Lesson Series 64

Corruption and its effects on human rights in Asia

Summary

This lesson outlines the widespread corruption prevalent in most of Asia. This corruption affects the rule of law situation, as well as daily affairs of ordinary people. It prevents people’s rights from being protected and realized, and encourages lawlessness in society.

The lesson also outlines key provisions of the UN Convention against Corruption.
Theme: Corruption and its effects on human rights in Asia

The Issue

Corruption and its ill effects can be found throughout Asia, from government officials, politicians, social welfare institutes to business practices and routine daily affairs. The prevalence of corruption is directly linked to a breakdown in the rule of law. On the one hand, when justice institutions are not functioning, when the law is not upheld, there is no mechanism to check and prevent corruption. On the other hand, the existence of corruption renders law meaningless, as law is now dependent on money or personal connections.

Without law, society is left in a situation of anarchy, with no means to safeguard human rights, and little chance of democracy flourishing.

The Lessons

Lesson 1 will give an overview of corruption in various Asian countries, and how this affects people’s human rights.

Lesson 2 will introduce the UN Convention Against Corruption and its relevant provisions.
Lesson 1

This lesson will discuss the situation of corruption in Asia.

A. Corruption in Asia

The problem of corruption is rampant in many Asian countries. It seriously affects all aspects of peoples lives, as almost nothing can be done without giving bribes. If you want to make a complaint to the police or any authorities, you have to give bribes. If you want to get a driving licence or open a shop, you have to give bribes. If you want to receive a public service, such as education and healthcare, you have to give bribes. Even if you want to be properly treated in police custody, you have to give bribes. All the public institutions, which are supposed to provide services and protection to safeguard the human rights of people, have become dysfunctional because of corruption. In this sense, corruption is a main obstacle for the protection and promotion of human rights, as it destroys the proper functioning of the public institutions.

Corruption and rule of law

Corruption is the enemy of the rule of law. Under corruption, there is no respect for laws, because laws cannot be enforced or they are enforced arbitrarily in favour of people who have power or can afford to pay bribes. The key institutions for the rule of law—the police, the prosecution and the judiciary—become dysfunctional. As a result, people have no means to make complaints or seek remedies. It is a total denial of justice.

To tackle the problem of corruption, the Asian Legal Resource Centre held a Regional Consultation on Anti-Corruption Mechanisms in Asia, in Hong Kong on 11-15 January 2010. The aims of the consultation were to develop knowledge and critique existing mechanisms for the elimination of corruption in Asia and to introduce the participants to the Independent Commission Against Corruption (ICAC) in Hong Kong, so as to provide opportunities for comparative studies on corruption control.”

Fifteen participants from nine countries (Bangladesh, Cambodia, India, Indonesia, Nepal, Pakistan, South Korea, Sri Lanka and Thailand) took part in the consultation. The participants included the commissioners of anti-corruption commissions, activists of anti-corruption NGOs, human rights lawyers and scholars.

During the consultation, participants presented the situation of corruption and the functioning of anti-corruption mechanisms in their countries, exchanging experience and ideas on how to enhance the development of effective anti-corruption mechanisms. The participants also spent a day to visit the ICAC to learn about its successful experience in fighting
The paper on Sri Lanka focuses on the problems with the appointment, mandates and powers of the Bribery and Corruption Commission in the political context of the non-functioning of the Constitutional Council. For some years, the president has appointed the commissioners without checks and balances. Other attendant problems are the extreme politicisation of the commission and its activities, the disallowance of the commission to investigate complaints on its own initiative and the lack of an independent investigative force as possessed by the anti-corruption body in Hong Kong.

The experience in Indonesia provides a very valuable lesson for other Asian countries on how to develop effective anti-corruption mechanisms with the support of the public. The two papers on Indonesia, one by an anti-corruption commissioner and another by an anti-corruption activist, together give a comprehensive picture of the development of the Corruption Eradication Commission (KPK), the selection process of its commissioners, its powers and functions, what has been achieved and the present challenges. In his paper, KPK Commissioner Mochammad Jasin emphasizes that the KPK has accompanied law-enforcement efforts with prevention, supervision and coordination of all law enforcement institutions involved in processing corruption cases, and has at all points sought the participation of the public. The KPK is an independent body with a wide range of powers in investigation. The second paper discusses the advantage of the KPK of its support from civil society, the media and the public. However, it underscores that the political environment is still difficult, with the police fighting back and lack of support from political elites. The KPK also needs to develop its own investigative force instead of depending on the police to conduct investigations.

The paper on Pakistan highlights the key areas of corruption and problems of anti-corruption arrangements there, tracing corruption in land grabbing and allocation of state resources that have been institutionalised to provide benefits to the powerful sectors in which military personnel are dominant. The most important implication of this institutionalized corruption is that powerful actors—whether they are state or non-state—cannot be brought under the anti-corruption laws extant in Pakistan. The military, judiciary and lately the Islamic clergy are all by law outside the authority of anti-corruption mechanisms. The paper suggests the creation of a constitutional body to oversee all aspects of corruption and to include all groups, the strengthening of capacity and functions of the auditors office, and bureaucratic reform as some possible solutions.

The paper on Thailand discusses the role of civic organizations in fighting corruption through education, monitoring and watchdog functions. It illustrates four successful cases to show how civic organizations fight corruption. As corruption is still prevalent, Thailand needs to strengthen both state institutions in charge of fighting corruption from the top, as well as to multiply and strengthen civic corruption watchdogs that can chase and catch corruption at the bottom.

As described in the next paper, corruption in Bangladesh is so deeply rooted and institutionalised that it has become the way of life. The paper concentrates on the problems of corruption in the judiciary, describing the methods associated with
corruption, from jumping the queue of cases to be heard on a given day to getting a copy of the judgment. The paper emphasizes that people should be willing to eliminate corruption and suggests some steps towards this end.

"Corruption in Cambodia is still rampant. The paper on this country gives an overview of the existing laws and legal mechanisms for counter-corruption activities and assesses the prospects for development of anti-corruption mechanisms. The government has approved a draft anti-corruption law, but its contents have not been disclosed and the law is now waiting to be passed through the National Assembly. The lack of seriousness and political will to fight corruption is the key problem. The paper suggests several ways in which assistance could be given to promote anti-corruption work in Cambodia.

Instead of describing practices of corruption directly, the paper on India describes how people have been deprived of their livelihood through programmes for access to food and work due to the corruption patronized by the state. The state adopts growth-based development policies and squeezes public resources to provide benefits to the private and corporate sectors, whereas the poor and the marginalized are denied basic rights. Unaccountability has been fostered in a manner to further enhance corruption. Protections enshrined in the constitution and laws are not respected and ensured for people in need, as most public resources are sacrificed to corruption [Editorial board, ‘Corruption and counter corruption across Asia’, article2, vol 9 no 1, March 2010].

Questions For Discussion

1. Have you ever come across a case of bribery or corruption? Discuss the details and ramifications. How prevalent are such cases in your country?
2. In your opinion, how does corruption affect the functioning of public institutions, social morale and rule of law?
3. What are the corruption prevention mechanisms available in your country? How effective are they?
Lesson 2

This lesson will introduce the UN Convention Against Corruption, highlighting the key provisions; it is by no means an exhaustive overview of the treaty.

Why corruption?

In its preamble, the convention notes key reasons for why addressing corruption is crucial to the development of society, such as the “threats posed by corruption to the stability and security of societies”, the undermining of “institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law”, the “links between corruption and other forms of crime”, and how “the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law”.

Keeping this in mind, article 1 notes that the purposes of the Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
(c) To promote integrity, accountability and proper management of public affairs and public property.

Preventive measures

Article 5 requires states to develop and implement “effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public integrity, transparency and accountability”. The article also requires states to periodically review and evaluate their policies and measures against corruption, which is important in ensuring adequate ongoing practices, rather than any one-time, isolated action.

To implement and oversee such practices and policies, article 6 refers to the existence of “a body or bodies, as appropriate, that prevent corruption”. These should be granted “the necessary independence... to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff” should also be provided.
Public sector

The link between corruption and the recruitment, promotion and retirement of civil servants is very important, which is why article 7 discusses these issues in some detail. The article notes that “systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials” should be “based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude”, and which “promote adequate remuneration and equitable pay scales”.

Article 8 discusses codes of conduct for public officials, which is also important in combating corruption. It requires states to promote “integrity, honesty and responsibility among its public officials”, to establish measures facilitating “the reporting by public officials of acts of corruption to appropriate authorities and requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials”.

It further suggests that states consider taking disciplinary or other measures against those violating such codes and standards.

Articles 9 and 10 discuss the public procurement and management of public finances and public reporting. In particular, the articles discuss the need for measures relating to the public distribution of information pertaining to contracts and tenders, as well as measures promoting transparency and accountability.

Apart from the above measures relating to civil servants and public officials, article 11 focuses specifically on the judiciary and prosecution:

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

Private sector

A unique feature of the Convention is that it covers corruption in both the public and private sectors. This is in fact crucial, as no ill can be eradicated from society by focusing on merely one sector of the community.
Article 12 therefore states that:

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

In particular, the article notes the following measures to achieve the above: developing codes of conduct for businesses and professions (2b) and setting appropriate restrictions on the professional/private sector activities of former public officials (2e).

Further measures at the private sector level include the importance for states to put in place a regulatory and supervisory regime for banks and financial institutions to detect all forms of money laundering (article 14). The article further specifies that appropriate measures to monitor cash movements across state borders should be implemented, and cooperation between financial authorities, law enforcement officers and administrative bodies should be fostered.

Participation of society

Article 13 urges states to promote the active participation of individuals, NGOs and other civil society groups in fighting against corruption and raising public awareness. In particular, states should ensure public access to information, raise public awareness regarding the existence and threats posed by corruption, promote transparency and contribution of the public in decision making processes, and ensure that anti-corruption bodies are known to the public and can be accessed for the reporting of any offences.

Criminalization and law enforcement

This chapter of the Convention discusses the crimes considered as corruption offences and how they should be dealt with. Articles 15-25 define various intentionally committed acts as constituting corruption crimes, and requires states to ensure they are seen as criminal offences:

Article 15: The promise, giving, solicitation or acceptance to/of a public official, of an undue advantage, in order to act or refrain from acting in the exercise of official duties.

Article 16: The promise, giving, solicitation or acceptance to/of a foreign public official or an official of a public international organization, of an undue advantage, in order to act or refrain from acting in the exercise of official duties.
Article 17: The embezzlement, misappropriation or other diversion by a public official for personal benefit, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his position.

Article 18: The promise, giving, solicitation or acceptance to/by a public official or any other person, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage.

Article 19: The abuse of functions by a public official the performance of or failure to perform an act in violation of the law for the purpose of obtaining undue advantage.

Article 20: Illicit enrichment - a significant increase in the assets of a public official that cannot be explained reasonably.

Article 21: The promise, giving, solicitation or acceptance to/of a person working in the private sector, of an undue advantage, in order to act or refrain from acting in breach of his duties.

Article 22: The embezzlement of any property, private funds or securities or any other thing of value entrusted to a person working in a private sector entity by virtue of his position.

Article 23: The conversion, transfer, acquisition or use of property, knowing it is the proceeds of crime, whether for the purpose of concealing or disguising its illicit origin, of helping someone evade the legal consequences of his actions, or for personal benefit. Conspiracy to engage in any of the above in a foreign jurisdiction is also a crime, provided it is a criminal offence in the domestic law of that state.

Article 24: Concealment or continued retention of illegal property (knowing it is the proceeds of an offence).

Article 25: The use of physical force, threats or intimidation or the promise, offering or giving of undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention, or to interfere with the exercise of official duties by a justice or law enforcement official in relation to such offences.

Who can be punished?

Article 26: Legal and natural persons can be held liable for offences established under this Convention. The liability for legal persons may be criminal, civil or administrative, while for natural persons it can be criminal.

Article 27: All those participating in any capacity (accomplice, assistant or instigator) in an offence established under this Convention, as well as those attempting to commit offences.
**Article 28:** Knowledge, intent or purpose is required as an element of an offence established under the Convention.

**Limitation and fairness**

To ensure that crimes can be properly prosecuted, article 29 urges states to establish "a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice".

Furthermore, article 30 notes the importance of fair trial principles in all prosecutions, and the prohibition of holding offices of the accused.

With regard to the property in question, article 31 requires states to establish measures allowing for the freezing, seizure and confiscation of all proceeds and property from offences under the Convention.

**Witness and victim protection**

Keeping in mind the importance of witness and victim testimony to criminal prosecution, article 32 requires states to take measures to provide effective protection to them and their families from intimidation or retaliation. Such measures can include relocation, non-disclosure of their identities and permitting them to testify through the use of communication technology.

**Article 33** further notes that protection should be provided "against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning relevant offences".

**Compensation**

**Article 35:**

Each state party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.
Procedural issues

Article 36: States should provide for specialized authorities to combat corruption within law enforcement agencies. These authorities should have the necessary independence, training and resources to carry out their duties effectively.

Articles 37-39 discuss fostering cooperation with law enforcement agencies, as well as between national institutions and the private sector.

Article 42 discusses establishing jurisdiction over crimes.

International cooperation

Articles 43-50 require states to cooperate with one another regarding offences of corruption, in terms of dual criminality, extradition (article 44), transfer of sentenced persons and criminal proceedings, legal assistance and criminal inquiries.

Asset recovery is seen as a fundamental principle of the Convention according to article 51, and states shall therefore “afford one another the widest measure of cooperation and assistance in this regard”. Articles 52-59 specify the various components and means of asset recovery, including detecting and preventing transfers of proceeds of crime, international cooperation in confiscation of such proceeds or property and returning the proceeds to the legitimate owners.

Finally, article 60 deals with training and technical assistance to combat corruption.

Questions For Discussion

1. Discuss the strengths and weaknesses of this Convention. Are there any loopholes/missing provisions?
2. How could these provisions combat corruption in your country?
3. Discuss initiating a campaign to ratify and implement this Convention.