
CHAPTER 13

Justice System



Introduction

Defining the justice system

The justice system plays a key role in fighting the various forms of corruption across all sectors.

The justice system is understood to comprise “the institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members’ behavior; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions.”¹ This normative framework includes the rules about preventing and sanctioning corrupt practices.

Beyond these rules, the justice system has the key task of upholding the rule of law more broadly, including by providing checks and balances on abuse of power by the executive and legislative branches of government. As the World Development Report 2017 summarizes it, the rule of law at its core is “the impersonal and systematic application of known rules to government actors and citizens alike” and requires that both “be bound by and act consistently with the law.”² This task is particularly relevant in contexts of elite capture and grand corruption, because they result in the normative framework itself being skewed. Justice institutions then become the last resort to ensure the supremacy of fundamental principles of rule of law, fairness, and equality.

The justice system is more than a loosely connected set of independent institutions.

These institutions constitute a network of interdependent actors. The performance of each of them is affected by the performance of the others. Courts are at the core of dispute resolution and are supported in this function by a range of other justice sector institutions, including the prosecution service, public defenders, bar associations, state and civil society legal aid providers, police, alternative dispute resolution mechanisms, administrative adjudication and enforcement mechanisms, customary and community-based institutions, anti-corruption and human rights commissions, ombuds offices, judicial academies, and more.

Preventing and sanctioning corrupt practices

The justice system plays both a preventive and a repressive role in the fight against corruption.

On the repressive side, it empowers citizens, businesses, and other stakeholders to actively fight corrupt practices by denouncing perpetrators and bringing facts and evidence to the attention of relevant justice institutions. While the starting point may vary and lawsuits in civil or administrative courts may proceed, the criminal justice chain is generally the one that is ultimately set



in motion to sanction perpetrators. On the preventive side, justice institutions also play a key role in enforcing the rules put in place to prevent corruption. Thus, when government officials, for example, do not comply with transparency requirements, even ahead of yet to materialize subsequent corrupt behavior, they can be

held accountable for that, which in turn strengthens the effective implementation of this anti-corruption framework. Moreover, the effective functioning of the criminal justice chain sends a strong signal of deterrence, including by increasing the likelihood of being caught in case of wrongdoing.

The roles of the different institutions

Justice institutions play different roles in fighting corruption, but each institution's performance counts. While it is important for the overall justice system to perform effectively so anti-corruption efforts can succeed, each institution plays a particular role. Below is an overview of the role of the key institutions.

The courts

For most observers of anti-corruption efforts, one of the most visible moments is when someone is convicted of a crime by a criminal court, with or without a jury trial depending on the country. These can be specialized anti-corruption courts, specialized anti-corruption chambers, or just the general criminal courts.

The role of other courts for anti-corruption efforts is less visible, but nonetheless important. Lawsuits in civil courts can provide an effective complement to more commonly used criminal approaches as a way to recover stolen assets.³ Insolvency proceedings can be used to recover corruption proceeds.⁴ Depending on the jurisdiction, civil or administrative courts can hear cases filed by journalists who are denied access to information in violation of freedom of information legislation. More broadly, administrative courts offer a venue for citizens and civil society to challenge abusive or simply illegal (in)actions by public authorities and their officials. Proving corruption in a public procurement case may be more challenging than proving the illegal nature of an administrative (in)action. While this does not normally result in a criminal sanction of the public official or the corruptor, the ultimate (in)action sought by the corruptor can be annulled or declared void this way.

The effectiveness of courts in fighting corruption is not just a function of their own performance, but also of

the performance of institutions that participate in their proceedings or contribute to earlier stages of the process prior to indictment. The effectiveness and quality of the investigations led by the prosecution service and/or the police in terms of the comprehensiveness, timeliness, and quality of evidence, and compliance with legal requirements are ultimately reflected in the quality of the case presented to the court. While the courts have the ultimate decision power, they do not operate in isolation. They depend on a range of other justice sector institutions to carry out their mandate.

The prosecution service

The prosecution service is a key part of the criminal justice chain that, on behalf of society and in the public interest, ensures the application of the law where the breach of the law carries a criminal sanction.⁵ This includes legislation criminalizing corrupt practices. In criminal justice systems, public prosecutors normally (i) decide whether to initiate or continue prosecutions; (ii) conduct prosecutions before the courts; and (iii) may appeal or conduct appeals concerning all or some court decisions.⁶ Thus, without a well-performing prosecution service, the effectiveness of the fight against corruption would be seriously undermined, because corruption cases may not be successfully brought to the court or the court would not be able to adequately sanction perpetrators, due to the low quality of the indictments.

Moreover, in many criminal justice systems, public prosecutors also (i) implement the national crime policy; (ii) conduct, direct or supervise investigations; (iii) decide on alternatives to prosecution; and (iv) supervise the execution of court decisions.⁷ They carry out their mandate while taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system in the fight against corruption.

BOX 13.1

Romania's National Anti-Corruption Directorate (DNA)

For a long time, Romania's DNA was a success story in the fight against corruption. The EU has praised the DNA for being effective and proactive and credited it with significant achievements in cracking down on corruption. The DNA increased the number of indictments by 50% between 2012 and 2017.⁸

An evolving political environment and subsequent justice sector reforms negatively affected this positive record.⁹ The Group of States against Corruption (GRECO), the Council of Europe's anti-corruption body, has voiced deep concerns in a 2018 report criticizing the justice system reforms adopted by the Romanian parliament, undermining the effectiveness of the fight against corruption.¹⁰

For example, public prosecutors have to scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue.

These considerations apply to prosecution services in general, but also to anti-corruption agencies that some countries have chosen to equip with such prosecution functions.¹¹ Whether general prosecution services or specialized agencies with prosecutorial functions, units with specialized and multi-disciplinary expertise within these institutions are often created to ensure adequate prosecutorial expertise in highly technical areas, for example in financial matters.

The effectiveness of the prosecution service in fighting corruption depends on the effectiveness of the whole justice system. Where the political environment is adversely affecting the justice system, the public prosecution service will be impacted. This is illustrated by Romania's National Anti-Corruption Directorate (Box 13.1)

The police

The police is also a critically important justice institution in the fight against corruption, intervening mainly in the preparatory phase of the criminal justice chain. Under the rule of law, the main purposes of the police in this context are to (i) detect crime; (ii) prevent and combat crime; (iii) protect and respect the

individual's fundamental rights and freedoms; and (iv) provide assistance and service functions to the public.¹² Whatever the exact relationship between the police and the prosecution service in a given jurisdiction,¹³ weak performance of the police will result in the prosecution service not being able to proceed with indictments for corruption. Illegal police actions, in particular, are likely to jeopardize the chances of indictments being successful or of indictments being brought to court by the prosecution service.

Other justice institutions

The performance of the courts, the prosecution service, and the police as the primary institutions of the criminal justice chain in the fight against corruption is more or less directly affected by the performance of other justice sector institutions as well. Without going into detail, they include bar associations (often tasked with taking disciplinary measures to sanction lawyers who act as vehicles for corruption),¹⁴ judicial and prosecutorial councils (often tasked with managing the performance of judges and prosecutors or with disciplining them for corrupt behavior), the Ministry of Justice (often tasked with setting national policies and managing judicial infrastructure, including facilities and ICT for courts), judicial inspections, forensic institutions, and judicial training institutions, which play an important role in providing training relevant for the fight against corruption.

What specifically causes weak performance of justice sector institutions in the fight against corruption?

Capacity constraints and under-resourcing in terms of financial and human resources as well as infrastructure, particularly in low-income countries, pose severe constraints to the effective operation of justice sector institutions. At the same time, the World Development Report 2017 on Governance and the Law has identified weakness in institutional performance not primarily as a function of weak capacity, but as a result of the elite bargain in place.¹⁵ Institutions are often meant to be weak for a reason. Were well-functioning justice institutions and the fight against corruption a priority within the existing elite bargain, the institutions would be resourced, equipped, and managed as a matter of priority, albeit within the country's overall limitations in terms of GDP and capacity. While a complete and nuanced list of what specifically causes weak performance of justice institutions in different country settings is beyond the ambition of this analysis, the following provides a summary of some key aspects.

First, the governance of justice sector institutions relevant to the fight against corruption is often deficient. Courts and the prosecution service are not sufficiently independent and free from undue interference based on capture, cronyism, corruption, and political relevance. In authoritarian environments, these institutions as well as the police protect the interests of those in power and are actively utilized to crack down on opposition, including at times under the pretext of fighting corruption. Beyond the actual influence on specific decisions, capture, cronyism and corruption also impact appointments to relevant positions and promotions within the justice institutions themselves, resulting in a playing field skewed against anybody who would challenge the status quo. To the extent that these institutions are not needed to support the elites in place, they are not managed for performance and service delivery is weak as a result.

Second, justice sector institutions in many developing countries are chronically under-resourced, though that is not necessarily true for all parts of the system. Higher echelons of the system are generally better resourced, because those working at that level are part of the ruling elites. In authoritarian

regimes, the capacity in the criminal justice chain and the level and quality of resources (e.g. financial resources, human resources, ICT, and infrastructure) tend to be relatively higher because, based on the elite bargain in place, criminal justice institutions are needed to maintain the status quo. But the incentives will then not result in this capacity to be prioritized for the fight against corruption.

These issues result in often observed performance weaknesses in justice institutions, whose strong performance is needed in the fight against corruption. These weaknesses include delays at all stages of the process, from police to prosecution to the courts. The low level of effectiveness of the police in investigating corrupt practices results in very few cases, if any, reaching the prosecution service. The same ineffectiveness there and in the courts often means that nobody, other than maybe political opponents, is ever convicted for corruption. The population knows the situation and therefore has no reason to initiate cases with the objective of holding anybody accountable for wrongdoing. They understand that applicable legal frameworks are deliberately kept weak and that even when they are improved, for example upon donor insistence, their application is likely to remain unpredictable, biased, and selective, without generating results, unless there is a change in political will. It is not uncommon for countries to instill fear in order to keep people in place by threatening them with jailtime or fines for challenging state institutions and their officials.¹⁶

Aspects of the weak performance of justice institutions not only limit the effectiveness of the fight against corruption elsewhere, they also create a market for corruption within justice sector institutions themselves. This is especially true for cases that are of no particular political relevance. Systemic delays, arbitrary application of the law, and lack of performance accountability offer opportunities for petty corruption to speed things up, slow things down, or influence the outcome of cases, depending on the needs of the corruptor, thus further weakening the credibility and effectiveness of the police, the prosecution service and the courts.

How can justice sector institutions improve their performance in fighting corruption?

Implementation of laws to fight corruption must be backed by political commitment. Based on the findings of the World Development Report 2017 on Governance and the Law, the performance weaknesses are primarily the result of the elite bargain in place. A paradigm shift to improve the effectiveness of justice institutions in fighting corruption in truly systemic terms therefore primarily requires strong commitment at the political level. Without such a commitment, the

potential for improvements through purely technical approaches is marginal at best, leading to a gap between the beautiful laws on the books and the weak implementation on the ground. Such a system is like a “Potemkin village” with institutions potentially designed based on international best practice, but merely as a façade that conceals what is really happening, as explained in Box 13.2 below.

BOX 13.2

Specialized Anti-Corruption Courts: Political Commitment or Implementation Gaps

Despite the benefits of specialized anti-corruption courts, technical solutions to address corruption will fail unless there is political commitment because of an implementation gap. A 2016 survey has identified roughly 20 countries that have implemented specialized anti-corruption courts worldwide.¹⁷ Additional courts have been created since, notably in 2019, in Albania, Ukraine, and Madagascar.¹⁸

From a technical point of view, there are arguments in favor of and against specialized anti-corruption courts. Advantages are that the institution is created from scratch and can more easily receive preferential treatment in terms of resourcing (financial resources, human resources, ICT, and infrastructure) so they are adequately equipped for the fight against corruption. Doing this for the entire court system or focusing such resources on the parts of the broader system that are particularly relevant for the fight against corruption is more challenging. At the same time, it takes time for new institutions to be established and perform, increases institutional complexity and overheads, and can lead to disagreements about jurisdiction. Politically, the establishment of specialized anti-corruption courts can send a strong signal of government commitment.

While some of these specialized anti-corruption courts were successful and had strong local ownership, international donors have played a pivotal role in the creation of many of these institutions, for example as conditions to the provision of budget support. At times, this results in a lack of ownership translating into a significant implementation gap, with these externally imposed institutions often looking impressive on paper but falling short of achieving their declared objectives due to a lack of political commitment.¹⁹

If the commitment at the political level exists, it requires an adequate communication strategy as well as sound technical solutions to translate it into tangible improvements. Putting in place an adequate normative framework to fight corrupt practices is often a starting point, but it is at the level of implementation through justice institutions where the rubber really hits the road to translate the political commitment into results on the ground. In the case of the Philippines, such results have not materialized and in the case of Indonesia these results, while initially promising, are disappointing (Box 13.3).

The overarching goal is for the entire justice system to work properly, and in today's world, this requires international cooperation. Domestically, the justice system is based on the mandates of the police, prosecution service and the courts within the given jurisdiction. But in an increasingly interconnected world, mutual legal assistance and other forms of international cooperation between jurisdictions are crucial to effectively fight against cross-border corruption, as Box 13.4 explains.

BOX 13.3

Specialized Anti-Corruption Courts in the Philippines and Indonesia

The Philippines' **Sandiganbayan** is the oldest specialized anti-corruption court in the world. It has operated since 1979 without interruption and witnessed several amendments since its creation. Sandiganbayan is at the level of a Court of Appeals, but functions as a court of first instance. It has original jurisdiction over anti-corruption cases provided they are (1) brought against a senior public official; and (2) involve a sufficiently large amount of money. Its decisions may be appealed to the Supreme Court. The Office of the Ombudsman has exclusive authority to bring cases to the Sandiganbayan. In addition to the political signal to the population, the main declared rationale in creating Sandiganbayan was to expedite anti-corruption cases. They have struggled to meet that objective. Sandiganbayan experienced, over the years, substantial inefficiencies and delays in deciding anti-corruption cases, in part due to limitations at the Office of the Ombudsman.²⁰

In 2002, Indonesia's **specialized anti-corruption court**, known as the **Tipikor**, was established at the same time as the Corruption Eradication Commission, known as the KPK. Due to a Constitutional Court ruling in 2006, criticizing the legal dualism established by these specialized institutions, the entire anti-corruption judicial system underwent a major legal reform in 2009. Initially, there was one Tipikor court in Jakarta. Only the KPK had competence to bring cases before this court, while the public prosecution brought cases only before the general courts. The Tipikor had a conviction rate of 100% in 250 cases, while only 51% of cases prosecuted by the public prosecution resulted in a conviction. The 2009 reform decentralized the system by creating 34 Tipikor courts, one in each Indonesian province. Both the KPK and the public prosecution can bring cases. Prior to the 2009 reform, the integrity of the specialized judges before the Tipikor was not questioned. They were perceived as rather overzealous in achieving a 100% conviction rate. With the decentralization and the convictions of several specialized judges for corruption, the belief that these judges are clean and trustworthy outsiders to the system has been undermined.²¹ The recent KPK law risks reducing the institution's effectiveness at attracting high-quality employees and its independence in gathering information. This could partly reverse the remarkable progress in controlling high-level corruption since the institution's establishment.

BOX 13.4

International Cooperation and Mutual Legal Assistance (MLA)

The legal basis required for states to provide MLA can come either from domestic law, rogatory letters, or multilateral and bilateral agreements.²² For instance, China adopted the Internal Criminal Judicial Assistance (ICJA) into law in 2018.²³ The ICJA provides for both rules on domestic anti-corruption enforcement and rules for China's cooperation with foreign authorities in connection with criminal investigations and prosecutions. The ICJA is intended to fill the gap for countries where China does not have MLA treaties and clarifies the terms, roles and responsibilities of relevant government agencies in the process of providing or requesting judicial assistance. Cross-border plea deal settlements reached in cases like Airbus and Odebrecht show that this cooperation is key.

Airbus: In 2020, Airbus struck a deal with the UK, France and the United States by signing a corporate plea deal to settle several probes into allegations of bid-rigging and bribery in exchange for aircraft contracts.²⁴ Courts in all jurisdictions with open investigations have approved the Airbus settlement that totaled EUR 3.6 billion. The signed settlement was published and acts as a powerful deterrent to multinational companies not to engage in future corruption, both to avoid high financial fines and significant reputational damage.

Odebrecht: When Operation Car Wash,²⁵ a codename for the biggest corruption scandal in Brazil, became public in 2014, it shone a light on the misconduct of this Brazilian conglomerate active in the fields of engineering, construction, chemicals and petrochemicals in Latin America. It also challenged the independence of judges and revealed bribes paid to elite high officials. The Odebrecht case led to multiple settlements amounting in total to USD2.6 billion and to prison sentences issued against its senior officials. Moreover, this case unraveled a network of bribes spreading all through Latin America, involving, notably, a Colombian Senator, the Vice President of Ecuador, the President of Venezuela, and four former Presidents of Peru.²⁶ More than USD10 million in bribes were paid in Mexico. Former Brazilian President Luiz Inacio Lula da Silva was convicted of bribery charges and served a prison sentence. Operation Car Wash had numerous repercussions around the continent and the way jurisdictions cooperated. Intensive MLA played a crucial part in untangling these corruption cases in Latin America. Transparency International counted 484 MLA requests mostly related to the Odebrecht case, between 2014 and June 2018, made by Brazil (250 requests) and 55 other countries (234 requests).²⁷

An adequate communication strategy needs to support the anti-corruption effort, externally with the population and internally with justice stakeholders. Externally, it is absolutely key to continuously inform the population about measures taken and the impact they have. This builds trust in the leadership of the anti-corruption effort and in the judicial system. Internally, continuous dialogue with and among stakeholders is required to continue

communicating the political will and actively engage with all those who in the end will implement the technical solutions. Lack of communication can leave internal resistance unaddressed and result in delays with implementation or in derailed technical solutions. Thus, to the extent possible stakeholders need to be on board, for which effective communication with them and among them in support of the reform effort is a key requirement.

Addressing the challenges at three levels

Justice institutions need to address performance and internal corruption challenges in order to strengthen their fight against corruption. At the level of implementation, justice institutions need to maintain a dual focus on (1) improving their performance in the fight against corruption, and (2) fighting corruption within the justice institutions themselves. Tackling these challenges effectively is vital as weak institutional performance undermines the effectiveness of the justice system as a whole. The challenges should be addressed at three levels: system-wide, at the criminal justice chain level, and at the institutional level.

1. System-wide national level

Domestically, the first level is the system-wide national level, i.e. the government, including senior leadership of the judicial branch. At this level, questions regarding the governance of the justice system need to be addressed; for example: How best can judicial and prosecutorial independence be ensured so that decisions are made without undue interference, while encouraging judges and prosecutors to be accountable to the public for their performance, including for non-compliance with integrity requirements? The sequencing here is important. If there has been a regime change with justice system officials compromised through involvement in abuse of power, cronyism and corruption, a vetting may be warranted as a first step. The second step is to increase independence, but only hand in hand with greater accountability to the public for performance. Many countries have made the mistake of increasing independence as a first step. It meant that the second step of creating accountability mechanisms was much more difficult or even impossible to implement. Putting in place a performance measurement and management system to ensure performance accountability to the public may then encounter resistance that becomes insurmountable, not least because judges at the Supreme Court or Constitutional Court themselves tend to have the last word in case of disagreement between branches of Government. It is therefore important to have the right pool of personnel and then balance independence and accountability. Providing independence unconditionally as a first step is not the way to go.

Reforms at this highest level to increase performance in the fight against corruption should also target the process of selection, evaluation, and promotion of judges, prosecutors and court staff. Indeed, the selection process needs to be as merit-based and apolitical as possible, for example through involvement of a broader range of stakeholders other than politicians, including justice professionals, civil society and academia with high technical credentials. Other reforms seek to create islands of excellence in parallel to an existing institutional landscape, whose performance may take too long to improve in the eyes of reformers. Often driven by the need to show quick results, they focus on establishing specialized anti-corruption agencies, prosecution services, courts or a combination thereof, instead of trying to fix the existing institutions in the criminal justice chain in charge of the fight against corruption. All of these reforms are likely to require constitutional and/or legislative changes.

Questions of adequate resourcing and equipment also need to be addressed at this level. The question of resources includes the overall level of resourcing, but also the allocation and availability of the required resources in all relevant parts of the system.

2. Criminal justice chain level

The institutions of this chain need to be effectively interconnected and bottlenecks in inter-institutional communication addressed effectively through a joint committee or roundtable at the institutional leadership level. This provides a forum where inter-institutional challenges can be raised and addressed right away and where progress can be monitored towards achievement of joint performance targets to be agreed upon between all of them, targets that can be adjusted over time. Other relevant justice institutions should be involved as needed.

3. Institutional level

Each institution itself needs to diagnose two things: (1) its performance bottlenecks, and (2) the corruption challenges it faces internally. The performance weaknesses of any one institution

BOX 13.5

Court User and Multi-Stakeholder Justice Surveys

Court user surveys generate data about the experience of court users, which is one of the best proxies to measure the quality of services. If designed correctly, they can capture all kinds of service delivery bottlenecks, including the vulnerabilities for corruption. In places where it is known that there are challenges, such surveys tend to be resisted by those supplying justice services, i. e. judges, prosecutors and administrative staff. Multi-stakeholder justice surveys provide opportunities for all stakeholder groups to participate and to share their view, thus making it easier for professionals in the institution to accept that users are also consulted. The triangulation of the data and the analysis of the discrepancies of views then offer an opportunity to start a dialogue and to reach an agreement on challenges. The World Bank has carried out such multi-stakeholder justice surveys in the context of the EU accession process in 2014 in Serbia²⁸ and 2018 in Montenegro.²⁹ A series of cross-country multi-stakeholder justice surveys are currently under implementation in countries of the EU's Eastern Neighborhood.

of the criminal justice chain weakens the chain as a whole, because the chain can only be as strong as its weakest link. So overall institutional performance matters. The very first step in this process is for the institution to acknowledge that these challenges actually exist. Court user and multi-stakeholder justice surveys have proven to be a useful tool in this diagnostic phase (see Box 13.5). Indeed, justice institutions themselves are not exempt from corruption and capture that affect the broader public sector. Police is a common first interface for citizens with the justice system and surveys worldwide indicate that many citizens in developing countries have had experience with police corruption, for example with police stopping or arresting vulnerable people in particular to extort a bribe or other favors. Corruption among judges and court staff often involves the speeding up and slowing down of case processing, or other manipulations of case files. Surveys also indicate that many developing countries struggle with a lack of integrity among judges and prosecutors, influencing their decision-making.

Once the challenges are identified and acknowledged, consultations will be needed. Such consultations should involve the relevant institutional stakeholders, if possible in conjunction with civil

society, with the aim of agreeing on what specific actions will be taken to address the challenges (by whom, by when, with what resources). To ensure effective implementation of these actions, they should be captured in a performance improvement action plan. A key aspect at the institutional level is a commitment to manage the institution for improved integrity and performance in terms of service delivery. A strong initial signal of such a commitment is full transparency about the survey findings. Transparency along the implementation process, including the communication of whether and to what extent reform targets have been reached, remains critical for reformers to retain credibility with the public.

Measures to increase the institutional performance can focus on the processing of identifiable corruption cases by prosecution services and the courts. They can be tracked, monitored, and prioritized, potentially supported by ICT-based case management systems and performance dashboards. However, measures should not focus on such identifiable cases alone, because the “anti-corruption” segment of an institution is not necessarily an easily distinguishable workstream separate from its overall work. Broader solutions can cover a very wide range of activities, from business process reengineering followed by automation to backlog and delay reduction programs, workflow

improvements through better spatial arrangements, capacity building, tools to improve the coherence of adjudication, improvements in the management for service delivery of financial and human resources as well as ICT and infrastructure, and support to disadvantaged court users through simplified procedures for small claims, effective provision of free legal counsel to the indigent, self-help guides for specific types of cases and groups with access challenges, and legal information for various types of court users to only name a few. There is no blueprint for that. This is a broad field and much depends on the specific challenges in the local context and the resources available to address them. One aspect that remains key in any context, however, is the commitment to achieving real improvements and the implementation of technically sound solutions.

When it comes to measures to specifically address corruption challenges within justice sector institutions themselves, the range of options is narrower. Some tend to feature prominently across many countries, while the potential of other measures

is often overlooked. Examples include:

- Establishing effective complaint mechanisms as well as disciplinary systems
- Strengthening institutions investigating and sanctioning integrity breaches (e.g. judicial inspection)
- Preventive measures, such as asset and income disclosure requirements of justice sector officials and strengthening of conflict of interest legislation
- Information and communication technology
- Random assignment of cases to judges and prosecutors based on an adequate algorithm.³⁰ This can eliminate or limit the ability of parties, their lawyers, or those in the system assigning cases to judges and prosecutors (e.g. administrative staff in the intake office or court presidents), to ensure that the case reaches the “right” decision maker in the system (see Box 13.6 below).

BOX 13.6

Trade of Influence in the Judiciary

The ability of parties to “shop” for specific judges deemed to be favorable to their cause undermines the integrity of the judicial process. Moreover, the ability of people inside the judicial system to allocate specific cases to specific judges to ensure particular outcomes creates opportunities for corruption. In Bulgaria, for example, the European Union’s Cooperation and Verification Mechanism highlighted this kind of trade of influence in the judiciary as a major risk,³¹ but the phenomenon is widely spread. The Quality of Judicial Processes Index of the World Bank’s Doing Business report and its chapter on Enforcing Contracts therefore includes the criterion of the existence of an automated random case assignment system to make such trade of influence more challenging.³²

Increasing transparency

The establishment of prosecutorial and judicial databases and systematic publication of decisions with online access for lawyers and the general public and a well-performing search function increases transparency. This also supports judges and prosecutors in their effort to provide legal certainty through consistency in decision making and adjudication. The ability of artificial intelligence (AI) to process large amounts of data also provides an additional tool for analyzing the consistency of decision making, and to identify biases as well as inconsistency among specific judges and prosecutors. Some law firms tout the ability to identify “friendly” judges due to their knowledge about the judges and their practice, but the potential for specifically using AI in the fight against corruption seems to remain largely unexplored for now.³³ However, simple solutions such as the establishment of forms for common types of cases and provision of standard building blocks for formulating decisions in these cases gently increases the pressure on judges and prosecutors not to make changes to the forms unless there are good reasons for digressing.

Audio and/or video-recording of proceedings can also increase transparency. A common face of corruption in the courts is that those in charge of the minutes are biased towards one party and draft the records accordingly. Or the minutes are deliberately of such poor quality that the judge retains discretion on which facts and evidence, if any, to retain. Recordings accessible to the parties of the trial provide an objective basis for appeals in case the decision is not based on facts or evidence provided.

Insufficient attention is given to judicial infrastructure. In many developing countries, adjudication takes place in judges’ chambers, thus limiting access of the public and transparency. Reorganizing the spatial arrangements can have an impact on corruption practice, e.g. by limiting access of lawyers or the public to the area of the court where the judges and prosecutors have their offices. In modern courthouses, there is a functional separation of spaces, establishing entirely separate pathways for the general public and lawyers, judges and prosecutors, and detainees, pathways that only intersect in the courtroom.³⁴

Providing parties with clear information and guidance can also limit the need for parties to resort to petty corruption. “Facilitators” in many developing countries offer their services at the court building and promise effective access to the relevant staff and prompt processing against additional remuneration. If the pathways are simple with adequate signage and adequate information and required forms provided to parties online or at a physical helpdesk (e.g. about procedural steps to file a claim, required documentation, court fees), the journey becomes more predictable and parties less prone to intimidation by those who are eager to market their services. In this respect, legal aid can make a big difference in empowering poor and marginalized populations to even just dare to engage in the process of claiming their rights.

Identifying corrupt practices requires considerable effort, but the results make it worthwhile. While it is challenging to root out corrupt practices in justice institutions and elsewhere, such efforts contribute to improving service delivery, enhancing transparency, and increasing accountability for performance to the general public. Communication to the population about the commitment, actions taken, and their impact will contribute to rebuilding trust in the institutions.

Conclusion

Policy makers today have access to an arsenal of tools that justice reform practitioners have developed to improve the way justice sector institutions contribute to fighting corruption, including corruption within justice institutions themselves. As outlined above, many lessons have been learned over the last couple of decades, including about areas and sequencing of reforms. Four lessons, however, truly stand out. They revolve around transparency, accountability, the role of civil society, and – above all – political will.

Transparency

Increasing transparency is absolutely paramount for the success of anti-corruption efforts. In terms of transparency about the operation of justice institutions, there is a broad range of entry points. Publishing relevant performance data can be done at low cost and dissemination requires only basic technology like a website. The same is true for providing authoritative guidance to users on what is needed to access and navigate services. The use of ICT, however, is a game-changer, but these solutions can be costly and may not be implementable within the short term. ICT has a tremendous potential for truly transformational impact. Technology standardizes practices and can limit the ability of individuals to manipulate business processes without leaving a trace, for example through an ICT-based case management system in the courts or prosecution service. Technology can increase people's ability to access information about what is happening within a justice institution, and for the institution to collect and disseminate performance data to the public. In terms of transparency about the people working in justice institutions, the establishment of mechanisms for asset and income disclosure of justice officials can be impactful.

Accountability

Increasing accountability is of fundamental importance for successful anti-corruption efforts and does not require major allocation of resources. The important question is: Who needs to be accountable to whom and for what? There is a need for accountability of justice officials for compliance with ethics and rules, both

internally as well as externally to the broader public. For courts and prosecution services, this can be a tricky question due to the need for adequate protection of judicial and prosecutorial independence. Ultimately, this independence is less a privilege of the individual official, but an entitlement of the population: the right of citizens to an impartial judge and prosecutor. Transparency is a key ingredient for this accountability to be effective.

Role of civil society

Strengthening the role of civil society organizations and free media is important for accountability mechanisms to deploy their full potential in the fight against corruption. While they do not require major funding either, they need a sufficiently open space to operate in. The potential and actual beneficiaries of the justice system are very dispersed, they are not a well-organized group with adequate agency. Civil society organizations and free media are therefore key to act on behalf of the broader population to uncover wrongdoings and ensure that adequate sanctions are imposed on the perpetrators.

Political will

Finally, while technically sound solutions are a key requirement for success, the breadth and depth of impact ultimately hinges upon the extent of commitment at the political level, both outside and inside the justice system. While it is important for policy makers to be able to show short-term victories to citizens and other stakeholders to maintain or increase the momentum of anti-corruption efforts, the sustainability of these reforms is not primarily a function of the soundness of the technical solutions. Long-term impact and its sustainability depend on the extent to which the fight against corruption has become part of the DNA of the political system. Even the most successful reforms, such as the Romanian Anti-Corruption Directorate, fade away when the commitment at the political level dries up. Integrity achievements are not a one-time victory. Maintaining them requires a renewed social contract that fully embraces this dimension and holds those to account who try to find ways around it.

Notes

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- Ibidem*.
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- Not all anti-corruption agencies have prosecution functions, as this depends on the specifics in each jurisdiction.
- Council of Europe (2001), *Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics*, available online at <https://rm.coe.int/16805e297e>.
- There are countries where the police are placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor. In other countries the police are independent of the prosecution service.
- For examples from Mongolia as well as South and East Africa see Transparency International (2007), *Judicial Corruption Report 2007 – Corruption in Judicial Systems*, Cambridge University Press (Cambridge, NY: 2007). Available online at https://www.transparency.org/whatwedo/publication/global_corruption_report_2007_corruption_and_judicial_systems.
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- See one example of many: BTI (2018), Bertelsmann Transformation Index, Morocco Country Report 2018 (under Political Participation – Freedom of Expression). Available online at <https://www.bti-project.org/en/reports/country-reports/detail/itc/MAR/>.
- See Matthew C. Stephenson (2016), "Specialised Anti-corruption Courts: A comparative mapping", Series editor: Sofie Arjon Schütte U4 Issue December 2016 No 7, p 7.
- In 2019, Albania, Ukraine, and Madagascar have established specialized anti-corruption courts. See Exit News (2019), *Special Anti-Corruption and Organized Crime Courts Established in Albania*, available at <https://exit.al/en/2019/12/19/special-anti-corruption-and-organized-crime-courts-established-in-albania/>. See UNIAN (2019), "Ukraine launches High Anti-Corruption Court", available at <https://www.unian.info/politics/10513461-ukraine-launches-high-anti-corruption-court.html>. See Florian Schatz (2019), "Madagascar's Specialised Anti-Corruption Court: The quest to end impunity", Series editor: Sofie Arjon Schütte, U4 Brief 2019:2, pp1-2. Available at <https://www.u4.no/publications/madagascars-specialised-anti-corruption-court-the-quest-to-end-impunity.pdf>.
- For example, in Afghanistan, Albania, Indonesia, Madagascar, Malaysia, Nepal, Palestine, Uganda, and Ukraine, see Matthew C. Stephenson (2016), p. 8-9.
- Matthew Stephenson (2016), *Specialised Anti-Corruption Courts: Philippines*, U4 Brief, July 2016:3.
- Sofie Arjon Schutte (2016), *Specialised Anti-Corruption Courts: Indonesia*, U4 Brief, July 2016:4.
- Several multilateral treaties have dispositions on MLA, such as the Inter-American Convention against Convention (article XIV), the OECD Anti-Bribery Convention (article 9), and the UN Convention against Corruption (UNCAC, article 46). See Marie Terracol (2015), *Mutual Legal Assistance and corruption*, No 2015:17, available at <https://www.u4.no/publications/mutual-legal-assistance-and-corruption.pdf>.
- See Hughes Hubbard & Reed (2019), *Alert - FCPA & Anti-Bribery*, p 150, available at <https://files.hugheshubbard.com/files/HHR-Fall-2019-FCPA-Alert.pdf#page=13>.
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- See Watts (2017), *Operation Car Wash: Is this the biggest corruption scandal in history?*, *The Guardian*, June 1, 2017 available at <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.
- Anthony Faiola (2018). *The corruption scandal started in Brazil. Now it's wreaking havoc in Peru*, *The Washington Post*, available here https://www.washingtonpost.com/world/the_americas/the-corruption-scandal-started-in-brazil-now-its-wreaking-havoc-in-peru/2018/01/23/0f9bc4ca-fad2-11e7-9b5d-bbf0da31214d_story.html.
- See Gillian Dell and Andrew McDevitt (2018), *Exporting Corruption*, *Progress Report 2018: assessing enforcement of the OECD Anti-Bribery Convention*, Transparency International, p 109 https://www.transparency.org/whatwedo/publication/exporting_corruption_2018.

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29. Svircev (2018). Experiences and Perceptions of Judicial Performance in Montenegro. World Bank. <http://documents.worldbank.org/curated/en/673881525871078007/pdf/Experiences-and-Perceptions-of-Judicial-Performance-in-Montenegro.pdf>.
30. The effectiveness of random case assignment requires the consideration of other factors as well. If the court fees are very low and the system does not prohibit multiple filing, the lawyer can play the random case assignment lottery until the case is assigned to the right judge. All duplicate cases would then be withdrawn. Where multiple filing with the same party names is impossible, lawyers may resort to changing a letter in the name of the parties until they “win” in the case assignment lottery, withdraw the other cases, and then correct the spelling mistake as a clerical error. Building a waterproof system requires an in-depth understanding of local practice.
31. See EU (2011). EU Progress report Bulgaria February 2011 (COM(2011)81), available at <https://ec.europa.eu/transparency/regdoc/rep/1/2011/EN/1-2011-81-EN-F1-1.Pdf>.
32. See <https://www.doingbusiness.org/en/methodology/enforcing-contracts>.
33. France recently passed a law criminalizing the analysis of data about the decisions of individual judges to prevent profiling. See Tashea (2019). France bans publishing of judicial analytics and prompts criminal penalty. <https://www.abajournal.com/news/article/france-bans-and-creates-criminal-penalty-for-judicial-analytics>.
34. That does not prevent meetings in the parking lot or elsewhere, but the threshold for this is higher.
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