversation at the end of the hearing, was very significant*:*

With the wage we have, it is difficult to maintain one's family. To become a judge I have studied, worked a lot, and my wage does not even reach one hundred dollars a month. There are people who earn much more than a judge without being trained or qualified. Young people prefer to work for international organizations. A guard within an organization or a driver earn much more than a judge. So, it is not strange that many cases end when one agrees with the judge or the prosecutor (...) I never took money. But in Afghanistan, if you need something you have to pay. Some years ago my father needed a document. He went several times to the Ministry office [Sayed did not tell me which ministry] *and they told him to go back, that there were problems. My father needed it, so I went, I made a deal with an employee and few days later my father held the document in his hands. Without doing so you do not obtain anything.*

Judge Sayed seemed to distinguish between bribery at the level of "Justice" and the Kafkaesque bureaucratic system that characterizes the governmental and provincial administrations. In his opinion, it is one thing to bribe a judge, and another thing to get hold of a document by getting around the inefficiency of the system. In this way, the judge put his job at a superior moral level; in fact he stated:

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41 Basir received an education in Law at the University of Kabul. His help during my research in Afghanistan has been crucial for accessing judicial institutions.

42 Fictitious name to protect the identity of the judge.

Being a judge is not a job like any other. It is not a job that involves the state solely, but it involves faith, justice. It is easy for a Muslim judge to end up in hell, because only Allah is right. (...). The judge has to work for justice. If one counts the names of honest and competent judges one does not cover the fingers of one hand.

Sayed was obviously conscious of the context within which he has to work and described his role in terms of an attempt to "do his best for justice". This implied, from his point of view, that on one side one has to adapt to the "system" (that is, to exploit the weaknesses in issues of little relevance; live together with colleagues considered highly corrupt and corruptible; and comply with certain consolidated practices), and on another side it is necessary to emancipate oneself from it (that is, abstract one's work in terms of "justice and faith"). This abstraction is translated daily in a personal "common sense", in a discretion that tries to satisfy the recognised ideals.

The judge thus underlined two important aspects linked to the phenomenon of corruption: the will to answer to an ideal of justice that is, to him, indissolubly linked to religious belonging; and the necessity to face certain economic realities. Regarding the latter, judge F.H. working within the Provincial Office, stated:

For a woman it is even more difficult to be a judge, because the political context is what it is. I know several colleagues who decided to abandon their assignment. Until now, I resist, because I am convinced that this effort will lead us to something; the objective is to build an equity system for women and men in this country. (...). Corruption is related to survival. If you are a judge or a teacher in Afghanistan you cannot support your family with the state stipend. Nowadays it is impossible to live in Kabul with the little money that the state acknowledges. (...). Apart from working in a dangerous context, we are in no way protected by the government. In fact, I suffered several threats in the past few years. Little money and no protection. Is very difficult to carry out one's job with such conditions[43].

Such economic conditions become fertile ground for the practice of corruption, insofar as they create a social context that is rife with tension between processes of nationalization and mechanisms of resistance. The expression used by the judge of the Provincial Office "corruption is related to survival" can refer to a logic of *savoir faire* within a context where neoliberal economic models are programmatically re-proposed, and where, at the same time, scarcity of resources and political tension are the reality. In tribunals, even in those cases where there is no act of corruption, the weight of the climate of corruption (apart from the pressures, direct or indirect, of the national and international political system) introduces this logic of *savoir faire* in the sphere of judgement, reformulating a judicial practice that, as we will see, is articulated in a practice of compromise. An easily imaginable consequence is that for those who do not have money and

43 Interview of 31 March 2008.

important friends, the possibility of solving daily injustices through the judicial system becomes an ever blurrier mirage.

Thus, the climate of corruption plays an important role in making it difficult to gain access to justice, in a double sense: on one hand, the stories of corruption precede judicial experience and mould people's prejudice (characterised by mistrust) so that they have even less incentive to turn to judicial institutions (which people already consider to be distant from value-regulatory references to which they refer daily to solve problems and sort out controversies); on the other hand, the high percentage of judges who are involved in acts of corruption (affirmation based on the declarations of judges and prosecutors interviewed and the testimony of persons met who have had judicial experiences in Kabul), as well as the impact of the political system on the work of the judges, exacerbates the inherent social inequities that play out in judicial practice, reifies social hierarchy and penalizes the weakest in society who are unable to afford the bribes necessary to get the action by the court.

Many people I interviewed complained that they lost their lawsuit because the judges (or others acting on their behalf) were bribed by the opposing party in the case. These complaints do not prove whether in specific cases the judges had actually made illicit agreements with one party, but they are in any event indicative of uneasiness, mistrust and disrespect towards judges and judicial institutions. We should not exclude the fact that where a civil case is not concluded with an acceptable agreement for both parties involved in a dispute, but with the "victory" of one, the damaged party accuses the judge of having being bribed. Thus, the idea of corruption is compounded by the difficulty experienced by many Afghan citizens to understand the "rules" of judicial institutions and accept a model of justice that is perceived to be distant and imposed externally.

In Kabul courts, prejudice, structural decline, hegemonic impositions and corruption are found, exposing as myth the ideology of legalism that would represent judicial practice as mere exercise of jurisprudential nature[44]. Judicial practice, instead, emerges as a form of institutionalized social bargaining through which is possible to observe the complex socio-political negotiations that characterize the process of the centralization of justice underway in Afghanistan.

The narratives of corruption are structured through a lexicon of institutionalisation. Corruption, in other words, becomes so in the moment when the

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44 In March of 2008, thanks to my friend Shahim, I was able to participate in some classes held by the International Development Law Organization at the University of Kabul. During one of the last lessons, the teacher gave students documentation of some court cases and asked them to describe the procedure they would have used to resolve each one. Having been present at many actual court cases, I was struck by the gap between the judicial praxis which one witnesses in the courtrooms of Kabul, whose settlements are aimed at finding an accord between the parties involved in an effort to avoid disturbing preexisting social stability, and the settlements laid out by the IDLO teacher, which were aimed at identifying legislative provisions that will support the judges unilateral decision. The gap between judicial praxis (influenced by custom and external pressures) and the abstraction common to the classes was reflected in the objectives of the class itself, one of which was to promote standard legal models, in line with Afghan law and respectful of international agreements.

state imaginary of justice attempts to impose itself as the primary form of collective imaginary of justice, circumscribing normative practice within the borders of law.

Discourses on corruption can, in brief, be seen as collective narratives that, on the one hand, deny the dichotomy between "state discipline" and "individual desire" (Hasty 2005) by defining and politicizing the actual historical-national conjuncture of Afghanistan, while on the other, they tend to expose the tight relation between the imposition of a model of justice and its potential drifts.

Judicial practice and the poetic of compromise

In the civil cases that I observed in the courts of Kabul, the culture of settlement emerged as a fundamental characteristic. Usually, the court plays a mediating role, with the objective of finding an acceptable solution for all the parties involved without upsetting the pre-existing social equilibrium. In the daily application of judicial procedures, the order of reference of law is grounded upon customary references and historically rooted social practices. Generally speaking, a single case may be tackled in different contexts such as the court, domestic environment, the office of the prosecutor, and sometimes even in the office of an organization or of a lawyer. The inter-familiar settlement does not represent an alternative to pursuing a case in court but remains the fulcrum of the process of conciliation. The courts, on the whole, do not act as a safeguard against conflicts. Instead, they attempt to mitigate the conflicts and/or to preserve a certain equilibrium. Moreover, it is not at all certain that the parties involved in a dispute will respect the decision of the court (the enforcement mechanisms are often ineffective). As a result, mediation and the culture of settlement emerge as the primary features of the civil process.

In criminal cases, on the other hand, it seems that a precise hierarchical order between judges and the accused is being re-established: the search for agreement leaves space to the judge's authority, who attempts to legitimatize himself through the *force of law*[45]. This authority does not emerge only in the moment of the sentencing but is evident in the spatial arrangement of the protagonists (the accused in criminal cases sit at the back of the room, sometimes chained at the wrists and ankles), in procedures that involve the way the body is used (in criminal cases, the accused are made to stand while talking), and in language (the way to address the judge shows reverence, while the judges talk to the accused in a more severe manner). Further, while in civil cases the negotiation is already evident in the procedure of composition of the quarrel, in criminal cases negotiation is manifested in the implicit criteria the judges use to reach the verdict. The complex relationship between theory and practice in the judicial field gives way to careful legal discretion not to betray the forms of authority and respect recognised within the social context in which the judge works. By ignoring these aspects and pushing away the entrance of consolidated values and customary practices, the fragile and unstable social legitimacy of the judge would fail completely.

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45 The use of such expression initially refers to the reflection by Derrida (1994). The ethnographic analysis pushes then to consider the *force de loi* not only as one of the constitutive elements of power that imposes itself in the name of law, but also as a condition built daily through negotiation practice.

The government and international agencies, for their part, condemn resorting to customary practices and to *do-it-yourself* justice, trying to affirm the priority and supremacy of the judicial system as a useful instrument to extend central political power[46]. Nevertheless, the promotion of the state system of justice is not accompanied by an adequate attempt to solve the problem of the inaccessibility to judicial institutions; nor does it rectify a structure worn out by interests and powers which find in the actual process of reconstruction the possibility of reaffirmation, even as their shape and language have mutated.

In any case, despite the position expressed by the government and international agencies, the resolution of cases appears decipherable within a poetic of the compromise. The judges, on the one hand, represent an instrument of extension of the project of centralization of justice, in relation to the project of stabilization of the state system (considered within the reformulation of sovereignty in the transnational "space"); on the other hand, they constitute the point of convergence between different normative systems that result in a form of negotiated justice that strongly reflects the influence of Islamic principles, Western models of justice and practices and values linked to the customary sphere.

Keeping these aspects in mind, insofar as the climate of corruption becomes a constitutive element of the Afghan judiciary, the work of the judges in the actual system consists of looking for a balance between moral ideals, social relations, economic means and forms of bargaining. This inevitably weighs upon the resolution of controversies and the definition of the verdicts. From this point of view, the culture of settlement, resorting to customary practices, and the interaction between forms of authority and strategies of legitimization configure the field of action of judges, which is consumed in a poetic of compromise in which the sacrifice of the ideals of justice is justified by the grammar of survival.

Inaccessible pluralism

In Kabul, the complex fabric of customary practices, state judicial mechanisms, references to principles of Islamic law, and absorption/imposition of Western models of justice constitute the normative substratum that connotes daily practices to which individuals and families resort to solve problems, resolve conflicts and take decisions. Such interweaving does not imply, in practice, a clear distinction between the several normative reference systems. In short, empirical evidence leads one to view each in strict relation to the others.

By following the work of Saber Marzai, a prosecutor in District 11 of Kabul, I was able to observe several cases, starting from the accusation to the hearing in court. Discussing the issue of access to justice with him, Saber told me:

It is improbable that a case is brought to the official legal system without having first passed through discussions and decisions of various members of the family and

46 Issue that, moreover, poses serious questions regarding the independence of the bench.

suggestions of elders. If a woman comes in this office because the husband beats her, the first thing that one asks her is if she tried to talk to her family, or to her husband's family. In this way the woman can avoid other problems. Solving a problem in court or in a jirga or within the family is not a question of choice. Sometimes it can be dangerous to tell others about a family problem, it can cause violent reactions -- even very violent. Many people do not think it is a good idea to reveal family problems to strangers. It is better to talk to an uncle than a policeman, who might even ask for money. I saw many women who were beaten by their father, their husband or their brothers because they conferred with the police, or came here directly. (...). If you think about the problem of corruption and the fact that many prosecutors and judges have not even studied law (...). It is difficult for a poor person to have a just trial. I should not tell you these things. (...). If we speak of civil cases, then I can tell you that people come back and forth. Then they might solve the problem on their own, which is sometimes better. When something serious like a homicide occurs, it is a different story[47].

In Kabul, pluralism is not inherent in the possibility of choosing to which reference system to resort to, but pertains to the mixture of meanings, practices, logics of power and values that intervene when persons face matters of normative order. The normative space is thus configured as a space for bargaining that implies, among other things, the inability to address judicial institutions in a free and autonomous way. This inaccessible pluralism produces an inevitable effect in Kabul: that of leading many people to take law into their hands. For the multitude of people forced into dire socio-economic conditions, the resort to customary assemblies such as *jirga* and *shura*[48] is a difficult road to take, and, when it is taken, it only confirms the importance of such conditions even in the resolution of problems and disputes. In courts, on the other hand, corruption, external pressures and lack of resources put the system at the mercy of the most powerful. In this sense it is possible to affirm that the resort to (and for certain aspects the worsening of) certain customary practices at a familiar and inter-familiar level is a consequence of the actual system of justice and of the politics that have guided it. The parallelism of tradition-customary practice is not, as a consequence, sufficient to explain the implications and value of certain practices that do not simply represent a legacy of the past but rather a contemporary tension between forms of power, models of justice and structural injustices, the resonance of which goes much further than simple local dynamics.

The phenomenon of corruption is certainly relevant in this context and is directly linked to the problem of access to justice. In fact, although recourse to corruption can, in some cases, mitigate the barriers and delay imposed by the judicial

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47 Conversation of the 12 September 2006.

48 Social institutions spread all over the country and made up of important men at the local level. They are not permanent institutions but are created when there are important decisions to be taken (at the level of the community) or conflicts to be solved (for example, conflicts between families). However, the assemblies are not only functional to the resolution of disputes but also play an important role as communication channels among the Afghan population. The assembly carries out a relevant part in the production of public consent, both in times of peace and war. At the local level, the members of the *jirga* and the *shura* can take positions on issues regarding the construction of infrastructure; they can mobilize a protest or negotiate with international organisms. There are several "levels" and forms of assembly, for a synthesis see Hanifi 2009.

system (i.e., difficulty in understanding the legal language, the ability to fill in documents or whatever is requested by the institutions, very lengthy waiting times for the conclusion of cases, the lack of sufficient numbers of defence attorneys, etc.), it also has the consequence of exacerbating social-economic asymmetries. Very poor families, always more numerous in the capital, are increasingly turned away from judicial circuits because they do not have the financial means or important "friends" who could give them easy access to the system. Without the possibility of illicitly getting around the extreme bureaucracy of the system, illiterate and poor people (very often completely unaware of the way judicial institutions function) are put off from turning to state justice, which is structurally unable to take the responsibility for these people. The (inter)familial sphere remains in many cases the only possible recourse to solve a problem or settle a quarrel. But where customary practices clash with other social phenomena such as unemployment, lack of accommodation, or alienation from one's social group, the result is the detachment between social practices and the system of values recognized by the social group. A consequence is the radicalization and strengthening of certain solution-methods, like the use of forced marriage in terms of compensation[49]. For these reasons, I believe that the common expression "legal pluralism", used to describe the normative Afghan scenario, is losing any meaning. In Kabul, an inaccessible normative pluralism is in force which has to be tackled if one wants to confront the problem of corruption.

Conclusions

The four levels of analysis introduced here are evidently interlinked; the distinctions are merely analytical ones, to help highlight the complexity of the phenomenon of corruption within the Afghan judiciary.

With the Karzai administration, which seems to be ever more corrupt (ARGO 2008), certain measures have been adopted to "moralise the state apparatus" (ibidem). Among these there are: the institution of the General Independent Administration of Anti-Corruption in 2004; the approval of a law against administrative corruption also in 2004; the signature of the UN Convention against corruption again in 2004, which the *Wolesi Jirga* approved in August 2007; the decree of 2008, amended in March 2010; and the creation of the High Office of Oversight. At the same time, the international community has increasingly expanded its technical and financial support for anti-corruption actions, and several civil society organizations have stepped up their engagement in the big fight against corruption (Gardizi, Hussmann, Torabi 2010). However, until relevant actors acknowledge the complex dynamics involved in the processes of legal modernization and the role played by the politics of centralization of justice in re-institutionalizing corruption, the "paladin anti-corruption agencies" and international agreements will not properly address the problem of corruption.

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49 There are also cases where customary assemblies, frequently with the support of local governors and/or *mullah*, resort to this type of practice. In these cases, what is at stake is the political role of customary institutions as well as their socio-normative function.

The phenomenon of corruption, even if it enjoys a certain fame, carries the toll of legalistic interpretations that obfuscate its historical roots and its social and political importance. In this article I analyzed corruption as an interstitial moment of the encounter between processes of statalization, legal transplanting, and re-adaptation of local socio-normative practices. Within what we might call the reconstruction scene, the paradigm of legal pluralism, widely used to describe the Afghan legal system, loses its pertinence, since the asymmetric overlapping of different normative reference systems eventually results in an inaccessible pluralism with the exclusion of certain strata of the Afghan population both from customary and from judicial institutions. It would therefore be worth considering the complexity of corruption as a liminal phenomenon that reflects (like a mirror on the doorstep) the mechanisms of inclusion and exclusion from the so called palace of justice.

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Constructing Corruption: Narratives of Panchayat Justice under British Rule During the Early Nineteenth Century

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Abstract:

This article examines the ways in which the structures of norms of the British administration of civil law in colonial India constructed the meanings and definitions of corruption. Its evidentiary base is founded upon the analysis of several particularly notorious and complicated corruption cases from the early 1820s; that is, the cases administered by William Hockley, a British judicial administrator who was charged with bribery and corruption of panchayat cases. While his actions may have come under scrutiny at any other time, his malfeasance in office in 1820-1 was considered to be especially serious because they arose within the first years of the British occupation of the Deccan. Thus, the record of the investigation, including, petition and interrogations, is both extensive and unique for this period.

Through an analysis of these complaints, it is argued that the British norms brought to the new judicial arrangements in the Deccan were adopted, re-shaped, and reconstructed by Indian litigants who sought to pursue their cases in British-administered panchayats. Their cases focus upon the construction of stories that fit the new administration's definition of justice, equity, and fairness.

Corruption has been defined and described in any number of ways. In most definitions, 'political' corruption has been taken as the standard unit of analysis. Thus, some of the most common attempts to define corruption describe it as the supersession of the public interest by private interests, the abuse of public political offices for personal gain, or the use of public offices as an income-producing unit.[50] Equally, nearly all definitions assert that corruption can only be judged against a set of norms that circumscribe proper behavior in public office.

Less common, however, has been the attempt to closely analyze the normative standards employed by the victims; that is, the standards by which victims of corruption evaluated, recognized, and even sought to adapt to corrupt practices. The cases presented here seek to analyze these practices, but in a rather unusual setting. In the first instance, it expands upon the most common descriptions of political corruption by highlighting the problem of judicial corruption. Rather than subsume

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50 Of course, these are much over-simplified characterizations of several important schools of thought and are employed only for heuristic purposes. For a cogent and perceptive analysis, see Mark Philp, "Conceptualizing Political Corruption," in A. J. Heidenheimer and Michael Johnson, eds., *Political Corruption: Concepts & Contexts*, 3rd ed. (New Brunswick, N. J.: Transaction Publishers, 2002), pp. 41-57.

judicial corruption into the political sphere, this analysis of judicial corruption presents a unique opportunity to discuss the evolution of contemporary norms of justice, equity, and fairness, key rhetorical elements of British sovereignty in India. Thus, close attention is paid not only to the practice of corruption, but also to the languages and meanings that were created to explain and comprehend what contemporaries considered to be legitimate and illegitimate behavior.

Second, these cases occurred at a unique historical juncture, during the early nineteenth century when British control of western India expanded significantly and new methods and systems of judicial administration were being tested and implemented. It thus presents an opportunity to assess both transnational and cross-cultural perceptions of justice and corruption. Corruption had long been a key concern of the British East India Company, but its importance in the governance of India had been given even greater emphasis by the impeachment and trial of Warren Hastings, governor-general of Bengal, which dragged on between 1787-1795. Key elements in this trial were charges of corruption through bribery and extortion, charges from which Hastings was eventually exonerated.[51] Nevertheless, the legacy of this trial and therefore the relationship between the East India Company and the British Parliament clearly made Company officials quite sensitive to similar instances of corruption during the first decades of the nineteenth century.

Finally, the cases examined below occurred at the local level and thus can provide a view of corruption and its effects from the ground up, as it were. Principal among the new methods of administration in this early period was the attempt to incorporate local panchayats (or village councils) into the British system of justice. These case studies thus can provide access to popular conceptions of corruption and justice, an aspect of the study of corruption that heretofore has been neglected in historical enquiries in favor of discussions of the analysis of corruption in high political or socio-economic theory.[52] Therefore, this article examines several cases of British judicial corruption for evidence of how contemporary standards of justice and equity in western India were transgressed, how the victims' notions of corruption were created and developed, and the role of British administrators in this process.

Unique among the studies of modern corruption in India, Akhil Gupta has sought to employ ethnographic analysis to interrogate the discourse of corruption

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51 See P.J. Marshall, *The Impeachment of Warren Hastings* (London: Oxford University Press, 1965) and, for legal-historical perspective, James Lindgren, "The Elusive Distinction between Bribery and Extortion: From the Common Law to Hobbs Act," *U.C.L.A. Law Review*, vol. 35 (1987-1988), pp. 858-861.

52 Examples of such analyses for this period include Philp, *ibid*.; Bruce Buchan and Lisa Hill, "From Republicanism to Liberalism: Corruption and Empire in Enlightenment Political Thought," http://www.arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/political-theory/buchan-hill.pdf, accessed 25 March 2011; Lisa Hill, "Adam Smith and the Theme of Corruption," *The Review of Politics* 68 (2006), 636–662; Brian Smith, "Edmund Burke, the Warren Hastings Trial, and the Moral Dimension of Corruption," *Polity*, 40:1 (January 2008), pp. 70-94; W. D. Rubinstein, "The End of 'Old Corruption' in Britain 1780-1860," *Past & Present*, No. 101 (Nov., 1983), pp. 55-86; Philip Harling, "Rethinking 'Old Corruption'," *Past & Present*, No. 147 (May, 1995), pp. 127-158

and its popular meanings in contemporary village India.[53] Key among Gupta's insights has been the recognition that discourses of corruption can be deployed not only "as a means to demonstrate how the state comes to be imagined"[54] by citizens and subjects, but also as a "fecund signifier" of "conflicting systems of moral and ethical behavior."[55] Such insights can be applied equally albeit with care to the study of corruption during the early colonial era. During this period, western Indian society found itself enmeshed not only in competing concepts of the state, but in the rapid transformation of administrative structures and governing practices. In this situation, western Indian litigants struggled to comprehend and adapt to the changing legal and judicial environment as East India Company institutions replaced those of the former Peshwa. Simultaneously, British Company officials sought to comprehend "native" judicial institutions and adapt their 'rule of law' to them.

In this remarkably fluid space, not only were openings created for new practices of corruption, but also concepts and discourses of justice and corruption necessarily became contested and the site of conflict.[56] In the cases examined below, attention is paid to both of these elements. As Gupta notes, "the 'system' of corruption is of course not just a brute collection of practices whose most widespread execution occurs at the local level. It is also a discursive field that enables the phenomenon to be labeled, discussed, practiced, decried, and denounced."[57] Thus, an understanding of the colonial origins of concepts and practices of corruption may be understood as essential to an understanding of their modern iterations. Equally important, however, is the fact that this mode of analysis is an especially appropriate one for the examination of legal cases. For quite some time now, there has been a confluence between the study of law and the study of narrative.[58] It is no longer unique to describe case-law analysis as the study of competing stories, or of the imaginative reconstructions of events, or the transactional relationships between narrators and their audiences. Indeed, the cases presented below should not necessarily be taken as expressions of 'fact,' but as stories created to convince and persuade a specific audience, in these cases, the regional East India Company officials to whom they appealed their complaints. However, it is perhaps only in this guise that we can come to a clearer understanding of how litigants fashioned themselves before the courts, what expectations they brought to the judicial process, how they sought to adapt to the changing structures of judicial administration during this period, and how they formulated and expressed what they thought was just.

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53 Akhil Gupta, "Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State," *American Ethnologist,* vol. 22: no. 2 (1995), pp. 375-402; *idem*., "Narratives of Corruption: Anthropological and Fictional Accounts of the Indian State," *Ethnography*, vol. 6: no. 1 (2005), pp. 5-34.

54 Gupta, "Blurred Boundaries," p 389.

55 *Idem*., "Narratives of Corruption," p. 7.

56 For a compelling analysis in the African context of the ways in which the transition to colonialism opened new social and legal spaces, see Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth, N.H.: Heinemann, 1998).

57 *Idem*., "Blurred Boundaries," p. 385.

58 For just two of the more prominent scholarly examples, see Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1998) and in its historical iteration, see Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* (Stanford: Stanford University Press, 1987).

As is well-known, the panchayat, or village council, is a traditional forum for the adjudication of disputes common to Indian society. During the late eighteenth and early nineteenth centuries, British administrators working for the East India Company, led by such powerful and influential men as Thomas Munro and Mountstuart Elphinstone, roughly understood the panchayat to be an indigenous form of Indian arbitration although this perception was often confused as well with an understanding of the function of the panchayat as a type of 'native jury.' Undoubtedly, panchayats came in any number of forms and followed a variety of different customary practices. While the ideal-type of panchayat may have consisted of five male members, hence the derivation of the term from *panch* or five, it was not uncommon in the west of India to find panchayats of three, five, seven or sometimes even more members. Moreover, as Upendra Baxi and Marc Galanter noted several years, while some panchayats were very informal others could be quite formal and legalistic. "Some panchayats," they wrote of pre-British era panchayats, "purported to administer a fixed body of law or custom; some might extemporize. In some places and some kinds of disputes, the process was formal and court-like. Some panchayats were standing bodies with regular procedures, but many of these tribunals were not formal bodies but more in the nature of extended discussions among interested persons in which informal pressure could be generated to support a solution arrived at by negotiation or arbitration."[59] British administrators recognized several advantages to the employment of panchayats over British courts. Most importantly, they saw in the panchayats a means by which to gain access to local customs, language, and knowledge as well as a means by which to provide cheap and efficient justice to their new subjects. Because they were perceived of as 'native courts,' informal, and free from the expensive and lengthy forms and pleadings common to the British legal system, the panchayat became a foundational element of the British judicial project in western India.

However, the panchayat system as practiced in pre-colonial western India was quite different from British preconceptions. In many disputes in the Bombay Presidency, especially those involving debts and rights to landed property, the panchayat adopted highly legalistic and formal practices. In such cases, documentary evidence was relied upon to establish legitimate claims and the panchayat was expected to produce several documents in turn establishing and explaining their decision. Moreover, panchayats were composed of representatives voluntarily selected by each party to negotiate a settlement rather than having the decision of their dispute left to a group of elders, disinterested parties, or judges.

The British emphasis on the role and functioning of the panchayats served to bureaucratize and regularize panchayat procedures. In particular, British authorities established certain standards of procedural justice that together came to constitute a 'fair' panchayat. Reflecting some of the most common British practices of arbitration, these standards included the presentation and validation of written

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59 See Upendra Baxi and Marc Galanter, "Panchayat Justice: An Indian Experiment in Legal Access," in M. Cappelletti and B. Garth (eds.), *Access to Justice: Vol. III: Emerging Issues and Perspectives* (Milan: Guiffre; Alphen aan den Rijn: Sijthoff and Noordhoff, 1979) pp. 341-386.

documentary evidence. As we shall see below, the production of panchayat awards, bonds, and memos took on striking significance and became key elements in the construction and presentation of the narrative of litigants' cases. In addition, as in the British common law of arbitration, litigants could not be forced into these proceedings. Thus, in panchayat cases, evidence of compulsion were key signifiers of injustice. Finally, the voluntary nature of panchayat proceedings in western India included the litigant's authority to appoint their own representatives, or *panchayatdars*, to serve on the panchayat. Such procedural justice therefore was deemed by British administrators to be an essential element of panchayat justice precisely because they were most comprehensible in terms of British legal practices. As will be suggested below, Indian litigants responded by shaping their stories and cases upon precisely these issues. In part, these new narrative elements were constructed through the process of the British interrogation of witnesses and litigants, but they were equally constructed by the litigants themselves who sought to adapt their justice claims to British standards and practices.

As previously noted, according to British administrators, the great advantages of the panchayat over British courts lay in its access to local knowledge as well as its relative cheapness. While litigants were obligated to provide food and drink for the members of the panchayat during the time in which they met, the proceedings of the panchayat were not matters of court record. Thus, the litigants were spared the expense of travel to the British courts located in the major towns or cities as well as the costs of submitting evidence on official stamped paper. Perhaps of even greater importance was the fact that members of a panchayat, being local men of some standing, were possessed of the knowledge of local languages, personal experience, and understanding of local customs and practices that could never be fully acquired by British judges. Under British administration, the legal purview of panchayats was exceptionally broad. Archival records indicate that they attempted to settle disputes regarding caste, marriage, maintenance, adoption, inheritance, personal injury, and employment. However, the panchayats were undoubtedly most active in the settlement of commercial disputes. To give but one example of many, in the Collectorate of Khandesh (now Jalgaon) to the north-east of Mumbai, in the first six months of 1826, more than half of the disputes settled by panchayats were cases concerning contracts and debts.[60]

While there is an extensive archival record of the attitudes, inspirations, and motivations of the British administrators who sought to invigorate the panchayats during the early colonial period, evidence of the attitudes and aspirations of Indian litigants is naturally much more difficult to come by. However, this is not altogether impossible. Indeed the most striking evidence of these attitudes survives in the petitions and appeals of litigants, especially in those cases involving alleged corruption or gross error, the only two grounds upon which panchayat awards could be appealed. The cases presented here thus open a unique window not only upon concepts of judicial corruption, but also upon litigants' perception of and response to it.

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60 Maharashtra State Archives, East India Company (hereafter MSA, EIC), Judicial Department, Annual and Periodical Reports, Vol. 1/102, 1826.

Such issues became prominent in the first years of the 1820s under the local administration of William Brown Hockley, an East India Company officer who was later charged and convicted of bribery and corruption in several panchayat cases. Considering the fact that Hockley's malfeasance in office occurred during the very first years of the British occupation of the western Deccan, they came under special scrutiny and left a lengthy archival record that includes a number of petitions and interrogations that are unique for this period.

Hockley was an Assistant Collector stationed at Ahmadnagar east of Mumbai. The Collectorate of Ahmadnagar was a province that had only recently been ceded to the British by the Maratha Peshwa at the end of the third Anglo-Maratha War of 1817-18. As such, the organization of British judicial administration was at this time in its very infancy. One of the primary judicial responsibilities of the Collector and his assistant was to promote the settlement of disputes through the convening of panchayats. Over the course of his brief tenure there in 1820 and 1821, Hockley proceeded to cajole, threaten, and intimidate members of panchayats as well as litigants in an effort to extort money from them. Eventually, he was tried, convicted, and dismissed from the service of the East India Company in 1823.

The case of Panderong Krishnu and Lumkray Bullal Narsawey *v.* Hungeykur and Khatgaonkur[61] reveals not only the grievous intervention of Hockley, but it also lends significant credence to the argument that narratives of panchayat injustice were built upon notions of voluntariness, due process, and the valid representation of interests. Among the surviving documents from this case is a petition to the Governor-in-Council, Mounstuart Elphinstone, dated 26 December 1820.[62] The dispute concerned the disposition of property after the transfer of power from the Peshwa to the British. However, in this case, the defendants were *coolcurnee* (*kulkarni*), that is, village accountants, whose office entailed lands and other perquisites for their support. The disposition of three villages near Ahmadnagar became the subject of this dispute after they had been seized by the British and two claimants, Panderong and Lumkray, on the one hand, and the Khatgaonkur, on the other, came forward to claim the lands. Subsequently, Hockley examined the papers presented by both claimants and granted the property to Panderong and Lumkray.

The situation remained stable for almost eighteen months thereafter until a third claimant, the Hungeykur, appeared. He prevailed upon Hockley to call for Panderong and Lumkray to attend to him at the Ahmadnagar adalat. "We accordingly went," Panderong and Lumkray wrote in their petition, "and explained the nature of the case, when we were directed to refer it to a punchaet [panchayat]. We represented that we had nothing to do with the Hungeykur, but without attending to this, the case was referred to a punchaet."

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61 The suffix 'kur', or 'kar,' indicates the town, village, or region of origin or residence, as in the modern 'Mumbaikar.'

62 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 'Translation of a petition from Panderong Krishnu and Lumkray Bullal Narsawey Koolhurnees of the Villages of Wajooray [,] Boojoorg [and] Khoord to the Honorable the Governor, Dahot the 7th Magsur Vud 1742 Lalbahan or 26th December 1820' [hereafter 'Petition']. Contemporary spellings have been retained throughout.

The element of compulsion in submitting to a panchayat became an important element in the British investigation of the case and, in effect, began to structure the nature of the investigation. Further investigations into Hockley's actions left a remarkable record of interrogations of both Panderong and several members of the panchayat. Panderong testified that upon being ordered to submit the dispute with the Hungeykur to a panchayat,[63]

> I said, that I had nothing to do with the Hungaykur, that my Dispute was with the Khatgaonkur, and that I was ready to have a Punchayet with him.
> I had originally complained against the Khatgaonkur, who had placed my Papers in pledge with the Hungaykur, [which] had led to my Wuttun being 'Zubted' [attached], and he also wanted to establish it, that I was his Gaomashta or agent.
> Question – When you expressed your aversion to a Punchayet with the Hungaykur what reply did Mr. Hockley make?
> Answer – He said I must submit to one; and I at length was forced to agree.

Indeed the British investigation became less a matter of the story the witnesses wanted to tell and more of a matter of what the investigator wanted to hear. Panderong and Lumkray tried to explain that as the discussion with Hockley had proceeded, "we then mentioned that as the matter related to a wutun[64] it should be referred to the Jameedars [*jamindars*] and Gataururs[65] (Village Officers) and that the Saheb [Hockley] on seeing their decision should issue such orders as were conformable to justice; this being the practice of our former Government and our country."[66] Hockley, nevertheless, ordered a panchayat "without listening to this."[67] To the British interlocutor, therefore, the legitimacy of the panchayat as the proper forum in which to hear the case was not at issue. Instead, in the eyes of the British, it was whether or not there had been an element of compulsion in agreeing to a panchayat. Thus, the litigants' testimony was directed along this line of inquiry.

The examination of Panderong also provides an interesting insight into precisely how members of a panchayat were selected by the parties. The process often was an exceedingly informal one as litigants endeavored to secure friends,

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63 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 16 April 1821, 'Examination of Pandoorung Krishen as to allegations against Mr. Hockley' [hereafter 'Examination'].

64 In Marathi, a 'wutun' indicated an hereditary estate often associated with a political office.

65 *Jamindars* were local village judicial officials under the Peshwa. The term 'gataururs' may refer to members of a *gota*, or village assembly, a judicial body that had fallen out of use under the Marathas in favor of the panchayat. See V. T. Gune, *The Judicial System of the Marathas* (Deccan College Postgraduate and Research Institute: Poona, 1953), pp. 54-9.

66 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 'Petition.'

67 *Ibid.*

relatives, or allies to serve as *panchayatdars*. Panderong explained that after meeting with Hockley[68]

> I went to search for members to sit in the Punchayet. I met Mahadjee Punt Joshee Poonakur in the Road and told him that I was seeking for Punchayetdars. He advised me to apply to Moro Madhoo Row Daishmookh of Wankooree. I then went to the Daishmookh's house, told him I had been ordered to have a Punchayet, and could get no members, showed him my Papers and asked him to be one of my Punchayetdars to which he agreed, and also desired me to try and get Krishnajee Mahayun as the other. I accordingly proceeded to the house of the latter, and told him what I had before said to the Daishmookh and he in like manner consented to sit for me: the following day, I again attended at the Adawlut and gave in the names of my two Punchayetdars.

It was not uncommon for litigants from the countryside to rely upon the advice of others to secure members of their panchayat, as Panderong was forced to do. Since he was not a resident of Ahmadnagar, he had but little choice. As he noted, he "could get no members." Unfortunately, unbeknownst to Panderong and Lumkray, Moro Madhoo Row was one of Hockley's corrupt accomplices.[69] At their first meeting, Panderong testified that "I was told by Moro Madhoo Row Daishmookh to bring 500 Rupees for Mr. Hockley. I replied that I knew nothing of Mr. Hockley, and the Daishmookh then said 'Bring it to me, and I will place it in Hindoo Mull Sowkoers hands and get your Punchayet decided as you wish.'"[70]

One should not underestimate the sense of injustice engendered by this blatant act of corruption. Although the judicial systems under both the Marathas and the British were replete with payments, charges, and costs of all kinds – to draw up papers, to feed the members of a panchayat, to pay for travel to and housing near the court, or to feed a *tugaza* peon, to name but a few – normative concepts nonetheless required that justice not be for sale. In this regard, the obsession of British administrators with Indian corruption is untenable at best. When Panderong was first approached for the payment, he hesitated but reluctantly agreed. "As we had no resource," the petitioner stated, "and the cause would not be tried without the payment of money, and as we were afraid of losing our wutun, we went round to different places, and having got our relations and a Waree to stand forword [sic], we paid four hundred rupees in cash thro' the hand of the mediator (Moro Madhow Row Deshmookh)."[71] Thus, while panchayats might very well be costly, the plaintiffs certainly were unprepared to entertain this extraordinary charge.

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68 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 'Examination.'

69 Moro Madhoo Row was eventually apprehended for his role in the case and agreed to testify against Hockley. See the letter of 4 May 1821, Henry Pottinger to William Chaplin, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

70 *Ibid.*

71 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 'Petition.'

Shortly thereafter, even further demands for money were made upon them. This time, the plaintiffs balked at the payment. "The next morning," Panderong testified, "after we had eaten something we went to the Adawlut where the Punchayetdars were sitting, and they began to examine us and Pungobha Dahorey [a member of the panchayat] told us the Hungaykurs [the defendant] had agreed to give 1000 Rups., and unless we made up as much we should lose our suit. We said we could not command so much money, and that the Punchayetdars must act as they chose."[72] At this point, Panderong and Lumkray went back to Moro Madhoo Row and demanded their money back, a demand that appears to have been fulfilled but only after several attempts. The extent to which Panderong and Lumkray now acted out of resignation or principle is not altogether clear. Upon some readings, the testimony suggests that both sentiments were involved. Yet, once again, the fact that such extortion was contrary to contemporary standards of panchayat justice and not a matter common to the judicial business of the era needs to be noted.

Much of the remaining testimony from the case relates to the procedures adopted by the panchayat itself, the elements of judicial administration that especially occupied the British in western India. This testimony is especially revealing not only for the insight it gives into how the panchayat was expected to function, but also the circumstances that garnered attention most from British investigators. As the discussions of the panchayat dragged on for over two months, Hockley inserted himself into the panchayat process by aborting the panchayat's investigation and ordering it to produce an award. Although the dispute had evolved into one between Panderong and Lumkray, on the one hand, and the Hungeykur, on the other, the sitting panchayat sought to interview the plaintiff from the original case, the Khatgaonkur. According to the testimony of Rungo Moraishwer Dahorey, a panchayat member for the Hungeykur, early one morning, the *panchayatdars* were all called to meet at the *adalat*:[73]

> Mr. Hockley did come to the Adawlut about 11 o Clock. The whole of the Punchayetdars immediately went to him and represented to him 'that we require the Khatgaon Takleekur Coolkurnies before we could finish the "Sarounsh," that the Hooly was at hand and that we therefore begged to be excused till it was over.' M. Hockley snatched the papers from our hands with some abusive expressions, and told us to get along. We went into the Kucherry where we had been sitting to get our Inkstands &c, and whilst there, a Peon came & called us into the Adawlut. We obeyed the summons, and Mr. Hockley gave back the papers and said 'There is no occasion to call the Khatgaon Tankleejurs. Prepare a sarounsh between these two (the Hungaykurs and Wagoondaykur) and let me have it immediately.' We five persons accordingly went back and prepared a 'Sarounsh' to the best of our judgement.

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72 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 'Examination.'

73 *Ibid*. 'Adalat,' or court.

Hockley's interference was remarked upon in the interviews of other panchayat members and was a significant contravention of panchayat procedures.[74] Equally notable, however, was that fact that Hockley's accomplice, Moro Madhoo Row, had long ago stopped attending the panchayat's deliberations and had been sending his *gumashta*, or agent, to attend in his stead. This irregularity was compounded even further by the fact that Moro ultimately refused to sign the award, or *sarounsh*, and ultimately deputed his agent to do so. Both actions were later uncovered by the investigation into Hockley's actions and both actions seriously undermined the legitimacy of panchayat justice.

Moro's actions may very well have been an attempt to avoid further involvement in the case and perhaps insulate himself from possible prosecution. But the later investigators were clearly troubled by the fact that Moro had not sought Panderong and Lumkray's permission to send an agent to attend the panchayat's meetings and that he had not personally signed the *sarounsh*. Moro testified as to his role in the case on 16 April 1821:[75]

> The two Wagoodaykurs[76] (Sumkrajee [Lumkray] Bullalls and Pandooruung Krishen) came to my house to ask me to sit as their member. I refused twice, but the third day when they met me in the street I agreed, and went to the Adawlut with them. I attended there several times, but did not look at the Papers and I appointed a Carkoon[77] to sit on my part whose name is Shakoo Luximon Govindah an inhabitant of Ahmednuggur.
>
> Question – Did the Wagoodaykurs never tell you, that the Punchayet has not acted fairly towards them and that they had suffered injustice?
> Answer – Yes they did; they said that the Punchayet had not been fair.
>
> Question – What reply did you make to these observations?
> Answer – I told them not to trouble me, but to act as they thought best.
>
> Question – You were one of their Punchayetdars and why therefore should they not trouble you?

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74 See the testimony of Mahadew Gondajee Saupkur, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 16 April 1821, 'Examination of Mahadew Gondajee Saupkur, Shroff, and member of the Punchayet,' who noted "The whole of the members immediately went into the Adawlut with the Papers and represented to Mr. Hockley that the 'Sarounsh' was not ready, and that we required the Khatgaon Tankleekur Coolkurries before we could finish it. Mr. Hockley took the Papers, abused us, and told us to be gone, at the same time observing that the dispute had no connection with the Tankleekurs. We returned to the Kucherry where we had been sitting and about a quarter of an hour after a Peon came with the Papers and ordered us to prepare the 'Sarounsh' between the Wagoondaykur and Hungaykurs instantly."

75 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 16 April 1821, 'Testimony of Moro Madhoo Row, Deshmookh of Wankoree in the Turuff of Kuwelleenuggur.'

76 Wagoodaykurs here refers to Panderong and Lumkray, residents of the village of Wagooday. At various times in the petition and examinations, the village is spelled 'Wajooray', 'Wagooday', 'Wagoondy', or 'Wagoonday'. The spelling that occurs most frequently is 'Wagooday,' which I have adopted throughout to facilitate identification.

77 A *carkoon*, *carcoon*, or *karkun* is a clerk or auditor.

> Answer – I told them that my Goomashtee (who has signed the Sarounsh in my name) had acted like the others.
>
> Question – By whose authority did you put your Goomashtee into that Punchayet?
> Answer – I informed the other members that I could not attend, and therefore, with there [sic] permission, I sent my Goomashtee.
>
> Question – Did you ask the Wagoodaykurs permission to put in your Goomashtee?
> Answer – No I did not.
>
> Question – Did you ever tell the Wagoodaykur you had not signed the Sarounsh and give your reason for not doing so?
> Answer – I told him I had not signed the 'Sarounsh' but said nothing of my reason.

Considering the procedural expectations of British judicial administrators, the connection drawn here between fairness and justice, on the one hand, and the valid representation of interests, on the other, is not surprising. In their eyes, Panderong and Lumkray had secured Moro's services as their duly deputed member of the panchayat and his absence did much to de-legitimize the tribunal's claim to those values.

Moro's refusal to sign the award obviously disturbed other members of the panchayat as well. Krishnajee Mahajun, who served as a member of the panchayat for Panderong and Lumkray, testified that when Moro refused to sign the *sarounsh*, he refused as well. According to Krishnajee's testimony, Moro "then said, if you will sign it first, I will do so afterwards. This I did, and he afterwards caused it to be signed by the hand of Shahoo Goomrah, his agent."[78] One of the Hungaykur's members of the panchayat similarly testified that he had at first refused to proceed without Moro's signature. Rungo Moraishwer Dahorey explained that Moro "said he had sworn not to do so. On hearing this Krishnajee Mahajun and myself likewise declared we would not put our names to it. At last he agreed to have it signed by one of his Dependants [sic] in his name, and then we did so."[79]

The apparent dismay caused by the failure of Moro to sign the award further underlines the importance attached to the elements of procedural justice needed to legitimate an award. However, it also underlines the ambivalence many *panchayatdars* may have brought to their service on these tribunals. Panchayat cases could be long, complicated, and conflictual, as this case certainly was. Service on a panchayat could bring one into conflict with the litigants themselves as well as the

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78 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 16 April 1821, 'Testimony of Krishnajee Mahajun, member of the Punchayet on the part of Nareesawaz.'

79 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 16 April 1821, 'Testimony of Rungo Moraishwer Dahorey, member of the Punchayet..'

judicial authorities. There was a certain sense of frustration and resignation in Krishnajee Mahajun's voice when he was interviewed by the British authorities:[80]

> Question – Has the Wagoondaykur Nareesawuz ever complained to you since or not?
> Answer – Sunkrajee Bullall did complain to me of the manner in which I decided for him and [I] reminded him that I had asked Mr. Hockley to send for the Khatgaon Tankleekur Coolkurnies, and as he had refused I could do nothing else.

Further evidence from this case does not survive, however, other cases corrupted by Hockley also explicate the relationship between British corruption and the claims to procedural justice during this era. For example, the case of Sukhoo Punt Apte *v.* Nilkunt Myraul came to the attention of William Chaplin, the Commissioner of the Deccan, in April 1820 and had its origination in a suit filed by Sukhoo Punt to collect his portion of the revenue returns from two districts in the *subha*, or province, of Joonur. [81] Sukhoo Punt held these returns in partnership with Nilkunt Myraul.[82] Chaplin, whose initial letter is lost, apparently requested Henry Pottinger, the Collector of Ahmadnagar, to inquire into the case, which somehow had resulted in Sukhoo Punt's imprisonment for debt. Relying upon information supplied by Hockley, Pottinger replied that Sukhoo Punt's imprisonment had been the result of two separate panchayat investigations and decisions. Pottinger explained that the first panchayat had found in favor of the Sukhoo Punt, but had not settled upon the exact amount of award. This led the defendant, Nilkunt Myraul, to deposit approximately Rs. 1500 with a local goldsmith to settle the debt. A second panchayat was then assembled to establish the exact amount, an award which eventually totaled Rs. 1326.3.25. Thus, according to the second panchayat, Sukhoo Punt owed Nilkunt just over Rs. 653. According to Pottinger, Sukhoo Punt then protested that the money had never been put into his account with the goldsmith, but since he could offer no proof and also refused to pay the amount in question, he was imprisoned for debt.

In December 1820, Sukhoo Punt was released from prison when Nilkunt stopped paying for his daily sustenance.[83] He immediately went to Pottinger and complained that the final award had not been duly signed by all the members of the panchayat. Pottinger reviewed the *sarounsh* and "was equally vexed and astonished to find that it was not properly authenticated."[84] He then wrote to his subordinate, Arthur Crawford, asking him to find out why the *sarounsh* had not been signed by

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80 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 16 April 1821, 'Testimony of Krishnajee Mahajun.'

81 Henry Pottinger to William Chaplin, 25 April 1820 and Henry Pottinger to William Chaplin, 4 November 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

82 Henry Pottinger to William Chaplin, 4 November 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

83 Under the East India Company's regime, imprisonment for debt was supported only so long as the debtor's sustenance was paid for by the creditor. In the 1820s, this rate was fixed at 2 annas per diem.

84 Henry Pottinger to William Chaplin, 27 January 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

all the members of the panchayat. "A Person called Succoo Puntaply," Pottinger wrote to Crawford, "who has been confined in jail at this place for some time for debt having been lately released he appealed against the award of the Punchayet under which he was imprisoned and on examining that document, I find that one of the members (and that too the only one on the part of the appellant) has not signed it."[85] Pottinger, beginning to doubt Hockley's initial report, concluded rather ominously that "I have also other reasons to doubt the fairness of that award."[86]

In fact, Pottinger had only just begun to uncover the web of intrigue and extortion that marked Hockley's tenure in Ahmadnagar and that had relied upon the manipulation of panchayat justice. As we shall see, Chaplin also had begun to sense the extent of Hockley's malfeasance and within several months would request a formal investigation of his actions by a Bombay solicitors' firm. Pottinger's initial investigation revealed that the dispute had begun about two years previously and that the litigants had taken their case to a panchayat, which awarded the plaintiff just over Rs. 712. Hockley had correctly noted that Nilkunt claimed to have deposited Rs. 1500 worth of gold with a banker, or *sahukar*, in Pune. However, he had not informed Pottinger that the panchayat had also examined the banker and had found that the gold had not been deposited as a security against Sukhoo Punt's claim, but for another purpose altogether. "It was proved," Pottinger wrote, "that the deposit of Gold related to quite a different affair, and had only been brought forward in this instance to mislead the members of the Punchayet, whose decision in every respect was final, and apparently very just."[87] In fact, Nilkunt's deposit was made into the account of the Pune province and not the Junoor province, which he shared with Sukhoo Punt, and "the accounts of the two Soobhas were necessarily to be kept distinct from the very agreements made by the Parties with the Paishwa's Government."[88]

At this point, Hockley interfered in the panchayat proceedings once again and appointed a pair of arbitrators and an umpire to review the original award. The encouragement of dispute resolution through British-styled arbitration had been a standard aspect of British judicial administration in all of the Indian presidencies at least since the passage of the Bengal Regulations in 1793. In Pottinger's view, the appointment of arbitrators was not in and of itself inappropriate, if they were appointed only to examine whether the gold was indeed intended as security. Hockley, however, ordered the arbitrators to review the entire award and as such clearly went beyond their legitimate purview. The validity of the award, Pottinger reasoned, was not in question here and could not be appealed. The precise amount in dispute, however, could be subject to arbitration.

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85 Henry Pottinger to Arthur Crawford, 23 December 1820, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

86 *Ibid.*

87 Henry Pottinger to William Chaplin, 27 January 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

88 Henry Pottinger to William Chaplin, 4 November 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

The arbitrators, as we have seen, subsequently reviewed the entire award and found in favor of Nilkunt for an amount of just over Rs. 650. For Pottinger, however, equally unnerving was the fact that the award was not signed by all of the arbitrators. Moreover, there were indications that this new award had been written without the concurrence of one of the arbitrators and contrary to the full tribunal's initial recommendations. Pottinger explained that Sukhoo Punt's claim had been fully supported by the first panchayat, but Hockley had seriously mishandled the subsequent inquiry by the arbitrators. After the first award, Pottinger wrote,[89]

> The only thing therefore that remained to be done, was to see the award of the Punchayet enforced, but instead of this, it now would appear the [sic] Mr. Hockley allowed two persons, who ought to have been simply charged with ascertaining the truth or falsity of the assertion about the Gold, to enter into scrutiny of the sarounsh of the Punchayet, and after setting aside some items, and deducting from others, a second sarounsh was submitted to Mr. Hockley by one of the members, in which the charge of 1500 Rupees for Gold was admitted, on a copy of a memorandum ('Yadachee Nukl'[90]) and consequently the Plaintiff instead of having to receive the sum stated in the 3rd Paragraph [of this letter], was brought in as debtor to the amount of 651.[0].50.
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> The sarounsh was, as I have said above, presented to Mr. Hockley by one of the two arbitrators and the 'Aspree' or Umpire, and that Gentleman I am informed sent for the other member (if such he can be called) and demanded from him why he did not subscribe his name to the Paper. The man replied that the award was unjust and that it had been prepared by the arbitrator and the umpire without his concurrence; that a Draft of their real sentiments as settled by all three, was then in his hand, and that he would not sign what he knew to be false and illegal.

Pottinger's further investigations revealed not only that the new award was improper and not duly signed, but also that the arbitrators had relied upon an unsubstantiated memorandum in order to reach their decision. Quoting from the arbitrators' award, Pottinger discovered that the banker had been called before them to produce any documents he had relating to the gold account. When the banker replied that he did not have any, the arbitrators asked the same of Nilkunt. Nilkunt then submitted a copy of a memorandum purporting to support his claim. Pottinger was clearly aggravated by such unorthodox procedures. "It appears," he wrote, "even from the document, that the Gold was admitted on a copy of a memorandum given in by Nilkunt Myraul and which should have been utterly rejected on every principle of just arbitration, for had it been proper to receive an alleged copy of a Paper on either

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89 Henry Pottinger to William Chaplin, 27 January 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

90 Perhaps refers to a *yachita*, which in Hindu law is a form of deposit that the holder may have use of. A *nakl* is a copy or transcript.

side, Succo Punt Aptay could have had no difficulty in fabricating one to suit his purpose."[91]

The accumulated evidence of improper procedures in the case eventually led Pottinger to set aside the second award and to restore the original *sarounsh*. Although he was "averse to speak harshly" of Hockley's motives, he indicated to the Deccan Commissioner that Hockley had acted improperly by espousing the cause of the one of the parties.[92] Moreover, the full extent of Hockley's corruption was becoming too obvious to ignore. Pottinger discovered that several of the same people were repeatedly involved in disputed panchayat cases under investigation. Nilkunt Myraul, for example, had been the complainant whose suit had landed the Warrekur's *gomashta* in jail a year earlier; and, another man, Moro Bulwunt, had served as a *punchayatdar* for the opposing side in both the Warrekur's and Sukhoo Punt's case. Eventually, Pottinger would discover that Hockley had extorted over Rs. 30,000 from litigants in return for favorable panchayat decisions and be dismissed from the Company's service.[93]

Pottinger had long held that he had "but one object in view which was to see justice done in the affair."[94] However, the path to justice was obstructed in a number of ways. Most apparent in these cases were the numerous instances of the corruption of procedural justice that was fundamental to panchayat justice. As in the other case described here, the production of valid documents, the valid representation of interests, and the avoidance of elements of compulsion and coercion were framed by litigants to constitute the normative foundations of justice and fairness.

In conclusion, corruption may commonly occur when public offices are treated as "maximizing units" for personal gain. However, victims of corruption during this period may have experienced corruption in quite different ways. The principal narrative structure of these stories instead revolve around procedural injustices, that is, when the commonly-accepted practices of application, awards, and the constitution of panchayats were violated.

One must be careful nevertheless to avoid coming to the conclusion that these cases therefore indicate that violations of procedural justice were more important to litigants than the actual act of graft or extortion. Instead they suggest not only that litigants had a clear understanding of the issues and concepts that would appeal most to their British administrators, but also that British investigators actively participated in the construction of the litigants' narratives to fit their preconceptions of propriety and legitimacy. Therefore, textual evidence in the form of written awards, written memoranda, signatures, and other forms of written as well as evidence of

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91 Henry Pottinger to William Chaplin, 4 November 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3. Emphases in original.

92 Henry Pottinger to William Chaplin, 27 January 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

93 MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3, 'Statement of Kaishao Row Mistry,' 18 May 1821.

94 Henry Pottinger to William Chaplin, 4 November 1821, MSA, EIC, Judicial Department: Civil Judicature, Vol. 10/11, 1821-3.

correspondence to British practices of arbitration, especially voluntariness, came to be understood as essential to ensuring success in the panchayat.

As Martin Chanock has explained in the case of African customary law under the British, the process of taking evidence, examining witnesses, and the like was part of a more general project by British administrators to "discover" the rules of customary law. Yet this process of "discovery" inevitably led not only to the stultification of law, but to its partial and perhaps biased recovery. Such legalistic procedures as the taking of evidence or the examining of witnesses should therefore be understood "not as part of the process of discovering the rules of customary law but as a vital part of the rule-making process. What kinds of rules would be made out of this process, and how and whether they would be applied, depended on a number of circumstances: the rules would reflect the current aims and anxieties of the witnesses, and if these coincided with the moral predilections and administrative purposes of the officials, a 'customary law' might become established."[95] Perhaps more than anything else, these cases serve to exemplify this process as Indian litigants sought to adapt themselves to the newly-imposed system of British justice at the same time that they sought to use the system to project and restructure their standing in this new world.

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95 Chanock, *Law, Custom and Social Order,* p. 201.

Vernacular Anti-Corruption: Rural Experiments with Agendas of Good Governance

***Gaia von Hatzfeldt**

Abstract:

This paper proposes to investigate anti-corruption campaigns in rural Rajasthan, India. Local claims against corruption in India are increasingly being articulated through the register of law, leading consequently to the advancement of ideals of governance as set forward by the state. With the recent enactment of the national Right to Information Act (RTI) in 2005, India has legally sanctioned the enforcement of administrative transparency and accountability. I argue that the institutionalisation of anti-corruption is inextricably intertwined with neoliberal principles of good governance. My study of village based anti-corruption campaigns is an attempt to investigate the local and unanticipated manifestations that emerge out of the technical policies on good governance.

In this paper I use the case study of anti-corruption public hearings - known in Hindi as jan sunwais - in rural parts of Rajasthan, India. Jan sunwais are typically organised in villages in which a scam is suspected regarding the (non-) implementation of a government-sanctioned development project. By employing an eclectic mix of state laws, particularly the RTI, and local norms of justice in a jan sunwai, rural populations publicly call corrupt local government officials to account.

With demands for transparency and accountability being the guiding objective and ambition of a jan sunwai process, they starkly resemble principles that guide agendas of good governance. Within a jan sunwai citizens take it upon themselves to correct state malpractices and to enforce ethical standards of governance. In this manner, they resemble social audits and contingently show parallels to principles of neoliberal political agendas.

In the paper I argue that although jan sunwais may echo neoliberal principles, in practice good governance comes to expression in multiple and unanticipated forms. Invocations of conceptual notions such as good governance, participatory democracy, transparency and accountability are not simply products of top-down interventions and discourses, but are creatively crafted into socio-cultural contexts. Jan

sunwais, with their aspiration for transparency and accountability, represent a culturally specific interpretation of notions of good governance.

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Introduction

In the contemporary development discourse, anti-corruption reforms make up a core component within the proclamations for good governance. By combining economic reforms with institutional and political revisions, agendas of good governance foreground notions of efficiency, accountability and transparency. In this equation, corruption is viewed as one of the principal causes of impaired social and economic development and, thus, as the antithesis of the good governance ethos. Leading international institutions, most notably the World Bank, the International Monetary Fund and Transparency International, prescribe a set of technical prerequisites as the panacea to many deficiencies and irregularities within public institutions. In consequence, anti-corruption incentives are taking root throughout the world falling under the overarching framework of good governance.

In this paper I examine anti-corruption campaigns in rural parts of Rajasthan, India. In India, local claims against corruption are increasingly being articulated through the register of state law. This legalization of claims is largely a result of the Right to Information Act (RTI), enacted in 2005, that legally sanctions the enforcement of administrative transparency and accountability at the national level. Implementation of the RTI is regarded as a major steppingstone in the government's attempt to counter widespread institutional corruption. Since its enactment, numerous government incentives and civil society initiatives have emerged, aiming to strengthen and advance the RTI throughout the nation. Particularly in rural areas where state laws remain largely unknown to local populations, endeavours are carried out by civil society organizations to raise awareness and efficacy of the RTI.

The case studies I draw on in this research are anti-corruption public hearings – known in Hindi as jan sunwais – in rural parts of Rajasthan. Jan sunwais are typically organized in villages in which a scam is suspected regarding the (non-) implementation of a government-sanctioned development project. By applying the RTI law, civil society activists and villagers attain all the documents related to the government project and thereby collectively probe and, if evidence is found, adjudicate the particular case of corruption. By employing an eclectic mix of state laws and local norms of justice in a jan sunwai, rural populations publicly call corrupt local government officials to account.

The objective of this study is to examine the extent to which demands for transparency and accountability of a jan sunwai process fall within the purviews of good governance agendas. As will be elaborated further below, good governance relies on self-reliant and self-managing citizens who bring forward ideals of participation, accountability, transparency, openness, the rule of law, effectiveness

and efficiency. Participants of a jan sunwai arguably conform to these prerequisites in that they take it upon themselves to correct state malpractices and to enforce ethical standards of governance. By monitoring and managing the effectiveness of duties and responsibilities of state actors, citizens engage in processes that parallel those of financial auditing.

In the paper I argue that although principles that guide a jan sunwai may echo standards of good governance as set by transnational institutions, in practice these benchmarks come to expression in multiple and unanticipated forms. Local manifestations of global aspirations do not neatly represent the sanitized version as held at the discursive level, nor are they simply products of top-down interventions and discourses. Instead, conceptual notions such as good governance, participatory democracy, transparency and accountability are creatively crafted into socio-cultural contexts. In a jan sunwai, claims for good governance are articulated against corrupt local officials in a culturally specific register that negotiates and translates transnational standards of good governance. I call this process the 'vernacularization' of institutional anti-corruption initiatives.

Right to Information: institutionalizing anti-corruption

The Right to Information has been acclaimed to be a revolutionary step towards the solidification of democracy in India. It sustains the participation of citizens in the governance of the country and thereby extends democracy's paramount principles of openness and transparency. With the RTI in place, anti-corruption is institutionalized and systematized at the national level.

Until the landmark day of 15 June 2005, official information of the government of India had been kept in obscurity under the draconian Official Secrets Act 1923, dating back to the colonial era. This Act, together with various other regulatory laws (such as the Indian Evidence Act – relating to the admissibility of evidence in courts) had been enacted by the British powers in order to prohibit disclosure of official records and to thus protect the executive powers in the name of security of the State and sovereignty of the nation.

On the aforesaid 15 June 2005 the Parliament of India passed a law that would put an end to this antiquated Act that had hitherto perpetuated the veil of government secrecy, and in its place the national Right to Information Act was enacted. With this progressive Act in force, any citizen can now legally claim access to official government information, which, Section 1(f) of Chapter 1 of the RTI Act defines extensively as "any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force". Exemption from disclosure is limited to information that is deemed to "prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence" (Section 8 (1) a), Chapter 2).

Provisions within the Right to Information Act include the compulsory proviso to allow the general public to obtain any information without being "required to give any reason for requesting the information" (Sub-section 2, Section 6, Chapter 2). Failure to provide the information within 30 days results in the monetary penalization of the bureaucrat in question. All provisions aim to make information easily accessible to citizens and to thus ensure that bureaucrats at the various echelons of the state apparatus are made to comply with the new official doctrine of transparency and accountability.

The expansiveness of the RTI implies that it can be employed in innumerable contexts, meeting myriad ends. Particularly in villages, the RTI is being used as a means to track funding and expenditures of government money intended for rural development. Through a wide range of schemes and programmes targeting poverty, the central and state governments allocate large sums of money for rural development. It is common knowledge, however, that funding for the various schemes is embezzled as it filters down along the bureaucratic line, with only a diluted sum reaching the supposed beneficiaries. With the RTI in force, people are now, in theory, in the position to seek information regarding the provisions provided by the various government schemes to their local area and to track down the related expenditures. The RTI allows the beneficiaries themselves to scrutinize and assess the effective implementation of government development projects administered in their name.

The RTI indisputably has potentially transformative consequences for citizens who, with this act in force, are no longer rendered complacent victims of arcane and abstruse policies. Despite its progressive nature, nonetheless, it has been argued that the RTI is a tool used mainly by the middle classes and that awareness of this law remains largely absent from rural areas. A study by PriceWaterhouseCooper in 2009 shows that only 13% of rural populations, in contrast to 33% of urban populations, knew about the RTI (Bhalla 2010).

Anti-corruption public hearings

Even if, on rare occasions, rural populations are aware of the RTI, they will generally not have access to the resources needed to use this law, such as confidence to speak up against the local officials or technical skills to decipher the official information. An effective method to demystify the well intended but arcane RTI Act is by means of a jan sunwai process. Jan sunwais are public hearing forums in which local communities are the principle actors in uncovering government malpractices. These participatory public hearings typically take place in villages when strong indications point at a scam having taken place in a given government project, usually in the gram panchayat (the local government body at the village level). Scams take myriad forms of expressions, often 'petty' in nature yet always severe in their consequences on the poor. Embezzlement typically occurs on government sanctioned anti-poverty schemes and projects so that the failure to implement them correctly has grave implications on the poor. In this regard, claims against corruption in a jan sunwai are not made so much on moral grounds as on direct articulations of threats to livelihood.

A typical jan sunwai setup is as follows: prior to the actual public hearing an audit team (comprised of civil society organizations and active members of the given village) obtains all documents and records relating to the development project in question through the filing of RTI applications. Records include muster (pay) rolls, cash books, expenditure vouchers, bills of material bought and project engineer measurement books. These findings are compiled into a legible form and then verified by the audit team by tracking down and interviewing all labourers and witnesses concerned on the accuracy of the documents. It is through this interactive process that villagers become involved in the uncovering of corruption and are animated to participate in the upcoming public hearing.

Once the relevant information has been gathered, the jan sunwai event is organised by the audit team under a pandal (a traditional, colourful marquee) in a visible location in the village, to which the entire village is invited by means of vibrant music, songs and puppets. With its somewhat 'festive' mood, jan sunwais are generally widely attended, not least by the local government officials.

During the jan sunwai proceeding a verification process with reference to the findings revealed by the audit team takes place again, yet this time in a public setting. Each labourer of the government work in question gives testimony and reveals publicly the inconsistency between the official documents and their own experiences. One by one the aggrieved villagers and any concerned witnesses are called forward to speak up. Typical cases include forged signatures on payment slips, enlisted workers who have long since died, claims of hiring tractors or camel-carts from villagers who do not own such things, bogus entries of projects that do not exist in reality, exaggerated bills and vouchers of material.

What is noteworthy in all the accounts of corruption raised in a *jan sunwai* is that they refer to very local occurrences of misappropriation of funds that directly affect villagers' livelihoods. With personal experiences of embezzlement as the starting point, villagers begin drawing on broader philosophical debates on corruption. Individual accounts of fraud are redefined in terms of injustice, where the denial of adequate government services is viewed as constituting an infringement into their rights as citizens. The act of publicly articulating a grievance is typically an indication of an awareness of ones entitlements and a consequent dissatisfaction with a denial hereof. Slogans cheered throughout a *jan sunwai* proceeding, such as '*hum janenge, ham jiyenge*' ('we will know, we will live'), or *'hamara paisa, hamare hisab'* ('our money, our accounts') are direct calls for access to information and broader demands for openness and transparency. With these simple slogans, principles of governance are made locally tangible and meaningful. Participants of a *jan sunwai* seem all too aware of the importance of access to information for their struggle for social justice.

It is within the public and collective forum of a *jan sunwai* that the culprit official is held culpable. At the end of the cross-examination, the concerned local official is given the opportunity to explain his (occasionally her) actions, to counter allegations made, or even to admit wrongdoings. A panel of internal and external

experts – journalists, lawyers, academics or government officials – participate in the jan sunwai, assuming the role of the 'jury' or third-party guarantors.

The individual cases of petty-fraud that are articulated in a *jan sunwai* bring to expression the dissatisfaction with a faulty governance. The local officials, such as the *sarpanch,* being held to account for corruption become signifiers of 'the state' writ large. The *sarpanch*, typically a fellow villager embedded in the locality through ties of kinship, cannot evade in an illusive disguise, and thus becomes the direct contact to the *sarkar* ('government'). This personification of the government in the form of the *sarpanch* is the avenue through which people make their demands for accountability. It is at this local most level that notions of governance find expression.

Being informal in nature, the outcomes of a jan sunwai are not legally binding nor do they have direct de jure enforcing powers. However, the mere performance of the public inspection and collective scrutiny of the government works as conducted in a jan sunwai is a form of redress in itself. The public declaration of official wrongdoings, supported with the meticulous evidence presented in a jan sunwai leads, inter alia, to the shaming of the official in question. What makes this method particularly efficacious is that generally the government representative being held to account is the sarpanch (the elected village headman) who is typically from the area and thus cannot evade the public gaze. In other words, the corrupt sarpanch is not a faceless bureaucrat who can hide in an impersonal guise or in a rationalized bureaucratic structure, but is an individual whose reputation needs to be maintained in the eyes of kin, neighbours and peers. In many occasions, the proceedings of a jan sunwai has the consequence of a public apology or even a return of the embezzled funds.

Follow-ups of a jan sunwai also involve the writing of reports to relevant senior government officials with recommendations regarding action and policy considerations to improve delivery of governance. Pressure is enforced either by means of a petition to local officials or by involving the local or even national media. In some cases, the civil society groups involved in the jan sunwai process file a complaint of the frauds uncovered in a jan sunwai in the local courts. Thus, although jan sunwais do not have legal powers, they nevertheless act as a form of sanctioning and punishment forum by putting public pressure on the government to take corrective steps.

Good governance and anti-corruption

Without question, the jan sunwai process represents a unique experiment in combating corruption that reflects the particular demands and needs of rural populations in Rajasthan. However, by expanding the analysis beyond the specificities and idiosyncrasies of a jan sunwai, connections to broader processes come to the surface. An examination of the good governance agendas reveals striking parallels to the village processes occurring in rural Rajasthan. Buzzwords circulating in the international development discourse include transparency, accountability and anti-corruption, and it is no coincidence that jan sunwais are concerned with precisely these concepts, even if not explicitly employing these

terms in the course of the hearings. This case suggests that debates and discourses occurring at the transnational level come to be reflected in some form or the other at the local level.

Good governance is one of the central concerns in the contemporary development discourse. Although no clear definition of good governance exists, it is usually associated with ideals of the rule of law, participation, accountability, transparency, openness, effectiveness and efficiency. The conventional connotations of good governance are the efficient management of a nation's resources and affairs by minimizing corruption and insuring participation of minorities in decision-making processes. To accomplish this, good governance reforms comprise both economic and political principles based on models of liberal democracy that are targeted at the state, the private sector and civil society. If these institutions conform to market driven principles, it is argued by good governance proponents, they contribute to economic growth, and, consequently, to the development of the country. This position sustains the idea that liberal political democracy and a free market are mutually reinforcing (Currie 1996: 790).

The promotion of good governance agendas was buttressed through the collapse of socialism in the early 1990's (Corbridge et al. 2005). In consequence, this failure of the state-controlled economy gave way to the advocacy of a politically unfettered market. With the World Bank at the forefront, the initial stages of the promotion of good governance saw the advancement of a set of structural adjustment programmes that aimed to free the market from the burdensome control of government. The role of the state was redefined as needing to work in the interest of the private sector and the market economy. Official bureaucrats, with their discretionary power, were blamed for being inefficient and motivated by self-interest and thus accountable for corrupt institutions.

Within the new orientation towards market-based governance, a thriving civil society, made up of active individual citizens, was conceived as a means of replacing inefficient politicians. The credo was that an active civil society could press for governmental accountability and thus raise efficiency and effectivity. Concurrently to the strengthening of a civil society whose intrinsic value-aspirations were market-oriented, an incentive for decentralization follows suit in the agenda of good governance, with the similar intention of loosening centrally held government control.

India's liberalization of its market in the early 1990's marked a heightened point in the promotion of good governance agendas. Facing an economic crisis, various stabilization and structural adjustment plans were implemented to enliven the market. In 1991, the World Bank supported India's economic policy reforms through a 'structural adjustment operation' (SAL) worth $500 million[96]. A range of conditions, in line with the Bank's agenda, accompanied the SAL, including the

[96] From the World Bank's website: http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/0586cc45a28a2749852567f5005d8c89?OpenDocument&Click=

liberalization of trade by promoting export, abolishing import licensing and introducing cuts in subsidies. Beyond the Bank's conditions-tied loans, the government of India introduced its own economic reforms with the incentive of 'slimming down' the state and its welfare institutions by emphasising managerial forms of economic rationality and cost-benefit. Following the neoliberal model, it was held that allowing more autonomy to the private sector would reduce opportunities of corruption to state officials (Currie 1996: 798). This led subsequently to the proliferation of civil society and non-governmental organizations that were increasingly vested with responsibility and conceived of as 'partners' of the state.

Good governance, so it has been criticized, is promoted by global organizations such as the World Bank as a means of addressing the institutional contexts within which economic adjustment policies are to be implemented (see Kiely 1998). In other words, implementation of good governance principles provides the institutional shifts required for neoliberal pro-market intervention. Thus viewed, good governance and market liberalization go hand-in-hand. Neoliberalism as a doctrine has become so entrenched in contemporary life, that its purview extends well beyond the paradigms of the market and comes to be experienced in social and political spheres. Ong's (2006) study of 'neoliberalism as exception' is particularly instructive in providing an expansion of the notion of neoliberalism. She focuses on the function of neoliberalism as a new "technology of governing" (2006: 4), and argues that the logic of the market penetrates into the political sphere, thus resulting in "a new mode of political optimization" (ibid: 3). Within this order, individuals are expected to regulate and discipline themselves according to standards of efficiency and competitiveness as demanded by the market and thereby come to replace some of the functions of the state. Neoliberalism, in other words, relies on self-reliant and self-managing individuals that constitute an efficient and effective citizenry. Ong concludes that neoliberalism constitutes a mode of governmentality whereby everyday conduct is managed and regulated so as to best serve the market.

Thus viewed, neoliberal governance advances by institutionalising social situations according to standards of effectiveness and efficiency. An example of such technological instruments designed for the implementation of transparency and accountability are audits. The practice of audits has become so widespread and ubiquitous in the current neoliberal order, that reference has been made to the 'audit explosion' (Power 1999) or to 'audit cultures' (Strathern 2000). Audits are being increasingly institutionalized in various spheres of life, whereby individuals are made to undergo formalized and technological standards of accountability. This results in ever-standardized forms of measuring performance and efficiency. Power (1999) explains this to be a result of a broader agenda of social organization and control that culminates in an "extreme case of checking gone wild" (1999: 14). Ultimately, institutionalized forms of audits conform to the neoliberal demands of managerial efficiency and effectivity.

Good governance and jan sunwais

Having thus far outlined the central aspects of good governance and its correlation to neoliberal ideals, the question arises as to its applicability to the jan

sunwai context. Characteristics of agendas of good governance appear to be conspicuously present in the jan sunwai. Demands for transparency and accountability are the guiding objective and ambition of a jan sunwai process, whereby the proceedings are carried out by holding government officials to account. The state is portrayed as and attacked for being constituted by ineffective and corrupt bureaucrats who signify a failure in the state apparatus. It is through the jan sunwai model, in the form of social audits, that citizens take it upon themselves to correct state malpractices and to enforce ethical standards of governance. Citizens become principle actors in seeking appropriate enforcement of development projects that affect their lives, and, thus conceived, engage in models of participatory development. Citizens who engage in such processes must be responsible, managerial and effective in order to make demands of government officials. In sum, what we have here is an assemblage of all buzzwords of the agenda of good governance converging in the processes of a jan sunwai: transparency, accountability, participation, decentralization, responsible citizens and the practice of auditing.

In spite of these striking parallels between jan sunwais and agendas of good governance, it is questionable whether these anti-corruption public hearings in rural Rajasthan form part of a wider framework of neoliberalism. The characteristics drawn upon in the local contexts may bear resemblance to agendas as proclaimed by the World Bank and other major transnational organizations, but does this imply that they are guided by neoliberal ideals? What is it about transparency and accountability per se that is neoliberal? Surely the World Bank and other neoliberal institutions do not have supremacy over the definition of concepts such as transparency, accountability and participation so that these terms may have entirely different meanings and effects in the jan sunwai case. Or do processes of translation and dissemination take place, implying a continuum in meaning? If so, in which spaces does this translation occur and who are the actors involved? Some of these questions can be answered by examining, what I refer to here as the processes of vernacularization.

Vernacularization of anti-corruption

In order to examine the link between neoliberalism and jan sunwais, I draw on Tsing's (2004) tour de force ethnography on global connections. Tsing's study provides a useful framework from which to identify the nexus of convergence between global and local phenomena and thus lends towards an explanation of how macro concepts are manifested and experienced at the micro level. Her work on environmental movements in Indonesia indicates that the global is always enmeshed in the particular, with both ends of the spectrum mutually constituting one another. Universal aspirations are not imposed as standardised abstractions, but rather, the universal comes to be “charged and enacted in the sticky materiality of practical encounters” (2004: 1). In other words, the proliferation of universal aspirations does not result in general global homogenization, but instead, through its encounters with the particular, it is transformed and reformulated in specific situations. Moreover, universals themselves come into being and are given substance precisely in the interactions with the culturally specific, resulting in always hybrid, transient and dialogical aspirations. These global connections bring about 'emergent cultural

forms' produced through processes of 'friction' that describe "the awkward, unequal, unstable and creative qualities of interconnection across difference" (2004: 4). This approach urges for a conceptualization of the universal as an "aspiration, an always unfinished achievement, rather than the confirmation of a pre-formed law" (2004: 7).

Following on from Tsing, I suggest that jan sunwais can be read as a manifestation of a space of 'friction'. They represent the global connections that emerge out of the encounter between the transnational promotion of neoliberal agendas of good governance and the specificities of needs and demands in rural Rajasthan. Neoliberalism as a concept does not exist in isolation from the practical encounters, whilst the local contexts, no matter how particular or idiosyncratic, are infused to some degree with neoliberal concepts. This indicates the workings of multiple and intersecting structures of power and meaning.

What this reading allows for is an examination of the processes of translation of global ideas and concepts as used in particular contexts, without reducing them to mere rhetoric or as products of top-down intervention. Instead, the creative interpretation and unique adaptation of the local experiences comes to the forefront. Although jan sunwais indicate apparent parallels to the contemporary global promotion of good governance, the notion of friction warns against a monolithic analysis hereof. Dialogues between the local, national and transnational spheres shape the experienced realities of good governance. It is through cultural dialogue in the spaces of friction that meaning arises. The culturally specific registers through which claims for good governance are being articulated against corrupt local officials in Rajasthan are an indication of the cultural dialogue through which universal aspirations are negotiated.

It is this cultural dialogue between universal aspirations and local articulations that I refer to as a process of vernacularization. Vernacularization, as applied here, implies the transformation, appropriation or adaptation of normative ideals into locally meaningful contexts. It involves the translation and dissemination of transnational ideas and concepts into local social settings. Paley (2002) characterizes this process of vernacularization as one in which local actors "strategically and selectively appropriate and transform transnationally circulating discourses, sometimes filling foreign words with their own meaning" (2002: 485). This indicates that exogenous terms are not enforced institutionally, but undergo processes of internalization and adaptation. For example, the vernacularization of democracy, as shown by Michelutti (2007), implies that ideas and practices of democracy come to be embedded in popular consciousness until they are "gradually moulded by folk understandings of 'the political'" (2007: 642).

The events that unfold in a jan sunwai appear to be a result of processes of vernacularization. Notions of transparency, accountability and anti-corruption that prevail in the transnational discourses are found replicated in the jan sunwai process, yet as unique and distinct manifestations. Macro concepts are given a tangible and visible face, whereby local actors are actively involved in translating, appropriating and negotiating universal aspirations to suit the local contexts. In this way, anti-corruption agendas are vernacularized as they materialise in specific locations.

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Book Review

Corruption and Misuse of Public Office

*Book review by Asad Jamal**

Authors: Nicolls, Colin; Daniel, Tim; Polaine, Martin and Hatchard, John
Publishers: Oxford University Press, Second Edition 2011
929 pages, ISBN: 978-0-19-957727-9, Price: £165.00 (Hardback)
Available in Pakistan with Pakistan Law House, Pakistan Chowk, Near M.C.B. Bank, GPO Box: 90, Karachi

The second edition of *Corruption and Misuse of Public Office* is a revamped new version of its first edition. Several important developments have taken place since 2005 when the first edition came out. This new edition provides a more comprehensive and detailed analysis of the law relating to corruption as it has evolved in the UK and around the world, with greater focus on developments that have taken place in recent years.

In Pakistan, the law and practice relating to corruption and the misuse of public office has assumed a new political and legal dimension in recent years with the increasing demand for new effective anti-corruption measures in accord with internationally recognized standards and principles. The reasons for this new climate are, among others, that the existing framework has proved to be inadequate and inefficient thus ineffective. The ineffectiveness of our legislative framework also emanates from the abuse of it at the hands of the rulers for political gains.

A new proposed bill on accountability by the title of Holders of Public Offices (Accountability) Act, 2009 has been pending before the Parliament, but no headway is being made due to difference of opinion between the government and the opposition over various proposed provisions. The issue is, therefore, of considerable topical interest for legal, political and civil society circles in Pakistan. The book provides critical insight in several respects to better understand issues in and demerits of Pakistan's existing anti-corruption legislative framework as well as the proposed accountability law.

The legal instruments for which insight has been provided in the book include new addition to UK's anti-corruption regime i.e. the Bribery Act, 2010 as well as the pre-existing Prevention of Corruption Acts of 1889 and 1916 as amended by Anti-terrorism, Crime and Security Act (ATCSA) of 2001, and the Proceeds of Crime Act, 2002. A detailed historical background encompassing judicial interpretations of various elements of the law, have been discussed providing the context to understand the present law.

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*The reviewer is a Lahore-based lawyer.

Apart from that the book discusses at length the United States' Foreign Corrupt Practices Act, 1977; the United Nations Convention against Corruption, 2005; current revisions and implementation of anti-corruption legislation in some foreign jurisdictions.

The book informs us that legislation across the globe has made great strides over recent years, For example, with the implementation of statutes like UK's Anti-Terrorism, Crime and Security Act, 2001 and the Proceeds of Crime Act, 2002 extend jurisdiction to corruption offences committed abroad by UK nationals as well as incorporated bodies/companies. More significantly, these UK laws strengthen the mechanisms to recover assets and wealth obtained as a result of unlawful activity.

The book also examines the legal and practical issues relating to the investigation and prosecution of corruption cases and includes coverage of specialist areas such as recovering the proceeds of corruption, and whistle-blowing. It also discusses changes to the area of mutual legal assistance and civil recovery including the Stolen Assets Recovery Initiative (StAR).

The book is arranged in six sections. Chapters 2 – 7 UK criminal law relating to the prosecution of corruption offences under the old law, and under the new Bribery Act, 2010. Several aspects such as the definition and scope of common law bribery offences and various aspects, including the treatment of facilitation payments, the mental element, entrapment, defences and immunities have been examined. The section also gives an adequate sketch of the movement in the UK for reform in recent decades. Chapters 8 and 9 discuss confiscation and recovery of assets under criminal and civil law. Chapter 10 takes up the critical topic of regulation of conduct in public life in the UK.

Chapters 11 - 15 move out of the domestic context to discuss international and regional conventions, initiatives, and instruments. This section, first of all, records the background to the UN Convention against Corruption (UNCAC) and sets out its purposes and structure. The measures for maintaining integrity in the public sector including candidature for public office, political office, political funding, detailed treatment of managing and avoiding conflicts of interest, asset declaration, codes of conduct for public officials, and whistle-blowing guidelines, are discussed in chapter 11. The aspect of criminalization, international cooperation, asset recovery, and mechanisms for implementation of UNCAC are discussed in chapter 12.

The subject of the bribery of foreign public officials is discussed in chapter 13 with focus on Convention on Combating Bribery of Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development (OECD). The chapter 13 highlights difficulties which arise in defining offences under the common law and achieving compatitbility with the civil law jurisdictions. Also included are the issues of money laundering, mutual legal assistance, tax deductibility and extradition.

Chapters 16 to 19 venture into discovering corruption laws of other jurisdictions, both civil law and common law, including Australia, Canada, Hong Kong, and India, Brazil, China, France and South Africa.

The effect and implementation of the US FCPA, 1977 is discussed in Chapter 16. Chapter 17 discusses bribery of foreign officials, the role of anti-corruption agencies, investigation and prosecution, jurisdiction, defences, and penalties in common law jurisdiction and Chapter 18 focuses on key civil law and other jurisdictions. The book thus presents a holistic comparative view.

Finally, and very importantly, the role of the civil society organizations in fighting corruption has been discussed in chapter 20.

The writers of the book are well known legal practitioners. Colin Nicholls QC is a leading international criminal lawyer specializing in complex commercial crime cases including corruption, extradition, and war crimes. He acted for the defense in the Guinness case, Brent Walker and BCCI. Tim Daniel has extensive experience of major civil cases concerned with corruption and asset recovery. Alan Bacarese is Head of Legal and Case Consultancy at the International Centre for Asset Recovery, Basel Institute on Governance. John Hatchard has written widely on criminal law, human rights and good governance issues and is Professor at the UK's Open University, School of Law. He is also the Vice-President of the Commonwealth Legal Education Association.

The book has great relevance to the Pakistani context. For instance, one of the reported objections, among others, to the pending government proposed bill on accountability is their argument against the provision of immunity to holders of public office for acts supposed to have been done in good faith. The issue of good faith and other such issues have been discussed and explored in various respects to provide us a lesson or two. The book, therefore, can be extremely useful for legislators, lawyers, and human rights and other civil society players in understanding substantial questions. Such an understanding can help us make headway on a critical national issue.

This book enables practitioners to handle any aspect of a corruption case by providing them with detailed analysis of the international efforts to combat corruption, and the legal developments taking place in key jurisdictions and regions covered by UN, EU, OECD, the Commonwealth, as well as important regional initiatives. Detailed references to over 400 case judgments have been made. It's a must read for researchers, students and teachers of law, judges, lawyers, civil society activists working for the elimination of corruption, and journalists. It's also a must addition to library collections across Pakistan.

CALL FOR PAPERS FOR SPECIAL ISSUE 2012

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4) Many important and patriarchal legal institutions such as state and family have been weakened over the last years. How do these processes interplay with growing feminization of the legal professions?

5) How do these developments affect our emotions about and our concepts of justice?
6) What is the value of Gender and the legal profession as a field of research?
7) Key-concepts in gender and legal profession policy writing

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Favour the British spelling and ending –ize for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

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