Misrule of Law

Does the Evidence Challenge conventions in Judiciary and Legal Reforms?

Daniel Kaufmann, The World Bank

http://www.worldbank.org/wbi/governance

“I only want to draw your attention straightaway to the fact that you have yourselves formed this very state, to a large extent through political and quasi-political structures under your control, so perhaps what one should do least of all is blame the mirror.”


‘…In many settings policies have favored vested interests of the elite, and thus not promoted investments in human capital… Quality of life is about access for boys and girls to education…about the participation of people along with reformers in the government in implementing an anti-corruption program. It is about fighting the vested interests of an economic elite that unduly influences, or even purchases, the policies, regulations, and laws of the state.’

Jim Wolfensohn, in foreword to The Quality of Growth, 2000


A. Starting from a simple definition. According to the Palgrave Dictionary of Law and Economics, Rule of Law is defined by its apposite, contrasting it with Rule of a Powerful Man or Woman. The implicit benchmark is the all-powerful ruler of the past, ruling over society, rather than the laws of the land so doing. While there are settings in today’s world where manifestation of the rule of (one) all powerful leader still exists, it is a rarer occurrence than in the past. However, this decline in the prevalence of the rule of an all-powerful political leader does not imply that (even in the strict Palgrave definitional sense) ‘Rule of Law’ has prevailed worldwide nowadays. The problem is implicit in the notion of Rule of Law vs. Rule of Powerful Man or Woman (the ‘ruler’): that there is a strong state or ruler. Yet in many settings neither is strong. In those weak states, there can be the ‘Rule’ of powerful forces outside of state or political leadership -- such as the ‘Rule of the Oligarch’, or of the powerful few in the Financial/Economic Elite. This, in turn, can have vast implications in terms of our understanding of the causes of misgovernance and ‘misrule’ of law, and in terms of institutional and policy reform advice. Based on a review of recent empirical evidence, this paper is an initial effort in developing this line of argument.

1 In the context of this article, Rule of Law is approached within its broadest meaning, encompassing legal and judiciary institutions, and transcending ‘laws in the books’ -- focusing more on application of the law and on performance of the judiciary/legal institutions. In this work, the collaboration and contributions of many colleagues in the Bank (and within WBI) are deeply acknowledged, in particular Joel Hellman (collaborator in the ‘State Capture’ research project), as well as Randi Ryterman, Maria Gonzalez de Asis, Joel Turkewitz, and Francesca Recanatini. I have also benefited from substantive discussions with Luis Moreno Ocampo, head of TI-LAC. I am also grateful to Erin Farnand and Jennifer Clark for editorial assistance. Responsibility for errors and views are the author’s. Views may not necessarily reflect the official institutional ones or of its Board of Directors. This draft is work-in-progress based on research and diagnostic findings and is intended as a contribution to the debate on these issues. Following the next round of discussions and feedback, it will be subject to modifications.
In this contribution we cannot do full justice to this complex topic. Yet we attempt to contribute to the debate by providing an initial empirical exploration, based on recent data from a number of different sources, and from surveys of many stakeholders (including lawyers, prosecutors, judges, users of legal/judiciary institutions, firms, experts, etc.) – into the challenge of why there is such a large variation worldwide on the both the performance of ‘Rule of Law’ (judiciary/legal) institutions, and on the apparent forces behind ‘functional’ vs. ‘dysfunctional’ rule of law regimes. Within the latter (the ‘dysfunctional’ context), the phenomenon of ‘capture’ of judicial and legal systems by vested interests is given particular emphasis. In so doing, we challenge the prominence given to the traditional ‘long list’ of obstacles to proper rule of law/judiciary performance in the literature and in practitioner’s writings – such as conventional focus on budgetary resource constraints, cumbersome procedures, process delays, caseload management, traditional training approaches, study tours, and the like.

Given the prominence emanating from the evidence on these issues of ‘capture’ and poor performance of public rule of law institutions in many settings, the related phenomenon of corruption (‘grand’, as in the case of ‘capture’; ‘pettier’ as in the case of administrative bribery) cannot be sidestepped – and thus key interlinkages between rule of law and corruption issues are emphasized in this paper as well. Dysfunctional rule of law institutions are after all an important determinant of corruption in a country. Conversely (and often underemphasized) there are forms of ‘grand’ corruption which appear to be important as determinants of a dysfunctional judiciary and legal regimes (see Figure 1, below, on the close correlation between misrule of law and corruption). In other words, there are forms of corruption (such as state capture) which rather than being a symptom of more fundamental weakness, can in themselves be the cause of a dysfunctional judiciary. We submit that acknowledging and understanding better such (bi-directional) linkages between corruption and ‘misrule of law’ is important for improved advise on policy and institutional change (and for moving forward on improved property rights protection).

Figure 1: Rule of Law and Control of Corruption are closely related; data from c.1998.

Source: KKZ Governance Matters
B. Evidence sources. Over the past few years we have supported many different types of empirical surveys on governance and anticorruption, eliciting information from a variety of stakeholders in scores of countries. These include:

i) in-depth country diagnostics on governance and corruption, surveying users of public services/citizens, enterprises, and public officials;

ii) multi-country governance surveys of enterprises (such as the worldwide World Business Environment Survey [WBES] and the regional Business Environment and Enterprise Performance Survey [BEEPS]),

iii) the generation of worldwide governance indicators for about 170 countries;

iv) instant feedback surveys of participants in the Governance Learning programs at WBI (through new interactive technologies such as the instant-feedback “Option Finder”) and at large conferences (such as the First Judiciary Reform Global Conference held in Washington, DC, June 5th-7th, 2000), and,

v) large-scale, internet-based surveys on governance, such as the internet survey carried out at the time of the Governance Global Forum II that recently took place in The Hague from May 25th-28th, 2001. In the case of this latest internet survey, over the period of just a few short weeks, more than a thousand respondents from throughout the world provided feedback to ten multiple choice questions. In brief, where relevant, they are also presented below.

None of these different data sources can be considered as fully representative of the world population at large, or devoid of margin of error -- even though the statistical tests performed suggest that the error is not very large, particularly when the sample size is significant. As an illustration of methods we have utilized to assess the margin of error, we can review the average regional outcome for the quality of the application of rule of law variable based on the governance indicator dataset of about 170 countries. This is depicted in Figure 2 below, where the thin line atop the thick columns depicts the margin of error of the Rule of Law subcomponent.

On the one hand, it suggests that empirical evidence needs to be interpreted with care. On the other, there are clear limits to the margin of error, and thus statistically robust inferences can be made. Thus, while there is no statistical difference between the averages of South Asia and Eastern Europe, there is a clear difference between Eastern Europe and the former Soviet Union.

Nonetheless, the fact that there is a high degree of convergence of views and survey reports by a very disparate set of stakeholders interviewed -- through very different (and independent) sets of instruments -- points to the need to codify such information. Such codification of the information at hand is particularly warranted since it appears to challenge some conventionally-held views in the field of judicial and legal reform – views which have often shaped the policy advice given by western experts in this area.
B. Do good Rule of Law and Judiciary institutions matter? Motivating the importance of this inquiry and debate, at the outset it is worth emphasizing how much Rule of Law matters. As rated by Nobel Laureate Amartya Sen at last year’s keynote speech at the Legal and Judiciary Reform Conference, when making the case for the importance of linking legal and judicial reform with a comprehensive development framework: “Legal and judicial reform is important not only for legal development, but also for development in other spheres, such as economic development, political development, and so on, and these in turn are also constitutive parts of development as a whole” (p.13).

The emerging empirical evidence is consistent with this view. Based on the same large cross-country governance indicators database presented in Figure 2 above, our econometric analysis indicates that there is a very large, significant and causal relationship (and controlling for other factors) between improved rule of law and income of nations (Figure 3), rule of law and literacy (Figure 4), and rule of law and reduced infant mortality. The difference in income per capita and in reduced infant mortality can be about three-to-one between a country with relatively good rule of law institutions and those with inadequate institutions, controlling for other factors. A related empirical finding, as was seen in Figure 1 above, is that within governance subcomponents, rule of law and corruption are the most closely correlated.
Figure 3: Better Rule of Law associated with higher incomes for the population (KKZ'00/F&D)

Figure 4: Better Rule of Law is associated with improved literacy (170 countries)

Note: The bars depict the simple correlation between good governance and development outcomes. The line depicts the predicted value when taking into account the causality effects (“Development Dividend”) from improved governance to better development outcomes. For data and methodological details visit http://www.worldbank.org/wbi/governance. Source: KKZ (1999), based on 1998 data. Same relationship applies between Quality of application of Rule of Law and income per capita as well as with infant mortality. See also IMF’s F&D article (‘Governance Matters: From Measurement to Action’, June 2000)
Beyond cross-country international evidence, the data from in-depth in-country diagnostics also inform us. For instance, from a number of recent governance diagnostic surveys in Latin American countries it is clear that corruption and dysfunctionality of the judiciary is related to a large ‘regressive tax’ of bribery and corruption to the poor (Figure 5 below), as well as to the smaller-sized enterprises that end up paying disproportionally. In Peru, in terms of bribery payments required for the appropriate paperwork for judicial procedure/certification in court, such bribes were extorted more commonly among lower income users of public services: it constituted about 6% of their monthly income, while it was only about 1.3 percent for medium income strata, and less than 0.6% for higher income users of courts. As seen in Figure 5 below, such a pattern of regressiveness of the ‘bribery tax’ also applies to the overall bribe payments for all procedures in Peru, as ranked by users. Furthermore, in Peru, Bolivia and Ecuador the evidence from these studies also suggest that the poor ends up having less access (and when not denied access, lower quality) of public service delivery – including legal and judicial services.

Thus, the emerging worldwide evidence, as well as specific country diagnostics, do suggest that a well performing rule of law and judiciary institutions is key for providing the poor with fair access to the poor to the courts and for enforcement of their rights, as well as protection of property rights for the small and competitive enterprise sector.

**Figure 5: Results from in-depth country governance and corruption diagnostic:**

*Peru: Corruption is a very ‘regressive tax’ -- how it disproportionally affects the poor*

Following this introductory section, we next present recent evidence given by a variety of stakeholders on what they view as the main *determinants* of poorly functioning and non-transparent judiciary institutions. Then we present the evidence from responses of various groups of stakeholders and data sources on the *role* of rule of law institutions in addressing public misgovernance and corruption. We also present the responses from stakeholders as to the most *costly* types of corruption in their countries, and on what forces appear to be behind corruption and ‘misrule of law’. Then we briefly note the responses on whether enforcement institutions are fit to lead anticorruption programs, and on whether staff in IFI/donor agencies hold similar or divergent views compared with the rest of the stakeholders on these issues. We conclude with a section on salient implications emerging from this approach and its evidence, challenging some conventional notions.
II. What are the most important constraints to a Transparent and Fair Judiciary?

A. Evidence from the First Legal and Judicial Conference, June 5th-7th, 2000, in Washington, DC: What did worldwide judicial and legal experts say about the constraints to an honest, transparent and fair judiciary?

At the First International Legal and Judicial Conference held in early June 2000 in Washington, D.C., worldwide experts in the interactive session coordinated by WBI entitled “What Conditions are Necessary for the Judiciary to Curb Corruption?” completed an instant survey using “Option Finder” technology. Out of the over 250 experts from throughout the world that attended the session, 135 people had access to interactive electronic keypads and answered the anonymous survey of seven questions at the outset of the session. The large majority of respondents were lawyers, prosecutors and judges, while economists, academics and others comprised the residual minority (see for details Annex Figure A1).

A key question in the survey asked participants to identify the single most important obstacle to transparency and impartiality in the Judiciary in their region or country of expertise. Throughout much of the conference (and consistent with much writing in the literature) the emphasis had focused on discussing the paramount importance of independence of the judiciary from the executive branch and politicians. Yet, a central finding from the survey experts was the fact that many experts rated the powerful economic interests of the elite (related to capture) as a particularly daunting obstacle. There were important regional variations in the responses as well. In particular, at the conference experts and participants from transition economies considered the powerful economic influence to be significantly more relevant than the challenge of political independence, as shown in figure 6 below. By contrast, in other emerging economies, the challenge of independence from the executive is more significant on average – although even in this group of developing economies (excluding transition economies) the challenge of independence from economic capture is very significant as well, particularly in some countries and regions.

It was also noteworthy to analyze the feedback from these experts, who reported that factors such as job security, meritocratic appointments or conventional training of judges per se did not rate highly as obstacles – while inadequate salaries was an important obstacle only in selected regions (particularly in transition economies) and a lower priority obstacle elsewhere (Figure 6). The low ranking given to a host of factors other than economic and political independence ought not to be interpreted as implying that they are unimportant in any reform program. Yet the results question the wisdom of focusing on any one of these particular (lower-ranked) obstacles by itself, without addressing the more fundamental causes emanating from political and economic forces – and often without approaching such reforms as part of an integrated package (rather than for instance merely recommending higher salaries, in isolation of other crucial reforms).
Tellingly, the expert responses given at the conference not only varied by region, but also by the extent of corruption in the respondent’s country of expertise. In countries where systemic corruption was prevalent, experts were of the view that independence from economic vested interests (and thus addressing elite capture) was a much larger obstacle to effectiveness of the judiciary than independence from the political and executive arena.

B. Other Evidence on Determinants of a Transparent and Fair Judiciary: Consistency of results across surveys.

B1. Evidence from Enterprise Survey in Transition. The results from the First Legal and Judiciary Conference held last year are consistent with the large-scale enterprise-level survey and analysis recently carried out for over 20 transition economies (comprising almost 4,000 surveyed firms) and synthesized in various papers and reports. In this research, economic capture was identified as a major phenomena with dire consequences for institutional development and investment in the enterprise sector in almost a dozen or so transition countries where the evidence strongly indicated that they were subject to ‘state capture’ as well as to judicial/legal capture by vested economic interests (Figure 7 illustrates for some counties). It was noteworthy that the results of the instant survey at last year’s Legal and Judiciary Conference the prevalence of powerful vested economic interests were also recognized by the large group of experts as the most important obstacle.
Figure 7: Evidence from the Analysis of BEEPS Enterprise Survey in Transition

Legal and Judicial Capture by Economic Elite in Transition
(Selected country cases: Azerbaijan/Russia vs. Estonia/Hungary, based on analysis of BEEPS enterprise survey, end-’99)


B2. Evidence from Worldwide Internet Survey, June 2001: How consistent with the rest?

Well over one thousand respondents have participated in this very recent internet survey, widely representing all regions of the world, as well as the whole gamut of workplaces – public sector, private sector, NGOs, and IFIs (International Financial Institutions)/donor agencies, from emerging, transition and OECD economies. The overall results emerging from this survey are synthesized in a separate paper. The regional and job composition of respondents to this internet survey is depicted in Annex Figure A2. While the survey contains a number of governance-related questions, here we focus on the particular responses regarding judicial/legal systems. Statistical analysis (including multivariate analysis, to control for other factors) was performed in order to ascertain statistical significance; in such cases of significant differences they are pointed out below.

What is the key to a transparent Judiciary in your region?: The increasing recognition that it is naïve to presume that the judiciary will always be poised to play a positive role in addressing the challenge of corruption country-wide (i.e. the notion that it is not always ready to be ‘part of the solution’ in the near term) implies that it is key to probe the internal weaknesses within judicial institutions. As in the case of last year’s Legal and Judiciary Conference, the recent internet survey results are also very telling, and discordant with the conventional wisdom -- in that neither political independence of the judiciary from the executive nor high salaries or more training that were actually identified as the top priority for a more transparent and fair judiciary. In fact, on average, the most frequent choice as the obstacle to a transparent and fair judiciary was the ‘economic independence’ of the judiciary from the vested interests of the elite (‘economic independence’ in this context meant in terms of independence from the vested interests of the economic elite – rather than budgetary autonomy). In other words, judicial capture by vested economic interests rated even higher than political independence from the executive (Figure 8). Such primacy of judicial ‘economic’ capture by the elite was particularly marked for transition
economies of the former Soviet Union, East Asia and Latin America (and, relative to other factors, for OECD countries as well).

By contrast, in Sub-Saharan Africa and the Middle East/North Africa, the political independence of the judiciary rated as the most binding constraint. Indeed, overall, both economic and political independence rate, on average, well above the other choices (salaries, training, meritocracy, job security) as a constraint. Not only do each one of these ‘independence’ factors prevail in different regions (as per above), but the evidence also suggests that their respective primacy is related to the extent of corruption: in countries with systemic corruption, mitigating judicial capture from economic interests appears to be the priority, while in countries with more moderate levels of corruption, addressing political independence appears to take priority.

As indicated, factors such as training, meritocracy, job security and salaries received relatively low rankings from respondents received low rankings (Figure 8). An exception was for the case of salaries in transition economies: consistent with the results from last year’s Legal and Judicial Conference, more internet respondents singled it out as a constraint.

Figure 8: Internet Survey ’01 on Main Obstacle to Transparent and Fair Judiciary.

III. Extent of Misgovernance within Public Rule of Law Institutions

A. Background: explicitness about an uncomfortable issue? Thanks to the empirical revolution in the area of governance and corruption which has permitted in-depth analysis based on evidence, coupled with the resolute stance of a few international leaders, nowadays there is far more recognition of the prevalence of misgovernance and corruption in many countries, as well as the enormous socio-economic costs that such misgovernance imposes on society and the poor.

Yet it would appear that in the judicial and legal arena there has been reticence in acknowledging the severity of misgovernance, as well as the implications of corruption and misgovernance in their midst for its role. Often there is even resistance to hold sessions on corruption and governance within international workshops on judicial/legal issues. When the issue is addressed,
often the approach is to ask what the judicial/legal institutions can do to address the national governance/corruption challenges. Rarely is the more sensitive issue of asking whether there is a serious misgovernance challenge within the rule of law institutions explicitly addressed upfront.

**B. What does the evidence suggest? – Rule of Law Institutions as part of the problem or of the solution?** A ‘back-seat’ status to the question of addressing misgovernance and corruption within rule of law institutions would be justified if the evidence suggested that it is not a priority issue. Yet the evidence points to the contrary: misgovernance and corruption in judicial, legal (and enforcement) institutions is a major challenge. Much recent survey evidence points in this direction, some of which is presented below.

**B1. Evidence from a worldwide Enterprise Survey.** First, based on a worldwide enterprise survey (GCS '00), the evidence suggests that in many countries, bribery in the judiciary is at least as prevalent as in the administration/bureaucracy – or even more (as seen in Figure 9 below, with particular emphasis in this case in the fact that for instance in Latin America judiciary corruption often prevails more commonly than administrative bribery).

**Figure 9: Unbundling Corruption – Bureaucratic vs. Judicial Bribery** (some illustrative countries)

![Unbundling Corruption: Extent of Bribery in the Bureaucracy vs. in the Judiciary](source)

**B2. Evidence from In-Depth Country Governance Diagnostic Studies.** Second, relying on the in-depth country-specific governance survey diagnostics, based on independent surveys of i) users of public services, ii) enterprises, and iii) public officials in each country, a number of insights are apparent. First, the judiciary is often singled out as one of the most (if not the most) vulnerable institutions in terms of misgovernance and corruption. As illustrated in Figures 10 and 11 below, a case in point emerges from the results of the major governance diagnostic work for Peru (which ought not be seen as the exception since some other diagnostics suggest similar
During the very recent presentation of the initial results at a major anti-corruption conference in Lima in June, 2001, it was highlighted that the judiciary enjoys the least confidence among all of the country’s institutions in terms of performance, fairness, honesty and other characteristics (Figure 10), and also suggested the importance of ‘economic capture’ as determinant of misperformance (Figure 11). It is noteworthy in this context to point out the remarkable degree of consensus on these challenges between the responses by the enterprise sector and by the public officials themselves, as seen in Figure 11 below.

Figure 10:

**Peru Governance Diagnostics: Performance Evaluation of the Judiciary (as reported by enterprises, March 2001)**

<table>
<thead>
<tr>
<th>Aspect</th>
<th>Positive (%)</th>
<th>Neutral (%)</th>
<th>Negative (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent of political pressures</td>
<td>45</td>
<td>88</td>
<td>91</td>
</tr>
<tr>
<td>Independent of economic pressures</td>
<td>48</td>
<td>86</td>
<td>88</td>
</tr>
<tr>
<td>Deserves confidence</td>
<td>59</td>
<td>86</td>
<td>86</td>
</tr>
<tr>
<td>Is very fair</td>
<td>75</td>
<td>84</td>
<td>15</td>
</tr>
<tr>
<td>Contributes to the resolution of conflicts</td>
<td>75</td>
<td>78</td>
<td>15</td>
</tr>
<tr>
<td>Laws apply equally to the rich and the poor</td>
<td>75</td>
<td>78</td>
<td>15</td>
</tr>
<tr>
<td>Independent of the government</td>
<td>127</td>
<td>77</td>
<td>11</td>
</tr>
<tr>
<td>Less corrupt than the government</td>
<td>26</td>
<td>66</td>
<td>8</td>
</tr>
</tbody>
</table>

These in-depth governance and corruption diagnostics within a country also elicit information on the key legal institution: the Parliament. Based on the evidence, for Parliaments, as for Judicial institutions, there appear to be many settings where such rule of law institutions are a major part of the country’s public governance problem, and not a part of the solution. A salient finding of these in-depth diagnostics is in fact the enormous variance across settings. As depicted in Figure 12, in some countries Parliaments are rated by public officials themselves as one of the better-governed institutions in the country (relative to the others within the country), in contrast with other countries where Parliaments are rated among the worst.
**Figure 11:**

*Peru Governance Diagnostic: Extent of ‘State Capture’/Undue Influence by Elite in Bribing to Shape Laws and Regulations*  
(as reported by public officials and by enterprises, 2001)

<table>
<thead>
<tr>
<th>Frequency of bribes to promote private interests:</th>
<th>% of officials/firms responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bribes to Judiciary</td>
<td></td>
</tr>
<tr>
<td>To officials influencing ministerial/presidencial decisions</td>
<td></td>
</tr>
<tr>
<td>To Parliamentarians to influence laws</td>
<td></td>
</tr>
<tr>
<td>To Municipal authorities/councils</td>
<td></td>
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<tr>
<td>To Regulatory agencies</td>
<td></td>
</tr>
<tr>
<td>To Central Bank</td>
<td></td>
</tr>
</tbody>
</table>

As reported by:

- Officials
- Businesses

**Figure 12:** How Transparent and Honest are Parliamentary Institutions Relative to others in the Country?: Some results from country governance diagnostics

**Parliaments Misgoverned or Honest Institutions?: Enormous Variation on Corruption Relative Standing**

The ratio at the top of each column is the corruption ranking of Parliament among all surveyed institutions. Thus, for instance, in Cambodia, relative to other surveyed public institutions, Parliament rated best among 10, while in Ecuador it rated worst among 35. Research sources: Governance Anti-Corruption Index Country Diagnostic Surveys, Bolivia, Cambodia, Ecuador, Georgia, Latvia, Paraguay, Romania, Slovakia, WBI/WB. [http://www.worldbank.org/wbi/governance/](http://www.worldbank.org/wbi/governance/)
B3. Evidence from Enterprise Survey in Transition. The enormous variation across rule of law institutions in different countries also emerges from the analysis of the recent enterprise survey in transition (BEEPS). If we focus on the enterprise reports regarding the performance of courts, for instance, it is clear that there are two sets of countries: one where courts are functioning and another where they are dysfunctional, as seen in Figure 13 (where the larger the size of the diamond, the better the performance in a particular dimension, with the lower right corner depicting an ‘ideal’ benchmark country).

Figure 13: A bi-polar rule of law world?: Performance of Court Systems (from Enterprise Survey in Transition)

Quality of Courts Varies Enormously Within Each Region
(Corporate Sector View in Transition Countries: Four Dimensions; Larger area within red Diamond means Better)

<table>
<thead>
<tr>
<th>Country</th>
<th>A: Uncorrupt</th>
<th>B: Fair</th>
<th>C: Reliable</th>
<th>D: Enforces Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kazakhstan</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Russia</td>
<td></td>
<td></td>
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<tr>
<td>Ukraine</td>
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<tr>
<td>Estonia</td>
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<tr>
<td>Hungary</td>
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</tr>
</tbody>
</table>

Quality Dimensions Measured: A - Uncorrupt  B - Fair  C - Reliable  D - Enforces Decisions


Note: Four-pronged diamond on a scale of 0-1, where 1 indicates 100% of firms respondents giving highest rating in relevant court decisions. The last panel, hypothetical "Nirvana", represents an ideal benchmark, where 100% of firms would give perfect scores on all four dimensions.

B4. Evidence from survey at last year’s First Legal and Judiciary Conference on Governance and Corruption Vulnerability of Rule of Law Institutions: What was the view of experts at the First Legal and Judiciary conference held in June 2000 in Washington, D.C.?

Tellingly, the view of the experts was consistent with the evidence presented above. As seen in Figure 14, about 20% of expert participants in the interactive survey at last year’s conference identified the courts as either the most or second-most corrupt institution in their country of expertise, while almost one-quarter of respondents identified parliaments as the most or second-most corrupt institution. These results are again consistent with the responses from the current worldwide internet survey, where one-third of all respondents are singling out either parliament, the judiciary or the police as the most corrupt institution in the country (roughly equally divided, implying that twenty percent identify either the judiciary or parliament as the most corrupt
institutions). The recent internet survey also suggests that there are regional variations. Particularly, corruption in the judiciary was singled out as rather prevalent in terms of most vulnerable institution in Latin America, transition economies, and East Asia.

Figure 14: Experts from First Legal and Judiciary Conference respond to: Most vulnerable institutions to corruption in your country of expertise?

B5. Is there trust in judiciary/legal/enforcement institutions to lead an anticorruption program?

Not surprisingly, given the above evidence of the challenges in the performance of judiciary/legal institutions, the governance and related surveys for many countries do not indicate the either citizens, entrepreneurs or public officials have significant trust in such institutions to lead an anti-corruption program. The results of the internet survey indicate a very low preference for legal/judicial or enforcement institutions to lead in programs to improve governance and address corruption, hinting at a crisis of confidence in these institutions. Indeed, very low ratings were given to select either anticorruption commissions, legislative/judiciary (or executive) bodies, pointing instead to the need to have broad participatory coalitions (including civil society). In fact, although respondents had to select from seven choices of institutions, the vast majority (almost 60%) opted for the broad coalition.
IV. What types of corruption are the most costly to the country?

Conventional approaches to studying corruption focus on assessing the prevalence or frequency of bribery/corruption, implicitly equating such indicators with how costly for development this manifestation of corruption may be. Recent empirical work that we have carried out in transition economies suggests that different types of corruption may have vastly different private and socio-economic costs, and the prevalence of corruption or frequency of bribery cannot necessarily be associated with the overall cost of a particular type of corruption. Consequently, in this internet survey an effort was made to also elicit feedback on the most detrimental type of corruption.

Based on the overall sample of internet responses, **State Capture** (the shaping of laws, policies and regulations of the state by illicit payments of elite corporates to public officials/politicians) was identified as the most detrimental type of corruption, along with **corrupt leadership**. Again, there are important regional differences: while the primacy of State Capture as the most costly manifestation of corruption was particularly marked for transition economies, East Asia, and some OECD countries, and to a somewhat lesser extent in Latin America, that was not the case in South Asia or Africa. For **corrupt leadership** as the most detrimental type of corruption, the regional pattern was markedly different, with a disproportionate number of responses singling out this category in Africa and South Asia (contrasting low responses for OECD countries and East Asia). Similarly, **bureaucratic corruption** was also often identified as very costly, particularly in Latin America and South Asia.

**Figure 15: Most Detrimental Type of Corruption in country/region of expertise***

![Pie chart showing the most detrimental types of corruption](image)

* 1,176 respondents

In order to probe in further depth the sources of grand corruption, specific questions to that effect are now included in governance/corruption diagnostic surveys. In the recent diagnostic for Peru, for instance, the answers of public officials and firms were not only rather consistent with each
other, but revealing as well, as seen in figure 16 below. While it is not possible to generalize from one country diagnostic (and particularly where there are localized governance challenges stemming for instance from drug trafficking), it is suggestive the extent to which stakeholders report that powerful economic interests (colluding with some politicians and public officials) outside the public sector play a key role in overall national level misgovernance.

Figure 16: Peru Governance/Corruption Diagnostic:

Main Sources of Undue Influence- Elite Capture/Grand Corruption?
(responses from public officials and enterprise sector)

V. A convergence challenge on expert views on priorities for Rule of Law: Do staff from IFIs/Donor Agencies hold similar views as other experts?

How differently do staff of IFIs/Donor Agencies perceive the various corruption challenges as compared with other stakeholders? The broad-based internet survey provides a few insights: the IFI/Donor staff respondents (about 15% of total responses) provided similar responses to the rest of the participants in the following dimensions (and thus the overall averages reported above apply as well): i) on the most costly/detrimental type of corruption; ii) which institutions are the most vulnerable to corruption, and, iii) who is best equipped to lead anticorruption programs.

By contrast, and relevant in the context of this paper, a notable category where IFI/donor staff responses differed from all others throughout the world (85% of respondents) was on the question about the most important factor for a transparent and fair judiciary. IFI/donor agency staff gave more prominence to the issue of independence from the executive, compared with other respondents, who rated judicial capture by vested economic interests as the highest. While many IFI/donor staff acknowledged the importance of elite economic capture, such issue was emphasized significantly more by other stakeholders and experts. This is consistent with qualitative feedback to discussions of these topics at recent international conferences, where the issue of elite capture has been voiced in particular by a variety of stakeholders (and incidentally
highlighted not only for the domestic elite, but in the context of the role of some FDI/transnationals as well).

VI. Concluding and Some Implications.

A Bipolar Rule of Law World: The Challenges of Localization and Prioritization will vary in different settings. One of the salient issues that emerges from this initial analysis, which complements the survey of worldwide experts, as well as the evidence from broad internet surveys, from regional and worldwide enterprise surveys and from recent in-depth governance diagnostic work within countries (surveying enterprises, users of public services and public officials) is the paramount importance of **localizing and adapting policy advice and priorities to country circumstances**. Related to this, there is a large variation in the realities across settings.

**Distinguishing between settings where public rule of law institutions are part of the public governance ‘solution’ vs. settings where they are part of the ‘problem’**. In particular, the evidence from various surveys presented here suggests that where rule of law institutions are particularly dysfunctional, and where corruption is rife, the priorities would have to be different than where such institutions are functioning (with conventional legal and judicial development challenges) and where corruption is on a more moderate scale. In the first set of countries, public rule of law institutions need to be acknowledged as part of the problem in the short-to-medium term. Thus, the tendency to see such institutions as an integral part of the solution for the governance challenges in the country (at least for the near future) need to be resisted.

Dysfunctional public Rule of Law/Judiciary institutions tend to be present in countries where there is systemic and/or ‘grand’ corruption. In those settings, often such institutions are captured by corrupt elite economic interests and/or by politicians/political leadership. The forms of capture do vary, in some regions and countries the evidence points strongly to economic capture by the vested interests of the elite outside of the public sector, while in some countries there may still be a kleptocracy – or subtler forms of grand corruption by the political leadership. Under these circumstances of economic or political capture, when formulating anticorruption strategies it is imperative to consider mechanisms and innovations which do not rely heavily (and not solely) on the official legal system and its conventional enforcement mechanisms – at least in the short-to-medium term. Needless to say, within a medium-to-longer term perspective it is imperative to continue working towards the revamp and subsequent strengthening of key public rule of law/judiciary institutions. But in the shorter term it is key to consider alternatives (in part to enhance contestability and apply competitive pressures on the standard rule of law institutions).

Specifically, what kind of initiatives could be considered in this context? The proposals fall within the integration of two key linchpins in the process of improving governance: concrete involvement of civil society (including the private sector) and the power of data (i.e. transparency through rigorous empirics). The proposals here share in common a low requirement of probity and sophistication of public "rule of law" institutions. They either get around the existing official legal institutions altogether, or would relieve and simplify the work of public rule of law institutions, specifically referring to effective means of data and information gathering, their use and dissemination.

**Data Power.** Expanding Governance and Anticorruption Diagnostics over space and time. The in-depth diagnostic surveys of citizens, firms and public officials, carried out by institutions outside of the public sector, and broadly discussed and transparently disseminated, can play a key role: i) in enhancing accountability and in providing rigorous inputs for priority areas of reform, as well as ii) entry points for institutional change and improved rule of law. The results presented
in brief above on Peru’s diagnostic results are meant to illustrate; a number of other countries have undertaken such governance diagnostics, which in turn have generated momentum for change and increased accountability. Once a first ‘baseline’ diagnostic survey has taken place, the approach would entail repeating such surveys every year and half or two years to monitor progress. Furthermore, associated with this effort, more continuous empirical monitoring mechanisms within the public sector would be set up. Other innovations in this context, include the formation of benchmark price database – data collection and access for comparator benchmark prices of goods common in public procurement, and expenditure tracking mechanisms, such as in Uganda for budgetary allocations to schools.

Addressing Judicial/Legal Capture by Vested Economic Interests as centerpiece of a strategy in many dysfunctional settings. Indeed, in the set of countries with dysfunctional rule of law institutions, and within them, in particular where the state and leadership are not strong, the priority in any strategy for improved rule of law institutions would need to focus more on measures to mitigate judicial capture by economic interests, which, inter alia, may require: i) an understanding of the elite forces that are capturing the judiciary or legal institutions, ii) measures to increase the economic independence of the judiciary, iii) promoting civil society and NGOs to play roles in enhancing the transparency and accountability of these public rule of law institutions, and iv) increasing contestability by promoting the involvement of NGOs in taking up some judicial functions (such as ADRs), etc.

Is independence from the Executive and other ‘conventional measures’ still relevant? By contrast, in settings with better-governed rule of law institutions, the issue of independence from the executive may be required to be given due prominence (also, in selected settings, the challenge of proper salary and compensation packages, as well as meritocracy may be given particular attention). Yet on the other hand, some conventional initiatives favored until recently by some donor agencies need to be revisited, such as: i) study tours for judges instead of questioning whether rotation/replacement is sorely needed; ii) conventional training programs focusing only on judges or on parliamentarians; and iii) salary reviews without addressing the fundamental causes of misgovernance, etc.

What is the relevant point of entry for Governance Reforms?: Distinguishing between different Rule of Law Institutions within a country, and the importance of in-depth in-country diagnostic analysis. One of the most potent and simple pieces of evidence emerging from the governance country diagnostics is that even within generally misgoverned settings, there is a large performance variance across institutions within the country’s public sector, with some institutions performing well and offering examples to others. For instance, as illustrated above, governance diagnostics point to a few countries where in spite of major governance problems (including in public rule of law institutions), Parliaments are better performers than other institutions (or vice versa).

The variation in performance within the public sector in general, and within rule of law institutions in particular, which emerge from the diagnostic evidence can suggest points of entry to improve governance and avoid falling into the trap of selecting the dysfunctional public rule of law institutions for supporting a program of overall governance improvement. In Russia, for instance, while most public rule of law institutions do not function as such, a commercial court system (‘arbitrazh’), relatively speaking, has been an island of good governance due to factors that ought to be well understood and could provide pointers to other institutions in the same country. By contrast, it is imperative to more critically review the role of enforcement agencies (such as the police), as well as anticorruption agencies, for instance, which often are proposed in a rather facile fashion as a key linchpins needed to improve governance.
Checks and Balances to public rule of law institutions: the importance of civil society’s voice and transparency mechanisms. Civil society, broadly defined, can play a very important role in increasing contestability and accountability of rule of law institutions. In addition to the transparency mechanisms through the new set of survey diagnostic tools discussed above, ongoing innovations in a number of countries worth replicating in many settings include: i) activist business associations of small and medium-scale entrepreneurs, as pressure group for leveling the playing field and mitigating capture by the larger conglomerates (and also to enhance accountability by some transnational corporations), ii) transparency in access to information to parliamentary votes, iii) transparent access to assets and income declarations of leaders and senior public officials and their dependents; iv) NGOs on judicial/legal issues who monitor and provide information on the integrity of the judiciary and on transparent access to judicial decisions, compilation of lists of judges with highest integrity – as well as in promoting non-public sector institutional alternatives such as ADRs, and v) role of a responsible media in enhancing transparency and providing rigorous information in this area.4

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References:


4 This section is to be expanded in the next version.


Sen, Amartya, 2000, ‘What is the Role of Legal and Judicial Reform in The Development Process?’, Keynote Address at the Comprehensive Legal and Judicial Development Conference, June 5th-7th, Washington, D.C.


World Bank Institute, 2001, “Voices of the Misgoverned from Peru” (‘Voces para un Mejor Gobierno’): What do Citizens, Firms and Public Officials report on Governance and Corruption? – Results of the Governance & Anti-Corruption Country Diagnostic (Presented at International anticorruption conference in Lima, June 26th, 2001) [Note: In this paper, results from various governance diagnostics from other countries were also used for background information].
Annex Figure A1: Composition of Respondents from Survey at First Judicial and Legal Conference, Washington, DC, June 2000.

**Job/Professional Expertise of Respondents**

**Region of Expertise of Respondents**

Annex Figure A2: Composition of Respondents from Internet Survey, May-July 2001.

**Where do you currently work?**