



Writing an effective anticorruption law

“Justice howls when she is dragged about by bribe-devouring men whose verdicts are crooked when they sit in judgment.”

—Hesiod, *Works and Days*, circa 800 BCE

When Hesiod discovered that a corrupt judge had deprived him of his patrimony, his only recourse was to memorialize his loss in verse. But as growing numbers of citizens in developing countries have suffered at the hands of corrupt officials, they have started to demand government action.

An obvious first step is ensuring that laws are in place to deter corruption. Law enforcement measures are not the first, or necessarily the preferred, method of defense. An informed and vigilant citizenry, government employees imbued with a service ethic, and other measures can be more effective in combating corruption. But achieving those objectives takes time, while enacting an anticorruption law is a relatively speedy, inexpensive way to start addressing the problem.

As a result laws that punish bribery and other forms of corruption have proliferated throughout the developing world (Ofosu-Amaah, Soopramanien, and Uprety 1999). Yet while these new statutes represent a strong commitment to eradicating corruption, they often do not reflect the limitations of the institutions that enforce them—whether the police and public prosecution service or a noncriminal administrative agency. Many recent anticorruption initiatives have also overlooked complementary legal reforms that can prevent or expose corrupt acts.

Tailoring the law to enforcement capacity

Anticorruption and ethics laws generally encompass a variety of statutes that prohibit bribery, nepotism, conflicts of interest, and favoritism in the award of contracts or the provision of government benefits. Such laws often also require public servants to disclose their incomes and assets. When drafting such acts, the instinct is to list every activity that could conceivably be considered corrupt and then write language making each illegal. But people are endlessly creative in finding ways to enrich themselves or their friends and family at the public’s expense. As drafters realize this, the rules they write become more general. The result is often a broadly drawn provision setting out a general standard—such as the provision found in the laws of several nations making the “abuse of public office for private gain” a crime.

Such sweeping language does address bribery, nepotism, and conflicts of interest. But bureaucratic and political rivals can also invoke it to question perfectly innocent actions. If the person responsible for investigating an allegation is tainted by personal animosity, open to political pressure, or fearful of criticism for being weak on corruption, false charges can trigger a judicial or administrative proceeding. If the court or administrative agency is not impartial or is incompetent, cases driven by extralegal considerations may not be

Anticorruption laws are a good start—but they should be tailored to enforcement capacity and bolstered by other legal reforms

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weeded out. Even if charges are eventually dismissed, a prolonged investigation can itself be a severe punishment.

Accordingly, those who draft anticorruption legislation should ask several questions: What is the capacity of the institutions that will enforce the law? Are the police, prosecutors, courts, and other enforcement agencies staffed by honest, technically competent professionals? Are they independent of the executive in theory? In practice? To whom, and in what ways, are they accountable?

The answers to these questions will often not be reassuring. In many countries enforcement institutions lack skilled professionals. Moreover, the employees of such institutions are often easily manipulated for political purposes. Indeed, World Bank surveys have found that the poor rate the police and other enforcement agencies as some of the most corrupt and least trusted government agencies. Reformers may believe that anticorruption work cannot proceed until enforcement agencies are strengthened. But while capacity building is essential for the long-term sustainability of an anticorruption program, it takes time.

In the meantime those writing anticorruption statutes must take into account the weaknesses of the agencies that will enforce the law they draft. In most cases that means writing a law that is easy to understand, simple to apply, and demands little or no judgment in determining its applicability. Laws written this way are said to contain “bright-line rules” and are contrasted with those containing standards that are open to interpretation by enforcement agencies (Kaplow 1992).

Bright-line rules

How do bright-line rules eliminate enforcers’ discretion? A recent proposal from Argentina provides an example. There, nepotism and favoritism in government hiring are perceived as serious problems. Draft legislation would have prohibited government employees from hiring a friend or relative unless he or she was “qualified” for the position. But if prosecutors and courts were left to determine who was qualified, they would have tremen-

dous leeway in enforcing the law. Suppose instead that the law were to prohibit the hiring of any friend or relative—with no exceptions or qualifications. Were this kind of bright-line rule the law, enforcers would have no discretion.

Such a rule would make it easier to monitor compliance and enforcement. If hiring a relative were against the law, and an official’s nephew suddenly appeared on the payroll, the ethical breach would be obvious. On the other hand, if the law contained an exception for “qualified” individuals, endless arguments about the nephew’s qualifications could ensue, muddying the question. With bright-line rules, citizens, the media, and watchdog groups can readily determine whether government is serious about enforcing anticorruption laws.

Bright-line rules are not costless. First, they rob the law of flexibility. In the case of an antinepotism law, the government may lose the best person for the job if that person happens to be related to someone already working in the relevant department. Second, bright-line rules often must be simplified to the point of arbitrariness—making them harder to accept than broadly worded standards, which often conform to intuitive social understandings. But in countries with weak legal traditions, courts may be unable to enforce standards effectively (Hay and Shleifer 1998). In addition, the costs of bright-line rules are often more than offset by their deterrence value and their value in facilitating monitoring in countries with weak enforcement agencies (Posner 1998).

Countries with weak enforcement institutions should consider including the following bright-line rules in their anticorruption laws:

- No government employee may receive any gift, payment, or anything of value in excess of a small sum from anyone who is not a member of that person’s immediate family.
- No employee may hold, directly or indirectly (that is, through family or other agents), an interest in a corporation or other entity affected by that employee’s decisions.

- Every year all employees above a certain pay level must publicly disclose all assets they hold directly or indirectly.
- No employee may hire a relative (with a precise specification on how distant a relation must be before he or she is not a “relative”).
- All employees must disclose any relationship with people hired and with firms or entities to whom they award a contract or concession. (Since in many countries the pool of talented workers and qualified firms is small, this rule leaves decisions about “corruption” to public opinion.)

Complementary measures

No statute can avoid some open-textured provisions. When a section in an anticorruption law must leave something open to question, one way to reduce enforcers’ discretion is to establish a procedure for obtaining advance rulings. Employees concerned about doubtful cases can then ask representatives of the enforcement unit, perhaps located within their agency, for an advance ruling on the legality of a proposed action. If, based on the facts disclosed, the enforcement authority concludes that the action proposed would not constitute a violation, the employee would be free from later prosecution. To prevent the process from unduly slowing government action, agency representatives can be required to rule on the request within a set period. If they do not, the law can provide that the action in question is legal.

At first the agency may be deluged with petitions for assistance. Gradually, however, its accumulated opinions will develop into a body of law to guide both the courts and those subject to ethics guidelines. An advance ruling procedure can also turn what could be an adversarial relationship into a cooperative one as civil servants work with ethics officers to structure transactions in ways consistent with the law. In addition, if a questionable action is later discovered that was not blessed with an advance ruling, it is one sign that an intent to evade the law was present.

Statutes outlawing bribery, nepotism, and other corrupt acts should be complemented by laws that help bring corruption to light.

A freedom of information law is one example. Such laws require government to disclose information about its activities at the request of any citizen and can be used by watchdog groups to monitor government behavior (Blanton 2001). Similarly, in recent years several countries have adopted whistleblower protection laws, which encourage government employees to reveal—without fear of retaliation—corrupt acts uncovered in the course of their work (Hall and Davies 1999; Pack 2001).

Libel law reform can also be an important part of anticorruption legislation. Some countries’ laws make it a crime to publish anything that brings the government into disrepute or insults a government official. Under such laws a journalist who accuses an officeholder of accepting bribes or otherwise acting corruptly can be fined and jailed regardless of whether the allegation is true or false.

To ensure that fear of prosecution does not deter the press from exposing corruption, many industrial nations make it difficult for government officials to obtain redress if they are libeled by the press (World Bank 2001; Schwartz 1996). Different nations will strike different balances between protecting the reputation of government and its employees and allowing journalists to write about corrupt behavior. But reformers concerned about suppressing corruption will want to review whether the balance their nation strikes reflects the public interest in combating corruption.

Finally, national legislation alone is not a panacea—international cooperation is also required. In cases involving large sums of money, recouping stolen funds is often problematic because corrupt officials can stash assets abroad. Treaties should be considered that would permit the requesting country to overcome bank secrecy laws and other obstacles to recovery. Transparency International’s *Source Book* (2000) lists dozens of other systemic reforms needed to root out corruption. And as study in the field grows, the number of needed reforms only increases.

Over the past 10 years a number of factors have combined to place corruption firmly on the global agenda. Under pres-

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sure from civil society and fueled by a growing body of literature detailing the deleterious effects of corruption on development, policymakers have come to realize the truth of Hesiod's ancient observation:

obey justice and restrain reckless wrongdoing, for such wrongdoing harms the poor, and even the noble find it an unwelcome burden that weighs them down and brings them ruin.

Ridding government of corruption may require deep, systemic reform. But the legal reforms detailed above offer a straightforward, inexpensive way to take the first step toward reducing the endemic corruption that plagues so many countries.

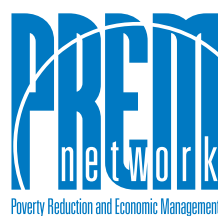
Further reading

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