

Anticorruption reform in rule of law programs

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1. Introduction

This chapter underscores some of the key findings of the last two decades of international efforts at promoting the rule of law in democratizing countries and transition economies. It explores the intricate links between, on the one hand, legal and judicial reform and, on the other hand, anticorruption efforts. It explains why and how, by broadening its scope to concerns over the strength of the rule of law, legal and judicial reform have come to integrate anticorruption reform as an one of its main objectives. The chapter also advances some proposals to enhance further the anticorruption thrust of the rule of law agenda.

The chapter is structured in six main sections. The following section distinguishes two distinct waves of legal and judicial reform. The third section briefly discusses the first attempts at reforming the judiciaries and their influence on controlling corruption. Section four depicts some of the specific measures adopted after the recognition of corruption as an obstacle to development. Section five shows the inflexion made in the rule of law agenda in the mid-1990s. The sixth and concluding section summarizes the recent evidence and current debates that are shaping the future of the anti-corruption agenda.

2. From “law and development” to “rule of law”

Since the 1960s, successive paradigms of development theory have recognized the critical role played by the law in economic and political development. This acknowledgement has been reflected in the myriad of cooperation programs undertaken to reform legal and judicial institutions, including legal training and education, legal assistance and law drafting, judicial systems, and court modernization.

A first wave of legal and judicial reform took place in the 1960s. Guided by a never confirmed premise that law could be the engine of social change, a movement led by prominent legal scholars based in the United States and supported by the United States Agency for International Development (USAID) and private donors, sought to promote economic growth and development through reform of legal codes and judicial systems in the developing world (Messick 1999; Carothers 2001 and 2003; Trubek 2003). The basic idea of that movement was to replace a formalistic conception of legal processes by a more policy-oriented approach to judicial functioning, in the context of state-led development strategies. They target audience for these programs was the policymaking elite in law schools throughout Latin American and some parts of Sub-Saharan Africa.

However, in the mid 1970s, changes in the economic paradigm that the endeavor was

supposed to serve, as well as the failure of their legal transplantation and institutional modeling strategies, the “law and development” promoters abandoned their reformer enterprise (Trubek and Galanter 1974; Trubek 2003).

A second wave of legal and judicial reform efforts emerged in the late 1980s. In the mid-1980s, the Washington consensus revived the faith in the development potential of the law. The idea of a direct relationship between the functioning of the law and economic development was re-invigorated, although in a significantly different context. International organizations, donor governments and private foundations embraced the idea that “building ‘the rule of law’ might itself be a development strategy” (Kennedy 2003: 2). Hence, beyond the externalities that legal and judicial reform may generate in terms of economic growth and political development, building the rule of law progressively became an end in itself, rather than a means towards broader goals. Nevertheless, the term “rule of law” is used in a very ambiguous way leading to multiple understandings of the concept (Stephenson 2000). It comprises several characteristics related to the fairness of both legal processes and judicial systems; the notion that law equally binds all actors, starting with the government; and the idea that courts can fairly and efficiently solve disputes among private parties and between them and the government (Carrothers 1998:96).

In spite of the lack of a precise definition, the rule of law as a development strategy has progressively been conceptualized along two main axes: economic development and political democratization. Both objectives, nonetheless, usually appear as intertwined goals, to the convenience of the rule of law promoters. Indeed, in some cases, donors do not want to be seen as promoting the interest of private businesses (Carrothers 2003). Conversely, arguments in favor of economic-only approach to the rule of law promotion often claim that such a covert strategy is indeed that of a “Trojan horse” ultimately furthering democratization, as some rule-of-law practitioners now argue in the case of China (Stephenson 2000). The arguments tend, however, to generate some confusion, as the rule of law tends to be conceived somehow both as an end in itself and a means to either economic growth or political democratization, or both. Combining both laudable goals in practice is a daunting challenge, for any conceptual contortionist.

The economic growth argument is on side of the rule of law coin. It is anchored in the belief that investments would be better promoted if property rights were clearly determined, consistently applied and effectively enforced. This has led in recent years to a proliferation of academic research on the correlation between economic growth and different indicators related to “governance”, a term coined by international organizations at the beginning of the 1990s (Upham 2002; Barro 1997; Weder 1995; World Bank 1997 and 2002) when Douglass North’s new institutional economics gained wider acceptance (North 1990.) Democratization theory is the other side of the coin. Linked to the human rights movement, the democratization agenda has also a developmental purpose, as liberal democracy

is considered the most compatible system to the market economy promoted by the prevalent development paradigm.

It is needless to mention that globalization and the fabulous increase of transnational trade favored this view. Although business opportunities are the primary factor considered by foreign investors when deciding whether to invest abroad or not, the legal and judicial systems –how property rights are enforced, how public goods are delivered, how transparent is the information flowing- are important secondary factors (Hewko 2002: 6).

Therefore, since the late 1980s, governments in Latin America, Sub-Saharan Africa and Eastern Europe have embarked upon a myriad of “rule of law” projects, sponsored by a wide range of bilateral donor agencies and multilateral development institutions, such as USAID or the German technical cooperation agency, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ.) In 1999, four bilateral aid agencies, the United Kingdom, the Netherlands, Norway and Germany established the Utstein Group Anti-Corruption Resource Centre to share information, build knowledge and disseminate lessons learned in their anti-corruption efforts. The international financial institutions, such as the International Monetary Fund, the World Bank and regional development banks, have all taken a keen interest in promoting the rule of law in developing countries and transition economies (Santiso 2003a.) The last two decades of rule of law promotion has thus generated important lessons, some of them learned, other not.

Regarding the links between rule of law promotion and anti-corruption policies, two distinct periods of reform can be discerned. The first wave of reforms has centered at the state and, obviously, the judicial branch of government. Although combating corruption was not always recognized as an explicit goal of rule of law programs, such programs aimed at curbing “discretion” within judiciaries by formalizing procedures, modernizing courts, professionalizing judgeship, and strengthening the independence of the judiciary as an institution of governance. The rule of law was primarily conceived as a question related to the functioning of the court system. The formalization and transparency of legal systems can be defined as the primary goals of these types of projects. While the former is usually associated with the reduction of discretion of judges through the drafting of clear laws, detailed procedures, and effective case tracking, the latter is linked to arguments over predictability, price distortion and transaction costs in litigation (Kennedy 2003). These programs conceptualize corruption or “judicial corruption” as the use of public power for private gain, which not only includes attracting economically measurable advantages (bribes, political exchanges,) but also creating both procedural (delays, record-keeping, case tracking, speed and delays) and substantive (legal interpretations and judicial verdicts) advantages. Indeed, legal uncertainties and unclear procedural rules leave room for interpretation to individual judges and gaps in legal and judicial processes create opportunities for multi-speed justice.

Curbing corruption has now become a core objective of most rule-of-law projects and governance programs. In the course of the 1990s, a large body of theoretical and empirical evidence demonstrates the negative impact of corruption on both economic growth and democracy. These developments has led rule of law promoters and practitioners to confront corruption more systematically, as a core component of any judicial reform programs. A turning point was the opening statement of the World Bank's President at the 1996 annual meeting, underscoring that controlling corruption was essential for development. Not only has corruption become an explicit component of rule of law programs since then, but the changes in World Bank policies that the 1996 speech of its President entailed meant a significant broadening of the scope of legal and judicial reform programs. Such as change was reflected, for instance, in the incorporation of non-state actors (such as civil society and the media) and broadening the understanding of the issues to be addressed. The inflexion in approach also reflected a rejection of "one size fits all" formulas, which had largely failed, and their replacement by more locally owned approaches entailing the active participation of local institutions and civil society organizations.

3. Curbing corruption by formalizing the judiciaries

Although curbing corruption has been perceived as a priority of "rule of law" strategies, judicial reform projects have traditionally not included anti-corruption components.

There were at least two main reasons for this. Firstly, corruption was essentially considered an internal political problem in the exclusive purview of state sovereignty. International agencies, inhibited by restrictive mandates, were not allowed to interfere in such domains of domestic jurisdiction. Bilateral donors were constrained in aid frameworks confined to or conditioned by state-to-state cooperation. International financial institutions, such as the World Bank, are explicitly prohibited from interfering in the political affairs of its members and can only support projects directly linked to economic development. At that time, corruption was not yet unanimously considered as an obstacle to development. Moreover, before the democratic wave of the 1980s, a strand of the development literature argued that some types of corruption could indeed stimulate development, although that argument was developed either in the context of authoritarian regimes or in that of state planning and regulation derived from import-substitutions development strategies (Leff 1979; Huntington 1964). These considerations refrained many donors from joining anti-corruption efforts during the first decade of "rule of law" programs. It took almost a decade for corruption to be widely accepted as a critical issue for democratic consolidation and economic development.

Secondly, donors' involvement in anticorruption efforts was resisted by governments in recipient countries, on the grounds of the interference in domestic affairs this entailed. Leaders in recipient countries rarely agreed in subjecting their own behavior to scrutiny.

Thus, much of the work done during until the mid-1990s focused on simplifying administrative processes, formalizing legal systems, modernizing judiciary structures, and increasing the independence of the judiciary. While not explicitly targeted at preventing corruption, these tentative measures were seen as having the collateral effect of curbing administrative discretion and reducing bureaucratic corruption. The goal of these legal and judicial reform projects was to achieve efficiency. However, it was expected that improving managerial skills, simplifying and clarifying procedures for case-management, and enhancing the transparency of and access to judicial information would contribute to reduce corruption and discretion. Designing rule-of-law programs in a technical frame has allowed the World Bank to indirectly engage in anticorruption, while remaining within the boundaries of its restrictive mandate (Santiso 2000.)

This approach is reflected in the measures hereafter examined. The following paragraphs are not an exhaustive review of the wide variety of rule-of-law programs, but rather a representative account of how corruption was understood and conceptualized, mainly as a collateral issue whose improvement would automatically result from efficiency and transparency reforms in other sectors.

Independence of the judiciary

The idea that an impartial authority entrusted with the adjudication of disputes and for enforcing contracts among private parties, as well as for making government to account and respectful of private property dates back to the Enlightenment movement of the 18th Century. Recent research has confirmed that the absence of an independent enforcer increases transaction costs, distrust and reticence to engage in commercial activities with unknown partners (See Messick 1999: 121-123). Feld and Voigt (2002) found a strong correlation between judicial independence and economic growth, although the causal direction of such correlation remains uncertain. An independent judiciary is usually characterized by judges who make decisions on legal cases regardless of political considerations or sympathies and without the undue influence or pressure of the other branches of government. Furthermore, it is expected that these decisions will be enforced truthfully and in full, regardless of their impact on government. Moreover, independence also means that judges will be protected from reprisals.

Rule-of-law programs have thus engaged in major efforts to increase judicial independence. Many projects in Latin America sought to enhance judicial independence through a

¹ For a useful review, see: Messick 1999: 121-123.

professionalization strategy. For instance, USAID encouraged the creation of more than fourteen judicial schools in the region or sponsoring training programs for members of the judiciary in eighteen countries (Sarles 2001:71). The main rationale of these intervention was that a professional judicial career and continuous training of legal and paralegal staff were not only necessary for enforcing new substantive laws (also drafted in the framework of the projects) but also to empower the judiciary, which is usually the weakest branch of the government.

Similarly, from a transparency perspective, professionalization may also contribute to promoting a culture of “judicial institutionalization” and foment an “esprit de corps.” It also helps reduce politicization within the judiciary, which is a serious problem in countries that lack effective mechanisms of scrutiny and accountability over the appointment, promotion and impeachment of judges.

In Latin America, the regular packing of the courts by incoming governments has contributed to create pliant judiciaries, or “politically addicted” automatic majorities such as in the case of Argentina in the 1990s (Santiso 2003a.) Political interference in the administration of judicial careers has allowed impatient government to capture the administration of justice and neutralize the accountability functions of the courts, with the unintended effect to undermine judicial certainty and social legitimacy (Gargarella et al eds 2003.) Indeed, Latin America has been characterized by both the “politicization of the judiciary” and the “judicialization of politics” (Vianna et al., 1999).

Absence of meritocracy along with pervasive politicization undermines professionalism and fuels corruption: decisions on recruitment, appointments and promotion of judges tend to be arbitrary. They usually are not based on merit, performance or experience. Sometimes judges are appointed by different political parties or as a result of delicate bargains struck by them, or even amongst factions within parties. Those parties or partisan factions responsible expect from the judges they appoint passive acquiescence, active cooperation, and even total allegiance. The deference of judges to their political godfathers can be reflected, for example, in the acceptance of suggested legal case leading to pre-determined decisions or the speeding up (or slowing down) of certain cases. Hence, the adoption of predictable procedures and clearer rules to administer judicial careers, along with incentive structures more prone to preserve the independence of the judiciary, such as transparency in promotions, clarity in career paths and unbiased rotations were seen as effective means for decreasing potential political interference.

Improving professionalism was considered a critical reform to “institutionalize” the judiciary, in particular in countries where corruption had become prevalent. Executive education for judges and continuous training for other court officials tend not only to improve their abilities to discharge their duties, but also to increase their sense of responsibility and self-esteem, their “esprit de corps.” More generally, providing adequate work-space and sufficient resources, including means

of transportation, information services, and protection, were seen as instruments contributing to empower judges and improve the motivation of the legal and paralegal profession. In addition, establishing standards of conduct for judicial employees and a formal disciplinary system for enforcing such standards fairly and consistently was deemed crucial to enhance the credibility of the judiciary as an institution of governance. These measures were also aimed at addressing prevailing opportunistic behavior among judicial personnel. The poor training and low motivation of judicial staff are mainly an outcome of deficient and unpredictable organizational practices and structures.

Rule-of-law reformers have also actively participated in the re-designing of appointment and impeachment procedures. In the course of the 1990s, systems for appointing judges were reformed. Several Latin American countries and some East European countries more recently have moved from a political appointment procedure, usually by the Ministry of Justice, to an allegedly more independent and pluralist mechanisms governed by “judicial councils”, usually integrated by judges, members of parliament, bar associations, and, at times, legal and paralegal non government organizations and renowned academic scholars. However, as Linn Hamberg (2002a) aptly underscores, these institutional reforms have neither automatically not necessarily improved the situation, as the main problem was not always related to the independence of the judiciary, as it was to its institutionalization. At least in Latin America, where judicial councils were widely adopted *de iure* or “in the books,” the formal insulation of judges from other branches of government has not per se lead to substantial changes, as the underlying have logics of patronage and clientelism have tended to endure. In Argentina, for example, the creation of the judicial council as well as the powers it has been endowed have been hampered by lack of political will. Formally established in 1994, the Argentinean judicial council only started to function in 1998 with its mandate and powers contested by the judicial hierarchy, in particular the Supreme Court.

Where every judge has his or her own patrons, be them politicians, superior judges or powerful individuals, formal institutions tend to be easily co-opted by these informal relationships and networks which dominate the political system in which the judiciary inserts itself. While the judiciary is expected to be politically independent, it nevertheless remain a critical political actor itself. Neither the government nor political parties can be solely blamed for undermining judicial independence. The judiciary inserts itself and is part of a broader and complex web of social networks, nourished by familiar, friendship and other social configurations, which vary from country to country. A critical lesson learned after almost two decades of rule-of-law reform is that the naïve distinction between politicians and judges must be abandoned. As an Argentinean Supreme Court justice once commented, “all judges are politicians, whether they know it or not” (Abramovich 1992).

The implications for anticorruption reform of the experience with judicial councils are, nonetheless, important. The creation of these councils, and more importantly, the debates over their

compositions and functions – in particular whether they shall administer the judicial budget - shed light on the influence informal relationships and patronage networks have on judicial governance. Understanding these dynamics is essentially to decipher how such social-economic networks interact with the judiciary (Cartier Bresson 1997). Undoubtedly, assigning to one single body the appointment of judges led to an increase in the transparency of the selection process. This does not necessarily mean a proportional increase in the quality of judges, but competition “eliminated many of the under-the-table machinations that went before” (Hammergren 2002a).

Accountability through performance

Another indirect way to control corruption in judicial reforms projects was the attempt to develop incentives that reward performance and indicators to measure that performance. The absence of systems for evaluating performance creates opportunities for arbitrary decisions based on personal convenience or political considerations, and consequently contributes to the self-perpetuation and reproduction of informal networks, making lower-level judges dependent on higher-level judges who tend to be more inserted in the political system. Indeed, while increasing the independence of the judiciary vis-à-vis other branches of government contributes to containing pressure from political forces outside the judiciary, it nevertheless grants considerable disciplinary powers to the judicial hierarchy and exposes lower-rank judges to pressure by their superiors (Santiso 2003b). Lower-level judges thus tend to become increasingly dependent on higher-level judges who control promotions, assignments and salary progression.

It is thus unsurprising that the judicial hierarchy tends to resist reform, as this undermines its discretionary powers. As Hammengren (2002a) underscores, judges usually interpret the monitoring judicial performance as a threat to their jealously defended independence. Indeed, the rejection of the legal principle of *stare decisis* - ‘stand by things decided’ - or precedent by many judicial systems in Latin America, such as in Argentina or Brazil, provide individual judges with greater scope for arbitrary decisions on a case-by case basis (Santiso 2003b.) This gives individual judges an extraordinary power to shape judicial decisions that can have a significant impact on the polity and the economy. Despite the importance of judicial reform in the public debate over the last decade, it has proven extremely difficult to craft a sufficient consensus on the shape of the reforms required, devise a credible reform project, and create a coherent pro-reform coalition. Lack of consensus what these reforms ought to look like further undermines the credibility of any attempt.

Reformers are, for this reason, conceptualizing judicial performance in a way that cannot be challenged as undermining judicial independence. However, reformers have also endeavored to instigate a broad social consensus to pressure government and lawmakers to establish some sort of judicial performance standards and external accountability mechanisms.

Performance indicators over timelines, consistency with similar cases and with substantive law considerably reduces the opportunities for corruption within the judiciary. When these performance indicators are used to determine promotions, compensation, and salary increases, they help improve judicial behavior. However, establishing an effective set of indicators is a difficult task, both in terms of designing it and implementing it. Hammergren (nd) has warranted caution and expressed skepticism on the ultimate usefulness and effectiveness of such mechanisms.

Furthermore, efforts to strengthen judicial independence have encountered serious legal and political challenges. In many countries, higher-level courts, in particular Supreme Courts, have fiercely resisted any encroachment to their alleged independence. They have tended to claim that performance-based judicial management systems would interfere with their independence. Since the restoration of democracy in 1985, the Brazilian judiciary has proved extremely skilled at resisting reform, based on a strict their administrative, personnel and disciplinary affairs. Furthermore, in order to prevent any interpretation of the principle of the separation of powers enshrined in the 1988 Constitution.

While the prevailing consensus holds that an independent judiciary is critical for its credibility, reformers have often overlooked the corresponding need to enhance accountability (Santiso 2003a; Prillaman 2000). For example, the Brazilian judiciary has been granted unprecedented levels of independence by the 1988 Constitution. The courts were given total control over their administrative, personnel and disciplinary affairs, as well as near total control over its budget. The democratic constitution clearly succeeded in isolating the judiciary from political interference. However, the central question is not whether the judiciary lack independence, but rather whether it has become too autonomous, lacking effective mechanisms of external accountability and control. The key challenge resides in finding the most adequate balance between independence and accountability. The paradox is that excessive independence makes it particularly difficult to reform the judiciary.

Case management and procedural law

Infractions of procedural law represent one of the most widespread forms of judicial corruption. Media reports claiming that employees are paid for delaying or accelerating legal cases, or even “compensated” for performing normal services, such as delivering a notification or taking a deposition during the evidence-gathering stage of a judicial inquiry, are abundant (Langseth 2000).

These situations occur because effective case control systems and case tracking mechanisms are lacking. In such contexts, creating a framework of incentives conducive to better performance and honest behavior is an almost impossible task if performance standards cannot be monitored, or even defined. In such cases, it is very likely that lawyers will use the judicial system not to obtain, but

rather to avoid justice through delays (Hammergren 2003). Defining such standards through quality control techniques is therefore key for identifying irregularities, deter tampering, and provide efficiency-enhancing incentives.

Reform projects have therefore endorsed case management techniques, archives and databases for controlling timelines. Some countries, such as Equator or Peru, have even adopted the so-called “corporate courts,” where paralegal staff is responsible for the initial processing of legal case, in an attempt to “mechanize” the initial stages of a trial.

Technology

Traditional judicial reforms have also endeavored to modernize the technology infrastructure of judicial institutions. Gaps in information systems and legal inconsistencies have indeed been identified as key sources of excessive discretion. The lack of sufficient record-keeping, case-tracking, file-management, docketing, and administrative follow-up contributes to corruption. Members of the judiciary who decide to engage in corrupt behavior can do so knowing that their actions are unlikely to be reviewed or questioned, and thus unlikely to be sanctioned. Systematic and consistent data allows to reviewing the job performance, actions or omissions of specific judges in specific cases. Thus, a computerized system has often been seen as a solution for simplifying administrative procedures and improving transparency in case-tracking.

Budgetary allocations

The judicial system requires adequate funding to perform efficiently and be effectively independent from political pressure, especially from the executive, as the latter controls the executing of the state budget. Security and stability in funding, for example through multi-year allocations or a fixed percentage of the state budget, are thus key dimensions of judicial effectiveness. The body in charge of the administration of the judiciary, not necessarily the courts, should determine and oversee judicial finances.

From a long time, improving the scales of remuneration of judicial officials was a primary objective of reformers. There were two main arguments in that regard. On the one hand, it was argued that the lower the salaries, the greater the temptation to receive or solicit money unlawfully. On the other hand, it was believed that higher pay tends to attract and retain more capable judicial employees. Although the latter argument continues to remain valid, the former proved to be applicable only to “petty” or administrative forms of corrupt practices. In cases of “grand corruption” and state capture, better salaries do not guard against corruption.

Since the aforementioned measures were not originally designed as anti-corruption measures as such, nor the methodologies developed for measuring their impact, it is not possible to evaluate

the impact of these measures on corruption control. Nonetheless, if cases are tracked through a systematized system with consistent rules and if such information is publicly available, a comparison among similar cases would provide basis for detecting irregularities. In other words, even if these mechanisms did not have automatic impact on corruption, by allowing comparisons, they would provide “paper trails” for investigating irregularities.

4. Specific anti-corruption measures

All the measures described in the preceding section were directed to combat administrative corruption within judiciaries, the rationale being that modernization, formalization and increased efficiency would inevitably increase transparency, oversight and self-restraint within the judiciary.

When, in the second half of the 1990s, corruption became explicitly recognized by international financial institutions as an obstacle to development, reformers broadened their original approach to judicial reform by incorporating specific anti-corruption components to their programs.

Some of these reform efforts acknowledged that the new phase or wave in development thinking provided them with an opportunity to empower judges with techniques directly directed at fighting the corruption occurring within and without the judiciary.

Special investigative techniques

Openly recognizing the adverse developmental consequence of corruption allowed reform programs to concentrate their efforts in providing judiciaries with adequate tools for curbing and preventing corruption.

This changes in strategy occurred simultaneously with other anti-corruption efforts taking place in developed countries as well. From the mid 1990s onwards, the legal framework for fighting corruption has drastically changed. Corruption started to be recognized as a global problem, implying that it should not be addressed unilaterally and domestically, but rather multilaterally through international cooperation. A series of regional conventions and soft-law international standards were progressively adopted (EU, OECD, OAS, UN draft). These initiatives were taken seriously by the international financial institutions, international anti-corruption non-governmental organizations (NGOs), the private sector, and, more remarkably, the international banking industry. The international anti-corruption drive was coupled with other global initiatives, such as the fight against money laundering and, after 2001, security threats and the fight against terrorism. These preventive mechanisms at the international level were complemented and amplified by the creation of national institutions whose mandate was to curb and prevent corruption, such as anti-corruption offices, anti-money laundering agencies or financial intelligence units.

This trend reflects a move from the traditional emphasis on controlling “petty” corruption, towards attempts at curbing “grand” corruption. Several resonant cases of the last decade –Sani Abacha in Nigeria, Ferdinand Marcos in the Philippines, Duvalier in Haiti, Mobutu in Zaire- have proved that grand corruption cases usually involves several jurisdictions, with different legal systems in operation. In addition, such cases are always surrounded by specific provisions on banking secrecy, corporate secrecy, off shore management of assets, corporate vehicles and similar structures created to preserve anonymity. Despite their legal uses, such structures have also been used for hiding the proceeds of major corruption affairs.

Leaded by OECD Countries, a new and specific legal domain has been developed to fight transnational corruption cases. The main theory was to extend the scope of money laundering from the narrow field of drug-trafficking offences to the broader sphere of macro-economic crimes.

The main consequence of the incorporation of corruption to the anti-money laundering logic was the involvement of several actors of the business community –financial intermediaries, accountants, real estate dealers and lawyers in some jurisdictions- in the anti-corruption global strategy. These actors are now obligated to act as gatekeepers of illicit financial transactions and to enhance in special due diligence procedures when they suspect that a transaction involves proceeds of corruption. As a consequence, these industry actors are developing their own internal procedures to comply with this new legal framework. Several jurisdictions are subjecting their financial intermediaries to rules directed to prevent their engagement in corrupt transactions. In addition, some industry sectors are taken self-regulating initiatives to deal with this new framework. For example, the major players in private banking decided to issue their own standards in both private banking and correspondent banking, two highly vulnerable segments of the industry in terms of illicit transactions (Wolfberg Principles). Moreover, following a Swiss initiative, the Financial Action Task Force has included in their 40 Recommendations the “politically exposed persons” standard (FATF Recommendation 6), recommending special due diligence procedures for bankers establishing business relationships with senior public officials.

This new global dimension of the anti-corruption strategy has also considerably increased the flowing of information among law enforcement officials and judges. However, it would be unfruitful if officials of developing countries were not aware of the advantages of the new system.

Rule-of-law programs have recently started to train judges, prosecutors and administrative staff in the functioning of this new legal domain and related institutions. The emphasis has been placed on the exchange of information and experiences between countries and on facilitating co-operation between the newly established agencies and other law enforcement agencies, as well as among similar agencies in different countries. The rationale is to broad the scope of both preventive and investigative agencies from a local to a transnational perspective. Collaboration and appropriate

exchanges of information with foreign peers is in the essence of these new projects, the specific topics ranging from how to obtain bank records in secrecy jurisdictions to tax disclosures, systems to collect and seize evidence abroad and confiscation measures.

Controls over illicit enrichment

Another common measure supported by rule-of-law reforms has been the disclosure of assets and liabilities of public servants, including members of the judiciary, upon appointment and annually thereafter. This measure is often coupled with shifting the burden of proof for unexplained enrichment from the accuser onto the suspected official. This exposes corrupt officials to the risk of having to justify the resources sustaining their levels of wealth and standard of living, something they can often hardly do. Some countries do confiscate goods and money if public officials cannot satisfactorily explain their origin. However, these sets of measures are particularly difficult to implement and monitor thereafter.

These measures have been adopted either as criminal – criminalization of illicit enrichment – or administrative provisions – an indirect control exercised by oversight agencies. The legal notion of illicit enrichment has, however, two drawbacks. On the one hand, illicit enrichment prosecutions are usually constitutionally challenged on the basis that the reversal of the burden of proof violates the defendant's right not to be compelled to declare against him/herself.

On the other hand, criminal charges of illicit enrichment seriously undermine international co-operation procedures, both for evidence gathering and for recovering stolen assets. Since all mutual legal assistance treaties allow refusal of co-operation on dual criminality grounds –the conduct under investigation must be a criminal offence in both the requesting and the requested jurisdictions- and neither European countries nor the United States have criminalized illicit enrichment (on constitutional basis), prosecutions for illicit enrichment rarely obtain co-operation from jurisdictions where this conduct has not been criminalized..

This has been a point of discussion in the ongoing negotiations of the United Nations Convention Against Corruption. During the Fifth Session, delegates agreed in recommending the criminalization of illicit enrichment subjected to the constitutional principles and the administrative disclosure mechanisms of each signatory party (art. 25, as agreed at the Fifth Session of July, 8, 2003). In addition, the Convention has relaxed the dual criminality principle, making co-operation voluntary to the requested party in cases in which the principle is not met.

4. Broadening the reform horizon

Although reforms in specific countries and specific sectors were successful, an overall examination of both stages of judicial reform - modernization of judiciaries and specific anti-corruption measures - did not show impressive results (Kauffman 2003).

Overall, the measures described in the precedent section pertain to what can be called the initial approach to reform. Such approach tended to assume that an independent and efficient judiciary supported by a modern legal framework and trained with appropriate techniques to investigate cases of corruption would, by itself, reduce corruption. Moreover, the reform template was deemed universally applicable, with the sense that the same approach could be replicated across countries, regardless their political, economic and social characteristics (Carothers 1999).

These two original assumptions have been challenged by the initial results of the reforms: variations across countries showed that the “one size fits all” assumption did not work. As a result, reformers recognized that rigorous assessments of the political, social and economic conditions of the recipient country should be undertaken before designing and implementing reforms.

Another important change was the move away from the exclusive focus on the judiciary. On the one hand, the limited access to formal justice in most developing countries, suggested that reforms should broaden their scope in terms of the actors involved. In addition, reformers realized that a broader consensus on the reform agenda was needed (Messick 1999). The initial reforms were based on the assumption that consensus at the highest level of government would suffice to make reform happen. However, experience has showed that those who were actually expected to change resisted reform. As a result, rule-of-law programs started to include not only those actors directly involved in the administration of justice, such as judges and prosecutors, but also external actors, such the NGOs and the media as key “drivers” of anti-corruption reforms.

This shift in approach led to the development of new concepts, strategies and instruments to better plan and execute anti-corruption reforms. A first fundamental lesson of the first decade was that reforms needed to be carefully planned and tailored to the necessities of each country. Consequently, reformers started to develop mechanisms for measuring corruption or “diagnostic surveys” (see below). Such surveys would lead to the identification of priority areas. Stakeholders would then be invited to participate in the elaboration of reform proposals as well as the oversight and monitoring of their implementation. Only once these preparatory steps are taken, including a consensus among the relevant actors, would a reform project adopted.

Measuring corruption through diagnostic surveys

Having abandoned the “one size fits all” idea, anti-corruption reformers confronted another commonly held belief: that corruption cannot be measured. Economists used to claim the secret

nature of corruption impeded assessing its costs. For decades, such a belief had denied the possibility of measuring corruption.

In 1997, however, “diagnosis surveys” started to measure corruption and evaluate its impact. Diagnosis surveys are specially designed surveys on specific themes related to corruption. Measurement is, of course, imprecise for strict economic analyses or econometric tests. They are nevertheless good enough for detecting problems, making comparisons across countries, and designing policy responses. In addition, surveying different actors is a powerful tool for recognizing informal centers of power as well as potential partners for policy design and external oversight.

More fundamentally, diagnosis surveys increase the overall understanding and awareness of the reform process. The information generated by diagnoses allows reformers to avoid past mistakes resulting from incorrect problem specification or the lack of a precise agenda, objectives, and strategies. Furthermore, diagnosis surveys help establishing priorities for reform and identifying the nodes where corruption is concentrated.

Survey methodology and the credibility of the surveyors are key factors conditioning the accuracy and adequacy of diagnoses. To be as effective as possible, diagnostic work should include an assessment of the needs, use comparative experiences and resort to best practices or lessons learned.

Building coalitions

Once the diagnostic work has identified target priorities and objectives, the next stages entail the crafting of pro-reform coalitions. Coalition-building is understood as the process of involving the different stakeholders to the process.

Civil society actors, represented by NGOs, consumers’ associations, bar associations and the like, are to become engaged in the design, implementation and monitoring of the reforms adopted. Civil society actors and NGOs can promote public awareness of the revised legal system, providing a common understanding of the informal and formal rules. Since any reform implies breaking established coalitions and diluting pre-existing networks, building new pro-reform coalitions is key. While the involvement of multiple actors tend to slow down the pace of reform and at times dilute reform proposals, when civil society actors are involved in the design of the reforms, the consensus required for implementation is automatically broaden, greatly facilitating the implementation process. As users, these actors have incentives for making reforms happen and seeing the process through. Furthermore, local NGOs have often undertaken in-depth technical assessments of concrete situations, providing detailed accounts of the functioning of formal and informal rules.

Civil society, as well as other state agencies, can also play a valuable role in monitoring corruption. Ombudsman offices, anticorruption agencies, policy think tanks, universities, and NGOs can serve as watchdogs. NGOs can bring pressure to bear on specific cases, through public

campaigns. They can also review enforcement mechanisms, compile statistics and make this information publicly available. At the international level NGOs are providing an invaluable source of pressure for making government ratify and implement anti-corruption conventions, and for forcing them to enact domestic rules complying with international soft-law standards.

Access to information and culture of transparency

Another key actor in any anti-corruption reform has been the media, when it is allowed to function in a context of freedom of expression and with relative independence. The media plays a key role in increasing public awareness and encouraging public involvement in the combat against corruption. High-profile corruption cases are usually exposed by journalists, who keep the public informed about the quality of the judicial process and its outcome. For such reasons, reform projects have incorporated training modules for investigative journalist in several countries.

Nonetheless, the effectiveness of the media not only depends on its cadre of journalists, but also on the access to information and the level of freedom of the press. Many countries have broadened the scope of these rights by enacting “freedom of information acts,” “access to public information laws,” or simply by developing legal remedies based not only in the right to freely express oneself, but also in the right to be informed about the public matters or to access government information. Access to official information in Sweden is exemplary in that regard. In Latin America, judiciaries have had to express themselves on the extent of these rights. In many cases, their intervention has obliged governments to release classified information and produce transparent accounts of their finances.

All these actions, in turn, have progressively contributed to creating a culture of transparency where access to official information becomes a right, with accessible, timeliness and accurate flows of information. In practical terms, this means that citizens are provided with the necessary information for performing their oversight responsibilities and exercising democratic accountability.

5. Recent evidence and future agenda

The evidence collected through diagnosis surveys, either for specific investment projects or for global research projects, in particular those sponsored by the World Bank Institute, has revealed that corruption in general, and specifically in the judiciary, has not decreased in the last six years. Moreover, the data gathered reflects a deterioration of judicial independence standards over the same period (Kaufmann 2003).

In addition, the prevalent orthodoxy reflected rule-of-law reform projects, which are based on specific assumptions about the functioning of the law (Kennedy 2003; Trubek 2003) and the way informal institutions and networks interact in the shaping of policy in developing countries, is

increasingly being questioned, in particular by the evidence on state capture gathered by the World Bank Institute (Hellman, J. et al: 2000, Hellman and Kaufmann: 2001, Kaufmann: 2003) State capture denotes a situation in which the enactment of laws, administrative procedures and judicial decisions are influenced and even purchased by private actors. When captured laws reach an average of around 20 percent in world, it is worth questioning the sense of advocating the application of “laws” that have been purchased by private groups.

The data showed by the aforementioned recent studies on state capture and other indicators of governance and institutional quality provide new insights for rethinking anti-corruption policies and re-designing the reform agenda. As Kaufmann (2003) suggests, a starting point lies in enhancing our understanding of the relationships between the public and private sectors. If an important percentage of laws and regulations are shaped by private actors, be it through influence or finance, the current focus of anti-corruption initiatives exclusively on the state bureaucracy should be revisited. A better understanding on the role played by the private sector in such settings must be reached.

However, these renewed criticisms and new challenges seem to converge to the same Gordian knot: the need to acquire a better understanding of informal institutions. Kaufmann (2003) has proposed to study the institution of “influence,” others, how influence flows through corruption networks composed of public and private actors (Cartir Bresson 1997). A series of high profile cases such as Alberto Montesino in Peru or Leonid Kuchma in Ukraine can serve as pilots for such studies: both Montesinos and Kuchma used to tape or videotape meetings where corrupt practices have taken place. In the case of Montesinos, the prosecutor has seized over 720 videotapes (some of them available at several Peruvian websites). In the case of Kuchma, 1000 hours of audio recording have been accumulated.²

Both cases provide important lessons on the functioning of formal judicial institutions and their relationships with other state agencies, as well as the interactions between the public and private sectors, the influence in policy-making and the exchange of favors between several actors in society. They demonstrate that when corruption is systemic the analysis is enriched by evaluating the different informal resources it mobilizes. Obedience, solidarity, friendship, loyalty and reciprocity appear to be resources more frequently mobilized than simple economic exchanges. Such networks are not usually exposed to collective-action problems, since the individuals that form them are not likely to act as “free riders”. Behavioral models highlight reciprocity and trust as the core and indispensable relationships for collective action (Ostrom 2003). From the tapes of both cases, it is clear that the integration of economic and social life within such networks -developed upon

² Some audio files are available at <http://www.wcfia.harvard.edu/melnychenko>.

principles of mutual aid and reciprocity- makes individuals to act “collectively”. Public servants – including allegedly independent auditors, comptrollers and even judges- are regularly moved from one position to another –even from one branch to another- according with the political opportunity. They usually received informal compensations, such as fellowships for family members, additional jobs or just money taken from special slush funds. The distance between the personal agendas and the institutional agendas is striking: nobody in such videos appears to feel any constrain in performing the institutional role is suppose to perform. On the contrary, constrains are produced by the rules of the informal institutions that regulated the network –friendship, subordination, economic speculation, fear and the like.

These informal networks constitute a powerful mechanism of resource exchange. They are, in fact, comparable to a “futures market” of favors and information: contributions to political campaigns, employment of relatives, a judicial decision or an executive decree can be future sources of access to confidential information, contacts and contracts. Moreover, since these favors are not always easily “monetized,” “debts” and “credits” are never cancelled in full. There is always a debt to be repaid. The continuous circulation of debts and credits is one of the factors that keep the links fuelled and the network running in a cohesive fashion (Cartier Bresson 1997).

The evidence revealed by such unusual cases must be better understood and taken into account when developing tools for further research on the functioning of informal networks of corruption. Understanding how to establish incentives strong enough to break such relationships up is the next stage of anti-corruption policy.

6. Conclusion

This chapter has provided an overview of the anti-corruption reforms of the last two decades, and, more substantially, has made explicit the assumptions made at different stages of this complex enterprise. After twenty years, it is amply recognized that some of these underlying assumptions must be revisited. Aid-practitioners are becoming increasingly aware of the complexities of the law. Consequently, the traditional formalistic approach to law functioning is fading away. Institutional modeling approaches aimed at replicating systems from one country to another and standard formulae have largely failed to bring about genuine and sustainable reform.

Aid practitioners have also learnt that institutions do not operate in a vacuum. As a consequence, donors are moving away from the narrow initial focus on building the technical capacity of specific institutions, such as judiciaries and bureaucracies, to more comprehensive approaches involving a wide range of “stakeholders.” These participatory programs, in turn, must be designed in incentive-oriented fashions, which allow for both consensus to emerge and reciprocal check and balances to strengthen amongst actors.

These findings do not necessarily mean that previous attempts at rule-of-law reform have been useful or fruitless. It nevertheless signals that, as all human enterprise, anti-corruption reform is a continuous learning curve. The chapter has shown how each new wave of reform was informed by the lessons learnt in the previous stage. Indeed, anti-corruption reform is now about to cross another threshold, as experts are advocating addressing new issues, such as the mechanics of influencing, the functioning of informal corruption network, the dynamics of clientelism and patronage and other informal institutions, which must be better understood for anti-corruption reform to succeed.

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